THE

INTERNATIONAL LAW ASSOCIATION

(FOUNDED 1873)

Charles Clore House, 17 Russell Square, London WC1B 5DR
http://www.ila-hq.org
Tel: +44 (0) 20 7323 2978. Fax: +44 (0) 20 7323 3580
Email: info@ila-hq.org

MULTIS MELIOR PAX UNA TRIUMPHIS

REPORT

OF THE

SEVENTY-SEVENTH CONFERENCE

HELD IN

JOHANNESBURG

August 2016

London
2017

Editors: Professor Marcel Brus; Alexander Kunzelmann;

Assistant Editor: Juliet Fussell

Reporters: Ernest Yaw Ako; Charmaine Awolaja; Jade Banda; Roxanne Barnard; Lucia Berro Pizzarossa; Tafadzwa Chiposi; Viviane Contin-Williams; Maria Del Pilar Vanegas-Guzman; Nhlosenhle Fakazi; Tahereh Fardintabrizi; Sarah-Jane Frith; Kevin Isaacs; Tinotenda Kakora; Emelia Kamena; John Kandala Lupwana; Kanhanga Tracey; Nicholas Kassier; Alexander Kunzelmann; Sewela Masie; Elaine Mitchell; Rutendo Muchinguri; Swikani Ncube; Lolah Nkosi; Jessica Odendaal; Faith Olaseinde; Azhar Aziz Ismail Sakoor; Mothepa Shadung; Musa Shongwe; Andisiwe Sixenxe; Clea Strydom; Natalie Venter; Anele Zondi;

Published by the International Law Association,
Charles Clore House, 17 Russell Square, London WC1B 5DR

Printed in Aberystwyth, Wales, UK by Cambrian Printers
Typeset by JS Typesetting Ltd, Porthcawl, Wales

ISSN 0074-6738

The publication of the ILA 2016 proceedings has been made possible with the financial support of the South African Research Chair in International Law hosted by the University of Johannesburg, funded by the Department of Science and Technology and administered by the National Research Foundation.

Hennie Strydom

TABLE OF CONTENTS

PART I

Preface by the Chair of The Executive Council,
The Rt Hon Lord Mance 13
Resolutions Proposed by International Committees 15
Notes on the business of the association 48
Financial Report 55
History of the International Law Association 58
Constitution of the Association 70
Patrons and Officers of the Association 85
International Committees 89
Branches of the Association 94
Chairs of the Executive Council 101
Directors of Studies 101

PART II

Opening Session 105

Committees

Space Law
Committee Report 117
Working Session 142
Protection of Privacy in Private International Law
Working Session 155
Baselines Under the International Law of the Sea
Committee Report 167
Working Session 194
Global Health Law
Committee Report 203
Working Session 237
Use of Force
Committee Report 248
Working Session 276
International Human Rights Law
Committee Report 284
Working Session 326
Committee on the Rule of Law and International Investment Law
Working Session 331
International Protection of Consumers
Committee Report 340
Working Session 376
The Role of Sustainable Natural Resources Management
International Law
Committee Report 387
Working Session 447

International Securities Regulation
Committee Report 457
Working Session 517
Recognition/Non-Recognition in International Law
Committee Report 533
Sustainable Development and the Green Economy in International Trade Law
Working Session 553
Implementation of the Rights of Indigenous Peoples
Committee Report 556
Working Session 602
Non State Actors
Committee Report 608
Working Session 644
Nuclear Weapons, Non-Proliferation and Contemporary International Law
Committee Report 655
Working Session 680
Committee on International Monetary Law
Committee Report 690
Working Session 722
Intellectual Property and Private International Law
Committee Report 733
Working Session 750
Cultural Heritage Law
Committee Report 758
Working Session 796
International Commercial Arbitration
Committee Report 801
Working Session 830
International Law and Sea Level Rise
Committee Report 842
Working Session 876
Committee on Complementarity and International Criminal Law
Working Session 884
Feminism and International Law
Committee Report 897
Working Session 933
Islamic Law and International Law
Committee Report 943
Working Session 969

Study Groups

Content and Evolution of the Rules of Interpretation – Preliminary Report
Preliminary Report 977
Working Session 987
Study Group on Principles on the Engagement of Domestic Courts with International Law
Committee Report 996
Working Session 1029
Study Group on Socially Responsible Investment
Working Session 1042
Teaching of International Law (Interest Group)
Working Session 1053
Study Group on Due Diligence in International Law
Committee Report 1062
Working Session 1111
Study Group on the Use of Domestic Law Principles in the Development of International Law
Committee Report 1118
Working Session 1183
Study Group on the Conduct of Hostilities and International Humanitarian Law
Working Session 1191
Sovereign Bankruptcy Study Group
Committee Report 1198
Study Group on UN Sanctions and International Law
Working Session 1228

Closing Session 1234

PART I

PREFACE TO JOHANNESBURG CONFERENCE REPORT

The Rt Hon Lord Mance, Chair ILA Executive Council

It has become almost a ritual to refer to each successive ILA Biennial Conference as a first. But it is tribute to the ILA's spread that this is almost always possible. On this occasion, it is the first conference held in Sub-Saharan Africa. As in Washington in April 2014, so in Johannesburg in August 2016, the conference, our 77th, took place in balmy Spring weather, although much of our time was of course spent in the conveniently arranged Sandton Convention Centre.

Our conference theme was *International Law and State Practice – is there a North-South divide?*, and the conference opened with a keynote speech from Judge Navi Pillay (UN High Commissioner for Human Rights 2008-2014). Responding to the conference title, Judge Pillay gave an inspiring insight into the extent to which the goal of universal, indivisible and interrelated Human Rights has over recent years achieved global acceptance, regardless of, and despite differences in the paths chosen by, political, economic and cultural systems.

After the opening ceremony, the conference proceeded with a rich and skilfully devised mix of special arranged talks and discussions, and sessions devoted to the continuing work of the ILA's committees and study groups. The ILA is grateful for all the arrangements made by the conference organisers, led by Professor Hennie Strydom of Johannesburg University, who now takes on the mantle of ILA President in succession to Professor Ruth Wedgwood of the ILA's US Branch, for whose successful term of office we express our gratitude. The ILA HQ support provided by Juliet Fussell and Natalie Pryer was as effective and welcome as ever.

Although I have mentioned the ILA's spread, its 57 existing Branches (some regional) still only cover about one-third of the world's countries. Before and during the conference, the ILA HQ and Executive Council have discussed how the ILA's reach might be further extended, so that knowledge about and the application of international law might be yet further extended.

The ILA scholarship scheme first launched in 2014 is here relevant. It enabled 11 successful applicants chosen from across the world out of particularly strong group of candidates to attend the Jo'burg conference. In addition, under the leadership of Willem van Genugten of the Dutch Branch, a further 9 scholarships were awarded by the generosity of his family, friends and colleagues together with the Dutch Ministry of Foreign Affairs and Tilburg University as well as North-West University, South Africa, with 8 out of 9 of these scholars coming from Africa.

We must build on such highly encouraging initiatives, drawing the scholarship recipients into a continuing network of young persons engaging in and with international law. I hope that those who read this, or have met some of the scholars in Jo'burg, will also support the HQ Scholarship Fund financially.

The next (78th) conference will again be in the Southern Hemisphere, this time in Sydney, Australia from 19th to 24th August 2018. After that, the 79th conference will be in Kyoto, Japan, from 23rd to 27th August 2020. The work of the ILA, focusing on both public and private international law, is as important as it has ever been since the ILA's foundation in Brussels in 1873. I look forward to working together ensure that it has its maximum potential impact.

RESOLUTION NO.1/2016

COMMITTEE ON THE INTERNATIONAL PROTECTION OF CONSUMERS

The 77th Conference of the International Law Association held in Johannesburg, South Africa, 7–11 August 2016:

HAVING CONSIDERED the Report on the Role of International Law on Contemporary Consumer Protection;

NOTING the book prepared by the Committee as well as its survey of the consumer protection laws and regulations in the global financial crisis;

THANKING the Chair, the Rapporteur and the members of the Committee for the valuable work done;

RECOGNISING the emergence of the international dimension in consumer protection, the role of international law in helping to develop more equitable standards of consumer protection, and the need to take the consumer into account in international trade regulation;

ACKNOWLEDGING that individuals are usually the weaker parties in consumer contracts in general, and in cross-border contracts in particular, most notably with respect to the choice of applicable law and jurisdiction;

CONCERNED about the lack of universal models to protect consumers in cross-border contracts;

AWARE that *ILA Resolution No. 4/2012 - Sofia Statement on the Development of International Principles on Consumer Protection* was utilised by the UNCTAD during the Revision of the UN Guidelines for Consumer Protection in 2015;

DESIRING to contribute to the debate on the creation of fair and equitable principles for international consumer protection;

ADOPTS the Recommendations and Guidelines annexed to this Resolution;

COMMENDS the Recommendations to international organisations, States and consumer groups that are working on national, regional or international initiatives relating to consumer issues, with a view to enhancing international cooperation in such initiatives and to focusing the attention of all concerned on the need to develop fair and equitable standards and models for all consumers in the world, without discrimination;

INVITES the Committee to continue and to complete its work on the development of mechanisms for the international protection of consumers and to focus on the protection of tourists.

JOHANNESBURG RECOMMENDATIONS AND GUIDELINES ON THE BEST PRACTICES ON INTERNATIONAL PROTECTION OF CONSUMERS

RECOMMENDATIONS

1. CONSIDERING that consumers as natural persons acting outside of their professions or trade do not have expert knowledge, and are in an unequal bargaining position making the application of the rules on commercial transactions (which often includes *lex mercatoria*) unfair to them; STRESSING the differences between consumer contracts and other business contracts and the need for special rules to protect consumers not only nationally but also in international contracts and with respect to dispute resolution,

RECOMMENDS acknowledgement of the protection of consumers as weaker parties as a principle in national and international transactions.

2. NOTING that several international law initiatives have been undertaken with respect to the harmonisation of laws relating to cross-border consumer transactions by different international bodies, which have produced conventions, model laws, and legislative guides; ALSO NOTING that the 2015 Revision of the UN Guidelines for Consumer Protection has acknowledged the international dimensions of consumer protection; WELCOMING the efforts of the Hague Conference on Private International Law concerning the necessity to regulate international tourism,

RECOMMENDS the adoption of special rules on applicable law and jurisdiction for cross-border consumer protection.

3. AWARE that foreign tourists demand special protection related to their consumer rights, especially when they are away from their place of habitual residence, culture, and language; ACKNOWLEDGING the efforts made at the UN World Tourism Organisation to enhance the protection of tourists in case of emergency situations and the efforts of the Hague Conference on Private International Law on the field,

RECOMMENDS more international co-operation on consumer protection, especially in the field of international tourism.

4. CONSIDERING the recent efforts to update national and regional laws, regulating international consumer contracts (especially in the EU, Mercosur, OEA, Japan, China, Korea, Brazil, Argentina, Panamá, Dominican Republic),

RECOMMENDS that States consider best practices on international protection of consumers, and to that end also RECOMMENDS the use of the models set out in Guidelines on the Best Practices on the Law Applicable to International Protection of Consumers, with the aim of helping the development of fair and equitable legal standards for all consumers in the world, without discrimination.

GUIDELINES ON THE BEST PRACTICES ON THE LAW APPLICABLE TO INTERNATIONAL PROTECTION OF CONSUMERS

CONSIDERING the 2012 ILA's Sofia Statement on the Development of International Principles on Consumer Protection which acknowledges that "It is desirable to develop standards and to apply rules of private international law that entitle consumers to take advantage of the most favourable consumer protection", the International Law Association RECOMMENDS the following models reflecting the best practices on applicable law to international consumer contracts, selected by the Committee on International Protection of Consumers.

Model Rule 1: Limiting the Chosen Law by Reference to Mandatory Rules

Article [X]. Consumer Contracts

1. An international consumer contract shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
   a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
   b) by any means, directs such activities to that country or to several countries including that country, and in both cases, the contract falls within the scope of such activities.[1]
2. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be governed by the law chosen by the parties, or in the absence of a choice, by the law of the country where the goods or services were agreed to be supplied.[2]
3. Where paragraph 2 above applies, a choice of law may not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of his habitual residence.[3]

Model Rule 2: Party Autonomy Limited to Choice of the Law Most Favourable to Consumers

Article [X]. Consumer Contracts

1. An international consumer contract shall be governed by the law of the habitual residence or domicile of the consumer or by the law chosen by the parties, provided that the latter is more favourable to the consumer.
2. The parties may choose between the law of the habitual resident or domicile of the consumer, of the place of the conclusion of the contract, of the place of performance and of the main office of the professional or provider of goods or services.
3. Under paragraph 1 above, the law more favourable to the consumer means the law that, viewed overall when the contract was made, assures the remedies or the redress more protective of the consumer's interests.

---

[1] Adaptation of the European model.
[2] Adaptation of the Argentinean model.
[3] Adaptation of the European model.

Model Rule 3: Limiting Party Autonomy by Reference to Connecting Factors

Article [X]. Consumer Contracts

1. The law of performance, meaning the law of the place where the goods or services were agreed to be supplied, shall govern an international consumer contract, if either (i) the consumer expressly chooses this law or (ii) the supplier/professional has under the contract no duty to undertake any business activities, related to the goods or services to be supplied, in the country of the consumer's habitual residence.
2. Save where paragraph 1 applied, international consumer contracts shall be governed by the law of the habitual residence of the consumer.

Model Rule 4 of the Committee

Article [X]. Consumer Contracts

1. An international consumer contract shall be governed by the law of the country where the consumer has his/her habitual residence, provided that the supplier or professional:
   a) pursues his/her commercial or professional activities in the country where the consumer has his/her habitual residence, or
   b) by any means, directs such activities to that country or to several countries including that country, and in both cases, the contract falls within the scope of such activities.[4]
2. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be the law chosen by the parties and in absence of choice, the law of the country where the goods or services were agreed to be supplied.[5]
3. Where paragraph 2 above applies, a choice of law may not have the result of depriving the consumer of the benefit of the law of habitual residence where that law is more favourable to the consumer.[6] The law more favourable to the consumer means the law that, viewed overall when the contract was made, assures the remedies or redress more protective of the consumer's interests.[7]

[4] Adaptation of the European model.
[5] Adaptation of the Chinese model.
[6] Adaptation of the Brazilian model.
[7] Adaptation of the Panama model.

RÉSOLUTION NO. 1/2016

COMITÉ SUR LA PROTECTION INTERNATIONALE DES CONSOMMATEURS

La 77ème Conférence de l'Association de Droit International, qui s'est tenue à Johannesburg (Afrique du Sud) du 7 au 11 août 2016 :

AYANT EXAMINÉ le Rapport sur le rôle du droit international sur la protection des consommateurs ;

PRENANT NOTE de l'ouvrage en préparation par le Comité de même que son étude sur les lois et règlements sur la protection des consommateurs dans le cadre de la crise financière mondiale ;

REMERCIANT le Président, le Rapporteur et les membres du Comité pour l'utile travail accompli ;

RECONNAISSANT l'émergence de la dimension internationale de la protection des consommateurs, le rôle du droit international afin de permettre l'élaboration de standards de protection des consommateurs plus équitables, et la nécessité de tenir compte de la protection des consommateurs dans le cadre de la régulation du commerce international ;

ADMETTANT que les individus sont en général les parties faibles des contrats de consommation, plus particulièrement dans les contrats internationaux, surtout pour ce qui concerne le choix du droit applicable et de la juridiction compétente ;

PRÉOCCUPÉE par l'absence d'instruments types universels destinés à protéger les consommateurs dans les contrats internationaux ;

CONSCIENTE que la *Résolution ILA No. 4/2012 – Déclaration de Sofia sur l'élaboration de principes internationaux concernant la protection des consommateurs* a été employée par la CNUDCI au cours de la révision des *Principes directeurs des Nations Unies pour la protection des consommateurs* en 2015 ;

DÉSIREUSE de contribuer au débat sur l'élaboration de principes justes et équitables pour la protection internationale des consommateurs ;

ADOPTE les Recommandations et Principes directeurs annexés à cette résolution ;

PORTE les Recommandations à l'attention des organisations internationales, États et associations de consommateurs qui travaillent sur des initiatives nationales, régionales et internationales concernant des questions liées aux consommateurs, en vue d'améliorer la coopération internationale pour ce qui concerne ces initiatives et d'appeler l'attention de toutes les parties concernées sur la nécessité d'élaborer des standards et instruments types pour tous les consommateurs dans le monde, et ce, sans discrimination ;

INVITE le Comité à poursuivre et achever son travail sur l'élaboration de mécanismes pour la protection internationale des consommateurs et de se concentrer sur la protection internationale des touristes.

RESOLUTION NO.2/2016

INTERNATIONAL HUMAN RIGHTS LAW COMMITTEE

The 77th Conference of the International Law Association, held in Johannesburg, South Africa, 7-11 August 2016:

REITERATES that the Human Rights Law Committee (the Committee) was vested with a dual mandate concerning (i) the impact of international human rights law on the International Court of Justice (ICJ) and (ii) the domestic implementation of judgments/ decisions of courts and other international bodies;

TAKES NOTE of the Interim Reports of the Committee submitted to the 75th Conference held in Sofia, Bulgaria, in 2012 and the 76th Conference held in Washington D.C., USA, in 2014 and the final Report submitted to the 77th Conference;

The impact of international human rights law on the International Court of Justice

ENDORSES the findings of the Committee that the impact of international human rights law on general international law is an on-going process in which the International Court of Justice, as a court of general jurisdiction, has had an important role to play, and that the ICJ has integrated international human rights law into its work and thereby contributed to the effort to define States' obligations under international human rights and other branches of law;

ENCOURAGES international courts and other bodies dealing with human rights issues to ensure the integration of international human rights law in their work and, where relevant, to make explicit the role and significance of international human rights law to their work, regardless of whether the international body is vested with specific or general jurisdiction;

The domestic implementation of judgments/decisions of courts and other international bodies

ENDORSES the findings of the Committee that despite States' obligations to respect and ensure, in good faith, the human rights of all persons within their jurisdiction, significant challenges impede the effective implementation of international human rights law due to the lacuna in international law regarding a State's obligations in the face of an adverse judgment or decision of an international supervisory body;

RECOGNISING the importance of setting forth Guidelines to assist States in carrying out their obligations;

ADOPTS the Committee´s Guidelines on the domestic implementation of international human rights judgments and decisions annexed to this Resolution;

ENCOURAGES States and their organs to take account of the Guidelines in their efforts to give full effect to international human rights law in domestic law;

REQUESTS that the Executive Council dissolve the International Human Rights Law Committee, since it has accomplished its mandate, and that it establish a new Committee on International Human Rights Law with a new mandate;

REQUESTS the Secretary-General of the International Law Association to forward a copy of this Resolution and the Guidelines (annexed to the Resolution), to the UN High Commissioner for Human Rights, the International Court of Justice, the International Law Commission and members of other international and regional courts and other international bodies dealing with international human rights law.

ANNEX

GUIDELINES

The obligations of a state and its domestic courts with respect to a decision issued by an international judicial or quasi-judicial body involving international human rights law

1. States, on becoming parties to human rights treaties, undertake to make such changes to domestic laws and practices as are necessary to ensure their conformity with the treaties and the jurisprudence of any judicial or quasi-judicial body with jurisdiction to interpret and apply the pertinent human rights provisions.
2. States give human rights treaties the force of law, allowing individuals to invoke them before domestic courts, and to take precedence over any conflicting national law.
3. States are under an obligation to organise the governmental apparatus, i.e. all structures through which public power is exercised, including the judiciary, so that they are capable of compliance with international human rights law. This obligation extends to
   a) bringing ongoing violations to a stop,
   b) preventing future violations from occurring,
   c) offering interim measures to prevent irreparable harm to persons,
   d) conducting effective investigation of human rights violations and, if warranted, guaranteeing that criminal proceedings are opened,
   e) providing for the option to re-open closed cases in which judgments and decisions are based on human rights violations and
   f) guaranteeing that restitution for a violation is made and, where such restitution proves inadequate or impossible, that damages are compensated.
4. States are encouraged to recognise individual complaint procedures pertaining to the treaty systems to which they are party. They are under an obligation to provide adequate and effective remedies for violations of international human rights law.
5. The state, in the implementation of a judgment or decision is more apt to render justice to the petitioner under a human rights treaty when that judgment or decision is principled, precise and clearly spells out the state's obligations in its operative paragraphs. In cases where the state has been unable or unwilling to execute the supervisory body's final judgment, the petitioner continues to have standing before the court or body, which delivered the judgment or decision, either by means of a new petition on the failure of compliance or by means of follow-up to the original petition until justice is rendered.
6. States are under an obligation to cooperate with the supervisory bodies in the processing of a case, i.a., by respecting interim measures and providing necessary information. They ensure the right to petition, i.a., by protecting petitioners and their counsel against threats and reprisals for bringing complaints.
7. States and their courts are under an obligation to give full effect to legally binding decisions of competent international courts and give due regard in good faith to all other decisions of competent international bodies.

8. States are under an obligation to cooperate in good faith with the follow-up mechanism developed to ensure compliance with decisions of international bodies.
9. Good practices of states lead to the following recommendations:
   a) Constitutional and supreme courts develop and practice control of conventionality. All courts accordingly interpret domestic law in conformity with international human rights law. They take the pertinent judgments and decisions of courts and quasi-judicial bodies, also in those cases to which the state was not a party, fully into account and integrate them in their reasoning in good faith.
   b) Domestic courts take into account the practice of courts of other states in their implementation of international human rights law. Courts facilitate this practice by translating their judgments.
   c) To avoid norm conflicts before courts, institutions and procedures are in place to review bills to be presented in the legislatures with respect to their compatibility with international human rights law and the pertinent jurisprudence of the competent international bodies.
   d) States establish paths of dissemination, including translation of judgements and decisions in international human rights law to governmental bodies, legislative committees and the judiciary with a view to enhancing awareness of these practices and their impact on domestic law.
   e) States establish independent National Human Rights Institutions (NHRIs), in accordance with the UN Paris Principles.

RESOLUTION NO.3/2016

COMMITTEE ON CULTURAL HERITAGE LAW

The 77th Conference of the International Law Association, held in Johannesburg, South Africa, 7 – 11 August 2016:

HAVING CONSIDERED the Report on the Law Pertaining to Cultural Landscapes Significant to Indigenous Peoples;

RECOGNISING both the challenge and the importance of further developing the disparate authority and commentary from numerous disciplines bearing on the protection of a multifaceted and vulnerable range of cultural heritage closely identified with the interests of indigenous peoples and bearing both tangible and intangible characteristics;

CONVINCED that the Report effectively responds to this challenge and will assist such stakeholders as intergovernmental and non-governmental organisations, regional organisations, organisations of tribal and other indigenous peoples, business interests, environmentalists, planners and others;

ADOPTS the Recommendations annexed to this Resolution;

REQUESTS the Secretary-General of the International Law Association to forward a copy of this Resolution and its annex to the Secretary-General of the United Nations, the Director-General of the United Nations Educational, Scientific and Cultural Organisation, and other appropriate international and regional organisations, especially indigenous organisations, and to circulate the Resolution and annexed Recommendations widely among the community of international lawyers, in particular experts and expert bodies addressing issues of cultural heritage law;

THANKS the Chair, the Special Rapporteurs, and Members of the Committee for the valuable work done;

RECOMMENDS to the Executive Council that the Committee on the Law of Cultural Heritage be dissolved, having accomplished many mandates, including two draft treaties, a book, three sets of guidelines and declarations as well as numerous studies over a period of 28 years.

ANNEX

RECOMMENDATIONS

In light of and by reference to the Report on the Law Pertaining to Cultural Landscapes Significant to Indigenous Peoples by the Committee on Cultural Heritage Law, the International Law Association makes the following recommendations:

A. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), though not hard law, establishes a commendable procedure of intercultural collaboration and a set of expectations concerning the protection of indigenous culture as well as land, and hence landscapes and even seascapes, of patrimonial importance to indigenous peoples. But it cannot be the last word because Article 31 of UNDRIP does not explicitly include in its extensive list of cultural heritage phenomena the concept of cultural landscapes discussed in the Report on the Law Pertaining to Cultural Landscapes Significant to Indigenous Peoples. More specific and perhaps divergent initiatives at international, regional, national and local levels may eventually be helpful. For the time being, however, it may be wise to rely primarily on UNDRIP as a chosen instrument to shape general practices. Even in an age of legal pluralism and overlapping normative ordering, the interests of indigenous peoples may be best served by universalising and refining a single regime (UNDRIP) to provide an authoritative common language for protecting cultural landscapes and seascapes of significance to indigenous peoples. An obvious model for such an approach has been the Universal Declaration of Human Rights as a foundation for the progressive development of human rights law in all of its complexity today. Then, as empirical evidence accumulates about both the efficacy and limitations of an UNDRIP-based regime, modifications to it and entirely new initiatives will likely be in order.

B. The established principle of sustainability must guide the formulation of rules to protect cultural landscapes of significance to indigenous peoples and to resolve disputes among diverse stakeholders. Representatives of indigenous peoples must be allowed to participate in global initiatives, such as the preparation of the United Nations Sustainable Development Goals (SDGs 2030) and local efforts so as to take fully into account and apply the experience and contributions of these peoples in promoting harmony with the Earth. By the same token, the United Nations organs and agencies should integrate the emerging regime associated with the Report for protecting cultural landscapes of significance to indigenous peoples. Economic development that encroaches on or impacts such cultural landscapes necessitates careful risk management or assessment.

C. The five distinct categories of cultural landscapes that the Report's typology proposes should inform the development of an effective international regime. Each category can be expected to generate its own normative variations.

D. The Aarhus Convention should be adopted as a model in requests to governing authorities for critical information that will encourage participation by indigenous peoples in decision-making and enable them and other interested parties to undertake good practices and collaborate effectively in making appropriate choices concerning cultural landscapes based on risk assessment and sound policy. The limitations to access of information in the Aarhus model should be modified to improve that access.

E. The UNESCO Operational Guidelines for the Implementation of the World Heritage Convention should be modified to require that all States Parties to the Convention obtain (as opposed to merely being encouraged to obtain) the free, prior and informed consent of indigenous peoples as a condition for seeking inscription on the World Heritage List of a site traditionally belonging to an indigenous community.

RESOLUTION NO.3/2016

COMITÉ SUR LE DROIT DU PATRIMOINE CULTUREL

La 77ème Conférence de l'Association du droit international, tenue à Johannesburg en Afrique du Sud du 7 au 11 Août 2016 :

AYANT EXAMINÉ le rapport sur la loi relative aux paysages culturels présentant un intérêt significatif pour les peuples autochtones ;

RECONNAISSANT tant le défi et l'importance de développer davantage les sources disparates et les travaux de doctrine issus de disciplines scientifiques intéressées par la protection d'un héritage culturel vulnérable et à plusieurs facettes ; que cet héritage culturel présente un lien étroit avec les intérêts des peuples autochtones ainsi qu'un caractère tant matériel qu'immatériel ;

CONVAINCUS que le rapport répond efficacement à ce défi et aidera les parties prenantes telles que les organisations intergouvernementales et non gouvernementales, les organisations régionales, les organisations de populations tribales et autres peuples autochtones, les intérêts économiques, les écologistes, les planificateurs et autres ;

ADOPTE les recommandations annexées à la présente résolution;

PRIE le Secrétaire général de l'Association de droit international de transmettre une copie de cette résolution et de son annexe au Secrétaire général des Nations Unies, au Secrétaire général de l'Organisation des Nations Unies pour l'éducation, la science et la culture, à toutes autres organisations internationales et régionales concernées, notamment aux organisations de peuples autochtones, et de diffuser largement la résolution et les recommandations annexées auprès de la communauté des juristes internationaux, en particulier les experts et les organes d'experts travaillant sur le droit du patrimoine culturel ;

REMERCIE le Président, les rapporteurs spéciaux, et les membres du Comité pour le précieux travail accompli ;

RECOMMANDE au Conseil exécutif que le Comité sur le droit du patrimoine culturel soit dissous, ayant accompli de nombreuses tâches, notamment deux projets de traités, un ouvrage, trois ensembles de lignes directrices et déclarations ainsi que de nombreuses études sur une période de 28 ans.

ANNEXE

RECOMMANDATIONS

A la lumière et en référence au rapport sur la loi relative aux paysages culturels présentant un intérêt significatif pour les peuples autochtones du Comité sur le Droit du Patrimoine Culturel, l'Association Internationale propose les recommandations suivantes :

A. La Déclaration des Nations Unies sur les droits des peuples autochtones (UNDRIP), bien que n'étant pas de droit dur, met en œuvre une procédure louable de collaboration interculturelle et une série de propositions concernant la protection des cultures autochtones aussi bien les sites, que les paysages y compris les paysages maritimes, ayant de l'importance patrimoniale pour les peuples autochtones. Mais cela ne peut être un instrument définitif car l'article 31 d'UNDRIP n'inclut pas explicitement dans sa liste extensive des formes d'héritage culturel, le concept de paysage culturel discuté dans le rapport sur la loi relative aux paysages culturel présentant un intérêt significatif pour les peuples autochtones. D'autres initiatives plus spécifiques et peut-être différentes peuvent être éventuellement opportunes aux niveaux international, régional, national et local. Pour le moment, toutefois, il est peut être sage de se reposer principalement sur l'UNDRIP comme premier instrument de référence pour façonner les pratiques générales. Même dans une ère de pluralisme juridique et d'ordonnancements normatifs qui se chevauchent, les intérêts des peuples autochtones seront peut être mieux servis en universalisant et affinant un régime unique (UNDRIP) afin de fournir une langue commune faisant autorité pour protéger les paysages et paysages maritimes significatifs pour les peuples autochtones. Un modèle évident pour une telle approche est celui de la Déclaration Universelle des Droits de l'Homme en tant que fondation pour le développement progressif des droits fondamentaux dans toute la complexité que nous connaissons aujourd'hui. Dans ce prolongement, au fil de l'accumulation de preuves empiriques relatives tant à l'efficacité qu'aux limites d'un régime fondé sur l'UNDRIP, des modifications à ce régime ou le développement d'initiatives complètement nouvelles seront probablement opportunes.

B. Le principe reconnu de durabilité doit orienter la formulation de règles pour protéger les paysages culturels d'importance significative pour les peuples autochtones et pour résoudre les conflits entre différentes parties prenantes. Des représentants de peuples autochtones doivent être autorisés à participer aux initiatives globales, comme la préparation des objectifs du développement durable des Nations Unies (SDGs 2030), et aux efforts locaux de manière à prendre complètement en compte et à appliquer les expériences et les contributions de ces peuples dans la promotion d'une harmonie avec la Terre. De même, les organes et agences des Nations doivent intégrer le régime réglementaire naissant résultant du Rapport pour la protection des paysages culturels significatifs pour les peuples autochtones. Les développements économiques qui empiètent sur ou affectent ces paysages culturels nécessitent des évaluations et gestions de risques conduits avec soin.

C. Les cinq catégories de paysages culturels que la typologie du rapport propose devraient éclairer le développement d'un régime international effectif. Il peut être prévu que chaque catégorie génère ses propres variations normatives.

D. La Convention d'Aarhus devrait être adoptée comme modèle pour les requêtes adressées aux autorités publiques afin d'obtenir des informations déterminantes pour encourager la participation des peuples autochtones dans la prise de décision et les habilitant, de même que toute autre partie intéressée, à adopter de bonnes pratiques et à collaborer efficacement dans la prise de décisions appropriées relatives aux paysages culturels, c'est à dire fondées sur l'évaluation des risques et des politiques saines. Les limites à l'accès à l'information dans le modèle de la Convention d'Aarhus devront être améliorées.

E. Les Orientations de l'UNESCO devant guider la mise en œuvre de la Convention du patrimoine mondial devraient être modifiées pour exiger que tous les États membres à la Convention obtiennent (contrairement à la simple incitation à l'obtention) le consentement libre, préalable et éclairé des peuples autochtones, et que ce soit une condition pour demander l'inscription sur la liste du patrimoine mondial d'un site appartenant traditionnellement à une communauté autochtone.

RESOLUTION NO.4/2016

INTERNATIONAL COMMERCIAL ARBITRATION

The 77th Conference of the International Law Association, held in Johannesburg, South Africa, 7 - 11 August, 2016:

HAVING CONSIDERED the Report on Inherent and Implied Powers of Arbitral Tribunals by the Committee on International Commercial Arbitration submitted to and discussed at the 76th Conference of the International Law Association held in Washington D.C., United States of America, 7 - 12 April, 2014;

RECOGNISING that powers of arbitral tribunals are an important aspect of the arbitral process in international arbitration but rarely have been analysed as to non-enumerated inherent and implied powers;

ADOPTS the Recommendations annexed to this Resolution;

COMMENDS the Recommendations to parties, arbitral tribunals and domestic courts considering the use of inherent and implied powers by arbitral tribunals;

REQUESTS the Secretary-General of the International Law Association to forward a copy of this Resolution to the Secretary-General of the United Nations Commission on International Trade Law and other appropriate international and regional organisations and circulate it widely amongst the community of international lawyers, in particular expert bodies in the field of international commercial arbitration;

WELCOMES the willingness of members of the present Committee to continue their activities;

RECOMMENDS to the Executive Council to extend the mandate of the International Commercial Arbitration Committee.

ANNEX TO RESOLUTION NO. 4/2016

INTERNATIONAL LAW ASSOCIATION

COMMITTEE ON INTERNATIONAL COMMERCIAL ARBITRATION

INHERENT AND IMPLIED POWERS OF INTERNATIONAL ARBITRAL TRIBUNALS

RECOMMENDATIONS

Considering the following Findings of the Committee's Report:

1. In addition to the powers expressly conferred by the parties' agreement and by the laws and rules governing the arbitration, international arbitral tribunals ("arbitral tribunals") have powers that are inherent and implied.
2. There exists no universal or closed catalogue of such powers, nor any fixed rules governing their invocation. Instead, the powers available and the use to which they may be employed depend substantially on the particular circumstances of the case.
3. Arbitral tribunals have invoked inherent and implied powers in varied situations, involving, *inter alia*, arbitral procedure, interim relief, decision-making, sanctions regarding alleged misconduct and impropriety, and revision of earlier decisions.
4. The arbitral rules and laws that apply to the arbitration constrain the powers that arbitral tribunals may exercise, and meaningful limits on those powers can be expressed by party agreement.
5. Inherent and implied powers have grown in recognition over time, and the historical context in which arbitral tribunals are operating is relevant. Actions that were once considered novel and contentious to take, absent express powers to do so, have now become part of the fabric of international arbitration.
6. The recognition and development of inherent and implied powers have proceeded in tandem with the proliferation of international arbitration, fostering and contributing to its creative development.
7. Inherent and implied powers may be assigned to three potentially overlapping categories:
   a. Powers implied by the parties' agreement and the rules and laws governing the arbitration,
   b. Discretionary powers over procedure, which are related conceptually to both implied and inherent powers, and
   c. Inherent powers necessary to preserve jurisdiction, maintain the integrity of proceedings, and render an enforceable award.
8. Implied and discretionary powers typically stem from and remain subordinate to party agreement.
9. Inherent powers are powers that would be expected to exist absent the clearest agreement, or provision of the *lex arbitri*, to the contrary.
10. Inherent powers will by their nature only arise for use in limited circumstances. They are to be read narrowly and used proportionately and only so far as necessary to meet the exigencies of the particular situation.

11. Categorising powers as implied, discretionary, or inherent helps ascertain the scope of powers that arbitral tribunals enjoy and assists in rendering orders and awards that withstand review.

The Committee recommends as follows:

1. *To Parties:*
   (a) Parties should understand that arbitral tribunals have inherent and implied powers.
   (b) Should parties wish to confirm, expand, or constrict arbitral powers, they should do so by agreement. However, it would be unusual and would at least require the clearest provision if arbitral powers were to be restricted in a manner that undermines an arbitral tribunal's jurisdiction, damages the integrity of its proceedings, or might result in an award liable to setting aside or unenforceability.

2. *To Arbitral Tribunals:*
   (a) In assessing the scope of their powers in any given situation, arbitral tribunals should first look to the arbitration agreement, the rules governing proceedings, and any relevant law.
   (b) If those sources do not adequately resolve the issue presented, arbitral tribunals should consider whether they can act on the basis of their implied, discretionary, or inherent power.
      (i) Implied power: Arbitral tribunals should examine the text of the parties' agreement and the other instruments governing the arbitration to determine if that text implies the power to resolve the particular issue.
      (ii) Discretionary power: Arbitral tribunals should assess whether the issue raised is a procedural question that, in the absence of contrary instruction, they would normally have the discretion to address.
      (iii) Inherent power: Arbitral tribunals should consider whether the issue before them risks undermining their jurisdiction, impugning the integrity of proceedings, or leading to their issuing an unenforceable award.
   (c) In proper deference to party autonomy, arbitral tribunals should undertake the analysis in this section sequentially, first determining whether they have the implied power to act, then whether they may exercise discretion, and finally whether they are to exercise an inherent power.
      (i) Arbitral tribunals may determine that the power to act is supported by more than one type of power. Where there are multiple bases for acting, tribunals should feel more comfortable in exercising power.
      (ii) Arbitral tribunals should feel safer in acting on the basis of implied or discretionary power than in acting on the basis of inherent power.
      (iii) When arbitral tribunals act solely pursuant to their inherent power, they must satisfy themselves that there is a compelling duty to act in order to preserve jurisdiction, maintain the integrity of proceedings, or render an enforceable award.
   (d) Before acting on the basis of any of these powers, arbitral tribunals should give the parties a reasonable opportunity to express their views and provide assistance to fashion the most appropriate solution in the circumstances before them. In doing so, the tribunal should also take into account the following:

(i) The legal background of the parties, and the legal systems under which the parties have chosen to arbitrate. Where the law governing the arbitration speaks clearly as to the permissibility of the exercise of a certain implied or inherent power, that determination must of course govern.

(ii) The appropriate scope of arbitral action, given the interests that a proposed measure might serve or put at risk. The remedy fashioned should be proportionate to the power being exercised and narrowly tailored to the situation presented.

(e) Arbitral tribunals should provide their reasoning for exercising implied, discretionary, or inherent powers, invoking such powers in a deliberate and thoughtful manner that will assist the award or decision in withstanding review at enforcement or set-aside proceedings.

3. *To Courts:*
Courts should appreciate that arbitral tribunals have inherent power as well as power conferred expressly or impliedly, as more fully described in paragraph 2 (b) and (c) above.

RESOLUTION NO.4/2016

ARBITRAGE COMMERCIAL INTERNATIONAL

La 77ème Conférence de l'Association de Droit International tenue à Johannesburg, Afrique du Sud, du 7 au 11 août 2016 :

AYANT CONSIDERE le Rapport du Comité de l'Arbitrage Commercial International sur les pouvoirs inhérents et implicites des tribunaux arbitraux soumis et discuté à la 76ème Conférence de l'Association de Droit International tenue à Washington, D.C., aux Etats Unis d'Amérique, du 7 au 12 avril 2014 ;

RECONNAISSANT que les pouvoirs des tribunaux arbitraux constituent un aspect important du processus arbitral en arbitrage international, mais qui a rarement été analysé du point de vue des pouvoirs inhérents et implicites non-énumérés ;

ADOPTE les Recommandations annexées à cette Résolution ;

PORTE les Recommandations à l'attention des parties, des tribunaux arbitraux et des juridictions nationales confrontés à l'utilisation des pouvoirs inhérents et implicites par les tribunaux arbitraux ;

DEMANDE au Secrétaire Général de l'Association de Droit International de communiquer une copie de cette résolution au Secrétaire Général de la Commission des Nations Unies sur pour le Droit Commercial International, ainsi qu'à d'autres organisations régionales et internationales appropriées, et de les faire circuler largement à travers la communauté des juristes internationaux, en particuliers des groupes d'experts dans le domaine de l'arbitrage commercial international ;

APPRECIE la volonté des membres de ce Comité de poursuivre leurs activités ;

RECOMMENDE au Conseil Exécutif d'étendre le mandat du Comité de l'Arbitrage Commercial International.

ANNEXE A LA RESOLUTION N° 4/2016

ASSOCIATION DE DROIT INTERNATIONAL

COMITE DE L'ARBITRAGE COMMERCIAL INTERNATIONAL

POUVOIRS INHERENTS ET IMPLICITES DES TRIBUNAUX ARBITRAUX

RECOMMANDATIONS

Considération prise des Déterminations suivantes du Rapport du Comité :

1. En plus des pouvoirs expressément conférés par l'accord des parties, comme par les lois et règles qui gouvernent l'arbitrage, les tribunaux arbitraux internationaux (« tribunaux arbitraux ») disposent de pouvoirs qui sont inhérents et implicites.
2. Il n'existe pas de catalogue universel ou limitatif de tels pouvoirs, ni de règles établies qui en régissent l'invocation. Mais, les pouvoirs disponibles et leur usage potentiel dépend en substance des circonstances particulières de l'affaire.
3. Les tribunaux arbitraux ont invoqués des pouvoirs inhérents et implicites dans des situations variées, qui impliques entre autres choses, la procédure arbitrale, les mesures provisoires et conservatoires, le processus de prise de décision, les sanctions de comportements inappropriés ou inconvenants, ainsi que la révision de précédentes décisions.
4. Les règlements d'arbitrage et les lois qui s'appliquent à l'arbitrage restreignent les pouvoirs que les tribunaux arbitraux peuvent exercer, et des limites significatives de ces pouvoirs peuvent être exprimées par accord des parties.
5. La reconnaissance de pouvoirs inhérents et implicites s'est accrue avec le temps, et le contexte historique dans lequel les tribunaux arbitraux opèrent a son importance. Les actions qui en leur temps ont été considérées comme nouvelles ou source de contentieux lors de leur mise en œuvre, en l'absence de pouvoirs exprès, font maintenant partie du processus arbitral international.
6. La reconnaissance et le développement des pouvoirs inhérents et implicites s'est développé en tandem avec la prolifération de l'arbitrage international, favorisant et contribuant à son développement créatif.
7. Les pouvoirs inhérents et implicites peuvent être divisés en trois catégories susceptibles de se recouper :
   a. Les pouvoirs implicites découlant de l'accord des parties et des règlements et lois qui gouvernent l'arbitrage,
   b. Les pouvoirs discrétionnaires sur la procédure, qui sont conceptuellement liés aux pouvoirs implicites comme aux pouvoirs inhérents, et
   c. Les pouvoirs inhérents nécessaires à la préservation de la compétence, au maintien de l'intégrité de la procédure, et au prononcé d'une sentence susceptible d'être exécutée.
8. Les pouvoirs discrétionnaires et implicites résultent généralement de l'accord des parties et y sont généralement soumis.
9. Les pouvoirs inhérents sont les pouvoirs dont on peut supposer l'existence en l'absence d'un accord contraire des plus clairs ou d'une disposition de la *lex arbitri*, qui s'y oppose.

10. Par leur nature, l'utilisation de pouvoirs inhérents ne sera en jeu que dans des circonstances limitées. Ils sont à comprendre strictement, pour un usage proportionnel et à seule fin de satisfaire aux exigences d'une situation particulière.
11. La catégorisation de pouvoirs comme étant implicites, discrétionnaires ou inhérents permet de déterminer l'étendue des pouvoirs dont disposent les tribunaux arbitraux et facilite le prononcé d'ordonnances et de sentences qui résistent à l'examen.

Le Comité recommande ce qui suit :

1. *Aux Parties :*
   (a) Les Parties devraient comprendre que les tribunaux disposent de pouvoirs inhérents et implicites.
   (b) Si les Parties entendent confirmer, étendre ou limiter les pouvoirs des arbitres, elles devraient s'accorder. Cependant, il serait inhabituel et justifierait au moins une stipulation des plus claires si les pouvoirs arbitraux devaient être limités d'une manière qui affecte la compétence du tribunal, comme l'intégrité de sa procédure, ou entraine le prononcé d'une sentence susceptible d'être annulée ou de se voir refuser l'exécution.

2. *Aux Arbitres :*
   (a) Pour déterminer, dans une situation donnée, l'étendue de leur autorité, les arbitres devraient se tourner en premier lieu vers la convention d'arbitrage, les règles qui gouvernent la procédure et tout droit concerné.
   (b) Si ces sources ne résolvent pas de manière adéquate la question qui se présente à eux, les tribunaux devraient se demander s'ils peuvent agir sur le fondement de leur pouvoir implicite, discrétionnaire ou inhérent.
      (i) Pouvoir implicite : les tribunaux arbitraux devraient examiner le texte de l'accord des parties et les autres instruments qui gouvernent l'arbitrage, pour déterminer si ce texte donne l'autorité de résoudre la difficulté en cause.
      (ii) Pouvoir discrétionnaire : les tribunaux arbitraux devraient évaluer si la difficulté en cause pose une question de procédure qu'ils auraient, en l'absence d'instruction contraire, normalement la discrétion de régler.
      (iii) Pouvoir inhérent : les tribunaux arbitraux devraient considérer si la difficulté en cause est susceptible d'affecter leur compétence, de contrarier l'intégrité de la procédure, ou de les conduire à rendre une sentence insusceptible d'exécution.
   (c) Par égard approprié pour l'autonomie des parties, les tribunaux arbitraux devraient conduire cette analyse par étapes, en déterminant d'abord s'ils ont le pouvoir implicite d'agir, ensuite, s'ils peuvent exercer leur discrétion, et enfin s'ils doivent exercer un pouvoir inhérent.
      (i) Les tribunaux arbitraux peuvent décider que leur pouvoir d'action se justifie par plus d'un type de pouvoir. Lorsqu'il y a plusieurs fondements à leur action, les tribunaux devraient se sentir plus confortables de mettre en œuvre cette autorité.
      (ii) Les tribunaux arbitraux devraient se sentir plus sûr d'agir sur le fondement de leur pouvoir implicite ou discrétionnaire que sur le fondement de pouvoirs inhérents.

(iii) Lorsque les tribunaux arbitraux agissent seulement en vertu de leur pouvoir inhérent, ils devraient s'assurer qu'il existe un devoir nécessaire d'agir pour préserver leur compétence, ou pour maintenir l'intégrité de la procédure, ou encore pour rendre une sentence susceptible d'exécution.

(d) Avant d'agir sur le fondement de l'un quelconque de ces pouvoirs, les tribunaux arbitraux devraient donner aux parties l'opportunité raisonnable d'exprimer leur point de vue et de les assister pour façonner la solution la plus appropriée dans les circonstances qui se présentent à eux. En le faisant ainsi, le tribunal devrait aussi tenir compte de ce qui suit :

(i) La culture juridique des parties et le système juridique dans le cadre duquel celles-ci ont choisi de conduire l'arbitrage. Lorsque la loi qui gouverne l'arbitrage couvre clairement la possibilité d'exercer un pouvoir implicite ou inhérent déterminé, cette indication doit bien sûr prévaloir.

(ii) L'étendue appropriée de l'action arbitrale, au vu des intérêts qu'une mesure envisagée pourrait servir ou menacer. Le remède envisagé devrait être proportionné au pouvoir exercé, et être rigoureusement adapté à la situation en cause.

(e) Les arbitres devraient expliquer le raisonnement qui les conduit à exercer des pouvoirs implicites, discrétionnaires ou inhérents, en invoquant ces pouvoirs de manière délibérée et réfléchie, qui permette à la sentence de résister à l'examen à l'occasion de procédures d'exécution ou d'annulation.

3. *Aux juridictions nationales :*
Les juridictions nationales devraient être sensibles au fait que les arbitres disposent de pouvoirs inhérents, ainsi que des pouvoirs conférés expressément ou implicitement comme il est décrit aux paragraphes 2 (b) et (c) ci-dessus.

RESOLUTION NO.5/2016

COMMITTEE ON INTERNATIONAL MONETARY LAW

The Ethical Culture of Financial Services

The 77th Conference of the International Law Association, held in Johannesburg, South Africa, 7 - 11 August 2016:

HAVING CONSIDERED the report on International Monetary Law;

NOTING FIRST that in the aftermath of the recent global financial crisis that has adversely impacted the economies (and societies) in many jurisdictions around the world, many have lost trust in the financial intermediaries that have traditionally bridged the gap between those who have accumulated savings and those who need to borrow;

SECOND that national and international institutions have promoted a range of supervisory and regulatory responses in an attempt to address the causes of that financial crisis and the erosion of public confidence in its wake;

THIRD that there have also been a number of important developments at the national and international level in soft law to address these issues;

FOURTH that these steps alone can only go so far in changing the behaviour of financial institutions operating nationally and internationally and of those working in them;

CONCLUDING that there is a growing recognition of the need for a cultural change to supplement the legal measures that have been and further will be taken;

CALLS ON international institutions, institutions in the financial industry acting internationally, and the international legal community:

A. to devote time and attention to foster an ethical culture to supplement and inform the operation of the law within the national and international financial industry and its institutions.;
B. to take steps designed to restore trust in the financial industry nationally and internationally;
C. to study and implement better practices that will lead those who deal with financial intermediaries to have a higher confidence in their integrity; and
D. to ensure that supervisors of financial intermediaries and financial service providers are adequately resourced to monitor and guide such entities in their implementation of good culture and conduct and to encourage sound standard-setting initiatives.

RÉSOLUTION NO. 5/2016

COMITÉ DE DROIT MONÉTAIRE INTERNATIONAL

La culture éthique des services financiers

La 77ème Conférence de l'Association de Droit International, qui s'est tenue à Johannesbourg (Afrique du Sud) du 7 au 11 août 2016 :

AYANT PRIS CONNAISSANCE du rapport sur le droit monétaire international ;

CONSIDÉRANT qu'à la suite de la récente crise financière mondiale dont maints pays à travers le monde ont subi les conséquences économiques et sociales, nombreux sont ceux qui ont perdu confiance en leurs intermédiaires financiers, lesquels faisaient traditionnellement le lien entre épargnants et emprunteurs ;

CONSIDÉRANT que l'action d'institutions nationales et internationales a permis de prendre une série d'initiatives en matière de supervision et de réglementation pour s'attaquer aux causes de la crise financière et à la perte de confiance qui en résulte ;

CONSIDÉRANT que de nombreuses normes non contraignantes (*soft law*) ont également été adoptées à l'échelon national et international en réponse à ces problèmes ;

CONSIDÉRANT que ces mesures ne peuvent, à elles seules, conduire à un changement de comportement tant des établissements de crédit opérant dans un cadre national et international que de leurs agents ;

ESTIMANT qu'il est de plus en plus reconnu qu'un changement de culture doit accompagner les mesures juridiques qui ont été et seront adoptées ;

INVITE les organisations internationales, les établissements de crédit à dimension internationale, et la communauté juridique internationale :

A. À promouvoir, en y consacrant le temps et l'attention nécessaires, une culture éthique qui complète et éclaire l'application du droit au sein du secteur financier, tant national qu'international, et des établissements de crédit qui en font partie ;
B. À adopter des mesures visant à restaurer la confiance dans le secteur financier tant au niveau national qu'international ;
C. À étudier et à mettre en œuvre de meilleures pratiques qui restaurent, chez ceux qui traitent avec les intermédiaires financiers, leur confiance en ceux-ci ; et
D. À veiller à ce que que les autorités de supervision des intermédiaires financiers et des prestataires de services financiers disposent de moyens suffisants pour suivre et guider ces entreprises dans la mise en œuvre d'une culture éthique adéquate dans ce domaine et pour encourager les initiatives visant au développement de saines pratiques.

RESOLUTION NO.6/2016

NON-STATE ACTORS AND INTERNATIONAL LAW

The 77th Conference of the International Law Association, held in Johannesburg, South Africa, 7 - 11 August 2016:

HAVING CONSIDERED the Reports of the Committee on Non-State Actors and International Law;

NOTING, first, the challenges that a growing and diverse group of non-state actors pose for international law; second, the range of distinctive and dissimilar practices which currently exist with regard to non-state actors; and third, the increasing significance attaching to the legal status, rights and responsibilities of non-state actors under international law;

NOTING IN PARTICULAR the continuing efforts in international humanitarian and human rights law to control the activities of transnational companies and armed opposition groups; the need to regulate the rising cooperation between NGOs and IGOs; and the trend to extend international enforcement, sanctioning and dispute settlement systems to non-state actors;

ACKNOWLEDGING the fact that the Committee has adopted a broad working definition of non-state actors, and that it is not possible to draw general or particular conclusions, in terms of *de lege lata* or *de lege ferenda*, without more specific analysis of individual types of non-state actor;

RECOGNISING a corresponding need for an applied typology of non-state actors and a differentiated examination of the status, rights and/or duties of specific types of non-state actors under international law;

COMMENDS the work of the Committee which introduced the many facets of this topic;

RECOMMENDS that the Executive Council dissolve the Committee which has achieved its mandate, while being prepared to consider favourably proposals for a new Committee with a more focused mandate.

RESOLUTION NO. 6/2016

LES ACTEURS NON ÉTATIQUES ET LE DROIT INTERNATIONAL

La 77e Conférence de l'Association de droit international, tenue à Johannesburg, en Afrique du Sud, du 7 au 11 août 2016 :

CONSIDÉRANT les Rapports du Comité sur les acteurs non étatiques et le droit international,

PRENANT NOTE, en premier lieu, des défis posés au droit international par la multiplication et la diversification des acteurs non étatiques ; en deuxième lieu, du large spectre de pratiques variées et singulières relativement aux acteurs non étatiques ; et en troisième lieu, de l'importance accrue du statut juridique, des droits et obligations des acteurs non étatiques en droit international ;

PRENANT NOTE EN PARTICULIER des efforts soutenus dans le droit humanitaire et dans les droits de l'homme, visant à contrôler les activités des entreprises multinationales et des groupes d'opposition armés ; du besoin de réguler la coopération croissante entre les organisations non gouvernementales (ONG) et les organisation internationales (OI) ; et de la tendance à étendre les systèmes internationaux de mise en œuvre du droit, de sanction et de règlement des différends aux acteurs non étatiques ;

RECONNAISSANT le fait que le Comité a adopté une large définition de travail des acteurs non étatiques, et qu'il n'est pas possible de tirer des conclusions générales ou particulières, en termes de *lege lata* ou de *lege ferenda*, sans une analyse plus spécifique des différents types d'acteurs non étatiques ;

RECONNAISSANT, par conséquent, la nécessité d'une classification des types d'acteurs non étatiques et d'un examen différencié du statut, des droits et/ou obligations des types spécifiques d'acteurs non étatiques en droit international ;

FÉLICITE le travail du Comité qui a présenté les nombreux aspects de ce sujet ;

RECOMMANDE que le Conseil exécutif dissolve le Comité qui a achevé son mandat, tout en étant préparé à considérer de manière favorable des propositions pour un nouveau Comité avec un mandat plus précis.

RESOLUTION NO.7/2016

STUDY GROUP ON PRINCIPLES ON THE ENGAGEMENT OF DOMESTIC COURTS WITH INTERNATIONAL LAW

The 77th Conference of the International Law Association, held in Johannesburg, South Africa, 7–11 August 2016:

ACKNOWLEDGING the increased and increasing engagement of domestic courts with international law;

DESIRING to assist scholars and practitioners, including domestic judges, in dealing with the complex issues that arise in the context of invocation and application of international law before and by domestic courts;

NOTING WITH SATISFACTION the conclusion of the work of the Study Group on Principles on the Engagement of Domestic Courts with International Law;

THANKS the Chair, the Co-Rapporteurs, the members of the Study Group, and the external researchers associated with the Study Group for the valuable work done;

COMMENDS the Final Report of the Study Group to the membership of the Association and to relevant stakeholders, including domestic judges and practitioners;

RECOMMENDS that the Study Group be dissolved.

RÉSOLUTION NO. 7/2016

GROUPE D'ÉTUDE SUR LES PRINCIPES CONCERNANT LE RECOURS AU DROIT INTERNATIONAL PAR LES JURIDICTIONS NATIONALES

La 77ème Conférence de l'Association de Droit International, qui s'est tenue à Johannesburg (Afrique du Sud) du 7 au 11 août 2016 :

RECONNAISSANT le recours accru et croissant au droit international par les juridictions nationales ;

DÉSIREUSE de prêter assistance aux experts et praticiens, notamment les juges nationaux, traitant de problèmes complexes survenant dans le contexte de l'invocation et de la l'application du droit international devant et par les juridictions nationales ;

NOTANT AVEC SATISFACTION la conclusion des travaux du Groupe d'étude sur les principes concernant le recours au droit international par les juridictions nationales ;

REMERCIE le Président, les co-rapporteurs, les membres du Groupe d'étude et les chercheurs extérieurs associés au Groupe d'étude pour l'utile travail accompli ;

PORTE le Rapport final à l'attention des membres de l'Association et aux parties prenantes concernées, y compris les juges nationaux et les praticiens ;

RECOMMANDE que le Groupe d'étude soit dissous.

RESOLUTION NO.8/2016

STUDY GROUP ON DUE DILIGENCE IN INTERNATIONAL LAW

The 77th Conference of the International Law Association, held in Johannesburg, South Africa, 7–11 August 2016:

RECOGNISING the importance of due diligence as a relevant standard of conduct in many areas of international law;

RECOGNISING ALSO the continuing reliance on due diligence by international courts and tribunals;

DESIRING to assist in the clarification of the material factors and underlying principles in the identification and operation of due diligence as a standard of conduct in such areas of international law;

NOTING the conclusion of the work of the Study Group on Due Diligence in International Law;

THANKS the Chair, the Rapporteur and the members of the Study Group for their work;

COMMENDS the Final Report of the Study Group to the membership of the Association;

RECOMMENDS that the Study Group be dissolved.

RÉSOLUTION NO. 8/2016

GROUPE D'ÉTUDE SUR LA « DILIGENCE REQUISE » EN DROIT INTERNATIONAL

La 77e Conférence de l'Association de droit international, organisée à Johannesburg, Afrique du Sud, du 7 au 11 août 2016 :

RECONNAISSANT l'importance de la diligence requise comme norme de conduite pertinente dans plusieurs domaines du droit international ;

RECONNAISSANT AUSSI le recours très fréquent à la diligence requise par les juridictions et tribunaux internationaux ;

DÉSIREUSE de contribuer à la clarification des facteurs matériels et de mettre en évidence les principes régissant l'identification et la mise en œuvre de la diligence comme standard de conduite dans ces champs du droit ;

PRENANT NOTE de la conclusion des travaux du Groupe d'étude sur la diligence requise en droit international ;

REMERCIE le Président, le Rapporteur et les membres du Groupe d'études pour leurs travaux ;

PORTE le rapport final du Groupe d'étude **à l'attention** des membres de l'Association ;

RECOMMANDE que le Groupe d'étude soit dissous.

RESOLUTION NO.9/2016

STUDY GROUP ON PREFERENTIAL TRADE AGREEMENTS

The 77th Conference of the International Law Association, held in Johannesburg, South Africa, 7 -11 August 2016:

ACKNOWLEDGING the increasing relevance of preferential trade agreements;

DESIRING to assist negotiators and scholars in dealing with the various and complex issues that arise in this context;

NOTING WITH SATISFACTION the conclusion of the work of the Study Group on Preferential Trade Agreements;

THANKS the Co-Chairs, the Co-Rapporteurs and the members of the Study Group for the valuable work done;

COMMENDS the Final Report of the Study Group to the membership of the Association and to relevant stakeholders;

TAKES NOTE of the wish of the Study Group that the Executive Council of the ILA establishes a Committee to continue the work on this topic;

RECOMMENDS that the Study Group be dissolved.

RÉSOLUTION NO. 9/2016

GROUPE D'ÉTUDE SUR LES ACCORDS COMMERCIAUX PRÉFÉRENTIELS

La 77ème Conférence de l'Association de Droit International, qui s'est tenue à Johannesburg (Afrique du Sud) du 7 au 11 août 2016 :

RECONNAISSANT l'importance croissante des accords commerciaux préférentiels ;

DÉSIRANT prêter assistance aux négociateurs et aux spécialistes afin de faire face aux problèmes divers et complexes qui se présentent dans ce contexte ;

PRENANT NOTE AVEC SATISFACTION de la conclusion des travaux du Groupe d'étude sur les accords commerciaux préférentiels ;

REMERCIE les co-présidents, les co-rapporteurs et les membres du Groupe d'étude pour l'utile travail accompli ;

PORTE le Rapport final à l'attention des membres de l'Association et aux parties prenantes concernées ;

PRENDS NOTE du souhait du Groupe d'étude que le Conseil exécutif de l'ILA institue un comité afin de poursuivre le travail sur ce sujet ;

RECOMMANDE que le Groupe d'étude soit dissous.

NOTES ON THE BUSINESS OF THE ASSOCIATION

April 2014 – August 2016

(Compiled from the Minutes of the Executive Council Meetings held in October 2014 and in April and November 2015 and in May 2016, and the Full Council meetings in August 2016).

Executive Council, 18 October 2014, London

Lord Mance (Chair) welcomed Members of the Executive Council and in particular, Dr Damilola S Olawuyi (Nigerian) and Charles Claypoole (British) who were attending for the first time. He also congratulated Professor Vanda Lamm (Hungary) and Marcilio Franca Filho (Brazil) who had both been appointed recently as Presidents of their respective Branches.

Professor Torsten Stein pointed out that ILA funds were in a healthy state. The balance held in the recently opened account for the Scholarship Fund was shown. He drew attention to the Branch contributions received thus far which were in excess of the amount received at the same time in 2013. He expressed gratitude to the British Branch for increasing the fee paid to HQ for the administration of the Branch. There had been an encouraging increase in membership numbers in the last 12 months. In particular the rise in membership of the American and French Branches were noted. The opening of 3 new Branches in April had also had an impact on this figure.

The Director of Studies commented on the success of the Washington Conference and thanked all concerned. 3 Committees had completed their mandates and therefore they were wound up: International Trade Law; Reparation for the Victims of Armed Conflict and The Legal Principles Relating to Climate Change. The very active Officers and Members of these Committees were acknowledged. A fourth Committee International Family Law was also wound up to allow the possibility of a new Committee in this field to be established should a new mandate be forthcoming. Extensions to the mandates until 2016 were granted to several committees. The following were appointed as Committee Officers: Alan Ewins (Hong-Kong) as Co-Chair of the International Securities Regulation Committee; Thilo Rensmann (Germany) and Professor Gus Waschefort (South Africa) were appointed Co-Rapporteurs on the International Human Rights Law Committee and Professor Christina Binder (Austria) was appointed as Co-Rapporteur on the Feminism and International Law Committee. Two new Committees were approved: Sustainable Development and the Green Economy in International Trade Law with Professor Mary Footer (UK & Netherlands Branch), Chair and Professor Meredith Kolsky Lewis (New Zealand) and Professor Locknie Hsu (HQ, Co-Rapporteurs; and Global Health Law Co-Chairs: Professor Frederick Abbott (American) and Brigit Toebes (Netherlands).

The Study Group on *Role of Soft Law Instruments in International Investment Law* was wound up. The mandates for the 2 Study Groups were extended to 2016: *Principles of Engagement of Domestic Courts with International Law* and *The Conduct of Hostilities under International Humanitarian Law.*2 new Study Groups were also approved: *UN Sanctions and International Law* Chair: Larissa van den Herik (Netherlands) and Kristen

Boon (*NM)* Co-Rapporteur; and *Individual Responsibility in International Law:* Co-Chairs: Chimene Keitner (American) and Lorna McGregor (British).

To allow work to commence more swiftly in certain particularly topical areas, it was agreed that appointments to Committees might be approved by email circulation to the Executive Council.

It was also agreed that Branches should urge their representatives on the ILA Committees to report back to them regularly.

Lord Mance reported that the papers of the ILA Regional Conference in Cape Sounion, Greece will have its papers published by W G Hart in due course.

Professor Manuel Almeida Ribeiro reported that the recent Regional Conference in Lisbon had been very successful and that the papers presented there will be published by Brill.

Dr Damilola Olawuyi informed the Executive Council that the Nigerian Branch will hold its inaugural meeting at a Conference on 28 October 2014. This will be attended by the Chief Justice of Nigeria and other senior figures. The theme of the event is: *Transnational Threats to Commercial Investment.*

Professor Chun-i Chen confirmed that the 2015 ILA/ASIL Asia-Pacific Research Forum :*Why International Law Matters?* would take place as planned in Taipei on 25 – 26 May 2015.

Professor Hennie Strydom confirmed that the ILA2016 Conference will be held in the Sandton Conference Centre in Johannesburg from 7-11 August. Chris Ward reported that plans for Sydney in 2018 are taking shape and Professor Yuji Iwasawa confirmed that preparations are underway in the Japanese Branch for the Conference in 2020 to be held in Kyoto in August. (The Olympic Games will be staged in Tokyo in July.)

Professor Catherine Kessedjian reported to the Executive Council on the establishment of the Scholarship Fund and the initial awards made. Over £10,000. Just under half this amount had been used to facilitate the attendance of 8 Scholars at the Regional Conference in Lisbon. The balance will be used toward the funding needed for the next Biennial Conference in Johannesburg.

Bruce Mauleverer QC was elected Patron & David Wyld was elected Vice-Chair in his place. Dr Antonios Tzanakopoulos was elected as Honorary Secretary General.

It was agreed that the ILA's mission statement should be reviewed and re-drafted.

Executive Council, 25 April, 2015, London

Lord Mance welcomed Professor Andrea Bjorklund (American & Canadian) who was attending for the first time. Tributes were paid to Dr Ivor Jackson and to Dr Luke Lee

Professor Torsten Stein presented the Annual Accounts for 2014 and said the financial position was good with reserves in excess of the minimum required. Provision for the ILA website & database revamp was included in the budget for 2015 and that these costs would actually come from the reserves.

The Director of Studies, Professor Brus had drafted new Rules & Guidelines for ILA Committees and Study Groups. Xavier Seuba (Spanish) and Ellen 't Hoen (Netherlands) were appointed Co-Rapporteurs of the Global Health Law Committee. Dalee Sambo Dorough (US) was appointed as Co-Chair and Timo Koivurova (Finnish) as Co-Rapporteur of the Committee on Implementation of Rights of Indigenous People. Eronika Bilkova (Czech) was appointed as Rapporteur on the Non-State Actors Committee. A new ILA Committee on the Rule of Law and International Investment Law chaired by August Reinisch (Austrian) with Andrea K Bjorklund (US) and Andreas R Ziegler (Swiss) as Rapporteurs was approved. An extension was agreed to the mandate to 2016 of the Study Group on *Use of domestic law Principles for the development of international law.* A new ILA Study Group on *Content and Evolution of the Rules of Interpretation* was approved. It will be chaired by Professor Photini Pazartzis (Hellenic) with Dr Panos Merkouris (Hellenic) as Rapporteur.

The Treasurer announced he would attend the 2015 ASIL-ILA Asia-Pacific Research Forum in Taipei from 25-26 May. Professor Hennie Strydom confirmed, the 2016 Biennial Conference will take place from 7 – 11 August in Johannesburg at the Standen Conference Centre. Professor Nakatani reported work was well under way for the 2020 Conference to be held in Kyoto at the Kyoto International Conference centre from 23 – 27 August 2020. The Executive Council accepted an invitation from teh Portuguese Branch to host the Biennial Conference in 2022. Professor Catherine Kessedjian (French) formally proposed that festivities be organised by the French Branch in Paris in 2023 to mark the 150th Anniversary of the founding of the ILA. It was suggested that a publication covering the ILA's history should be issued.

Professor Torsten Stein was re-elected as Honorary Treasurer for a further four year term.

A draft of the new Mission Statement had been presented and it was agreed that further consideration was required.

Two new Branches were established: Belarusian and Indonesian. It was agreed that renewed efforts should be made to encourage the establishment of a Branch in the PRC.

Executive Council, 14 November 2015, London

Lord Mance (Chair) expressed condolences to France for the atrocities committed in Paris the previous evening, 13 November. He welcomed Dr David Berry (Caribbean); Professor Alena Douhan (Belorussian); Dr Cemeletin Karadas (Turkish) & Judge Milenko Kreca (Serbian) who were attending for the first time.

Tributes were paid to Mr Barry Sen, who had been responsible for the foundation of the Indian Branch in 1950.

The Hon Treasurer, Professor Torsten Stein said that the ILA funds were again in a satisfactory state. He was hopeful that there would not be a deficit in 2015. Branch contributions received were already almost at the level budgeted for the year and there had been a higher than expected contribution from Hein on Line. The initial instalment to the cost of the website & database developer had been made and was shown as an extraordinary expense, it having been agreed that the costs of the project should come from the general funds. He pointed out that a deficit has again been envisaged in 2016, but that an increase

in ILA membership may ameliorate this. It was agreed that an increase in fees should be avoided if possible.

The Statement of Branch Contributions/Branch Membership as at 12 November (Annex 4) showed an encouraging rise in membership. The Treasurer stressed that Branches should be responsible for paying the fees of the number of Members listed in the branch, not just for those Members who have actually paid their fees. It was noted that the Croatian the Hellenic and the Turkish Branches will be expected to make payments by the end of the year.

The Director of Studies asked that Branches should consider whether they might be able to support Committees by hosting meetings locally, The Dutch Branch had just (financially) supported a meeting in The Hague and Leiden of the Role of International Law in Sustainable Natural Resource Management Committee (12-14 November 2015), as it did in June 2015 when the Study Group on UN Sanctions met in Leiden.

Three new Committee Officers were appointed, Professor Charles Jalloh (US) as Rapporteur on the Committee on Complementarity in International Law, Professor Jan von Hein (German) and Dr Christina Mariottini (American) as Co-Rapporteurs of the Committee on Protection of Privacy in Private International & Procedural Law. It was agreed that the ILA should operate in a transparent manner and that the practices relating to (membership of) Study Groups should be in conformity with the ILA's policies. Study Groups should aim at completing their work within a short life span and their membership should reflect the membership of the ILA. Members wishing to engage in longer term cooperation without having the ambitions of a Committee should consider forming an Interest Group. Professor Brus announced that a draft Programme for ILA2016 in Johannesburg had been circulated to all ILA Committee and Study Group Officers. As a high number of Resolutions were expected at this event, the Steering Committee whose members would be: Lord Mance, Dr Antonios Tzanakopoulos (Chair), Professor Marcel Brus, Professor Cynthia Lichtenstein, a representative from the South African Branch (to be identified), David Wyld, James Green, Dapo Akande and Christian Tam was appointed.

The website for the 2016 Conference in Johannesburg was then displayed and arrangements presented. Professor Chris Ward announced that the Hilton Hotel in Sydney has been provisionally booked from 9-25 August 2018. This Conference will be held jointly with Australian & New Zealand Societies, so a full parallel Programme will be provided. The Japanese Branch has appointed a Conference Committee for the Conference in 2020 in Kyoto.

The Portuguese Branch was considering the location for the 2022 Conference. Professor Kessedjian said it was important that all Branches should be involved and should participate in the 150th Anniversary Celebration to be held in 2023. It was agreed that the occasion would be an ideal opportunity for the history of the Association to be written up & published.

Professor van Genugten reported on progress made by that the Scholarship Fundraising Committee whose Members were: Professor Willem van Genugten (Chair), Professor Catherine Kessedjian, Professor Stephan Hobe and Professor Dapo Akande.

Professor Antonios Tzanakopoulos reported that work was under way on the new integrated system which will operate the HQ database and website. These are being designed to allow individual ILA Members, Branch & Committee Officers to update and post information directly onto the website. Those that already have their own independent site can of course continue to use that & this can be hyper-linked to the ILA central site.

Two additional Branches were approved in Pakistan & Cyprus. A Singaporean branch had been formally established on 30 June. Lord Mance attended and addressed the inaugural meeting in September. The representatives of two recently established Branches, Caribbean and Belorussian, reported on recent activities.

The Policy & Finance Committee was renamed the Management Committee.

Lord Mance reported that additional material would shortly be added to the ILA archives.

Executive Council, 7 May 2016, London

Lord Mance welcomed Ms Valentina Dimitriou (Cypriot); Professor Paul Dubinsky (American); Dr Erick Kassongo (HQ Member from The Congo) Professor Fidelis Oditah (Nigerian); Mr Akis Papastavridis (Hellenic); Dr Christophe Paulussen (Netherlands) & Chen-Yu Wang (Chinese (Taiwan))

Tributes were paid to Professor Luigi Ferrari Bravo, former President Italian Branch had died recently.

The Annual Accounts for 2015 showed a surplus of just over £14,000. On the advice of the Auditor, all costs for the new website/database project would be taken into 2016 and written off as an intangible asset over the course of the next 5 years. The current financial position remains good so both the website/database & archive projects will be comfortably covered by the funds in reserves. The British Branch had contributed to the archive project. A rise in the rent for the HQ office was expected as the University of London had taken control of all the accommodation within the Institute of Advanced Legal Studies.

A new Committee on the Procedure of International Courts and was approved. The Officers were: Co-Chairs: Professor Helene Ruiz Fabri (French); Professor Philippe Sands (UK) & Professor Shotaro Hamamoto (Japan). The Co-Rapporteurs: Dr Arman Savarian (UK) & Dr Fillipo Fonatanelli (Italy).

Professor Hennie reported that the Programme for Johannesburg Conference was almost complete and most speakers had now confirmed their participation. Although fees were low & the destination inexpensive, registration was disappointing. The Sydney Conference will be held in Sydney from 20 – 24 August 2018 and the 2020 Conference will be held at the Kyoto International Conference centre from 23 – 27 August 2020. It was too early at this stage to have any details for the ILA2022 Conference which will be held in Portugal. Plans were in hand for the celebration of the 150th Anniversary of the formation of the ILA which will take place in Paris in 2023.

The Executive Council gave the Chair the mandate to finalise the text of the ILA Missions Statement.

Bruce Mauleverer QC reported on the work of the Scholarship Fund Award Committee (comprising Professor Cynthia Lichtenstein, Dr Sarah Nouwen & Professor Lavanya

Rajamani). The Committee had unanimously selected the 11 individuals from over 40 applicants. They received awards to allow them to attend the Johannesburg Conference.

First Full Council Meeting, 8 August 2016, Johannesburg

The Chairman welcomed Dr Damilola S Olawuyi (Vice-President, Nigerian Branch); Mr Ihor Turyanskiy (representing Ukrainian Branch); Professor Fernando Loureiro Bastos (representing Portuguese Branch) and Dr Veronika Bilkova (representing the Czech Branch) who were all attending for the first time.

He then listed the names of the following notable ILA Members who had died since the previous Conference in Washington DC: Dr Ivor Jackson (American); Mr Barry Sen (founder of Indian Branch); Professor Luigi Ferrari Bravo (former President, Italian Branch); & very recently, in July 2016, Judge Dolliver Nelson (British Branch), *who had been President of ITLOS (International Tribunal of the Law of the Sea dates)* & former Chair of the ILA Baselines Committee.

Lord Mance said that the attendance of 20 award winning Scholars at this Biennial Conference was an unprecedented and most welcome development. He thanked Professor Willem van Genugten (President, Netherlands Branch) for his own generosity & that of his law school, the Dutch Embassy in Pretoria, his friends & other colleagues who had funded 9 of these Scholars. 11 of them had been funded by the ILA's own Scholarship scheme which had been launched in 2014. He particularly thanked Professor Catherine Kessedjian (President, French Branch) as she had been the originator of the entire Scholarship scheme.

Professor Patrick Vranken, behalf of the South African Branch, proposed Professor Hennie Strydom, President of the South African Branch as next President of the Association. This was seconded by Jeremy Carver (President) and Professor Antonios Tzanakopoulos (Joint Secretary) of the British Branch. Thanks of the Full Council were expressed to Professor Ruth Wedgwood as she stepped down as President.

Lord Mance informed the Full Council that the Steering Committee (which had been appointed by the Executive Committee in May) had met the previous evening. He said the role of this Committee had developed at recent Conferences to look more actively and more critically than had been the case earlier, at Committees' Reports and Recommendations before Resolutions were put to the Closing Sessions.

The Members of the Steering Committee at the Johannesburg Conference were: Lord Mance; Professor Antonios Tzanakopoulos; Professor Marcel Brus; Professor Cynthia Lichtenstein; Bruce Mauleverer QC (replacing David Wyld); Professor James Green; Professor Dapo Akande; Professor Christian Tams and Professor Engela Schlemmer.

Professor Torsten Stein presented the Treasurer's Report which covers the full financial years from one Conference to the next and in this case, 2014 and 2015. These showed that the Association was in a healthy position at the end of 2015.

Professor Brus thanked the South African Branch warmly for providing such a full and interesting Programme for the Conference. 23 of the ILA's 24 Committees would be holding Open Working Sessions during the Conference. 8 Study Groups out of the current 12 would also be holding sessions in Johannesburg. The 6 Committees expected to

produce Resolutions at the Closing Session are: International Protection of Consumers; International Human Rights Law; Cultural Heritage Law; International Commercial Arbitration; International Monetary Law and Non-State Actors.

The revised Constitution which had been approved by the Executive Council in May 2016 would be circulated to all ILA Members present at the Conference and then presented for adoption at the Closing Session of the Conference.

Professor Willem van Genugten (President, Netherlands Branch) drew the attention of the Full Council to the joint Conference which had been arranged by the Cypriot & Netherlands Branch, with the financial support of the Dutch Embassy in Nicosia. This demonstrated the effectiveness of collaboration between Branches and said this should be viewed as a good example of outreach. He also said that some structural fundraising should also be attempted in order to further the participation in the work of the ILA from less developed economies and younger people.

Second Full Council, 11 August 2016, Johannesburg

The Director of Studies thanked the organisers for ensuring that the facilities provided were so good and had allowed the ILA Committees & Study Groups to conduct their work with ease. There had been some disappointment with the number of delegates registered, but most meetings had managed to have good discussions in spite of small numbers attending in some cases.

23 Committees, 8 Study Groups & 1 Interest Group had held Open Working Sessions. Several had also arranged closed meetings for their Members. He expressed his thanks to the Officers & Members concerned. 6 Committees had produced Resolutions at this Conference. He announced that Study Groups finishing their work would also be presenting Resolutions to mark the end of their work at this Conference. These Resolutions only take note of and do not adopt as work of the ILA any work of the Study Groups. The Resolutions should make the result of the work of the Study Groups more visible and would be published on the ILA website. He said that perhaps there had been insufficient scrutiny of the Reports & Resolutions during the Working Sessions and the Steering Committee had had to intervene. Finally, he said that the 32 Reporters who had done such challenging work covering all the Working Sessions should be thanked and especially their co-ordinator, Alex Kunzelmann.

Professor Cynthia Lichtenstein (American Branch) proposed a vote of thanks to the Chairs of the Working Sessions. This was seconded by Professor Antonios Tzanakopoulos (British Branch) and warmly approved by the Council. Professor Chris Ward (Australian Branch) proposed a vote of thanks to the South African Branch.

The Chair, Lord Mance drew attention to the success of the Scholarship programmes and the enthusiasm shown by the 20 young individuals who had attended this Conference as a result. Several ideas for future collaboration amongst themselves and with the ILA more generally had been proposed.

FINANCIAL REPORT 2014 – 2015

By the Honorary Treasurer

This report must be seen and read as a continuation of the report included in the report of the 2014 Conference held in Washington DC.

The data set out below, represent a summary of the figures of the main items of income and expenditure as audited for the years 2014 and 2015.

	Total 2014 £	Total 2015 £
Incoming Resources		
Subscriptions		
Branches	100,294	109,043
Headquarters membership	4,135	3,515
	104,429	112,558
Sales		
Publications	2,140	10,370
Deposit interest	238	291
Donation		
Contribution towards the administration of ILA branches	3,000	3,00
Royalties	4,666	6,024
ILA Scholarship Fund	10,535	6,461
	18,439	15,776
Total Incoming Resources	125,008	138,704
Deduct: Total Expenditure	114,817	118,119
Net Income (*Expenditure*) for the year	10,191	20,585
Total funds brought forward	178,203	188,394
Total funds carried forward	188,394	208,979

Expenditure		
Direct Charitable Expenditure:		
Conference report – distribution	1,002	1,393
ILA Scholarship Fund	4,696	–
	5,698	1,393
Staff salaries, pension and administrative services	86,134	91,103
Management and Administration:		
Rent and rates	10,370	12,444
Website development and computer consultancy	3,198	2,160
General expenses	9,417	11,019
	22,985	25,623
Total Expenditure	**114,817**	118,119
Funds		
Unrestricted Funds	182,555	196,679
Restricted Funds (Scholarship Fund)	5,839	12,300
Total Funds	188,394	208,979

Notes on Income

ILA receives most of its income from overseas branch subscriptions, following the standing practice such income is accounted for on a receipts basis.

Contributions are based on the numbers of members listed by each branch and recorded on the database maintained by ILA Headquarters. Invoices are sent to Branches annually.

Bank interest and other income are included in the financial statements on an accruals basis.

ILA Scholarship Fund has been established to encourage and facilitate younger persons to participate in the work of the ILA (shown as Restricted Funds).

Notes on Expenditure

Expenditure in 2014 and 2015 was within budget.

General Notes

Pursuant to provisions in the Charities Act 1993 applying to Charities with a gross annual income or expenditure below £ 250,000 in an accounting year, the Officers have elected that the accounts be "examined" rather than "audited", giving rise to a considerable saving in professional fees.

ILA reserves policy

To be able to provide reliable services over a longer period the Association must be able to absorb occasional shortfalls in income.

As the income of the Association comes mainly from its members (branches) from all over the world the annual level of income and the regularity of payment show big fluctuations over the years and as the expenditure in relation to the level of services is already minimal, and no big reductions in expenditure can be made, it is desirable that the Association maintains a reserve at least equal to the expenditure of one calendar year.

Professor Torsten Stein
Hon Treasurer

HISTORY OF THE INTERNATIONAL LAW ASSOCIATION

The International Law Association, originally called The Association for the Reform and Codification of the Law of Nations, was founded in Brussels in October 1873.

From its earliest days, the policy of the Association was one of openness and outreach: there was no fixed number of members but it was open to anyone interested in the improvement of international relations, lawyers or not. Equally the Association has always had a broad view of its mandate, which is not limited to public international law but includes private international law and comparative studies relevant to each. The contributions made to the work of the International Committees by those with a practical knowledge of relevant disciplines have been of enormous value.

Membership of the ILA is organised on a regional basis. There are currently some 50 branches around the world. These may be coextensive with States, but may reflect regional groupings; in any event the branches do not represent governments or national views. The branches are autonomous but work under the approval of the Executive Council, which is elected by the branches. Most branches organise seminars and meetings locally for their members, some also establish committees to study areas of law in parallel with those covered by the international committees.

The objectives of the ILA are: *the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law.*

These objectives are pursued principally through the work of the Association's international committees, with the focal point of its activities the series of biennial conferences. These provide a forum for comprehensive discussion and endorsement of the work of the committees.

Record of ILA Conferences:

City	*Resolutions*
1st Brussels 1873 *President:* M Auguste Visschers	
2nd Geneva 1874 *President:* Hon David Dudley Field	
3rd The Hague 1875 *President:* Hon David Dudley Field	
4th Bremen 1876 *President:* Sir Travers Twiss QC	Principles for an International Law to govern Bills of Exchange

City	*Resolutions*
5th Antwerp 1877 *President:* Rt Hon Lord O'Hagan	York-Antwerp Rules of General Average
6th Frankfort 1878 *President:* Hon David Dudley Field	
7th London 1879 *President:* Rt Hon Sir Robert Phillimore	
8th Berne 1880 *President:* Dr Friedrich Sieveking	
9th Cologne 1881 *President:* Herr H H Meier	
10th Liverpool 1882 *President:* Rt Hon Lord O'Hagan	
11th Milan 1883 *President:* Sir Travers Twiss QC	Slave Trade; Collisions at Sea; Rules for the Execution of Foreign Judgements
12th Hamburg 1885 *President:* Dr F Sieveking	Code of Affeightment
13th London 1887 *President:* Hon Sir Charles Parker Butt	
14th Liverpool 1890 *President:* Dr F Sieveking	Revised York-Antwerp Rules of General Advantage
15th Genoa 1892 *President:* Commendatore P Boselli	Jurisdiction in Territorial Waters
16th London 1893 *President:* Dr F Sieveking	London Rules of Affreightment

City	*Resolutions*
17th Brussels 1895 *President:* Sir Richard Webster	Rules for Procedure for International Arbitration; Rules of Jurisdiction in Territorial Waters; Resolutions on Collisions at Sea
18th Buffalo 1899 *President:* Hon Mr Justice Kennedy	Resolutions on Marine Insurance
19th Rouen 1900 *President:* Hon Simeon E Baldwin	Immunity of Private Property at Sea from Capture
20th Glasgow 1901 *President:* Rt Hon Lord Alverstone	Rules of Marine Insurance; International Agreement as to Assistance Judiciaire; Proposal for a General Treaty of Arbitration between Great Britain and France
21st Antwerp 1903 *President:* M Auguste Beermaert	British Participation in Conference on Private International Law and Maritime Law; Model Treaty for the Execution of Foreign Judgments; Rule as to Effect of Captain's Fault on Incidence of General Average; Company Law in various countries.
22nd Christiana 1905 *President:* F V N Beichmann	Law of Belligerency and Neutrality; International Prize Court of Appeal; Legal Relations of Charterers and Shipowners; Extension of the Berne Railway Transport of Goods Convention 1890.
23rd Berlin 1906 *President:* HE Dr R Koch	Code of Rules for International Recognition of Foreign Companies; Immunity of Private Property from Maritime Capture; Neutrality; Naturalization; Foreign Pauper Litigants and Security for Costs; Legal Relations of Charterers and Shipowners – Cases of Difficulty under York-Antwerp Rules.
24th Portland, Maine 1907 *President:* Rt Hon Lord Justice Kennedy	Contraband of War; Treaties; Intervention on behalf of persons who reside in or contract with Foreign States; Double Imposts; Divorce Jurisdiction.
25th Budapest 1908 *President:* Hon Mr Justice Phillimore	Rules for the Unification of Bills of Exchange Law; Comparative Procedure; Extradition; Territorial Waters; Seamen, Shipowners, the Strike Clause; Blockade; Double Imposts; Workmen's Compensation; Sale of Goods.

City	*Resolutions*
26th London 1910 *President:* Rt Hon Lord Justice Kennedy	Rules for the Unification of the Law of Cheques; Declaration of London; Workmen's Compensation; Criminal Procedure; Jurisdiction in Divorce; General Average; State Interference with Maritime Contracts; Bills of Exchange; Regulations of Land Traffic.
27th Paris 1912 *President:* M E Clunet	Modification of Budapest Rules; Law of the Air; Rules of Land and Sea Traffic; Private International Law Principles, including Renvoi Law of Association and of Copyright; Extradition; General Average; Comparative Legal Procedure; Industrial Problems.
28th Madrid 1913 *President:* Ex Marques de Allucemas	Provisional Code of General Average Law; Aviation Law; Effect of War on Enemy Contracts; Law of Mines; Deck Cargoes; Extradition; Company Law; Industrial Problems; Comparative Legal Procedure; Administrative International Law.
29th Portsmouth 1920 *President:* The Rt Hon the Earl of Reading	League of Nations; Report of the British Maritime Law Committee on the Laws of War at Sea; Treatment of Prisoners of War; International Cooperation under the League of Nations; Aviation in Time of Peace.
30th The Hague 1921 *President:* Professor Dr D Josephus Jitta	Regulations for the Treatment of Prisoners of War; Hague Rules of Affreightment
31st Buenos Aires 1922 *President:* Dr Estanislao S Zeballos	A Permanent International Criminal Court; Rights and Duties of States of the New World; Inviolability of Postal Packages; Recognition of de facto States; International Responsibility of the State for Damage suffered by Aliens during Civil War; Prohibition of the Employment of Apparatus of Locomotion of War; Social Insurance Law; Protection of Minorities; Use of Submarines in Wartime; International Tribunal of Commercial Arbitration; Reports and recommendations from: the Chemical Warfare Committee; the Aviation Committee; the Stolen Securities Committee; the Maritime Law Committee; Capacity of Married Women; Domicile and Nationality and Double Nationality; Cheques and their Negotiation; External Loans with Foreign Governments;

City	*Resolutions*
	Execution of Foreign Judgments; Private International Law in the Argentine.
32nd London (not a full conference) 1923 *President:* Dr Estanislao S Zeballos	Nationality of Married Women.
33rd Stockholm 1924 *President:* Dr H J Hammarskjold	Model Statute for Nationality, Statelessness and Expatriation; Draft Rules for the Enforcement of Foreign Judgements
34th Vienna 1926 *President:* Dr Gustav Walker	Draft Convention on Maritime Jurisdiction in Time of Peace; Statutes of a proposed International Penal Court; Rules relating to the Protection of Minorities and of Private Property
35th Warsaw 1928 *President:* Professor Zygmunt Cybichowski	Draft convention on Extradition and Rules for the Government of Territory Occupied by Hostile Forces
36th New York 1930 *President:* Hon John W Davies	Rules on the Effect of War on Contracts and the Legislation of Documents
37th Oxford 1932 *President:* The Rt Hon Lord Blanesburgh	Draft convention on the Legal Status of the Property of their respective Nationals in the Contracting States; Jurisdiction and Recognition of Decrees in Divorce and Nullity of Marriage; Rules on the Effect of War on Contracts; Draft Convention on the Sale of Goods; the effect of War on Private Enemy Property; Optional Forms of CIF Contracts
38th Budapest 1934 *President:* HE Stephen Osvald	Articles of Interpretation of the Briand-Kellogg Pact of Paris
39th Paris 1936 *President:* Professor Albert de Geouffre de La Pradelle	La Nationalité d'Origine; La Nationalité des Sociétés Commerciales; Commercial Arbitration; Tribunaux Mixtes de Droit Privé; La Clause or et les Paiements Internationaux; Conciliation between Nations and the Right of Defence; Le Probléme de la Faillite; Trade Marks; Protection of Civil Populations.

City	*Resolutions*
40th Amsterdam 1938 *President:* Professor Dr J A van Hamel	Conciliation between Nations; Reciprocal Trade Agreements; Protection of Civilian Population against new Engines of War; Business Contracts with Governments; Gold Clause in International Guarantees; Commercial Arbitration; International Exchange of particulars of Civil Status; Trade Marks; Insolvency; Constitution of the Association.
41st Cambridge 1946 *President:* The Rt Hon Lord Porter	The Present Structure of the UN Charter and the direction of desirable changes; Divorce; UN Trusteeship Neutrality; Trade Marks; Uniform International Legislation in the field of Commerce; Methods of Curbing the Aggressive Spirit; Conflict of Laws concerning the formation of Contracts.
42nd Prague 1947 *President:* Dr Jaroslav Zourek	Development and Formation of International Law; Human Rights; Jurisdiction and Recognition in Divorce; Conflicts of Laws; Jurisdiction in Sale of Goods; Constitution of the Association.
43rd Brussels 1948 *President:* M le Ministre Albert Deveze	75th Anniversary Addresses; Human Rights; Divorce; York-Antwerp Rules; Conflict of Laws; International Companies; Codification; Rights to the Seabed and Subsoil; Commercial Arbitration; International Arbitration and the Abolition of War.
44th Copenhagen 1950 *President:* Judge N V Boeg	The Copenhagen Rules of International Commercial Arbitration
45th Lucerne 1952 *President:* Professor Max Gutzwiller	Sovereignty and International Cooperation; International Company Law; Supranational Companies; Air Law; Rights to the Seabed and its Subsoil; Trade Marks; State Immunity; International Monetary Law.
46th Edinburgh 1954 *President:* The Rt Hon Lord Normand	The Present State of International Law; Review of the Charter of the United Nations; International Insolvency; International Monetary Law; Air Law; Inland Water Rights; Family Relations; International Company Law; Rights to Seabed and its Subsoil; Various Committee reports.
47th Dubrovnik 1956 *President:* Professor Dr Milan Bartos	Draft Convention on the Payment of Foreign Money Liabilities

City	*Resolutions*
48th New York 1958 *President:* Mr Oscar R Houston	Draft Convention on Conflicts of Law relating to Companies
49th Hamburg 1960 *President:* Professor Dr Rolf Stodter	Law of International Waterways; International Company Law; Legal Problems of a United Nations Force; International Trade Marks Law; Nationalization and Foreign Property; Air Sovereignty and the Legal Status of Outer Space; Enforcements of Foreign Judgments; Legal Aspects of the Peaceful Uses of Nuclear Energy; Juridical Aspects of Coexistence; International Monetary Law; Custody of Children; Economic Integration in Western Europe; Reports of various Committees.
50th Brussels 1962 *President:* Maitre Henri Cochaux	Air and Space Law; Nationalization and Foreign Property; Arbitral Tribunal for Foreign Investments; Act of State doctrine; Charter of the United Nations; International Commercial Arbitration; Juridical Aspects of Peaceful Uses of Nuclear Energy; Uses of the Waters of International Rivers; International Trade Marks; Enforcement of Foreign Judgments; International Medical Law; International Monetary Law; Family Relations (Adoption); Enlargement of the European Economic Community: Juridical and Political Aspects; Legislation against Cartels and Monopolies; The principle of Sovereignty in the Treaty establishing the European Coal and Steel Community; Community Law and National Law; Limitation of Shipowners' liability.
51st Tokyo 1964 *President:* The Hon Shigeru Kuriyama	A Model Act for the Recognition and Enforcement of Foreign Money Judgementa
52nd Helsinki 1966 *President:* Judge YJ Hakulinen	The Helsinki Rules (which deal with pollution, navigation, equitable utilization, timber floating and the settlement of disputes: the first general codification of the law of international rivers)
53rd Buenos Aires 1968 *President:* Judge Margarita Argus	Declaration on Diplomatic and Territorial Asylum

City	*Resolutions*
54th The Hague 1970 *President:* Professor Maarten Bos	Legal Aspects of the Problem of Asylum; International Commercial Arbitration: Arbitration between Government-controlled Bodies and Foreign Business Firms; State Succession: Public Debts; Extraterritorial Application of Restrictive Trade Legislation; International Medical Law: Application of the Geneva Conventions; Air Law: Air-Cushion Craft; Illegal Interference with Aircraft; Space Law; Foreign Investments in the Developing Countries; International Monetary Law: the Unit of Account; Human Rights; International Security and Cooperation: Nuclear Weapons; Disarmament; Piracy: Sea and Air; Family Relations: Matrimonial Property Relations; Deep-Sea Mining; Water Resources Law.
55th New York 1972 *President:* Professor Cecil J Olmstead	Rules on State Jurisdication in connection with Restrictive Trade Practices; Draft conventions on Diplomatic and Territorial Asylum
56th New Delhi 1974/75 *President:* A N Ray	Peaceful Settlement of International Disputes; International Monetary Law: Value Clauses; International Water Resources Law; International Terrorism; Human Rights; International Traffic Accidents: Jurisdiction and Insurance; International Security and Cooperation; Law of the Sea: Navigation; Underwater Habitations; Port State Jurisdiction; Foreign Investments in the Developing Countries; Space Law: Telecommunications by Satellite; International Commercial Arbitration.
57th Madrid 1976 *President:* Dr A Rodriguez Sastre	Draft Convention for the Unification of certain rules relating to Hovercraft; Draft Convention on Jurisdiction in International Traffic Accidents
58th Manila 1978 *President:* Professor Enrique P Syquia	Draft Convention on Expatriation of Accused Persons for Trial and Sentence and Repatriation for Enforcement of Sentence; Draft Articles for the Regulation of the Flow of Water of International Water Courses
59th Belgrade 1980 *President:* Professor Smilja Avramov	Draft agreement relating to International Assistance to Victims of Natural Disasters

City	*Resolutions*
60th Montreal 1982 *President:* Professor Nicolas Mateesco Matte	Draft Articles for a Convention on State Immunity
61st Paris 1984 *President:* Maitre Jean Lisbonne	Draft Minimum Standards of Human Rights Norms in a State of Emergency; Draft Statute for an International Criminal Court; Draft Statement of the Rules of International Law applicable to International Terrorism
62nd Seoul 1986 *President:* Dr Thok-kyu Limb	Draft Rules on International Water Resources;
63rd Warsaw 1988 *President:* Professor Jerzy Makarczyk	Enforcement of Human Rights Law; Legal Aspects of a New International Economic Order; International Monetary Law; Exclusive Economic Zone; Space Law; Transnational Recognition and Enforcement of Foreign Public Laws; Medical and Humanitarian Law; International Commercial Arbitration; Legal Status of Refugees; Right to Food; Legal Aspects of Long-distance Air Pollution; International Criminal Law; Legal Problems of Extradition in relation to Terrorist Offences; International Recognition of Adoption; Legal Aspects of Air Traffic Control; Formation of Rules of Customary International Law; State Immunity.
64th Queensland 1990 *President:* Sir Lawrence Street QC	Guidelines for bodies monitoring respect for Human Rights during States of Emergency
65th Cairo 1992 *President:* Professor Mohammed El-Said El-Dakkak	Islamic Law and International Law; International Monetary Law; Draft Convention on the Legal Aspects of Air Traffic Control; Principles Applicable to Living Resources Occurring both within and without the Exclusive Economic Zone or in Zones of overlapping Claims; Principles of International Law on Compensation to Refugees; Internationalised Arbitrations.
66th Buenos Aires 1994 *President:* Dr Ricardo Balestra	Draft Convention on the Protection of Cultural Heritage

City	*Resolutions*
67th Helsinki 1996 *President:* Professor Judge Bengt Broms	Provisional and Protective Measures in International Litigation; Legal Remedies for Arms Control Impasse; Report on Neutrality and Naval Warfare; Report on Dispute Settlement regarding Space Activities; Final report on Extraterritorial Jurisdiction; Legal Aspects of the Euro;
68th Taipei 1998 *President:* Professor Hungdah Chiu	Draft Resolution on Extradition and Human Rights; Principles on Maritime Neutrality; Draft Resolutions on the Committee on International Law in National Courts; International Securities Regulation
69th London 2000 *President:* The Rt Hon Lord Mustill	Leuven/London Principles on declining and referring jurisdiction in Civil and Commercial matters; Declaration regarding the exhaustion of Intellectual Property Rights and Parallel Trade; Final report on Women's Equality and Nationality; Final Report on Coastal State Jurisdiction relating to Marine Pollution; London Statement of principles applicable to the formation of General Customary Law; Declaration of international law principles on Internally Displaced Persons.
70th New Delhi 2002 *President:* The Hon Chief Justice S P Bharucha	New Delhi Declaration of Principles of International Law Relating to Sustainable Development; Review of Space Treaties in View of Commercial Space Activities; Refugee Procedures Guidelines on Temporary Protection; Declaration on International Minimum Standards for Refugee Procedures; Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards; Paris / New Delhi Principles on Jurisdiction Over Corporations.
71st Berlin 2004 *President:* Professor Karl-Heinz Bockstiegel	ILA Rules and Recommended Practices on Liability /Responsibility of International Organisations; Revision of the Helsinki and other International Law Association Rules on International Water Resources: The Berlin Rules on Water Resources;
72nd Toronto 2006 *President:* Mr Milos Barutciski	Recommendations on Lis Pendens and Res Judicata and Arbitration; Toronto Rules on Transnational Enforcement of Environmental law; Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material;

City	*Resolutions*
	Basic Principles Governing Diplomatic Protection of Persons and Property; WTO Law and Access to Medicines for All; Examination of the United Nations Convention on the Law of the Sea on the Establishment of the Outer Limits of the Continental Shelf.
73rd Rio de Janeiro 2008 *President:* Mr Eduardo Grebler	Paris-Rio Guidelines of Best Practices for Transnational Group Actions; Guidelines for the Establishment and Conduct of Safe Havens for Cultural Material; Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration;
74th The Hague 2010 *President:* Professor Nicholaas Schrijver	Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues); The Hague Recommendations on Iinternational Law on Biotechnology; The Hague Declaration 2010 on Women and Migration; The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunal
75th Sofia 2012 *President:* Professor Alexander Yankov	Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations; Principles of Jurisdiction over Foreign Bank Branches in the matter of Extraterritorial Attachment and Turnover; Sofia Statement on the Development of International Principles on Consumer Protection; Sofia Guidelines for a Model Law on National Space Legislation; Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development.
76th Washington DC 2014 *President:* Professor Ruth Wedgwood	Procedural Principles for Reparation Mechanisms (as an essential addition) to the Declaration of International Law Principles on reparation for Victims of Armed Conflict adopted at 74th Conference; Declaration on Legal Principles Relating to Climate Change; Convention on Immunity from Suit and Seizure for Cultural Objects temporarily abroad for Cultural, Educational or Scientific purposes.

City	*Resolutions*
77th Johannesburg 2016 *President:* Professor Hennie Strydom	Johannesburg Recommendations and Guidelines on the Best Practices on International Protection of Consumers; Guidelines on the Obligations of a State and its Domestic Courts with Respect to a Decision issued by an International Judicial or Quasi-judicial Body Involving International Human Rights Law; Recommendations on Inherent and Implied Powers of International Arbitral Tribunals; The Ethical Culture of Financial Services; Recommendations on the Law Pertaining to Cultural Landscapes Significant to Indigenous Peoples; Final Reports on Non State Actors, Principles on the Engagement of Domestic Courts with international Law, Due Diligence in International Law, and Preferential Trade Agreements.

INTERNATIONAL LAW ASSOCIATION

CONSTITUTION OF THE ASSOCIATION

(adopted at the 77th Conference, 2016)

1 Definitions

In this Constitution the following words and expressions shall have the following meanings:-

"Branch"	a branch of the Association established in accordance with Article 8 below;
"Conference"	a conference held in accordance with Article 10 below;
"the Executive Council"	the executive council of the Association described in Article 6 below;
"the Full Council"	the full council of the Association described in Article 7 below;
"A Council"	either the Executive Council or the full Council as defined herein;
"Headquarters Member"	those members elected by the Executive Council in accordance with Article 4.1.4 below.

2 Name

The name of the Association is "The International Law Association" ("the Association"). Its seat is in London.

3 Objects and Powers

3.1 The objectives of the Association are the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law.

3.2 In furtherance of such objects but not otherwise the Association may:-

3.2.1 employ any person or persons to supervise, organise and carry on the work of the Association and make all reasonable and necessary provision for the payment of pensions and superannuation to or on behalf of employees and their surviving spouses and other dependants;

3.2.2 bring together in conference individuals as well as representatives of voluntary organisations, Government departments, statutory authorities and international organisations;

3.2.3 promote and carry out or assist in promoting and carrying out research, surveys and investigations and publish the useful results of such research, surveys and investigations;

3.2.4 arrange and provide for, or join in arranging and providing for, the holding of exhibitions, meetings, lectures, classes, seminars and training courses;

3.2.5 collect and disseminate information on all matters affecting such objects and exchange such information with other bodies having similar objects whether in this country or overseas;

3.2.6 undertake, execute, manage or assist any charitable trusts which may lawfully be undertaken, executed, managed or assisted by the Association;

3.2.7 procure to be written and print, publish, issue and circulate, including through its website or otherwise online, gratuitously or otherwise, such papers, books, periodicals, pamphlets or other printed or electronic media as shall further such objects;

3.2.8 purchase, take on lease or licence or in exchange, hire or otherwise acquire any property and any rights and privileges necessary for the promotion of such objects and construct, maintain and alter any buildings or erections necessary for the work of the Association;

3.2.9 make regulations for any property which may be so acquired;

3.2.10 sell, let, mortgage, dispose of or turn to account all or any of the property or assets of the Association;

3.2.11 accept gifts and borrow or raise money for such objects on such terms and on such security as shall be thought fit;

3.2.12 procure contributions to the Association by personal or written appeals, public meetings or otherwise;

3.2.13 invest the money of the Association not immediately required for such objects in or on such investments, securities or property as may be thought fit, subject nevertheless to such conditions (if any) as may for the time being be imposed or required by law;

3.2.14 enter into contracts;

3.2.15 do all such other lawful things as are necessary or desirable for the attainment of such objects.

4 **Members**

4.1 The members of the Association shall be:-

4.1.1 honorary members elected by a Council;

4.1.2 individuals elected by a Branch;

4.1.3 organisations, whether corporate or unincorporated, elected by a Branch or the Executive Council; and

4.1.4 persons or organisations whether corporate or unincorporated elected by the Executive Council (to be known as “Headquarters Members”).

4.1.5 a Branch, if it is a corporate body, but only on the basis stated in paragraphs 4.5, 8.7 and 10.2 below.

4.2 Each member organisation, elected as aforesaid, may appoint two individuals (the "Appointed Representatives") being members of that organisation to represent it.

4.3 Each member organisation may appoint a deputy to replace either of its Appointed Representatives if either of the Appointed Representatives is unable to attend any particular meeting of the Association.

4.4 Individual members who are engaged in full time study at a school, university, college or other education establishment may be designated student members while they continue their studies.

4.5 Members of the Association have the right to attend conferences and to vote on the affairs of the Association in accordance with and to the extent stated in paragraphs 8.7 and 10.2 only, and not otherwise.

5 **Officers and Assistants**

5.1 At each Conference, the Association shall elect a president ("the President"), who shall hold office until the commencement of the next Conference, and shall, on vacating office become *ex officio* a vice-president of the Association ("the Vice-President" and if more than one "the Vice-Presidents").

5.2 The Executive Council shall elect the following additional Officers and such other Officers and Assistants as the Executive Council shall from time to time decide (together "the Officers") provided, subject to Article 5(3), that 3 months' notice of the proposal to make an election at a meeting of the Executive Council shall have been given in writing by the Secretary General to the presidents of branches and to members of the Executive Council. Nominations for such election may be made by branches and by members of the Executive Council not later than one month prior to such meeting of the Executive Council and shall be circulated by the Secretary General to the presidents of branches and members of the Executive Council as soon as reasonably possible:

5.2.1 An executive chair of the International Law Association ("the Chair");

5.2.2 such number (not exceeding 4) of vice-chairs of the International Law Association as the Executive Council may from time to time elect ("the Vice-Chairs");

5.2.3 a treasurer ("the Treasurer");

5.2.4 a director of studies ("the Director of Studies"); and

5.2.5 a secretary-general ("the Secretary-General").

5.3 The Officers shall hold office for a term of four years subject to the right of the Executive Council to terminate that period of office at any time by a two-thirds majority of those present and entitled to vote at a meeting of the Executive Council. Upon the expiration of a term of office any Officer shall be eligible for re-election provided that no person shall be elected to serve more than a maximum of three full four-year terms in that office. All Officers shall serve until their successors

have taken office. In the event of a vacancy occurring before the termination of an existing Officer's mandate, the Executive Council may fill that vacancy until the end of the period of the previous holder's mandate without complying with the requirements of Article 5.2.

5.4 At least three of the Officers, designated by the Chair after consultation with all the Officers, shall constitute the Trustees of the Association for the purposes of the law regulating charities in the United Kingdom.

6 **The Executive Council**

6.1 The powers of the Association shall be vested in the Executive Council in the intervals between Conferences.

6.2 The members of the Executive Council shall be:-

6.2.1 the President, Vice-Presidents and Patrons;

6.2.2 the Officers;

6.2.3 the ex-Chairs and ex-Vice-Chairs of the Executive Council;

6.2.4 one to three Branch members elected by each Branch in accordance with the following formula: one member for a fully paid Branch membership of fewer than 100, two members for a fully paid Branch membership between 101 and 250, and three members for a fully paid Branch membership above 250; and

6.2.5 individuals co-opted by the Executive Council.

6.3 Members appointed in accordance with Articles 6.2.4 and 6.2.5 above shall be Members for a period not exceeding four years and shall be eligible for re-election or co-option again.

6.4 The Chair shall preside at any meeting of the Executive Council. In the absence of the Chair the Vice-Chair with the longest period in office shall preside.

6.5 If a Member appointed in accordance with Article 6.2.4 cannot attend a meeting of the Executive Council, then the president of the electing Branch may appoint a substitute to attend that meeting only.

6.6 A vacancy in the Executive Council may be filled by election by the electing Branch, if the former member was appointed in accordance with Article 6.2.4, or by co-option, if the former member was appointed in accordance with Article 6.2.5. For the purposes of this Article 6.6 a vacancy shall occur by reason of resignation, death or election of that member as an Officer or President.

6.7 Eight members of the Executive Council shall constitute a quorum.

6.8 The Executive Council may appoint a Finance and Policy Committee and other special or standing committees, and it shall determine their terms of reference, powers, duration and composition.

6.9 The Executive Council shall have regard to any general direction of the Full Council.

6.10 The Executive Council shall, subject to the provisions of this Constitution, have power to settle, adopt and issue standing orders and/or rules for the Association, including standing orders or rules for the conduct of Conferences.

6.11 The Executive Council shall have power to delegate to such person or persons being members of the Association, such powers as it may resolve from time to time and for such period and on such conditions as it may resolve, in furtherance of the objectives of the Association and the conduct of its business.

6.12 The Executive Council shall have the power to consult and decide, in the interval between meetings, by electronic means, as follows*:*

6.12.1 Consultation: The Chair and the Secretary-General may, at the request of any Officer, propose a decision in draft form, including decisions for the approval of constitutions of new Branches in accordance with paragraph 8.5. The proposal shall include all relevant documents, request responses from members of the Executive Council, and set a reasonable deadline which shall not be less than one full week for such responses.

6.12.2 Decisions: After consultation in accordance with paragraph 6.12.1, the Chair and the Secretary-General may solicit a decision by consensus, setting a further deadline of no less than one full week for agreement on a decision in final form. If no objection is received by the deadline from any member of the Executive Council, that decision shall be taken as passed. If any objection is received by the deadline, the matter shall either be subject to further consultation, or shall be put before the Executive Council at a meeting.

6.12.3 Decisions reached by consensus shall be included in the Minutes of the next Executive Council Meeting.

7 **The Full Council**

7.1 The members of the Full Council shall be:

7.1.1 the members of the Executive Council; and

7.1.2 the presidents and secretaries of all Branches.

7.2 The Full Council shall meet at least once during each Conference.

7.3 Twenty members of the Full Council shall constitute a quorum.

8 **Branches**

8.1 Regional Branches consisting of at least ten members of the Association may be formed with the consent of the Executive Council.

8.2 The Executive Council may dissolve any Branch, or in the case of a Branch which is a corporate body may terminate its membership of the Association, where the membership of the Branch has become less than ten or if contributions are more than three years in arrears. Any Branch which has been dissolved or whose membership has terminated in this or any other way shall cease to operate or hold itself out as a Branch of or associated with the Association, and shall if necessary

change its name to make clear that it is no longer a Branch of or associated with the Association.

8.3 Branches are regional. They may be composed of countries within a geographical area, a single country or a geographical area within a country. The members of a Branch may be nationals of the country or countries in their respective region, whether residing or not in such country or countries, and other persons ordinarily resident there and any organisation member which has sufficient interests or presence there.

8.4 A Branch may expel any of its members from the Branch in accordance with the procedure set out in its constitution and such member shall cease to be a member of the Association without prejudice to the position of Headquarters Members. Any expulsion by a Branch shall be reported to the Executive Council as soon as possible.

8.5 The constitutions of the Branches and any amendments thereto must be approved by the Executive Council.

8.6 Each Branch shall appoint a president and secretary and such other officers as are authorised by the constitution of the Branch.

8.7 Individual Members of Branches may attend Conferences and speak and vote there as individuals, each having one vote. The Association does not recognise delegates or delegations as such. A Branch which is a corporate body has as such no right to attend or vote at a conference.

8.8 Branches are not authorised to enter into contracts on behalf of the Association and the Association shall not be bound by any contract entered into by a Branch. The Association shall not be liable for the contracts, debts, torts, civil wrongs or any other acts or omissions of a Branch whether in connection with a Conference organised by a Branch or otherwise.

9 **Patrons**

The Executive Council may appoint persons who have rendered distinguished service to the Association as Patrons who shall be ex-officio members of the Executive Council.

10 **Conferences**

10.1 Conferences of the Association shall be held at such times and places, and on such bases as shall be decided by the Executive Council in consultation with the Branch organising the Conference. Conference agendas shall be examined and settled in consultation between the Branch organising the Conference and the Executive Council prior to the Conference.

In addition to individual Members of Branches (paragraph 8.7 above), individual Headquarters Members, Honorary Members and Appointed Representatives (or deputies of Appointed Representatives) of member organisations may attend, speak and vote at Conferences, each having one vote.

10.2 There shall be paid to the Branch of the Association organising the Conference, by every individual Member and every Appointed Representative or his or her deputy attending that Conference as well as by any non-Member who may be permitted to attend and for each person accompanying such Member, Appointed Representative, deputy or non-Member, such fee as shall be determined by the Branch organising the Conference in consultation with the Executive Council ("the Conference Fee").

10.3 A report of each Conference shall be published as soon as possible after the Conference in accordance with guidelines laid down from time to time by the Executive Council.

11 **Contributions**

11.1 Each Branch member shall pay a subscription to the Branch of such amount as the Branch shall from time to time determine.

11.2 Each Branch shall pay to the Treasurer an annual subscription of such amount and at such time as the Executive Council shall determine in respect of each Branch member.

11.3 The Executive Council may set reduced subscription fees for new Branches or for Branches situated in the less developed countries, and may waive or reduce the fees payable to the Treasurer in respect of student members, on such conditions as it decides.

11.4 Headquarters Members shall pay such annual subscription as the Executive Council shall determine.

11.5 Only Members who have paid their Conference Fees shall be entitled to attend a Conference as Members. Members who are in arrears with their subscriptions may not vote on any resolutions put before that Conference.

12 **Official Languages**

The official languages of the Association shall be English and French. Each Member may write or speak at any Conference or Meeting of the Association or any of its Committees in either of the official languages.

13 **Expenditure**

No expenditure shall be made, and no liability incurred, in excess of the available funds of the Association.

14 **Amendment of the Constitution**

The Constitution of the Association may be amended at any Conference by a vote of two-thirds of the members present, three months' previous notice having been given in writing to the Executive Council of the motion to amend the terms, provided that no alteration shall be made which would have the effect of causing the Association to cease to have the status of a charity at law.

ASSOCIATION DE DROIT INTERNATIONAL

STATUTS DE L'ASSOCIATION

(adoptés à la 77ème Conférence 2016)

1. **Définitions**

Dans les présents statuts, les termes et expressions suivants ont la signification précisée ciaprès :

«Branche»	une branche de l'Association constituée conformément à l'article 8 ci-dessous;
«Conférence»	une Conférence tenue conformément à l'article 10 ci-dessous;
«le Conseil exécutif»	le Conseil exécutif de l'Association décrit à l'article 6 ci-dessous;
«le Conseil plénier»	le Conseil plénier de l'Association décrit à l'article 7 ci-dessous;
«le Conseil»	soit le Conseil exécutif, soit le Conseil plénier, tels que définis au présent article;
«Membre du siège»	membre élu par le Conseil exécutif conformément à l'article 4.1.4. ci-dessous.

2. **Dénomination**

L'Association est dénommée "Association de droit international" (l'"Association"). Elle a son siège à Londres.

3. **Objet social et capacité**

3.1 L'Association a pour objet social d'étudier, de clarifier et de développer le droit international, public et privé et de renforcer la compréhension entre les Nations et le respect du droit international.

3.2 En vue de la réalisation de cet objet et de lui seul, l'Association peut :

3.2.1 employer une ou plusieurs personnes en vue de contrôler, organiser et mener les travaux de l'Association et prendre toutes dispositions raisonnables et nécessaires pour le paiement de pensions et de retraites à ces employés ou à leur profit, ainsi qu'à leurs conjoints survivants et autres personnes dépendantes;

3.2.2 réunir, lors de Conférences, des particuliers, ainsi que des représentants d'organisations bénévoles, d'administrations gouvernementales, d'autorités prévues par la loi et d'organisations internationales;

3.2.3 promouvoir, mener ou contribuer à promouvoir et à mener des recherches, études et enquêtes et publier tous résultats utiles de telles recherches, études et enquêtes;

3.2.4 Seule ou en collaboration, organiser des expositions, réunions, cours, classes, seminaires et sessions de formation ou en provoquer l'organisation;

3.2.5 réunir et diffuser des informations sur toute matière entrant dans son objet social et échanger de telles informations avec d'autres organismes ayant un objet social similaire dans ce pays ou à l'étranger;

3.2.6 entreprendre, mener, gérer ou assister toute fiducie susceptible d'être entreprise, menée, gérée ou assistée légalement par l'Association;

3.2.7 en vue de la réalisation de l'objet social, susciter la rédaction et la publication de tout écrit, livre, périodique, brochure ou autre document, film ou bande enregistrée, et en assurer l'édition, la publication et la diffusion, sous quelque forme que ce soit, y compris sur son site internet ou, plus généralement, en ligne;

3.2.8 acheter, prendre à bail ou sous licence ou en échange, louer ou acquérir de toute autre manière tous biens et tous droits et privilèges nécessaires pour encourager la réalisation de son objet social; construire tout bâtiment ou construction nécessaire aux travaux de l'Association;

3.2.9 prendre toute disposition concernant tout bien ainsi acquis;

3.2.10 vendre, louer, hypothéquer tout bien ou avoir de l'Association, en disposer et en user;

3.2.11 accepter des dons, emprunter ou se procurer des ressources en vue de la réalisation de l'objet social, selon les termes, conditions et garanties que l'Association jugera convenables;

3.2.12 obtenir des contributions à l'Association grâce à la générosité de personnes dénommées ou par des appels écrits, par des réunions publiques ou de toute autre manière;

3.2.13 investir les ressources de l'Association qui ne sont pas immédiatement nécessaires pour la réalisation de l'objet social dans les placements, créances, garanties ou biens qu'elle jugera convenables, sous réserve néanmoins des conditions qui pourraient éventuellement être imposées ou exigées à l'heure actuelle par la loi;

3.2.14 passer des contrats;

3.2.15 mener toute autre action conforme à la loi qui peut être nécessaire ou souhaitable en vue de la réalisation de l'objet social.

4. **Membres**

4.1 Les membres de l'Association sont :

4.1.1 les membres honoraires élus par le Conseil;

4.1.2 les personnes physiques élues par une Branche;

4.1.3 les organisations jouissant ou non de la personnalité morale, élues par une Branche ou par le Conseil exécutif ;

4.1.4. les personnes physiques ou organisations jouissant ou non de la personnalité morale élues par le Conseil exécutif (dénommées «Membres du siège»).

4.1.5 une Branche, si elle jouit de la personnalité morale, ce dans les limites fixées aux paragraphes 4.5, 8.7 et 10.2 ci-dessous

4.2 Chaque organisation membre, élue comme prévu ci-dessus, peut désigner parmi ses membres deux personnes, «les représentants désignés », pour la représenter.

4.3. Chaque organisation membre peut désigner un suppléant pour remplacer l'un ou l'autre de ses représentants désignés pour le cas où l'un ou l'autre serait dans l'incapacité de participer à une réunion déterminée de l'Association.

4.4. Peuvent être nommés membres étudiants les personnes physiques appartenant à l'Association qui poursuivent des études à plein temps dans une école, une université, un collège ou un autre établissement d'enseignement.

4.5 Les Membres de l'Association ont le droit d'assister aux conférences et de voter sur les affaires de l'Association conformément aux paragraphes 8.7 et 10.2 et dans les limites fixées dans ces paragraphes.

5. **Membres du Bureau et adjoints**

5.1. Lors de chaque Conférence, l'Association élit un président (dénommé «le Président de l'Association») qui reste en fonction jusqu'au commencement de la Conférence suivante. A l'expiration de son mandat, le Président de l'Association devient de plein droit Vice-Président de l'Association. Le ou les Vice-Présidents sont dénommés «Le ou les Vice-Présidents de l'Association».

5.2 Le Conseil exécutif élit les autres membres du bureau énumérés ciaprès (ainsi que tout autre membre du bureau ou adjoint que le Conseil exécutif décide de désigner). Sous réserve des dispositions de l'article 5.3, le Secrétaire général notifie par écrit aux présidents des Branches et aux membres du Conseil exécutif, au moins trois mois à l'avance, toute proposition de procéder à une élection par le Conseil exécutif. Les Branches et les membres du Conseil exécutif peuvent présenter des candidatures à une telle élection. Ces présentations doivent être faites au plus tard un mois avant la réunion du Conseil exécutif et diffusées par le Secrétaire général aux président des Branches et membres du Conseil exécutif aussitôt que raisonnablement possible.

5.2.1 un président exécutif de l'association de droit international ("le président de l'association") ;

5.2.2 les vice-présidents de l'association de droit international que le conseil exécutif peut élire au nombre de quatre au maximum ("les vice-présidents de l'association")

5.2.3 un trésorier («le Trésorier»);

5.2.4 un directeur des études («le Directeur des études») et

5.2.5 un secrétaire général («le SecrétaireGénéral»).

5.3. Les membres du bureau sont en fonction pour une période de quatre ans. Toutefois, le Conseil exécutif peut mettre fin à ces fonctions à tout moment à la majorité des deux tiers de ses membres présents et jouissant du droit de vote lors d'une réunion du Conseil exécutif. Tout membre du bureau est rééligible au terme de son mandat, étant cependant précisé que nul ne peut être élu dans les mêmes fonctions pour plus de trois mandats pleins de quatre années. Les membres du bureau restent en fonctions jusqu'à ce que leurs successeurs prennent leurs fonctions. En cas de vacance survenant avant l'expiration du mandat d'un membre du bureau, le Conseil exécutif peut combler cette vacance pour la période de mandat restant à courir sans avoir à se conformer aux prescriptions de l'article 5.2.

5.4. Au moins trois des membres du Comité de Direction, désignés par le Président du Conseil, après consultation de tous les membres du Comité de Direction, seront les fidei commissaires de l'Association pour l'application de la loi encadrants les organismes à but non lucratif au Royaume Uni.

6. **Le Conseil exécutif**

6.1 Le Conseil exécutif a tout pouvoir pour agir pour le compte de l'Association dans l'intervalle des Conférences.

6.2 Les membres du Conseil exécutif sont :

6.2.1 le Président et les Vice-Présidents de l'Association ainsi que les membres bienfaiteurs;

6.2.2 les membres du bureau;

6.2.3 les anciens Présidents du Conseil exécutif et les anciens Vice-Présidents du Conseil exécutif;

6.2.4 un à trois membres désignés par chaque Branche conformément à la formule suivante : un membre pour toute Branche ayant réglé au siège ses cotisations pour moins de 100 membres; deux membres pour toute Branche ayant réglé au siège ses cotisations pour 101 à 250 membres et trois membres pour toute Branche ayant réglé au siège ses cotisations pour plus de 250 membres; et

6.2.5 des personnes physiques cooptées par le Conseil exécutif.

6.3 Les membres nommés conformément aux articles 6.2.4 et 6.2.5 cidessus appartiennent au Conseil exécutif pour une période n'excédant pas quatre années; ils peuvent être réélus ou cooptés à nouveau.

6.4 Le Président du Conseil préside les réunions du Conseil exécutif. En son absence, la présidence est assurée par le Vice-Président du Conseil le plus ancien dans ces fonctions.

6.5 Si un membre nommé conformément à l'article 6.2.4 est dans l'incapacité de participer à une réunion du Conseil exécutif, le Président de la Branche en cause peut désigner un suppléant pour le remplacer à cette seule réunion.

6.6 Toute vacance au Conseil exécutif peut être comblée par désignation de la Branche en cause, si l'ancien membre avait été nommé conformément à l'article 6.2.4 ou par cooptation si l'ancien membre avait été nommé conformément à l'article 6.2.5. Aux fins du présent article 6.6, une vacance survient du fait d'une démission, d'un décès ou de l'élection du membre en cause comme membre du bureau ou Président de l'Association.

6.7 Le quorum au Conseil exécutif est de huit membres.

6.8 Le Conseil exécutif peut créer un comité financier et de politique générale et d'autres comités constitués sur une base permanente ou de manière spéciale. Il détermine leur mandat, attributions, durée et composition.

6.9 Le Conseil exécutif prend en considération toute directive de caractère général émanant du Conseil plénier.

6.10 Sous réserve des dispositions des présents statuts, le Conseil a compétence pour établir, adopter et diffuser des instructions et des règles permanentes pour l'Association, et notamment des instructions et règles permanentes pour la conduite des Conférences.

6.11 Le Conseil exécutif peut déléguer à toute personne membre de l'Association, tout pouvoir qu'il lui semblera opportun de déléguer, le moment venu, pour toute période et dans les conditions qu'il décidera, pour la poursuite des buts de l'Association et la gestion de ses activités.

6.12 Le Conseil exécutif a le pouvoir de prendre ses décisions par consultation électronique, dans l'intervalle séparant ses réunions, de la manière suivante :

6.12.1 Consultation : Le président et le Secrétaire général peuvent, à la requête d'un membre du Comité de Direction, proposent un projet de décision, en ce compris des décisions d'approbation de nouvelle branche conformément au paragraphe 8.5. La proposition doit être accompagnée de tous les documents nécessaires, requérir une réponse des membres du Conseil exécutif et fixer un délai raisonnable pour cette réponse qui ne doit pas être inférieure à une semaine.

6.12.2 Décisions : Après une consultation conforme aux stipulations de l'article 6.12.1 ci-dessus, le Président et le Secrétaire général peuvent demander une décision par consensus sur un document en forme définitive, en fixant un nouveau délai d'une semaine au minimum. Si aucune objection d'aucun membre du Conseil exécutif n'est reçue dans ce délai, la décision sera considérée comme acquise. Si une objection est émise dans ce délai, soit la proposition fait l'objet d'une nouvelle consultation, soit elle est présentée lors d'une réunion du Conseil exécutif.

6.12.3 Les décisions prises par consensus sont incluses dans le procès-verbal de la prochaine réunion du Conseil exécutif.

7 **Le Conseil plénier**

7.1 Les membres du Conseil plénier sont :

7.1.1 les membres du Conseil exécutif; et

7.1.2 les présidents et secrétaires des Branches.

7.2 Le conseil plénier se réunit au moins une fois au cours de chaque Conférence.

7.3 Le quorum au conseil plénier est de vingt membres.

8 **Branches**

8.1. Des Branches régionales comptant au moins dix membres de l'Association peuvent être constituées avec l'accord du Conseil exécutif.

8.2 Lorsque le nombre de membres d'une Branche est tombé au dessous de dix ou lorsque les contributions d'une Branche ont plus de trois années de retard, le Conseil exécutif peut : (a) si cette Branche n'a pas la personnalité morale, en prononcer la dissolution (b) si elle a la personnalité morale, l'exclure de l'Association. Toute Branche ayant fait l'objet de telles mesures ou ayant de quelque manière que ce soit cessé d'appartenir à l'Association, devra cesser de fonctionner ou de se présenter comme une Branche de l'Association ou comme associée à celle-ci. Si nécessaire, elle devra modifier son nom afin qu'il apparaisse clairement qu'elle a cessé d'être Membre de l'Association ou associée avec elle.

8.3 Les Branches ont un caractère local. Elles peuvent être constituées par plusieurs pays dans une même zone géographique, par un seul pays ou par une zone géographique à l'intérieur d'un même pays. Les membres d'une Branche peuvent être des nationaux du ou des pays de la zone (qu'ils résident ou non dans ce ou ces pays), d'autres personnes y résidant de manière habituelle et toute organisation y ayant des intérêts ou une présence suffisante.

8.4 Une Branche peut exclure tout membre conformément à la procédure fixée dans sa constitution; un tel membre cesse d'être membre de l'Association, sans que ceci préjuge de la position des membres au titre du siège. Toute exclusion par une Branche est rapportée au Conseil exécutif aussitôt que possible.

8.5 La constitution des Branches et tout amendement à cette constitution doivent être approuvés par le Conseil exécutif.

8.6 Chaque Branche désigne un Président et un Secrétaire, ainsi que les autres membres du bureau tels que prévus par la constitution de la Branche.

8.7 Les personnes physiques, membres des Branches, assistent aux Conférences, y prennent la parole et y votent à titre personnel, chacune disposant d'une voix. L'Association ne reconnaît pas de délégués ou de délégations en tant que tels. Le droit d'assister aux conférences ou d'y voter étant reconnu aux personnes physiques appartenant aux Branches jouissant de la personnalité morale, ces dernières n'ont pas ces droits.

8.8 Les Branches ne sont pas autorisées à conclure des contrats au nom de l'Association et l'Association n'est pas liée par les contrats conclus par une Branche. L'Association n'est responsable ni à titre contractuel, ni à titre extra-contractuel des actes ou abstentions d'une Branche, que ces actes ou abstentions soient liés à une Conférence organisée par une Branche ou qu'ils y soient étrangers.

9 **Patronage**

Le conseil exécutif peut nommer des personnes ayant rendu des services éminents à l'Association comme membres bienfaiteurs de l'Association. Ceuxci sont de plein droit membres du Conseil exécutif.

10 **Conférences**

10.1 Les Conférences de l'Association se tiennent aux lieux, dates et conditions fixés par le Conseil exécutif, la branche en charge de l'organisation étant dûment consultée. Le programme des Conférences est étudié et établi avant les Conférences par voie de consultation entre la Branche organisant la Conférence et le Conseil exécutif.

10.2 Peuvent assister aux Conférences, y prendre la parole et y voter, outre les personnes physiques membres des Branches (paragraphe 8.7 ci-dessus), les personnes physiques, membres du siège ou représentants désignés des organisations membres (ou leurs suppléants). Chacun dispose d'une voix. Les membres honoraires ont le droit d'assister aux conférences et d'y prendre la parole, mais non de voter.

10.3 Toute personne physique membre de l'Association et tout représentant désigné ou suppléant, qui assistent à la Conférence, ainsi que toute personne non membre de l'Association autorisée à assister à la conférence, règle à la Branche de l'Association organisant la Conférence un droit d'inscription qui est fixé par la Branche en consultation avec le Conseil exécutif («le droit d'inscription à la Conférence»). Il en est de même pour toute personne les accompagnant.

10.4 Un rapport de chaque Conférence est publié aussi rapidement que possible après la Conférence conformément aux directives données par le Conseil exécutif.

11 **Contributions financières**

11.1 Chaque membre règle à la Branche à laquelle il appartient une cotisation d'un montant fixé par la Branche.

11.2 Chaque Branche règle au Trésorier pour chacun de ses membres une cotisation annuelle d'un montant fixé par le Conseil exécutif et dans le délai qu'il fixe.

11.3 Le Conseil exécutif peut fixer des cotisations à un taux réduit pour les nouvelles Branches ou pour les Branches situées dans les pays moins développés; en ce qui concerne les membres étudiants, il peut, dans les conditions qu'il détermine, réduire les cotisations à verser au Trésorier ou en dispenser.

11.4 Les membres du siège règlent une cotisation annuelle dont le montant est fixé par le Conseil exécutif.

11.5 Seuls les membres ayant acquitté les droits d'inscription sont en droit d'assister à la Conférence en qualité de membres. Les membres qui sont en retard dans le règlement de leurs cotisations ne peuvent pas voter sur les résolutions soumises à la Conférence.

12. **Langues officielles**

Les langues officielles de l'Association sont le français et l'anglais. Tout membre peut s'exprimer par écrit ou par oral dans l'une des langues officielles lors de toute conférence ou réunion de l'Association ou de l'un de ses comités.

13. **Dépenses**

Aucune dépense ne sera exposée et aucune responsabilité encourue audelà des fonds disponibles de l'Association.

14. **Amendements aux statuts**

Les statuts de l'Association peuvent être amendés à toute Conférence par un vote des deux tiers des membres présents. La résolution proposant de tels amendements doit être notifiée trois mois à l'avance par écrit au Conseil exécutif. Aucun amendement ne peut être opéré qui aurait pour effet de faire perdre à l'Association son statut d'oeuvre de bienfaisance («Charity at law»).

PATRONS AND OFFICERS OF THE ASSOCIATION
(as of August 2016)

Patron

Mr P B Mauleverer QC (UK)

President

Professor Ruth Wedgwood (USA)

Vice Presidents

Dr Ricardo R Balestra (Argentina)
Mr Milos Barutciski (Canada)
Professor Karl-Heinz Boeckstiegel (Germany)
Professor Bengt Broms (Finland)
Professor M Said El-Dakkak (Egypt)
Mr Eduardo Grebler (Brazil)
Dr Thok Kyu Limb (Korea)
Professor Jerzy Makarczyk (Poland)
The Rt Hon the Lord Mustill (UK)
Professor Nicolaas J Schrijver (Netherlands)
Professor Alexander Yankov (Bulgaria)

Chair, Executive Council

The Rt Hon the Lord Mance (UK)

Vice-Chair, Executive Council

Dr Kamal Hossain (Bangladesh)
Professor Cynthia Lichtenstein (USA)
Mr David J C Wyld (UK)

Treasurer

Professor Torsten Stein (Germany)

Director of Studies

Professor Marcel M T A Brus (Netherlands)

Secretary General

Professor Antonios Tzanakopoulos (UK)

Secretary

Ms Juliet Fussell

EXECUTIVE COUNCIL

The **EXECUTIVE COUNCIL** consists of the President; Vice-Presidents and Patrons, the Chairman and Vice-Chairmen of the Executive Council, the Director of Studies, the Treasurer and the Secretary-General and other members elected in accordance with the Constitution

Branch Members

Dr Gentian Zyberi (Albania)
Alternate: Erjon Muharremaj (Albania)
Alternate: Dajena Kumbaro (Albania)
Professor John Noyes (USA)
Anibal Sabater (USA)
Professor David P Stewart (USA)
Mr Julio Ernesto Curutchet (Argentina)
Mr Damian Sturzaker (Australia)
Professor Christopher Ward (Australia)
Professor August Reinisch (Austria)
Alternate: Dr Nikolaus Pitkowitz (Austria)
Dr Kamal Hossain (Bangladesh)
Professor Alena Douhan (Belarusian)
Professor Kim Van der Borght (Belgium)
Professor Marcilio Franca Filho (Brazil)
Alternate: Mr Eduardo Grebler (Brazil)
Mr Jeremy P Carver (UK)
Professor Antonios Tzanakopoulos (UK)
Professor Tsvetana Kamenova (Bulgaria)
Alternate: Professor Margarit Ganev (Bulgaria)
Dr Bernard Colas (Canada)
Dr David Berry (Caribbean)
Professor Chun-I Chen (China (Taiwan))
Alternate: Professor Sea-Wain Yau (China (Taiwan))
Professor Hrvoje Sikiric (Croatia)
Ms Alexia Solomou (Cypriot)
Dr Vladimir Balas (Czech Republic)
Professor Ole Spiermann (Denmark)
Dr Henry Mutai (East Africa)
Professor M Said El-Dakkak (Egypt)
Judge Gustaf Moller (Finland)
Alternate: Mr Uwe Uusitalo (Finland)
Professor Catherine Kessedjian (France)
Alternate: Professor Franck Latty (France)
Professor Rainer Hofmann (Germany)
Alternate: Professor Hilmar Raeschke-Kessler (Germany)
Professor Markus Krajewski (Germany)
Alternate: Professor Stephan Hobe (Germany)

Dr Christos Gortsos (Hellenic)
Alternate: Dr Maria Gavouneli (Hellenic)
Mr Daniel Fung QC (Hong Kong)
Professor Vanda Lamm (Hungary)
Mr Pravin H Parekh (India)
Mr James Kingston (Ireland)
Alternate: Dr Patricia Conlan (Ireland)
Sarah Weiss Ma'udi (Israel)
Alternate: Mr Daniel Taub (Israel)
Professor Gabriella Venturini (Italy)
Alternate: Professor Alberto Malatesta (Italy)
Professor Masato Dogauchi (Japan)
Alternate: Professor Yuji Iwasawa (Japan)
Professor Kazuhiro Nakatani (Japan)
Alternate: Professor Naoya Kasai-Okuwaki (Japan)
Professor Shunji Yanai (Japan)
Alternate: Professor Shinya Murase (Japan)
Dr Ibrahim Aljazy (Jordan)
Professor Kil-won Lee (Korea)
Professor Carlos Bernal (Mexico)
Professor Surya P Subedi (Nepal)
Professor Willem van Genugten (Netherlands)
Ms E L van Praag (Netherlands)
Mr Bill Mansfield (New Zealand)
Professor Fidelis Oditah (Nigerian)
Alternate: Dr Damilola S Olawuyi (Nigerian)
Professor Mads Andenas (Norway)
Alternate: Margit Tveiten (Norway)
Mr Arshad Ghaffar (Pakistan)
Professor Jerzy Menkes (Poland)
Professor Manuel Almeida Ribeiro (Portugal)
Alternate: Professor Jose Jacinto (Portugal)
Ms Alina Orosan (Romania)
Professor Anatoly Kapustin (Russia)
Profesor Milenko Kreca (Serbia)
Mr Khang Chau Pang (Singaporean)
Dr Vasilka Sancin (Slovenia)
Professor Hennie Strydom (South Africa)
Professor Julio Gonzalez Soria (Spain)
Professor Ove Bring (Sweden)
Professor Kaj Hober (Sweden)
Stefan Wehrenberg (Switzerland)
Professor Andreas R Ziegler (Switzerland)
Dr Cemalettin Karadas (Turkey)
Professor Roman Maydanyk (Ukraine)

Co-opted Members

Professor James Nafziger (USA)
Professor Christine Chinkin (UK)
Professor James Crawford (UK)
Mr R B Greenburgh (UK)
Professor Alexander Yankov (Bulgaria)
Mr L Cameron DesBois (Canada)
Professor Maureen Williams (HQ/)
Mr Giuseppe Guerreri (Italy)
Mr W A Hamel (Netherlands)
Professor Alfred H A Soons (Netherlands)

FULL COUNCIL

The **FULL COUNCIL** consists of the Members of the Executive Council together with the Presidents and Secretaries of all Branches.

MANAGEMENT COMMITTEE (FORMERLY POLICY & FINANCE)

Members

Professor Marcel M T A Brus (Netherlands)
Dr Kamal Hossain (Bangladesh)
Professor Catherine Kessedjian (France)
Professor Cynthia Lichtenstein (USA)
The Rt Hon the Lord Mance (UK)
Mr P B Mauleverer QC (UK)
Professor Torsten Stein (Germany)
Professor Hennie Strydom (South Africa)
Professor Antonios Tzanakopoulos (UK)
Professor Ruth Wedgwood (USA)
Mr David J C Wyld (UK)

INTERNATIONAL COMMITTEES & OFFICERS
(August 2016)

Full list of Committee Members can be found at the head of each Report in this publication

See www.ila-hq.org for lists of current committee members

Baselines under the International Law of the Sea

Chair: Captain J Ashley Roach
Rapporteur: Professor Donald Rothwell

Complementarity in International Criminal Law

Chair: Professor Mia Swart
Rapporteur: Professor Charles Jalloh

Cultural Heritage Law

Chair: Professor James Nafziger
Rapporteur: Professor Robert Paterson

Feminism and International Law

Chair: Dr Patricia Conlan
Co-Rapporteur: Professor Christina Binder

Global Health Law

Co-Chair: Professor Frederick Abbott
Co-Chair: Professor Brigit C A Toebes
Co-Rapporteur: Ms Ellen ‘t Hoen
Co-Rapporteur: Xavier Seuba

Implementation of the Rights of Indigenous Peoples

Co-Chair: Professor Dalee Dorough
Co-Chair: Professor Willem van Genugten
Co-Rapporteur: Professor Timo Koivurova
Co-Rapporteur: Dr Federico Lenzerini

Intellectual Property and Private International Law

Chair: Professor Toshiyuki Kono
Co-Rapporteur: Professor Pedro A de Miguel Asensio
Co-Rapporteur: Professor Axel Metzger

International Commercial Arbitration

Chair: Professor Filip De Ly
Co-Rapporteur: Mr Mark Friedman
Co-Rapporteur: Professor Luca G Radicati di Brozolo

International Human Rights Law Committee

Chair:	Professor Christina Cerna
Co-Rapporteur:	Professor Stefan Kadelbach
Co-Rapporteur:	Dr Thilo Rensmann
Co-Rapporteur:	Professor Koji Teraya
Co-Rapporteur:	Professor Gus Waschefort

International Law and Sea Level Rise

Chair:	Professor Davor Vidas
Co-Rapporteur:	Professor David Freestone
Co-Rapporteur:	Professor Jane McAdam

International Monetary Law

Chair:	Sir William Blair
Vice-*Chair:*	Mr Thomas Baxter, Jr
Vice-*Chair:*	Mr Antonio Sainz de Vicuna y Barroso
Rapporteur:	David Gross

International Protection of Consumers

Chair:	Professor Claudia Lima Marques
Rapporteur:	Professor Dan Wei

International Securities Regulation

Co-Chair:	Mr Alan Ewins
Co-Chair:	Ms Ida Levine
Rapporteur:	Paul Stevens

Islamic Law & International Law

Chair:	HE Judge Awn Al-Khasawneh
Co-Rapporteur:	Dr Hossein Esmaeili
Co-Rapporteur:	Professor Irmgard Marboe
Co-Rapporteur:	Professor Javaid Rehman

Non-State Actors

Chair:	Professor Math Noortmann
Rapporteur:	Dr Veronika Bilkova

Nuclear weapons, non proliferation & contemporary international law

Chair:	Professor Jonathan L Black-Branch
Rapporteur:	Dr Dieter Fleck

Procedure of International Courts and Tribunals

Co-Chair:	Professor Shotaro Hamamoto
Co-Chair:	Professor Helene Ruiz Fabri
Co-Chair:	Professor Philippe Sands
Co-Rapporteur:	Dr Filippo Fontanelli
Co-Rapporteur:	Dr Arman Sarvarian

Protection of Privacy in Private International and Procedural Law

Chair: Professor Burkhard Hess
Co-Rapporteur: Dr Cristina M Mariottini
Co-Rapporteur: Professor Jan von Hein

Recognition/Non-recognition in International Law

Chair: Professor Wladyslaw Czaplinski
Co-Rapporteur: Professor Christopher Borgen
Co-Rapporteur: Professor Aziz Tuffi Saliba

Role of International Law in Sustainable Natural Resource Management for Development

Chair: Professor Nicolaas J Schrijver
Rapporteur: Dr Marie-Claire Cordonier-Segger

Rule of Law and International Investment Law

Chair: Professor August Reinisch
Co-Rapporteur: Professor Andrea Bjorklund
Co-Rapporteur: Professor Andreas R Ziegler

Space Law

Chair: Professor Maureen Williams
Rapporteur: Professor Stephan Hobe

Sustainable Development and the Green Economy in International Trade Law

Chair: Professor Mary Footer
Co-Rapporteur: Professor Locknie Hsu
Co-Rapporteur: Professor Meredith Kolsky Lewis

Use of Force

Chair: Sir Michael C Wood
Rapporteur: Professor Noam Lubell

ILA STUDY GROUPS
(as of September 2016)

See www.ila-hq.org for lists of study group members

Business and Human Rights

Chair: Professor Michael K Addo (UK)
Co-Rapporteur: Mr Antony Crockett (Australia)
Co-Rapporteur: Rae Lindsay (UK)

Cybersecurity, Terrorism and International Law

Chair: Professor David P Fidler (USA)
Co-Rapporteur: Dr Russell Buchan (UK)
Co-Rapporteur: Dr Emily Crawford (Australia)

Due Diligence in International Law

Chair: Professor Duncan French (UK)
Rapporteur: Dr Tim Stephens (Australia)

Preferential Trade Agreements

Co-Chair: Professor Peter-Tobias Stoll (Germany)
Co-Chair: Professor Andreas R Ziegler (Switzerland)
Rapporteur: Dr Freya Baetens (Belgium)

Principles on the engagement of domestic courts with international law

Chair: Professor Andre Nollkaemper (Netherlands)
Co-Rapporteur: Professor Yuval Shany (Israel)
Co-Rapporteur: Dr Antonios Tzanakopoulos (UK)

Role of Soft Law Instruments in International Investment Law

Chair: Sir Franklin Berman (UK)
Co-Rapporteur: Professor Andrea Bjorklund (USA)
Co-Rapporteur: Professor August Reinisch (Austria)

Socially Responsible Investment

Chair: Ms Ida Levine (UK)
Rapporteur: Dr Myriam Senn (Switzerland)

Sovereign Bankruptcy

Chair: Professor Philip Wood (UK)
Co-Rapporteur: Brian Hunt (Canada)
Co-Rapporteur: Mr Michael Waibel (Austria)

Teaching of International Law (Interest Group)

Chair: Professor John Gamble (USA)

The conduct of hostilities under international humanitarian law – challenges of 21st century

Chair: Professor T D Gill (Netherlands)
Co-Rapporteur: Professor Robin Geiss (Germany)
Co-Rapporteur: Dr Robert Heinsch (Germany)

The use of domestic law principles for the development of international law

Chair: Professor M H Mendelson QC (UK)
Rapporteur: Dr Alejandro Carballo (Spain)

BRANCHES OF THE ASSOCIATION

Albanian Branch
Founded April 2014

President:
Dr Gentian Zyberi
Treasurer:
Erjon Muharremaj
Secretary:
Furtuna Sheremeti

American Branch
Founded November 1921

President:
Professor David Stewart
Treasurer:
Houston Lowry
Secretary:
Ms Amity R Boye
Director of Studies:
Professor Andrea Bjorklund
Director of Studies:
Professor Aaron Fellmeth
Chair of Branch Executive Committee:
Professor Ruth Wedgwood

Argentine Branch
Founded December 1949

President:
Dr Ricardo R Balestra

Australian Branch
Founded August 1959

President:
Dr Christopher Ward
Vice President:
Ms Natalie Klein
Treasurer:
Jean-Louis Potgieter
Secretary:
Alexander Kunzelmann
Director of Studies:
Dr K D Suter

Austrian Branch
Founded January 1925

President:
Professor August Reinisch
Secretary/Treasurer:
Dr Nikolaus Pitkowitz

Bangladesh Branch
Founded August 1977

President:
Dr Kamal Hossain
Vice President:
Mr Amir ul Islam
Secretary/Treasurer:
Dr Sharif Bhuiyan

Belarusian Branch
Founded April 2015

President:
Professor Ludmila Pavlova
Vice President:
Professor Alena Douhan
Treasurer:
Ekaterina Kouznetsova
Secretary:
Dr Elena Konnova
Director of Studies:
Dr Ekaterina Deikalo

Belgian Branch
Founded June 2006

President:
Professor Kim Van der Borght
Treasurer:
Professor Sven Biscop
Treasurer:
Dr Cailin Mackenzie
Secretary:
Professor Stefaan Smis
Director of Studies:
Professor Ian Wouters

Brazilian Branch
Founded June 1950

President:
Professor Marcilio Franca Filho
Vice President:
Professor Susana Camargo Vieira
Secretary/Treasurer:
Arnaldo Sobrinho
Director of Studies:
Professor Aziz Tuffi Saliba

British Branch
Founded November 1947

President:
Mr Jeremy P Carver
Treasurer:
Rae Lindsay
Joint Secretary:
Charles Claypoole
Joint Secretary:
Dr Antonios Tzanakopoulos
Director of Studies:
Professor Mary Footer

Bulgarian Branch
Founded August 1962

President:
Professor Alexander Yankov
Vice President:
Professor Dencho Georgiev
Vice President:
Professor Emil Konstantinov
Vice President:
Dr Atanas Semov
Vice President:
Dr Ventzislava Zhelyaskova
Treasurer:
Dr Evgueniy Jichev
Secretary General:
Professor Margarit Ganev

Canadian Branch
Founded June 1952

President:
Dr Bernard Colas

Caribbean Branch
Founded April 2014

President:
Dr David Berry
Treasurer:
Mr Westmin James
Secretary:
Mr Timothy Affonso

Chilean Branch
Re-formed May 2012

President:
Profesoor Teresa Infante-Caffi
Vice President:
Dr Ximena Fuentes
Secretary/Treasurer:
Valentina Monestario Galvez

Chinese (Taiwan) Branch
Founded August 1961

President:
Mr Nigel N T Li
Treasurer:
Blake C Y Wang

Croatian Branch
Founded June 1992

President:
Professor Budislav Vukas
Treasurer:
Ms Dora Zgrabljic Rotar
Secretary:
Mr Davorin Lapas

Cypriot Branch
Founded November 2015

President:
M s Alexia Solomou
Treasurer:
Ms Valentina Dimitriou
Secretary:
Ms Marie Christine Thomas

Czech Republic Branch
Founded November 2001

President:
Dr Vladimir Balas
Vice President:
Dr Jiri Malenovsky
Treasurer:
Dr Zuzan Travnickova
Secretary:
Professor Pavel Sturma
Director of Studies:
Dr Dalibor Jilek

Danish Branch
Founded March 1925

President:
Mr Henrik Thal Jantzen
Secretary/Treasurer:
Ms Eva Le Fevre

East African Branch
Founded November 2008

President:
Dr Henry Mutai
Secretary:
Dr Khoti Kamanga

Egyptian Branch
Founded January 1963

President:
Professor M Said El-Dakkak
Treasurer:
Mr Hassan El-Khashab
Secretary:
Mr Hisham El-Dib

Finnish Branch
Founded April 1946

President:
Judge Gustaf Moller
Treasurer:
Mr Uwe Uusitalo
Secretary:
Ms Katja Karjalainen

French Branch
Founded March 1925

President:
Professor Catherine Kessedjian
Vice President:
Professor Laurence Idot
Vice President:
Professor David Ruzie
Treasurer:
Professor Arnaud de Nanteuil
Secretary General:
Professor Franck Latty
Director of Studies:
Professor Regis Bismuth

German Branch
Founded July 1912

President:
Professor Rainer Hofmann
Vice President:
Professor Burkhard Hess
Vice President:
Professor Richard Kreindler
Vice President:
Dr Patricia Nacimiento
Treasurer:
Professor Stephan Hobe
Secretary General
Professor Markus Krajewski

Hellenic Branch
Founded May 2000

President:
Dr Christs Gortsos
Vice President:
Mr Stratis Georgilas
Vice President:
Professor Elina Moustaira
Treasurer:
Dr Anastasios Gourgourinis
Secretary:
Dr Akis Papastavridis
Secretary General:
Dr Maria Gavouneli

Hong Kong Branch
Founded May 1980

President:
Mr Daniel Fung QC
Treasurer:
Ms Deneb Cheung
Secretary:
Professor Gonzalo Villalta Puig

Hungarian Branch
Founded August 1960

President:
Professor Vanda Lamm
Vice President:
Professor Janos Bruhacs
Vice President:
Dr Erno Varnay
Secretary/Treasurer:
Dr Gabor Sulyok

Indian Branch
Founded April 1950

President:
Hon Mr Justice T S Thakur
Vice President:
Mr Mukul Rohatgi
Treasurer:
Mr Kalpathi Venkataraman Viswanathan
Secretary:
Hon Mr Justice Pradeep Nandrajog
Secretary:
Mr Pravin H Parekh
Secretary:
L Nageswara Rao

Indonesian Branch
Founded April 2015

President:
Dr Atip Latipulhayat
Treasurer:
Anggia Rukmasari
Secretary:
Ms Diajeng Wulan Christianti

Irish Branch
Founded November 1986

President:
Mr James Kingston
Treasurer:
Professor Ray Murphy
Secretary:
Dr Patricia Conlan

Israel Branch
Founded December 1949

President:
Sarah Weiss Ma'udi
Secretary:
Ms Shoshi Reshef-Mor

Italian Branch
Founded April 1925

President:
Professor Gabriella Venturini
Secretary/Treasurer:
Professor Alberto Malatesta

Japan Branch
Founded December 1920

President:
Professor Shunji Yanai
Vice President:
Professor Naoya Kasai-Okuwaki
Treasurer:
Mr Yoshio Kumakura
Secretary General:
Professor Kazuhiro Nakatani
Director of Studies:
Professor Masaharu Yanagihara

Jordanian Branch
Founded November 2013

Honorary President:
HE Judge Awn Al-Khasawneh
President:
Dr Ibrahim Aljazy
Treasurer:
Dr Mahasen Jaghoub
Secretary:
Dr Lina Shabeeb

Korean Branch
Founded August 1964

Honorary President:
Dr Thok Kyu Limb
President:
Professor Jae-Ho Sung
Secretary/Treasurer:
Professor Kil-won Lee

Mexican Branch
Founded November 1970

President:
Professor Carlos Bernal
Treasurer:
Ms Mariana Salazar Albornoz
Secretary:
Victor M Navarrete Villarreal

Nepal Branch
Founded May 2011

President:
Mr Kedar Nath Upadhyay
Honorary President:
Professor Surya P Subedi
Vice President:
Ms Ila Sharma
Treasurer:
Ms Shailaja Puri
Secretary:
Mr Manish Kumar Karky
Secretary General:
Mr Dinesh Tripathi

Netherlands Branch
Founded November 1910

President:
Professor Willem van Genugten
Secretary:
Ms E L van Praag

New Zealand Branch
Founded November 1996

President:
Mr Bill Mansfield
Treasurer:
Professor Campbell McLachlan
Secretary:
Dr Alberto Costi

Nigerian Branch
Founded April 2014

President:
Professor Fidelis Oditah
Vice President:
Dr Damilola S Olawuyi
Treasurer:
Mr Oyeniyi Abe
Secretary:
Mr Ayodele Oni

Norwegian Branch
Founded December 1925

President:
Margit Tveiten
Vice President:
Professor Christina Voigt
Secretary:
Ms Heidi Jokjend

Pakistan Branch
Founded November 2015

President:
Makhdoom Ali Khan
Vice President:
Mr Arshad Ghaffar
Vice President:
Jawad Sarwana
Treasurer:
Nausheen Ahmad
Secretary:
Mr Saqib Jillani

Polish Branch
Founded December 1923

President:
Professor Jerzy Menkes
Vice President:
Professor Karol Karski
Vice President:
Dr Anna Przyborowska-Klimczak
Treasurer:
Dr Ewelina Cala-Wacinkiewicz
Secretary General:
Anna Czaplinska

Portuguese Branch
Founded November 1995

President:
Professor Manuel Almeida Ribeiro
Vice President:
Dr Francisco Coutinho
Secretary/Treasurer:
Dr Isabel Cabrita

Qatari Branch
Founded November 2013

President:
Dr Talal Abdulla Al-Emadi
Treasurer:
Mohamed Salem Abou El Farag
Secretary:
Mr Saber Gdiri

Romanian Branch
Founded August 1966

President:
Dr Bogdan Aurescu
Secretary:
Ms Alina Orosan

Russian Branch
Founded October 1957

President:
Professor Anatoly Kapustin
Secretary:
Mme Ludmila V Korbut

Serbian Branch
Founded November 2012

President:
Professor Milenko Kreca
Vice President:
Professor Rodoljub Etinski
Secretary/Treasurer:
Mr Marko Novakovic

Singaporean Branch
Founded July 2015

President:
Mr Khang Chau Pang
Treasurer:
Paul Tan
Secretary:
Daphne Hong

Slovene Branch
Founded November 1995

President:
Professor Mirjam Skrk
Secretary/Treasurer:
Dr Vasilka Sancin

South African Branch
Founded November 1993

President:
Professor Hennie Strydom
Treasurer:
Professor Patrick Vrancken
Secretary:
Mr Ian Varga Lindsay

Spanish Branch
Founded May 1973

President:
Professor Julio Gonzalez Soria
Vice President:
Mr Jose Maria Alonso Puig
Vice President:
Mr Miguel Angel Fernandez-Ballesteros
Vice President:
Mr Antonio Hierro Hernandez-Mora

Vice President:
Mr Jesus Remon Penalver
Treasurer:
Mr Alfonso Iglesia Gonzalez
Secretary:
Mr Carlos de los Santos

Swedish Branch
Founded June 1922

President:
Professor Ove Bring
Secretary/Treasurer:
Mr John Kadelburger

Swiss Branch
Founded November 1929

President:
Professor Andreas R Ziegler
SecretaryTreasurer:
Stefan Wehrenberg

Turkish Branch
Founded June 2006

Honorary President:
Professor A Fusuun Arsava
President:
Professor Enver Bozkurt
Vice President:
Professor Ender Ethem Atay
Vice President:
Dr Cengiz Basak
Treasurer/Secretary:
Dr Cemalettin Karadas
Secretary:
Dr Serhat Eskiyoruk

Ukrainian Branch
Founded November 2009

President:
Oleksandr Kupchyshyn
Vice President:
Dr Vladislav Maksymov
Treasurer:
Volodymyr Iampolskyi
Secretary:
Galyna Mykhalko

CHAIRS OF THE ILA EXECUTIVE COUNCIL

1875	Sir Travers Twiss
1890	Dr Ernest E Wendt
1892	Sir Richard E Webster
1899	Sir Walter GF Phillimore
1908	Rt Hon Sir Wm Rann Kennedy
1920	Rt Hon Lord Phillimore
1928	Rt Hon Lord Blanesburgh
1938	Rt Hon Lord Alness
1946	Rt Hon Lord Porter
1956	Professor AL Goodhart
1960	Rt Hon Lord McNair
1962	Rt Hon Lord Spens
1964	Rt Hon Lord Wilberforce
1986	Professor Cecil J Olmstead
1988	Rt Hon Lord Slynn of Hadley
2009	Rt Hon Lord Mance

ILA DIRECTORS OF STUDIES

1969–1972	Sir Francis Vallat
1973–1979	Professor DP O'Connell
1980–1982	HE Judge Sir Robert Jennings
1982–1991	Professor Ian Brownlie
1991–1997	Professor James Crawford
1997–2004	Professor Alfred HA Soons
2004–2012	Professor Christine Chinkin
2012–	Professor Marcel Brus

PART 2

OPENING SESSION

SANDTON CONVENTION CENTRE

Monday, 8 August 2016, 11:00am

The Right Hon Lord Mance, Chairman of the ILA Executive Council welcomed attendees to the conference, and noted that it was first ILA conference to be held in SubSaharan Africa. The theme of the conference was *International Law and State Practice – is there a North-South Divide?* This reminded us of how important it was that international law should serve all countries and all the parts and peoples of the world. The ILA aimed to be representative. It had expanded its reach with a number of new branches in recent years, including a new Nigerian branch in 2015. Lord Mance was unable to attend the launch in Nigeria, but did attend and speak at the launch of a new Singapore branch in September 2015, and had, in the last two years, also spoken in Paris and Vienna to the ILA's national branches there. That was how the ILA should work, as an association whose members contacted, met and spoke to local branches when they travelled abroad often for quite different reasons. However, with only four African branches (South Africa, Nigeria, East Africa and Egypt), the ILA still had a long way to go on the continent.

Lord Mance congratulated Professor Hennie Strydom of the University of Johannesburg and his team on organising the conference, noting its rich programme. It was no mean feat to organise the conference, and without doubt a time-consuming and on occasions worrisome one.

Over the last few years, there had been a number of initiatives generated within the ILA. Lord Mance expressed his gratitude to the individuals who stimulated these initiatives, which had sought to evaluate whether the ILA was fulfilling its aims and potential externally, and also to examine whether its internal governance was fit-for-purpose (to use the UK political jargon). The two aspects were of course connected.

The first of these initiatives was software. The ILA's software system operated as an essential tool for head office and increasingly for branches, and provided the external face of the ILA on the web. The ILA determined in 2015 to take the necessary, if painful, financial step of engaging consultants to design and supply a whole new system, which should hopefully serve its purposes for years to come. When fully rolled out later in 2016, it would offer greatly improved facilities and opportunities for the ILA and its branches worldwide.

The second of these initiatives was internal arrangements. In this regard, Lord Mance referred to the proposed amendments to the ILA Constitution, relevantly to Arts 3.2.7, 5.4 and 6.12. The first amendment was to take account of modern methods of communication. The second was to limit the number of trustees required, which would avoid the problem that some officers might not wish to act and ease formalities, when and if signatures were required. The third was to enable a simplified and speedier means of taking Executive Council decisions by consensus between meetings, again using modern communication methods.

Lord Mance urged branches to ensure that their representatives on the Executive Council were chosen from active members who truly represented the relevant branch and were able for that purpose to attend its twice-yearly meetings. These meetings had their social side, but membership of the Executive Council should not be seen as a job for life. Renewal and change brought new ideas. While it remained the primary executive organ, the Council had at the same time been prepared to recognise the need for a smaller more manageable body to deal on a delegated basis with some decision-making matters, and the Policy and Finance Committee (or the General Purposes Committee as it was commonly known) was that body. Again, the ILA needed to keep the membership of that Committee under review, and to ensure that it was refreshed by new blood.

Lord Mance referred to the worldwide spread of the ILA. The ILA was conscious that the world had many more countries than were represented by its branches. At present, there were 57 branches. This included the headquarters branch, which basically accepted members who had no local branch to join. The 57 branches covered rather more than that number of countries, because some branches were regional, for example the East African or the Caribbean Branches. All the same, the ILA could not claim to represent more than about one third of the countries of the world. And its branches and membership were not equally distributed across the world. Lord Mance noted that Professor Lavanya Rajamani had done a helpful analysis of this point.

In this light, it was particularly valuable that the present conference was being held in Johannesburg, to encourage wider awareness of the role of international law and wider interest in supporting it in Africa. It might be no coincidence that the ILA Committee with the highest proportion of developing country members in its composition was working in the area of international criminal law. The Committee was also chaired by a South African, Professor Mia Swart.

The Scholarship Fund

One initiative which had been a resounding success was the ILA Scholarship Fund. This originated in an idea led by Professor Catherine Kessedjian, President of the French Branch. The fund's objectives focussed on younger persons. It aimed to facilitate involvement in the ILA activities of younger people from all over the world, "particularly in countries where the ILA [was] not present", enabling them to attend conferences like the present and intermediate conferences held for example regionally, getting them interested in international law, in the hope that they would be the ILA's future ambassadors in their own countries and that, through them, the rule of international law would be further expanded. As Nelson Mandela said, "education is the most powerful weapon which you can use to change the world".

The Scholarship Fund was launched in 2014. It had received considerable branch and personal support, and Lord Mance commended it to attendees as a charitable fund which surely deserved further and still wider annual support. It enabled a number of students to attend the 2014 Lisbon regional conference, and now was enabling 11 candidates from all over the world to be present at the Johannesburg conference, including four from four countries of Sub-Saharan Africa. Lord Mance referred attendees to the conference booklet for details of the candidates as well as the selection criteria that they had to

meet. It was a particularly strong group of candidates, and their wide geographical spread showed how well the fund was fulfilling its aims.

But that was not all. The conference booklet also described that, under the redoubtable leadership of Professor Willem van Genugten of the Dutch Branch, a further, matching group of 11 scholarships had been made available by the generosity of his family, friends and colleagues in conjunction with the Ministry of Foreign Affairs of the Netherlands, Tilburg University (Netherlands) and North-West University (South Africa). Of these, 10 came from Africa.

Lord Mance introduced each scholar and invited them to stand so that attendees could greet them. He paid tribute to the sponsors of both the ILA fund and of that led by Professor van Genugten, and encouraged attendees who would like to lend further support to do so.

Lord Mance paid tribute to, and thanked, those who gave unstintingly of their time and skill to consider and evaluate the considerable number of applications for funding which were received, particularly Mr Bruce Mauleverer, Professor Cynthia Lichtenstein, Dr Sarah Nouwen, and Professor Lavanya Rajamani. The work of the Scholarship Committee had also drawn attention to another possible need, that was to support more experienced practitioners from developing countries in attendance at ILA events and conferences. This would require a different sort of funding exercise, but one which it would be worth considering.

New President

Lord Mance noted that, over the previous two years, the ILA had enjoyed the always outspoken and energetic Presidency of Professor Ruth Wedgwood of the US Branch, which so successfully organised the joint conference with ASIL in April 2014. On behalf of the ILA, he thanked her for her services, and presented her with a gift. Lord Mance then informed attendees that the Full Council had resolved the day before that Professor Hennie Strydom should be elected as President for the next two years. He invited Professor Wedgwood to hand over the insignia of office to Professor Strydom.

With that, Lord Mance declared the 77th biennial conference open, and invited Professor Strydom in his new capacity to address attendees.

Profess Hennie Strydom, President welcomed dignatories, including the Hon Lord Mance and Lady Justice Arden, the Ambassador of the Republic of Ukraine, Mr Ihor Turyanski, Justice James Crawford of the International Court of Justice, Professor John Dugard, the first President of the South African Branch (SABILA), and Mr Arnold Pronto, representative of the UN Office for Legal Affairs. He also welcomed fellow African scholars from "up north".

Professor Strydom noted that it gave him great pleasure to welcome attendees on behalf of SABILA to the 77th biennial conference. SABILA was grateful for the support of attendees and wished them a memorable stay in South Africa. Hopefully, the conference would meet their expectations.

The planning of an event like the present conferene was not without its highs and lows. That much SABILA accepted from the outset when it submitted its bid some four years

ago to host the conference in 2018. But, as many of the delegates were aware, subsequent developments caused the conference to move closer in time to this year.

Professor Strydom shared some of the challenges that SABILA encountered along the road, which he would balance with an overview of some positive features. Among the challenges were a number of surprises, which, contrary to all outward signs four years earlier, caused SABILA to re-think and re-configure its original plans. What mostly interrupted the initial planning were:

- the wider consequences of a failing national economy, which was now sailing close to "junk" status according to the rating agencies, and a 0% growth rate – these were unfortunate developments that were not unrelated to disconcerting and damaging political conduct in recent years;
- the lower than expected registrations, which, at the start of SABILA's planning, were realistically assessed and adapted from attendance figures at previous conferences; and
- the disappointing responses by the legal profession and government departments, which SABILA had thought would be interested in supporting an international law conference of this magnitude taking place on home soil.

As a result, Professor Strydom asked attendees to excuse the absence of bells and whistles, for SABILA decided to concentrate on the essentials.

What is more, SABILA could not accommodate all requests for parallel sessions. One rather amusing request was the subject of a handwritten fax by an elderly gentleman from the UK. He wrote to SABILA requesting an investigation by the ILA into the effect of botulism on the mental state of Oscar Pistorius at the time of the killing of his girlfriend, a case that seemingly gripped the attention of people far beyond the borders of this country. Professor Strydom admitted that he was not aware of this illness, which, apparently could be caused by a bacterial infection affecting neurotransmissions to the muscles. It also had some link to the word "botch" which referred to a clumsy handling of a matter. Given the tragic event, Professor Strydom left the discussion at that.

On a more serious note, Professor Strydom listed those aspects of the conference that stood out:

1. There were delegates from 58 countries, which include 8 African countries. Not surprisingly, with 44 registrations, South Africa had the largest number of delegates with the majority made up of non-ILA members. SABILA considered this significant for our objective to grow the number of African members in the ILA, given their current under-representation.
2. The programme sessions had attracted a number of outstanding international law scholars, and SABILA was particularly grateful for their support.
3. Thirty ILA Committees and Study Groups would exhibit their work in the form of reports and open discussion sessions. It was the Committees and Study Groups that constituted the engine room of the ILA.
4. There were some twenty young scholars in attendance from different regions of the world. As mentioned by Lord Mance, their attendance was made possible by two separate scholarship funds. The individual ILA members involved in these initiatives

deserved a special word of thanks. SABILA was particularly grateful for the young African scholars on the list of scholarship award winners.

This brought Professor Strydom to another highlight for SABILA. SABILA had decided to announce at this occasion its resolve to honour the legacy of Professor John Dugard, who was SABILA's first president after South Africa re-joined the international community of States in 1994. This would take the form of an annual or biennial John Dugard lecture on international law, the details of which would be decided at SABILA's next AGM. Through his inspiring contributions as an internationally respected scholar, especially during the time of apartheid, and the intellectual legacy he had left behind, Professor Dugard had played a historically important role in the development of international law as a legal discipline in South Africa. The landmarks of his career were defined by: academic appointments at several universities, as visiting professor or fellow at universities in the UK, US, Australia, Netherlands, and Switzerland; his judicial office at the International Court of Justice; his work as a member of the International Law Commission and as a UN Special Rapporteur; and as a member of various international law bodies. SABILA was honoured to have Professor Dugard in attendance, and wished him good health as an octogenarian and beyond.

To conclude his address, Professor Strydom expressed his sincere appreciation to the following (listed in random order):

- Lord Mance, who played a leading role in the life of the ILA and whose presence was important to SABILA;
- Taryn Brooks, who played a key role in the organisation of the event, often under difficult circumstances not of her own making, and for performing a thankless job without losing her cool;
- Juliet Fussell and Natalie Pryor at the ILA HQ, who provided assistance and advice whenever this was needed, and for the functions they still had to perform in the course of the conference;
- Ruth Wedgwood, the outgoing president of the ILA, for coming all the way from the US to perform her ceremonial and other functions;
- the members of the SABILA organising committee, who assisted Professor Strydom in various ways without asking too many questions, and for their role in putting together the panels for the parallel sessions;
- Catherine Kessedjian, President of the French Branch, for various and crucial interventions, now and certainly in the future;
- Christopher Ward, President of the Australian Branch, for his presence – Professor Strydom wished him all the best for the 2018 conference, and looked forward to being in Sydney; and
- Alexander Kunzelmann, for organising the session reporters.

Professor Marcel Brus, Director of Studies started his address by thanking SABILA and Professor Strydom for organising the conference. Having been a member of the organising team of the 2010 conference in The Hague, Professor Brus knew know how much had to be arranged in order to get such a wonderful programme together and to make all the arrangements.

Professor Brus briefly explained the working methods of the ILA. The members of the ILA were convinced of the role that international law had to play in orderly and peaceful international relations. For almost 150 years, the organisation had engaged in studying international law and in formulating proposals to improve it. The ILA Committees were the main instrument of this. In the Committees, the national branches of the ILA were represented by experts in a particular field, like human rights, law of the sea, or international monetary law. Together, members of a Committee studied aspects of international law and developed proposals for improving international law. They reported on their work at biennial conferences like the present one, and submitted their proposals for adoption by the plenary meeting of the ILA members present. The discussion took place in open working sessions of the Committees, whereas the formal adoption of resolutions was taken at the plenary closing meeting at the end of the conference. These resolutions would be widely distributed to relevant international bodies, like the UN or more specific organisations, in the hope and expectation that they would influence the formulation and implementation of international law.

Besides these Committees, the ILA had also established a number of Study Groups, which studied particular issues in international law, but without the specific intention to formulate concrete proposals for implementation.

The role of Director of Studies was to organise and facilitate the work of the Committees and Study Groups as best as possible, with the help of the staff of the ILA HQ in London, Juliet Fussell and Natalie Pryer.

At the present conference, 23 out of the 24 Committees and 8 Study Groups would be presenting their work. Their reports had been published on the website of the ILA, and their members hoped to engage with attendees in a critical discussion in order to ensure that the ideas as finally presented reflected the opinions of the ILA as a whole, rather than the opinion of the experts in the Committee. On the final day of the conference, six Committees were expected to present their resolutions for adoption by the plenary meeting. All delegates were invited to participate in their discussion, but only ILA members had a right to vote. Substantive resolutions would be presented by the Committee on International Monetary Law, the Committee on Cultural Heritage Law, the Committee on International Commercial Arbitration, the International Human Rights Law Committee, and the Committee on the International Protection of Consumers. The text of the proposed resolutions would be available at the plenary session, but were usually also contained in the report as posted on the website by the Committee.

Professor Mia Swart (South Africa) addressed attendees to welcome the keynote speaker, Judge Navi Pillay. Judge Pillay was born in Durban in 1941. Her life paralleled modern human rights. She studied law at the University of Natal before studying at Harvard, where she became the first South African to obtain a doctorate in law. She was the first non-white to open a law practice in Natal Province (as it was at the time) and the first nonwhite woman judge on the High Court of South Africa. She once said that she did not allow any door to be closed in her face. She served on the International Criminal Tribunal for Rwanda, a position she held for eight years, the last four of which she served as president of the Tribunal. After that she became a judge of the International Criminal Court and, from 2008 to 2014 served as the United Nations High Commissioner

for Human Rights. Judge Pillay continued to be active, having recently been appointed Commissioner of the International Commission Against Death Penalty.

Two aspects of Judge Pillay's character interested Professor Swart in particular. The first was judicial innovation. She was credited for having taken the lead – and a progressive lead – in the *Akayesu Case* before the ICTR, where she amended the indictment from genocide to one containing sexual violence and rape as genocide and a crime against humanity. This case continued to be a monumental and proud legacy of Judge Pillay. The second aspect was the fact that British media had described her as an "international troublemaker". This was the result of her views as UN High Commissioner on Human Rights on matters from abortion to the Israel-Gaza conflict. Of all the many honorary doctorates, awards and medals that Judge Pillay had received, international troublemaker was the most significant!

Judge Navi Pillay commenced her keynote address by exclaiming what a daunting privilege it was to address such a distinguished audience, whose members already knew everything that she was about say!

Everyone in the room could agree that the United Nations had advanced resoundingly from a State-centred system of traditional international law based on the pre-eminence of State sovereignty, into a norm-based institution. Its goals were clear: while respecting the freedom of sovereign States, it was also dedicated to protecting and promoting peace, security, development, rule of law and human rights for the people of the world. The Member States of the UN had adopted universal standards of values and norms, as well as the tools to implement them.

International law increasingly played a role in shaping State policy as well as domestic law, to advance, collectively, the protection of human rights. There had also been marked growth in international criminal law, with its emphasis on the criminal responsibility of the individual. Progress in international criminal justice lay dormant for half a century after the Nuremberg and Tokyo Military Tribunals. But the landscape had shifted rapidly over the past twenty years.

The establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, and the ICTR in 1994 was followed by ad hoc tribunals for Timor Leste, Kosovo, Sierra Leone, Cambodia and the courts of Iraq and Lebanon. The African Union (AU) was presently setting up a hybrid court in the Central African Republic. With the adoption of the Rome Statute in 1998, the ICC was now available to render justice for the serious crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.

Yet the idea of developing universal standards of human rights was relatively new, and this use by the international community of judicial power backed by punishment to deter serious violations of human rights, constituting international crimes, was an even more recent development.

International law set clear standards of equality, freedom from discrimination and human dignity for all persons. The UN's Universal Declaration of Human Rights was the foundational framework for human rights, and today, all the countries of the world subscribed to its principles. Most constitutions and national legislations embodied them, and had

been strengthened over seventy years of steadfast activity by States, involving the adoption of conventions, treaties, resolutions, and declarations.

In accordance with the fundamental tenets of international humanitarian law and international human rights law, States accepted that it was *they* that carried the foremost responsibility to protect the human rights of their people – all rights, whether civil, political, economic, social or cultural – and to fulfil their demand to be free from fear and want.

At the same time, the UN subscribed to the principle that when States needed assistance in implementing their responsibility to protect their own people, the international community should assist. This was critical where civilians were at risk. International law was also clear that where a State manifestly failed to protect its population against massive violations of human rights, the international community was required to intervene to protect, using the means prescribed and circumscribed by the UN Charter. Unfortunately, State sovereignty was often invoked to block UN action to protect against serious human rights violations, and governments, themselves, by their actions or omissions, were often culpable of tolerating abuses.

The conflict in Syria had entered its sixth year. It was spreading its tentacles across borders, causing the loss of more than 200,000 lives and displacement of millions of people in the region. The atrocities being perpetrated by the Islamic State in Iraq and the Levant (ISIL) particularly shocked our collective conscience. Employing sophisticated modern technology of the digital era, ISIL had managed to recruit young fighters across the world in a most insidious manner.

One week earlier, the UN Security Council had resolved to send troops into Burundi. Other complex and potentially highly eruptive conflicts were underway in Afghanistan, the Central African Republic, the Democratic Republic of the Congo (DRC), Libya, Mali, the Occupied Palestinian territory, Somalia, South Sudan, Yemen and Ukraine. These crises hammered home the full cost of the failure of the international community to prevent conflict. They combined massive bloodshed and devastation of infrastructure with acutely destabilising transnational phenomena, including terrorism, the proliferation of weaponry, organised crime, and spoliation of natural resources.

None of these crises emerged without warning; they built up over years of human rights grievances, deficient or corrupt governance, and lack of independent judicial and law enforcement institutions, discrimination and exclusion, inequities in development, exploitation and denial of economic and social rights and repression of public freedoms. Although the specifics of each conflict could not necessarily be predicted, many of the human rights complaints that were at the core of a confrontation were known; they could and should have been addressed.

Early actions to address human rights concerns and to protect States by warding off the threat of violence; recognition of this urgent truth, and a broader conception of national interest, would be more appropriate to a century in which a growing number of challenges faced humanity as a whole. A number of good practices that addressed both proximate triggers and root causes had emerged. These included strengthening civil society actors, increasing participation by women in decision-making and dialogue, and addressing institutional and individual accountability for past crimes and serious human rights violations.

While conflicts raging unabated in a small number of countries was concerning, it was nevertheless heartening that the greater number of States across the globe were making serious efforts to advance the UN agenda to advance human rights. Credit for that should go to the countless brave and committed civil society activists, defenders, lawyers and journalists who, over decades, had slowly succeeded in firmly rooting international human rights norms in their societies. It was vital that democratic space for civil society be expanded in international forums and within States.

Many civil society organisations, human rights defenders, journalists and political opponents continued to operate in an increasingly hostile environment in many countries, and to face restrictions in the name of national security, counter terrorism, public order, and regulation of NGOs and the media. The ongoing arrest and detention of a large number of civilians, including judges, in Turkey was deeply troubling, as was the detention of opposition party members in Hungary. In the DRC, there had been an increasing number of arbitrary arrests and disruption of peaceful protest. In Burundi, electoral violence, with protests being violently suppressed by security forces led to more than 400 people being killed and displacement of 145,000 refugees into neighbouring states. Restrictions on fundamental rights also continued in Zimbabwe, Eritrea, Gambia, and Ethiopia.

De facto one-party systems, and a "winner takes all" approach to elections, continued to dominate the political landscape across Africa, with a number of incumbent presidents seeking to prolong their stay in power as witnessed in Congo, Uganda, the DRC, Rwanda, and Burundi. Some signs of progress included the AU's declaration of 2016 as the year of human rights in Africa to mark the 30th anniversary of the entry into force of the African Charter in 1986. It aimed to raise awareness in particular of women's rights and to focus on the progress made across the continent, as well as the major challenges and obstacles encountered. It was also committed to end child marriages by 2030.

The successful trial of the former dictator of Chad, Hissène Habré, set a new benchmark to end impunity in Africa. It marked a significant step forward in holding high profile human rights abusers to account in Africa and could be an important model of how hybrid courts could reconcile the often conflicting demands of international law and national sovereignty. The case was the first exercise of universal jurisdiction on the continent, and the first time a former African head of state had been prosecuted for crimes under international law.

It was disturbing that, in contrast, the AU saw fit to pass a resolution providing immunity from prosecution of serving high level officials. Fortunately, the so-called threat of withdrawal from the ICC had not reached the level of an agenda item at the recent AU summit in Rwanda. The importance of international criminal justice systems was that there should be no impunity for serious crimes, and that justice and the rule of law must be upheld.

In his first address to Parliament as President of democratic South Africa, Nelson Mandela said:

> *The memory of a history of division and hate, injustice and suffering, inhumanity of person to person should inspire us to celebrate our own demonstration of the capacity of human beings to progress and go forward.*

The constitution of South Africa had moved the country away from a culture of violence and retaliation to a society of values and respect for human rights. Mandela signed up to all major human rights treaties and conventions, including the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural* Rights. The latter was ratified earlier in 2016. The South African Constitutional Court declared the death penalty unconstitutional and contrary to the values of *ubuntu*. These were important steps and should enable South Africa to take the lead both inside the country and in its exchanges with other countries, especially in Africa, to advance human rights.

The Office of the UN High Commissioner for Human Rights (OHCHR), which Judge Pillay occupied for six years, was well placed to monitor the human rights performance of every State and to offer practical assistance and guidance. Resolution 48/141 of the UN General Assembly (UNGA) charged the office with "principal responsibility" for human rights, with the mandate to promote and protect all human rights for all in all States. The High Commissioner played a crucial role in safeguarding the integrity of the three pillars of the UN: peace and security, human rights, and development.

OHCHR was the secretariat of the Human Rights Council (HRC) in Geneva, and serviced the Special Procedures system of independent experts appointed by the UNGA and the HRC. It also serviced the ten treaty bodies. The office prepared the human rights reports of every State. Through the mechanism called Universal Periodic Review (UPR), the HRC reviewed the human rights record of every State, made recommendations, and reviewed implementation. The process was public and open to NGOs. The reviews were conducted in a universal, impartial and non-selective manner.

The process was now in its third cycle, with 100% participation by States. Judge Pillay informed attendees, from her hands on experience, that no State emerged with a perfect record, and it was completely misguided to entertain the perception that the North was more compliant than the South. It was true that well established democracies had independent mechanisms and active civil society organisations to advance human rights protections, but under the independent scrutiny of the HRC, States received hundreds of recommendations from other States and seriously engaged in addressing them.

The HRC had brought strength and flexibility to the international human rights system. The UPR had had remarkable success in encouraging States to recognise and resolve gaps in human rights protection, with new emphasis on dialogue with civil society.

The Special Procedure (SP) system remained nimble and deployed great expertise. For example, Professor Christof Heyns of the University of Pretoria was the Special Rapporteur on extra judicial executions and arbitrary killings. He had investigated and produced reports on the use of armed robotics or drones, especially by the US, deeming the indiscriminate killing of civilians unlawful executions. Five SPs, including the SP on torture, visited US prisons, and sought access to the Guantanamo facility. They found the imprisonment of individuals in isolation for periods of ten years and over to constitute torture.

The ten treaty bodies also monitored compliance by States with their obligations. Judge Pillay recalled that the Committee against Torture and the Committee on the Rights of

the Child critically reviewed the Vatican's failure to protect children against sexual abuse by priests.

It was axiomatic that every country had a vital interest in defending a principled structure for a common set of global values. Human rights violations and non-compliance with the rule of law were among the root causes of every type of instability and conflict, which meant that every State had an interest in detecting gaps in its human rights protection. Regrettably, the reports and recommendations were frequently met by stone-walling or denial by States, and civil society activists remained under threat in many countries.

The UN Human Rights Commission and the mechanisms described above were an outcome of the world Conference on Human Rights, which was held in Vienna in 1993. At this conference, western countries favoured civil and political rights, whereas the Eastern bloc and many developing countries argued that economic, social and cultural rights, as well as the right to development, had a priority. In addition, a sizeable group of States were vigorously arguing that the Universal Declaration of Human Rights was the product of a specifically western culture, and that, in reality, human rights should be considered relative to the characteristics and traditions of different cultures. And yet, as discussions unfurled, a consensus emerged – the key to this was the universality, indivisibility, and interrelatedness of all human rights. A number of States had been resisting the entire concept of economic and social rights, deeming them aspirations rather than rights intrinsic to human dignity and freedom. The vision of an interrelated and interdependent constellation of human rights allowed for economic and social rights to be on board, as well as the right to development. The debate regarding the so-called cultural specificities of human rights was resolved with an equally deft and inclusive approach. Of course, all countries were indeed not the same, and all voices must naturally be heard, but these cultural specificities in no way eroded the universality of human rights.

The formula that ultimately achieved consensus on this point was the following: you choose your path, but the goal is something we all hold in common; your specificity will influence the way you move forward, but that goal of human dignity and human freedom, via implementation of human rights elucidated in the international "Bill of Rights" was something we all shared.

And so the assembled delegates overcame major differences on contentious issues such as universality, sovereignty, impunity, and how to give voice to victims. The result was a powerful outcome document, the Vienna Declaration and Programme of Action (VDPA). It firmly entrenched the principle of universality by committing States to the promotion and protection of all human rights for all people, regardless of their political, economic and cultural systems.

For a long time, economic, social and cultural rights were not given proper attention and viewed, especially by donor States, as aspirations and not rights. Yet the right to food, to health, clean water and sanitation, housing, education and decent work were priorities for developing countries. Human rights were interdependent and interrelated, and could not be enjoyed without full access to all rights.

Within and among States, acute income inequalities were evidence of failures of social and economic governance. There was a fundamental need for more consistent application

of human rights standards in the economic sphere. The OHCHR made every effort to put forth a robust people-centred set of standards to the sustainable development goals.

Judge Pillay recalled that there was a total absence of the words "human rights" in the original Millennium Development Goals. The new Sustainable Development Goals, adopted in 2015, represented a paradigm shift. They will be universal and not addressed to developing countries alone. It was a more enlightened model of development, offering a balanced framework and human rights approach in which development embraced consideration of decent work, health care, adequate housing, levels of participation, fair institutions of justice, and a sense of personal security.

The new agenda recognised that old boundaries between developed and developing countries were breaking down and that new players from emerging and middle income economies were contributing to redefine the global economy. Growing poverty and inequalities in rich countries were blurring the distinctions between donor and beneficiary countries. Migrants, minorities, indigenous people, women, children, persons with disabilities, vulnerable, excluded and marginalised groups required a specific, equitable, and rights-based development approach wherever they lived, and governments and institutions in all countries and at all development stages had responsibilities in this regard. As such, the universally agreed and universally applicable normative framework for human rights was more relevant than ever to global challenges of development. It was now accepted that a post-2015 development agenda for development must be a global agenda, based on universal norms and universal objectives.

Lord Mance thanked Judge Pillay for a splendid, balanced and powerful overview. If that was troublemaking, there ought to be more of it! The address reminded one and all of what had been done and what could be done. It gave impetus to the ILA's work, and underlined the individual contribution of brave activists. This was seen in action in the DRC some 10 years earlier. But it was also seen remotely through NGOs in various countries and academics. Universality could not be displaced by cultural specificities. This was seen in international and domestic courts. The actions of some States led to individual litigation. Other facts needed to be considered; there was a need to mediate the requirements of national security and the effects of government acts on individuals. Lord Mance invited another round of applause for Judge Pillay.

Professor Strydom concluded the opening session by acknowledging the city of Johannesburg as the host city, and for its support for the conference.

Reporters: Alexander Kunzelmann (Australia)

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

SPACE LAW

Members of the Committee

Professor Maureen Williams (HQ): *Chair*
Professor Stephan Hobe (Germany): *Rapporteur*

Professor Setsuko Aoki (Japan)
Professor Elisabeth Back-Impallomeni (Austria)
Alternate: Professor Irmgard Marboe
Dr Kaare Bangert (Denmark)
Professor Karl-Heinz Boeckstiegel (Germany)
Dr Tare Brisibe (HQ)
Mag Aleksander Cicerov (Slovenia)
Professor Steven Freeland (Australia)
Professor Jonathan Galloway (USA)
Professor Raimundo Gonzalez Aninat (Chile)
Mr Niklas Hedman (Sweden)
Alternate: Ambassador Bertil Roth
Professor Mahulena Hofmann (Germany)
Professor Anatoly Kapustin (Russia) – Nominee of Chair
Professor Armel Kerrest (France)
Professor Doo Hwan Kim (Korea)
Alternate: Professor Ki-Gab Park
Professor Emil Konstantinov (Bulgaria)
Professor Frank Maes (Belgium)
Dr Jackson Nyamuya Maogoto (UK)
Professor Sergio Marchisio (Italy)
Mrs Tanja Masson-Zwaan (Netherlands)
Mr Felix Clementino Menicocci (HQ)
Professor Jose Monserrat Filho (Brazil)
Alternate: Antonio Carlos Rodrigues do Amaral
Alternate: Dr Valnora Leister
Mr Rafael Moro Aguilar (USA) – Nominee of Chair
Professor Marco Pedrazzi (Italy)
Mr Raymond Purdy (UK)
Dr Y S Rajan (India)
Professor Laurence Ravillon (France)
Dr Olivier Ribbelink (Netherlands)
Professor Matthew Schaefer (USA)
Dr Maes Alexander Schaer (Switzerland)
Dr Kai-Uwe Schrogl (Germany)
Phetole Patrick Sekhula (South Africa)
Dr Cassandra Steer (Canada)
Professor Lotta Viikari (Finland)
Professor Frans von der Dunk (USA) – Nominee of Chair
Dr Guoyu Wang (HQ)
Mrs Joanne Wheeler (UK)
Professor Haifeng Zhao (HQ)

SECOND REPORT ON DISPUTE SETTLEMENT, USE OF SATELLITE DATA, SPACE DEBRIS, SUBORBITAL FLIGHT AND NEW DEVELOPMENTS

PART ONE

By Professor Maureen Williams
Committee Chair

A. The aftermath of the 2014 Washington Conference

A very warm welcome to our new members Mr Félix Menicocci (HQs), Dr Guoyu Wang (HQs) and Dr Cassandra Steer (Canadian Branch) who have joined our Committee following the Washington DC Conference.

We are most grateful to the Committee members and other specialists of great renown who have been cooperating with us in the challenging responsibility of preparing this Second Report and discussing the intricacies brought about by the law of outer space in its recent developments.

The Committee has the sad duty to announce the passing of three of its longstanding members and pioneers of this new discipline from the early stages of its creation. These are Professor Gennady Zhukov from Russia, Professor Bozidar Bakotic from Croatia and very recently Professor Nicolas Mateesco Matte from Canada, in his one hundredth and two year. All three have contributed outstandingly to the work of the Committee with the authority of their experience and scholarly background.

On 23/24 February 2016 this Chair circulated an initial document entitled 'ILA Space Law Committee – A request for views from members in preparation for the Report to be submitted to the Seventy-Seventh ILA Conference on 7-11 August 2016'. We are grateful to all of you who provided excellent and realistic thoughts and very valuable information during March and April 2016. These contributions were duly registered, the authors quoted by name and all forms part of the current Report.

Before going into the discussion of substantial aspects underlying our terms of reference for the current mandate (2012-2016) I shall recall these terms which were drawn by the ILA Council meeting on 9 November 2012. They read as follows.

The Committee has an established and continued relationship with the United Nations institutions dealing with space law and, in addition to its on-going work with these bodies, the topics under the new mandate include:

- *Dispute settlement and the 2011 PCA Rules on Arbitration,*
- *Legal aspects of suborbital flights,*
- *Satellite data in international litigation and*
- *New developments on space debris.*

Moreover, the Committee will keep a general brief over further developments during the four-year mandate.

B. The basic document of 23 February 2016

This initial document circulated by the Committee Chair last February, and the solid answers received from the members, were at the root of this Draft Second Report for the Seventy-Seventh ILA Conference in Johannesburg next August. Following this document a next step was the annual presentation by the Chair to the 55th Legal Subcommittee of COPUOS on 4-15 April 2016 describing the activities of the ILA relating to space law during 2015[1]. This document focused mainly on the preparation of the ILA Report for the Seventy-Seventh Conference, in accordance with its terms of reference and carrying them further. In addition to this document a Conference Room Paper entitled 'Replies from the Chair of the Space Law Committee of the International Law Association (ILA) to COPUOS' on certain legal aspects of suborbital flights' was submitted to this 55th Session of the LSC[2].

In this framework the ILA Committee members participated in a symposium organised by the Permanent Mission of Argentina in Vienna on 8 April 2016 addressing '*The challenges to international law on the threshold of UNISPACE + 50'*. All five continents were represented on the panel and the outcome was seen as a useful, realistic contribution to the remarkably swift development of space law today. It was certainly helpful for the elaboration of our Johannesburg Report in its latest stages[3].

The current terms of reference of the Committee appear broad enough to address not only the topics under permanent review, notably dispute settlement, new applications of satellite data and space debris (in Part One) and the new topic assigned to the Committee for 2012-2016 on the legal aspects of suborbital flight (Part Two). In fact, the mandate of the ILA Executive Council also refers to the need for the Committee to remain on the alert for any new developments on the field.

For example, in this challenge -to be addressed in more detail later in this Report- the ILA Committee draws the attention to questions surrounding space security, cyber security and the risks of latest generation technologies becoming easily available to the civilian sector. There have already been cases of interference to communication networks, and earth observation satellites, among others, become attractive targets. These concerns were highlighted by the Committee Chair in the annual report to the Legal Subcommittee of COPUOS last April, as mentioned above. Another topic topping the current agendas is the legal nature -still undefined- of resources from outer space and

---

[1] A.AC.105/C-2/108.

[2] A/AC.105/C.2/2016/CRP.10.

[3] The keynote speech of the Symposium was given by the Permanent Representative of the Argentine Republic, **Ambassador Rafael Mariano Grossi.** The specific areas addressed by the speakers were '*Challenges posed for the design of international/national space law as the result of the rapid development of space-related technology*' **(Professor Steven Freeland)**, *'Security in space, cyber security and international law'* **(Professor Maureen Williams),** *'Appropriation of outer space resources'* **(Professor Armel Kerrest)**, *'International mechanisms for space cooperation to promote thematic priorities of UNISPACE + 50'*, (**Professor Setsuko Aoki),** *'The role of customary international law in the future exploration and use of outer space*' (**Dr Tare Brisibe),** *'Private entities as a challenge for outer space governance'* **(Professor Irmgard Marboe)** and *'International law in the XXI Century: Crucial challenges and issues, inter alia the threat of an arms race in outer space and the equitable exploitation of space natural resources. Need to update space law'* ***(Professor José Montserrat Filho).***

the legal status of mining activities on the moon and other celestial bodies, following the United States Act of 25 November 2015 entitled 'The United States Commercial Space Launch Competitiveness Act' (H.R.2262)[4], and the position paper of the International Institute of Space Law (IISL) of 20 December 2015 to which some ILA members -who are IISL board members- have contributed. The working session of our Committee in Johannesburg will include this topic for discussion.

On the basis of the discussion and recommendations stemming from the Washington Working Session on 8 April 2014, and in pursuance of our current mandate, the ongoing work of the Committee has been developing as follows.

C. The central topics[5]

1. Dispute settlement

The Chair

In this field the focal point continues to be the *PCA Rules on Arbitration of Disputes Relating to Outer Space Activities*. The Committee is now involved in creating awareness of these Rules in the various circles and exploring their effectiveness. To date the general view of the Committee is that the Rules should not be modified. Rather, they should remain in their present reading without becoming any stricter. Their procedural nature and flexibility are still their most attractive features, together with the wide space left to the autonomy of the parties. Moreover, the PCA Rules have enriched the existing procedures in the field of dispute settlement relating to outer space activities by envisaging the possibility of both sovereign states and private parties using its mechanisms, thus filling a serious gap in the field left by the UN Space Treaties. The ILA notes with satisfaction that the Chair and General Rapporteur of its Space Law Committee, and some Committee members, have been appointed to the Specialized Panel of Arbitrators pursuant to the PCA Outer Space Rules. This was announced in the ILA presentation to the LSC at its 55th Session on 11 April 2016.

What follows are the answers from Committee members, as requested, on their awareness of whether these Rules had been applied at any time in their own countries or elsewhere. The president of the International Institute of Space Law (IISL), Tanja Masson-Zwaan, will be opening the discussion.

Views from Committee members

Mrs Tanja Masson-Zwaan (Netherlands Branch) expressed that**,** to the best of her knowledge, the Rules have not yet been used but she is regularly alerting organisations and companies to their existence. It seems that some outreach could be done by the PCA itself also to inform organisations such as ESA and companies like SES, Eutelsat and others of their existence. She further believes the Rules might be helpful in case of disputes regarding non-technical (intentional) harmful interference in terms of ITU frequency management, for instance.

---

[4] See https://www.congress.gov.bill/114th-congress/house-bill/2262/text.

[5] The author is grateful to Conicet Argentina (National Council for Scientific and Technical Research) for its support for the research of these topics.

Professor Steven Freeland (Australian Branch) congratulated the Committee members who took part in the development of the Rules and noted that they are a useful addendum to the range of dispute resolution mechanisms that may be available. It is crucial that the PCA have a panel of specialist arbitrators available for any such disputes referred under the Rules, so as to streamline any arbitration proceedings. It would be very useful to gauge whether, and to what extent, the international (commercial) space community is aware of the Rules and have been/are prepared to utilise them in their commercial documents. In particular, it would be important to emphasize precisely what practical and commercial advantages the utilization of the Rules may offer. Moreover, if the Rules are not particularly well utilized, it would be equally useful to understand the reasons for this (apart from the possibility that their existence may not as yet be particularly well-known). Whilst he concurs with the view that the Rules should not be modified at this stage, he also believes that it is important to understand whether any aspects of the Rules are unattractive to commercial space actors (whether States or private entities) or are perceived as a hindrance to ongoing commercial relationships and activities. If that were to be the general perception, then some alteration to the Rules might eventually be deemed appropriate by the Committee.

Professors Aleksander Cicerov (Slovene Branch) and **Dr Y.S. Rajan** (Indian Branch) considered that the Rules on Dispute Settlement should not be modified for the time being and should evolve naturally as done so far. **Professor Marco Pedrazzi** (Italian Branch) observed that he was not aware of any instance of their application**. Professor Irmgard Marboe** (Austrian Branch) suggested exploring the way a '*compromis*' system could work in the context of the PCA Rules concerning, for example, launch contracts and treaties regulating space activities, cooperation agreements on registration, liability, authorisation and other examples such as the QB50-Project, an initiative of the European Union within its Seventh Framework Programme for research and innovation, which provides opportunities for cooperation and launch for up to 500 'CubeSats' for 2016-2017. **Dr Olivier Ribbelink** (Netherlands Branch) concurred, in general, with the views of the Chair and previous commentators on dispute settlement and the PCA Rules. The same may be said of **Mr Ray Purdy** (British Branch) and **Professor Jose Monserrat Filho** (Brazilian Branch) and **Professor Armel Kerrest** (French Branch). The latter, as member of the ILA delegation to COPUOS for several years now has accompanied the Chair and Rapporteur of the ILA Space Law Committee to the Annual Sessions for which we are very grateful.

The Chair points out that it is extremely difficult to prove a universal negative, even more so regarding the application of the PCA Rules. We should therefore continue exploring whether these Rules have ever been made effective, that is to say, if they have ever been applied -for better or worse- anywhere in the world to date. As recommended by **Masson-Zwaan** the PCA could be of assistance in this quest. (In fact, the **Chair** had asked PCA officers about their awareness on the application of the Rules, and they had answered in the negative). She agrees we should approach organisations such as ESA, and private companies as well, to provide them with more information on the Rules, especially their positive aspects which make them consistent with the present scenarios. This is in line with **Freeland's** and **Marboe's** suggestion of further examining the pros and cons of the PCA Rules in certain cases. The recommendation is therefore to continue our task on this matter during the next biennium.

2. Recent developments in the use of satellite data

The Chair

The state-of-the-art was examined and discussed in the 2012 Sofia Report to the ILA Conference and reviewed in the ILA Report submitted to the Washington Conference in 2014. It was agreed that this issue be kept under study by the Committee on the basis of recent case law and development of practices for the production of satellite data in court at the stage of evidence, with special reference to international boundary disputes (disputes between neighbours possibly affecting regional stability)[6]. In this chapter questions concerning privacy -particularly in decisions of courts and tribunals- should take pride of place given the scope and implications of far-reaching technologies such as Google Earth.

At this point in time it remains valid to wonder whether freedom of information is seen today in less absolute terms[7]. If so, would this be due to the need to protect privacy in the present world? A renewed look at the Hague, Sofia and Washington Reports (2010-2012-2014) is recommended. See also, inter alia, The Times**,** London, editorial of 21 April 2011, 2.

In this framework we have worked in cooperation with the ILA Committee on Sea Level Rise where space technologies have an important role to play. Moreover, this natural phenomenon has a strong impact on other areas of international law such as statehood and nationality issues, human rights, state territory and floods affecting the international boundaries causing, among others, migration problems. The ILA Space Law Committee finds that formulating proposals based on the use of space technology to meet the magnitude of this new threat is a realistic course of action.

Please note: Questions on space security in the application of new technologies, including cyber technologies, will be addressed separately at the end of this Report given their growing importance (PART ONE, point 5).

Views from Committee members

Tanja Masson-Zwaan suggested this topic be also considered in the context of 'big data´ and large satellite constellations envisaged, such as OneWeb. She also recommended the Committee follow and compare, in this field, the recent developments of data policy in the European Union regarding Copernicus. **Rajan**, for his part, added that nowadays there is also an important issue of 'national security' taking different shapes and actions carried out by non-state actors frequently supported by states, either tacitly or indirectly. For example, unregistered users of satellite telephony in mobile form are a matter of concern. Similarly, in an era of ultra-high resolution used by EOS, would it be legal to request the satellite data operator to avoid certain regions likely to cause serious panic among its citizens? And what would be the limit to such requests?

---

[6] Brownlie, Ian, 'International boundary and territorial disputes', D J Freeman, London, March 2000.

[7] Possibly a reaction to the 1979 decision of the Court of Strasbourg on the tragedy of thalidomide, currently known as the 'Sunday Times case', where freedom of information was interpreted in extreme terms and the protection of privacy suffered its worst defeat.

Steven Freeland´s answers are based on his vast experience in the field of international criminal law highlighting the increasing importance of the use of satellite data at the stage of evidence in trials of alleged perpetrators of genocide, war crimes and/or crimes against humanity, especially before the various international mechanisms of criminal justice. Such evidence may be crucial to demonstrate, for example, the perpetration of a deliberate act against the natural environment. As in national court systems, issues surrounding the accuracy and integrity of the evidence arise. However, such data is being increasingly used in such trials. The advent of small satellites and drone technology that enables Earth observation will mean that this trend will continue, subject to satisfying basic principles about the admissibility of the evidence.

Marco Pedrazzi focused on the use of satellite data and protection of privacy in what he considers a historical moment where the balance would probably shift increasingly, for reasons of terrorist emergency, in favour of security to the detriment of the protection of privacy**.** He referred to a specific type of data which does not appear to worry national and international judges, notably the GPS positioning data. The European Court of Human Rights, in *Uzun v. Germany* (29 June 2010) held that the surveillance via GPS of a suspect terrorist in order to investigate several cases of attempted murder and to present further bomb attacks 'served the interests of national security and public safety, the protection from crime and the protection of the rights of the victims', adding that the way in which it was carried out was proportionate to these legitimate aims. Therefore the Court found no breach of the right to privacy guaranteed by article 8 of the European Convention. More recently the Court, in *Ben Faiza v. France*, had authorised the use of GPS to track a suspect drug trafficker by means of a device placed in a car. In this case – which is still pending before the Court – GPS was used to track a suspect drug offender – under European law. **Pedrazzi** observed that the Italian Court of Cassation seems to go even further than the European Court -possibly with ensuing compatibility problems with the European Convention. In some recent judgments it has been considered that the determination of the location of a suspect by the police, via a cell phone used as a GPS device, needed no authorisation by a judge –under Italian law- and that surveillance via GPS could be considered a lawful means to be used by an employer in order to verify the faithful performance of tasks by an employee working outside the employer's premises (the employee was found spending many working hours in bars and had been fired). Finally **Pedrazzi** indicated that this description was only one example of the many possible uses of satellite data and that other uses may be much more intrusive. He concluded that these questions certainly merit a permanent in-depth analysis.

Dr Alexander Schaer (Swiss Branch) concurred with the suggestions and perceptions in the initial document. As to the protection of privacy in light of the unlimited possibilities of new technologies he mentioned that in 2012 the Swiss Federal Supreme Court had, for the above reasons, restricted the activities of a far-reaching technology surrounding Google Street View. He added his views on space security and cyber security under point 5.

Ribbelink referred to the reach of the principle of freedom of information suggesting to broaden it in the context of this Second Report so to include other human rights conventions and 'systems'. **The Chair** would like to clarify that the discussion surrounding this principle is definitely restricted, in this context, to a situation described at the 2012

Sofia Conference (see Report, footnote 17, p. 287) and later on at the 2014 Washington Conference (Report p.305) when addressing freedom of information and the right of privacy. This stems clearly from previous ILA Reports. The call of attention was especially registered at The Hague Conference (2010) by Frans von der Dunk and taken up by the Committee Chair a few months later with special emphasis on a particular new situation described by The Times (London) in its editorial of 21 April 2011. It concerns the decision in the 'Sunday Times case' (Strasbourg 1979) which was causing reactions and where freedom of information was taken to extremes and privacy went disregarded (as described at the outset of this chapter). In other words, we are referring to a specific, restricted and interesting situation which is now followed up according to the ILA mandate (last paragraph, *in fine)*. It certainly does not include the universe of human rights, conventions and declarations but is just another angle of the application of latest far-reaching technologies.

3. Space Debris

The Chair

This is an area under permanent review by the Committee since the adoption, by the ILA Sixty-Sixth Biennial Conference (Buenos Aires 1994), of the 'International Instrument on the Protection of the Environment from Damage Caused by Space Debris'. In line with the views provided by the scientists, its clauses continue consistent with the present landscapes. The underlying objective is now to continue opening a new chapter in the field of space debris, not only considering mitigation measures but moving on, as well, towards space debris removal possibilities in the framework of international law. Special attention is being given to state practice and compliance with the *2007 COPUOS Guidelines on the Mitigation of Space Debris*, as also to the domestic measures taken by states to this end.

The Committee continues to recommend a closer cooperation between the LSC and the STSC. Moreover, and given its importance, the STSC Working Group Report on 'Long term sustainability of outer space activities' should be viewed from a legal perspective as well. In this quest it is important to have in mind, *inter alia,* the treatment of this matter by the Sofia (2012) and Washington (2014) ILA Conferences**.**

A realistic step forward, registered in 2015 and followed up in 2016, is the addressing of this topic by the Legal Subcommittee of COPUOS from an intergovernmental perspective. This action was published in a Conference Room Paper (A/AC.105/C.2/2016/CRP.16) on 5 April 2016 entitled *'Compendium of space debris mitigation standards adopted by states and international organizations'.* This Compendium was a contribution from Canada, the Czech Republic and Germany for access to updated information on the measures implemented by states and international organisations on the mitigation of space debris and taking into account the work of the Scientific and Technical Subcommittee of COPUOS. To carry forward these objectives the Secretariat maintains a page on the UN OOSA website[8]. At the fifty-eighth Session of COPUOS, in June 2015, it was agreed that states members of COPUOS and international intergovernmental organisations having permanent observer status with COPUOS should be invited to contribute to the updating of the Compendium (A/7020, paragraphs 247-248).

[8] www.unoosa.org/oosa/en/ourwork/topics/space-debris/compendium.htm1

Views from Committee members

Tanja Masoon-Zwaan, in an optimistic approach to this question , had words of praise for the work of the UN Office for Outer Space Affairs when embarking in the compilation of the space debris Compendium (http://www.unoosa.org/oosa/en/ourwork/topics/space-debris/compendiumhtml) previously referred to and also for the International Academy of Astronautics (IAA) for the reference report 'Situation report on space debris' which updated the IAA position papers of 1993-2001 and included a legal chapter which she had written at the time (see http://iaaweb.org/content/view/569/755/). **Steven Freeland** noted that even though the 2007 COPUOS Guidelines on the Mitigation of Space Debris represent an important step forward, they are not the panacea that will solve the problem because they are recommendatory by nature and assume the continuance of debris creation, albeit at a slower rate than on a 'business as usual' basis. He added that the active removal of space debris -whilst on its surface appearing attractive- brings with it many difficult legal problems and technical/logistical questions, and will require broad international cooperation and a management regime for this to be undertaken safely and as effectively as possible. One important issue to further emphasize the complexity of the space debris problem is to draw the link between increasing space debris and its impacts and conflicts in space that might involve the deliberate destruction of space objects. **Aleksander Cicerov** agreed on this point -as did most of the ILA Space Law Committee members- as well as on the need to encourage a closer cooperation between the LSC and the STSC.

V. S. Rajan foresaw for the coming decade, or perhaps slightly later, the possibility of commercial services for space debris removal, initially on request from some space agencies and later extending beyond, and possibly using some form of guided robots. What would be the situation if they interfered with others' space assets? Many of the debris removing robots would be in a continuing move. **Rajan** added that such services would perhaps be required for the sustainable utilization of space, especially due to the cramming of those regions by thousands of small satellites. **Dr Valnora Leister** (Brazilian Branch) pointed out that space debris causes safety hazards not only to the space environment but also to aviation and transport by sea. Debris generated from launch operations is constantly being collected from the oceans and this environmental impact by space activities is not the object of dedicated attention today. **Olivier Ribbelink** emphasized the importance of pursuing studies in space debris removal possibilities in the framework of international law.

The Chair considers that this topic should continue under review by the Committee, particularly in light of the new possibilities brought about by the Compendium on Space Debris Mitigation mentioned in this chapter.

4. Suborbital flight

The Chair

The Committee Rapporteur, **Professor Stephan Hobe** (German Branch) will be submitting his Second Report to the Seventy-Seventh Conference next August in Johannesburg as a follow up to his First Report discussed at the working session of the ILA Seventy-Sixth Conference, in Washington 2014. Since 2014 not much progress has been registered at international level on these matters. Most issues are strongly linked to questions

of delimitation. The Second Draft Report on suborbital flight appears as Part Two of this Committee's Report to the Johannesburg Conference.

As indicated at the outset of this Report (Part B), a Conference Room Paper on the matter was prepared by this **Chair** for submission to the Fifty-fifth Session of the LSC (4-15 April 2016) entitled 'Replies from the Chair of the Space Law Committee of the International Law Association (ILA) to COPUOS on certain legal aspects of suborbital flights'[9]. It describes the development of suborbital flight issues within the Space Law Committee since 2014.

The initial discussions of the ILA Committee on suborbital flight show a wide range of options on ways and means of examining the topic. Some members favoured the drafting of a set of guidelines from the outset whereas others, in a more cautious attitude, observed the absence of a legal definition for this new technology noting that any action at this stage would be premature. It was widely perceived that this topic would bring back to the fore issues relating to the definition and delimitation of outer space to which the ILA answered in Doc. A/AC.105/1039/Add.3. The majority considers today that realistic answers to questions included in UN Doc. A/AC.105/1090, Annex II, paragraph 17 would go a long way in clarifying conflictive aspects of the topic. Other ILA proposals indicated the need for a substantial analysis of suborbital flight and the national legislations enacted to govern the matter in the aftermath of the Washington Conference. All in all there are many areas under discussion, and also boundary areas in which the Space Law Committee of the ILA is currently involved.

The net conclusion is that suborbital flights are prompting challenging legal issues -so far unresolved- which go back to the very root of both air and space law. Therefore, a recommendation to work jointly with ICAO in this task seems realistic. Without establishing priorities at this stage, questions relating to the applicable law and national space legislations, definitions and/or descriptions regarding space flight, delimitation issues, questions underlying registration, insurance and liability, and some agreement on the legal nature of space tourists should, inter alia, be addressed without delay. In this context the Second Report on the subject is developing as follows.

Views from Committee members

Tanja Masson-Zwaan pointed out that, at this point in time, other organisations are also becoming active on questions of suborbital flight as the industry comes closer to starting actual business, for example, the recent cooperation between ICAO and UNOOSA where two symposia -in which ILA Committee members participated- have now been held (see http://www4.icao.int/space). Moreover, the ITU is considering the issue of frequency use by suborbital vehicles and the WRC-15 has adopted a resolution to conduct research in this context and is planning to add this as an agenda item for WRC-23. The developments of national law on the matter are also of importance. In the UK, for instance, a task force has been set up in the framework of the Civil Aviation Authority (see https://publicapps.caa.co.uk/docs/33/CAP1189_UK_Government_Review_of_commercial_spaceplane__certification_and_operations_technical_report.pdf). She added that the drafting of guidelines by the ILA Space Law Committee for a model law in this field could be an interesting course of action and should take into account these current developments.

[9] A/AC.105/C.2/2016/CRP.10.

Mrs Joanne Wheeler[10] (British Branch) followed up the previous statement with similar views, and added news on the role of national space legislation in connection with the latest technological developments. It concerns a United Kingdom example. Briefly, this expert observed that for many years the UK had excelled in manufacturing small satellites and 'cubesats' and became world leaders in the industry. Yet the country has been missing its own launch capability for placing such small satellites in outer space. On 18 May 2016 the UK Government policy agenda was announced by the Queen and included an innovating proposal consisting of a first commercial spaceport in the country to be set up before the end of the current parliamentary term in 2020. This innovation will mean low-cost access to space for the small and microsatellite industry and space tourism and is seen as a powerful indication of the role national space legislation will come upon to play in the near future. In fact, before too long national laws will be needed for a number of purposes relating to this innovation, such as the certification of space vehicles and their safe operation within UK airspace.

Professor Frans von der Dunk (American Branch) believed that the Committee will inevitably have to revisit the question of delimitation of outer space, as most suborbital flights are aiming for altitudes well above the normal airspaces used for aviation yet well below the orbit of most LEO satellites and the ISS, in other words: the grey zone is most particularly at issue in the discussion on delimitation. This would also require going back to the true origin of the discussion on the so-called Von Karman-line, clearing up the many inconsistencies and obscurities surrounding it. An analysis of the various national space laws and regulations -both in existence and being developed- should be carried out in order to see how they handle suborbital flight and/or any spatial delimitation of outer space.

Steven Freeland considered as an obvious complexity the development of an appropriate management regime for any such activities at national and, in particular, international level. There is significant confusion and a lack of 'ownership' at this stage among the international organisations responsible for commercial air activities (principally ICAO) and those mandated to oversee space activities. Without a dedicated and responsible intergovernmental organisation –either a newly created one or through the expansion of the mandate of an existing one- it will be difficult to develop comprehensive, relevant and appropriate international legal frameworks within which specific countries can then operate through the development of national laws. Whilst, for example, ICAO and UNOOSA have begun to jointly explore this on a cooperative basis, there is much work to be done. The difficulties are compounded by the fact that, as yet, it is difficult for regulators to fully understand the technology and therefore the potential associated risks.

Professor Lotta Viikari (Finnish Branch) viewed any work towards guidelines for a model law certainly as most welcome and ideally as soon as possible. No doubt this requires, in the first place, some kind of definition of what is exactly meant by the term 'suborbital flight'. In this regard, she suggested an approach that intends avoiding -at this point at least- the highly problematic question of delimitation and instead focuses on other relevant characteristics of these flights. For instance, considerations of whether a flight reaches Earth orbit or not might provide the basis for a definition with high enough resolution for many purposes. **Viikari** strongly supported the Committee´s endeavours in

[10] **Joanne Wheeler**, 'UK Spaceports Announcements', Bird & Bird, Satellite Bulletin – May 2016.

this respect. However, she recommended caution when resorting to national legislation as a model for international norms -even those of legally non-binding status. All the more so, given the focal role of the non-governmental sector in this field of activity, whatever states regulate domestically will probably divert considerably from what is feasible within the realm of public international (space) law.

V S Rajan added what he considered 'another' category of 'suborbital flight' originating from the increasing attempts to recover parts of the launch vehicle and also to use them in 'unconstrained' mode of launch and then control and guide the used parts to areas where it will not damage other land mass or coasts. They are actually 'suborbital' in the physics sense. **Aleksander Cicerov**, for his part, fully supported the idea of having guidelines for a model law on suborbital flights as soon as possible.

Rafael Moro Aguilar, LL.M. (American Branch) referred to two recent developments in Europe which were of special interest having in mind the lack of international and/or national regulation on commercial human suborbital flight, as pointed out by the Chair and the Rapporteur of the Committee. One of the two countries was Spain, which dedicated to preparing a draft bill on private outer space activities in 2014-15. **Moro Aguilar** was pleased to report that the draft bill took, as one of its inspiring sources, the 'ILA Guidelines for a Model Law on National Space Legislation' prepared by this Committee. He added that the Spanish draft bill has covered the activity of private human suborbital flight (a future private human orbital transportation was also contemplated). This part of the bill basically follows the example set up by the US CSLAA. It includes a licensing regime whereby these flights would be considered as space flights and, therefore, their launches and reentries would require authorisation from the Spanish government according to Article VI of the Outer Space Treaty. It also includes an "informed consent" regime, whereby spaceflight participants would have to sign a waiver of liability as previous requirement to flying in the private vehicles.

The other country showing an interest in enacting national legislation has been the United Kingdom. A report was prepared by the UK Civil Aviation Authority and the UK Space Agency, published in 2014, under the title 'United Kingdom's government review of commercial space plane certification and operations'. The report admitted that the current legislation does not fully address space planes (either orbital or suborbital). 'Space planes' are considered 'aircraft' by the UK authorities and thus their use would require full certification, just as any other kind of aircraft. However, this would be a long-term approach, as certification in the European Union is now under the competence of the EU authorities. Therefore, to enable space plane operations to start from the UK in the short term, there was a proposal to classify them temporarily as 'experimental aircraft' (which would put human suborbital vehicles back within the power of the UK government) and then follow as well the regulation model set up by the US CSLAA.

It is noteworthy that no new developments have taken place lately with respect to these initiatives, neither in the UK nor in Spain. Nevertheless, this expert thought it interesting to bring them to the attention of the members of the Space Law Committee. These initiatives may give us a hint as to what will be the future regulation of commercial human suborbital flight in countries other than the USA, which for the time being remains the only country in the world to have regulated this activity.

5. New developments

As customary, and in accordance with its terms of reference, the Committee looks into any further developments surfacing during our work adding, if appropriate, introductory remarks on the matter. At this stage, as announced earlier, attention will be drawn to space security and cyber security**.**

Questions relating to space mining, in light of the 2015 US Act on Commercial Space Launch Competitiveness and the IISL Board Statement of 20 December 2015, will be addressed at the working session of the Johannesburg Conference. If unable to attend, members are kindly asked to send in their comments and suggestions on this topic to the Chair not later than 31 July 2016.

5.1 Security in space and cyber security

The Chair

The following lines, with further additions, were part of the ILA Report to the Fifty-fifth Session of the Legal Subcommittee of COPUOS in April 2016[11] so as to highlight certain matters the ILA wished to report to the Legal Subcommittee on the eve of the forthcoming Seventy-Seventh ILA Conference, where further discussion is expected. Not so long ago the doctrine concurred that the major threats to space security were space debris, an arms race in space and natural near-earth objects (NEOs) likely to impact on planet Earth. This was a recurring note, for example, at the UNIDIR Conference in Geneva on 'Security in Space – The Next Generation' (31 March-1 April 2008)[12]. However so, in the current scenarios the threat of a cyber attack should enter this list, and indeed top it, as it means harm on an unprecedented scale.

The importance of looking into security matters lies in the fact that we are living in a very unsafe world where certain situations call for sound solutions. In this particular case the threat of a cyber attack of untold dimensions looms on the horizon. Indeed – as referred to by recent literature- this is a new global security threat (GST). There are already a few examples in the public domain, communications networks for sure -and earth observation satellites as well- are under a serious threat, and appear, inter alia, as attractive targets for a terrorist attack using cyber technology. During the 2015 LSC Session the ILA Report thereto[13] had drawn attention to the question of space crisis management as discussed at a Seminar organised by the Royal Institute of International Affairs (Chatham House, London) on 22 July 2014. A second meeting, entitled 'Space Security and Cyber Security', followed on 16-17 July 2015. At these meetings an important topic on the agenda was cyber threats to satellites, discussed from different angles and country perspectives. One of the participating experts, **David Livingstone** (Chatham House) expressed the view that satellite services are key targets for a number of cyber threats, as they support a critical level -growing yearly- of functionality within a country's national infrastructure. This means that a single successful attack on a critical node can affect a large number of

[11] UN Doc. A/AC.105/C..2/108.

[12] This Conference was published by UNIDIR under that title, New York, Geneva 2008.

[13] UN Doc. A/AC.105/C.2/106, Part C.3 (b).

important national and international capabilities[14]. One of our new Committee members, **Dr Guoyu Wang** (HQs), was guest speaker at one of the 2014 Chatham House meetings where he addressed 'space crises management', gave his views on questions relating to information security and space security policies and highlighted the importance of international cooperation in these very sensitive fields[15].

On these occasions participants addressed the international perspectives resulting from the intersection of cyber security and space security. The standpoints and national legislations of China, France, India, Italy, Japan, Russia, the United Kingdom and the United States were profoundly analysed and compared. Concern was shown that modern technologies were gradually becoming more accessible to the civilian sector and represented a high threat, if misused, as an element for terrorism purposes. The central topic was an analysis of security challenges common to both the cyber and space domains noting, inter alia, an absence of national policy documents in the cyber and space spheres and a lack of agreed definitions of key terminology in both domains[16]. Furthermore, a 'blurring' line was observed between 'offensive' and 'defensive' actions in the cyber and space fields and certain confusion between non-military and military roles in the space and cyber sectors. Moreover, unfortunate asymmetric threats in both these sectors were perceived, such as the idea that 'offence is easier and cheaper than defence'[17].

There are other elements as well singled out in the Chatham House Seminar. Whereas the space sector has a most defined infrastructure at the Office for Outer Space Affairs (OOSA), the cyber sector is in a rather stormy infancy with no clearly defined facilities of the kind. This situation seems to hinder the development of cybernetic policies, especially at security level. The view was expressed that in today's space environment many of the key issues cut across the civil-military spectrum, thus interfering with the effectiveness of future space policies.

The prevailing opinion at the moment is that the United Nations are the natural forum for the development of global cyber policies. It would be desirable for policies on space security and cyber security to be designed in the United Nations given the high dependency of latest generation technologies -such as robots- on both space and cyber areas. In this framework, as **Professor Mahulena Hofmann** (German Branch) is suggesting, the word and experience of the ITU would be of important assistance.

Another threat to environmental security continues to be the loophole left by the 1967 Outer Space Treaty in Article IV which -to follow Bin Cheng´s wording- does not go beyond a limited denuclearisation of outer space and a non-militarisation of celestial bodies (see 'Le Traité de 1967 sur l'Espace', 598-9, Journal de Droit International N°3, 1968, Paris). The drafting of Article IV, by leaving a number of questions open to interpretation,

[14] See David Livingstone, 'The United Kingdom's Cyber and Space Security Policies', Challenges at the Intersection of Cyber Security and Space Security. Country and International Institution Perspectives, Chatham House (The Royal Institute of International Affairs), 2014, 35-37.

[15] Ibid, 16-18.

[16] Chatham House Research Paper, by Caroline Baylon, entitled 'Challenges at the Intersection of Cyber Security and Space Security. Country and International Institution Perspectives' published in December 2014.

[17] Ibid. Summary, 2-3. See also a Research Paper Chapter on the UN Structure, B. Baseley-Walker, 46-48.

has been a matter of concern over the years and is certainly inconsistent with the contemporary settings.

One of the recent meetings on these matters, interesting for its implications and similarities with recent space law issues and technologies, was a Cyberspace Conference organised by the University of Sheffield on 18 September 2015 to discuss 'Non-State Actors and Responsibility in International law'. Under this heading state responsibility, individual criminal responsibility and question of evidence were included[18]. The objective was to assess the effectiveness of international law in ensuring responsibility for the injurious cyber activities of non-state actors and it addressed critical international legal questions, such as the following.

- Can states be held responsible for injurious acts committed by non-state actors in or through cyberspace?
- Can individuals be held criminally responsible for malicious cyber operations and how is jurisdiction established in cyberspace?
- What challenges do international courts face when conducting cyber investigations and how do international courts assess the probity of cyber evidence?[19]

To go deeper into doctrinal positions on these matters would be going beyond the scope of this Second Report of the Committee and the introductory document that preceded it. Nevertheless, now seems to be the time to embark in discussions and responses on these topics within the ILA Space Law Committee. They certainly consist of new developments on which we are meant to be on alert.

Views from Committee members

Steven Freeland fully supports the development of a comprehensive and detailed research programme to investigate the plethora issues that arise when considering the impact of cyber security questions on the space domain. There is clearly an interaction and such a study clearly falls within the mandate of the Committee.

Lora Viikari points out that, regarding the issues underlying space security/cyber security, it is striking that both domains apply dual-use capabilities. This obviously makes it very difficult -if not totally impossible- for many states to accept binding international legal instruments. They may not even be desirable as -to be realistic- verification and compliance problems would weaken the effectiveness of such instruments. Instead, it would be wise to concentrate on confidence-building measures in general and a gradual development of non-binding codes of conduct or similar. Some kind of non-mandatory -albeit attractive- set or common rules seems, on the other hand, crucial in the long run as mere national approaches are highly inadequate to address this complex set of questions. **Viikari** adds that it is obvious that cyber security is critical to space security and vice versa and that in this field it would be useful to begin drafting key terminology to provide solid grounds for further discussion.

[18] Among others, this Conference continued discussing specific questions raised in the 'Research Handbook on International Law and Cyberspace', Ed. Tsagourias & Buchan, EDWARD ELGAR 2015.

[19] http://www.sheffield.ac.uk/law/research/conferences/cyberspace

Alexander Schaer agrees that topics as space security and cyber security should enter the list of issues for discussion by our Committee as soon as possible. In his opinion, nobody can deny today the latent threat of cyber-attacks -especially those with a terrorist or political background. He also completely agrees that 'space technology' is a most attractive target which could be caused immense harm with a simple laptop (for example, the shutdown of a communication network or the 'hijacking' and crash of a rocket). He particularly wishes to draw attention to the situation we are facing today with an ever-increasing number of private actors working in the space industry. Theoretically, at least, they appear more vulnerable to cyber-attacks than governmental actors. Nevertheless, they are becoming increasingly important in the space industry, carrying out more public functions and building up enormous data storage. Is there a public need for establishing international guidelines with minimum requirements regarding cyber security for contractors? Does the current legal framework equally cover problems arising from cyber-attacks or is there a need for adjustments? **Schaer** concludes by stressing the fact that various questions, both important and urgent, are growing in geometrical proportions on the international scenes and, for these reasons, security in space and cyber security should continue under discussion by the ILA Space Law Committee with a view to including these matters in its future mandate.

Dr Tare Brisibe (HQs) pointed out that in the framework of security in space and cyber security, whilst efforts at establishing technical means are on-going, including the International Telecommunications Union's initiative towards developing an international registry of interference to space services, it is of importance -amongst others- to address laws applicable to international telecommunications by cyber means relying on space-based and associated ground infrastructure, including private sector participation in operating infrastructure and delivering related telecommunications services. Cyberspace law, referred to the application of norms derived from existing international law relevant to the use of Information and Communication Technologies (ICT's) by States, is essential in reducing risks to international peace, security and stability. **Brisibe** recommended further study to promote common understanding on how far such norms apply to State behaviour and the use of ICTs by States, whose unique attributes may require the development of additional rules over time.

Y S Rajan considers cyber security crucial for space security since many of the space assets on space or on ground for tracking or receiving are heavily dependent on 'information transfer'. They are vulnerable to cyber attacks, especially by so-called non-state actors. Disruption and disability can be caused by elements other than guns and bombs, such as signals or radiation. Can the State where this originates be held responsible? Moreover, since the Internet can also be used to hide the sources of origin, the issues turn complex. If the States do not reach some agreement, space assets can be endangered. This raises questions of sovereignty, human rights, freedom of information and protection of privacy. **Rajan** finds no solutions in sight in this field. However, he observes that the threat should not be considered science-fiction as it could soon become a reality. He shows concern for the wording of the Outer Space Treaty in Article IV as it now stands and clarifies that it would have to go further than only banning 'weapons of mass destruction (WMD) in orbit around the Earth. With thousands of small satellites around, it would be quite easy for a State or non-State actor to place in outer space a few small satellites emitting radio signals, not just aiming at one or two satellites but disrupting, at random,

a whole series of civil and military operational space based systems. Such a situation may be even worse than the case of WMD placed in orbit around the Earth. This expert concludes that the 1967 Treaty needs some addition, such as a ban on anything likely to cause massive disruption on the space-based and/or Earth-based operations.

5.2 Additional Information on new developments

Some Committee members, having in mind the announcement of a discussion on space mining at the Space Law working session of the Johannesburg Conference next August, have sent further comments and information for which we are very grateful.

Tanja Masson-Zwaan would like to inform this Committee on the work of the recently created (October 2015) 'Hague Space Resource governance Working Group'. A symposium was held in Leiden last April and a report thereon has been published. Please see:
https://www.universiteitleiden.nl/en/news/2016/05/the-hague-space-resources-governance-working-group
http://law.leiden.edu/organisation/publiclaw/iiasl/working-group/the-hague-space-resources-governance-working-group.html

Marco Pedrazzi, in his comments to this Second Report of the ILA Space Law Committee notes that, on the recently enacted provisions on space mining in the US Commercial Space Law Competitiveness Act, he shares the view that its legal provisions may be seen as compatible with the 1967 OST. At the same time he holds the opinion that they are in contrast with the Moon Agreement and adds that, of course, the Moon Agreement is not applicable to the US as it has not been ratified by this State. It should be had in mind that the Moon Agreement is not binding on any major space power and is only in force among a limited number of States. However, the mere fact of the coexistence of two incompatible legal regimes is, in his view, highly problematic and it would be desirable that all interested States negotiate a solution to this issue.

Alexander Schaer pays special attention to this topic. Having gone through the U.S. Commercial Space Launch Competitiveness Act and related news articles he is interested in following this question closely.

6. Closing remarks

Johannesburg Working Session

The working session in Johannesburg will continue addressing the above-listed questions with a view to updating and reaching further conclusions and proposals. In addition, a discussion is envisaged on space mining in light of recent major developments in the legal field. In this context the 2015 US Act on Commercial Space Launch Competitiveness and the IISL Board Statement of 20 December 2015 stand out as possible interpretations of the applicable law, highlighting the freedom of space mining. This does not imply discarding any other interpretations brought about at the Johannesburg working session or elsewhere, or initiatives for drafting a -possibly- non-binding instrument (code of conduct, or guidelines, for instance), an option which seems to be gradually gaining ground.

Hence the reason for listing space mining within the working session of the ILA Space Law Committee next August. In spite of the topic not being part of our terms reference, a discussion is consistent with the last paragraph of our mandate for 2012-2016 requesting us to keep on alert over further developments in the field.

PART TWO

SECOND REPORT ON SUBORBITAL FLIGHTS

by Professor Stephan Hobe
Committee Rapporteur[20]

Introduction

This second report elaborates on the points laid down in the first report of 2014 of the Working group on suborbital flight by the Space Law Committee Rapporteur Professor Stephan Hobe to which full reference is made hereby and provides an update in as much as further developments in the field of suborbital activities can be reported with regard to definitional issues, the role of existing technological concepts and projects for determining applicable rules, state practice, liability aspects and the avenues for the possible evolution of commercial suborbital touristic flights to a transportation market.

1. Definition

No legally binding definition of suborbital flights has been accepted yet by the international community. ICAO elaborated that 'A sub-orbital flight is a flight up to a very high altitude which does not involve sending the vehicle into orbit'.[21] However, this definition has been used only as a reference, but has not been accepted in any legally binding document or in international and national legislation. Other propositions include any flight outside the Earth atmosphere with a maximum flight speed below the orbital velocity[22]; a trip to space that does not involve sending the vehicle into orbit"[23]; and "[flights] which involve the launch of an object or objects into outer space without that object or such objects completing one or more orbits around the earth.[24] Although it is difficult to draw a definition from these proposals, one can take as a reference and main characteristic of suborbital flights the fact that they do not reach orbit and thereby only partly take place in outer space. It remains to be seen whether a definition will be required for the establishment of legal rules on suborbital flights.

I. Current concepts for Suborbital Reusable Launch Vehicles (SRLVs)[25]

There are different concepts and technical solutions for sending a vehicle into a parabolic flight which, in the apogee, shall be for a few minutes in free fall and thereby not influenced by Earth's gravity. In order to establish which law should be applicable to suborbital flights a short overview on existing suborbital projects and their main parameters

[20] Special thanks are owed to Rada Popova for her support in the preparation of this report. Furthermore Tanja Masson-Zwaan is thanked for her valuable input.

[21] Concept of Suborbital Flights: Information from the International Civil Aviation Organization (ICAO), paper A/AC.105/C.2/2010/CRP.9, presented at the 49th session of the Legal Subcommittee of UNCOPUOS, 19 March 2010.

[22] Definition used by the company Orbspace, http://www.orbspace.com/Background-Information/Suborbital-vs-Orbital.html.

[23] „What is a Suborbital Flight?", http://www.spacetoday.org/Astronauts/Animals/SubOrbitalFlights.html.

[24] Van Fenema, P., Suborbital flights and ICAO, Air and Space Law 30(6), 2005, pp. 396-411.

[25] „The U.S. Commercial Suborbital Industry", U.S. Department of Transportation, FAA, 2011, p. 2, https://www.faa.gov/about/office_org/headquarters_offices/ast/media/111460.pdf.

is necessary so as to try to determine in which environment they are taking place. As to the existing concepts, vehicles can either be launched vertically from a launch pad (a spaceport) or horizontally, e.g. by using a carrier craft (a spaceplane) to bring it into higher altitude. Vertical takeoff/vertical landing (VTVL) suborbital vehicles use booster rockets and unlike aircraft which take off and land vertically, they do not use the air for launch support. Secondly, there are concepts for horizontal take off/horizontal landing (HTHL) suborbital vehicles which build upon the mode of operation of vertical take off/horizontal landing (VTHL) space planes such as the NASA Space Shuttle and the Soviet Buran space shuttle. HTHL suborbital craft also use rocket power but are first towed to the end of a runway before the vehicle is thrust by rocket engines to reach higher altitude. After reaching the apogee of its parabolic flight, the vehicle then performs an unpowered horizontal landing on the runway and thereby lands similarly to an aircraft.

II. Overview of existing projects

With regard to the different technological concepts for suborbital flights, in the following a short overview on the currently most relevant projects for suborbital flights shall be made. Virgin Galactic[26] was founded in 2004 and is developing a composite HTHL concept with a carrier craft from which the suborbital vehicle is released. The WhiteKnightTwo/SpaceShipTwo vehicles were planned to start operating private space tourism flights in 2009. However, an unfortunate test flight in 2014 which resulted in a crash, vehicle loss and the death of one of the pilots postponed the planned passenger flights. XCOR[27], a U.S. company which was founded in 1999, undertook first test flights in 2001 and is currently negotiating with the Netherlands to build a spaceport in Curaçao. Its VTVL Lynx reusable suborbital vehicle is planned to provide both touristic and payload delivery flights. Suborbital vehicles are further developed by Blue Origin[28] which was founded in 2000 by Jeff Bezos and flew the first test flights of its VTVL New Shepard vehicle in 2015. They succeeded to land the vehicle twice vertically and prove reusability. After first test flights, New Shepard became the first suborbital vehicle to land successfully vertically in 2015 and 2016. Masten Space[29], a U.S. company founded in 2004, developed the Xaero reusable vehicle which is not planned to carry humans. So far, flight test had taken place between 2006 and 2012. The space launch and flight test service provided UP Aerospace[30] founded in 2004 also has not announced plans to carry humans on suborbital flights. It developed the SpaceLoft vehicle and small sounding rockets for altitudes up to 160 km which can spend up to 6,5 minutes in microgravity. Apart from the SpaceLoft vehicle, all planned suborbital flights take place or are planned to take place in altitudes of about 100 km while the vehicle will be in free fall for around 4 minutes and the passengers and crew can experience the feel of zero gravity.[31]

---

[26] http://www.virgingalactic.com/human-spaceflight/.
[27] http://aerospace.xcor.com/.
[28] https://www.blueorigin.com/technology.
[29] http://masten.aero/services/.
[30] http://www.upaerospace.com/.
[31] For further overview on existing suborbital concepts, see „The U.S. Commercial Suborbital Industry“, U.S. Department of Transportation, FAA, 2011, available online at https://www.faa.gov/about/office_org/headquarters_offices/ast/media/111460.pdf.

It can thus be observed that the majority of suborbital projects are based on the HTHL concept. However, two of the companies offering suborbital services with highest landing success rates, SpaceX and Blue Origin, apply the HTHL concept for their launch vehicles. From a legal perspective, the characteristics of these two approaches might be relevant for determining the legal rules to govern suborbital flights as will be shown below.

III. Applicable law

From the concrete functioning of the suborbital flights follows that it is crucial to determine whether air or space law, or both should be applicable.

A. On the international level

No legal definition of a boundary or demarcation between air space and outer space has been yet adopted. The lack of a universal definition and the fact that flights will reach 100 km but will not reach speed high enough to complete an orbital rotation around the Earth leaves the question open whether reaching the van Karman line, seen by many as the border between airspace and outer space[32], but not legally defined as such, shall be a determining argument for the legal nature of suborbital flights. Moreover, as shown above, most of the existing concepts include plans to reach an altitude of not substantially more than 100 km. This does not provide an unambiguous answer for defining suborbital flights either as an air or as an outer space activity according to the environment it is taking place in. Thus, other factors must be assessed in order to look for further arguments supporting the application of air law, the law of outer space or other legal framework on suborbital flights.

Taking into consideration the different technological specificities for HTHL and VTVL suborbital launches, air law seems to be possibly applicable especially for HTHL suborbital craft. Looking at the example of Virgin Galactic's composite vehicle, it can be seen that all flight phases from the launch to the runway landing take place predominantly in air space and up to a maximum altitude of 100 km. The air-launched carrier craft flies only in air space before it releases the spaceplane SpaceShipTwo which then reaches the upper atmosphere under rocket power, glides back to Earth and finally lands on a runway as a plane.

At the same time, there are also a number of arguments which support the applicability of the law of outer space to suborbital flights. Firstly, as can be seen both for HTHL and VTVL launches, the technology applied for construction and propulsion is *per se* rocket technology used also for orbital launches. In addition, outer space is involved at least partly during the freefall stage of the parabolic flight. Furthermore, all objects intended for use in space or intended to reach space are to be considered 'space objects' and therefore space law shall apply to their operation from the launch phase to the completion of the flight[33]. This would mean that suborbital vehicles, because they aim to bring humans or payload to the lowest layers of outer space, shall be subject to space law.

---

[32] On the delimitation question and the van Karman line, see F. Llyall/P. Larsen, Space Law: A Treatise, (2009), p. 168; in 2015, at the World Radio communications Conference, the International Telecommunications Union (ITU) adopted its Resolution 763 (WRC-15) considering the boundary between air space and outer space to be 100 km.

[33] On the legal nature of space objects see, for example, Kerrest/Smith, Article VII OST in: S. Hobe/B. Schmidt-Tedd/K.-U. Schrogl (Eds.), Cologne Commentary on Space Law Vol. I (2009), mn. 51, 54.

Apart from looking for applicable existing rules, a third possibility for regulating suborbital flights may be the development of a *sui generis* legal order. This concept has already been on the agenda in discussions and literature and includes propositions to involve the International Civil Aviation Organization (ICAO)[34] in the legal governance of suborbital activities. ICAO has proven to be very successful in its legislative competence to the development of air law and is established to monitor all uses of air space – including also the access to outer space through air space. Also other international organizations and have been involved in the development of guidelines for suborbital flights in the recent years. In 2015, the International Telecommunications Union (ITU) recognized the necessity for identifying measures to avoid harmful interference through radiocommunication onboard suborbital vehicles.[35] Also in 2015 ICAO and UNOOSA organized a joint symposium on Aerospace travel in which safety management with regard both to civil aviation and to suborbital flights and developments in space transportation was one of the main agenda tasks.[36] This showed, firstly, that the Organization at least recognizes its competence for activities which encompass air travel but reach out of its traditional scope and secondly, that a common understanding for air and space activities and their cross section can be established on the international level. In 2016 there was a follow-up to the 2015 AEROSpace symposium as ICAO and UNOOSA organized a second joint Symposium relating again to suborbital activities on the topic of emerging space activities and civil aviation.[37] These initial cooperation steps might become the basis for coordinating the efforts on the regulation of suborbital flights and lead to some development of legislation. For defining the elements of a possible future international agreement, it might be helpful to look also at the existing state practice.

B. National legislation

On the national level, a few examples show how the application of air or space law is tackled in relation to suborbital projects. Apart from Australia, which is the only state which so far has legally defined the 100 km boundary between airspace and outer space in its Space Activities Amendment Act of 2002, also the 2005 Belgian Law on the Activities of Launching, Flight Operation or Guidance of Space Objects includes a statement regarding the applicability of air and space law to suborbital flights as it explicitly takes them from the applicability of space law. The 1981 German Luftverkehrsgesetz (Air Traffic Act) provides in its §1 that spacecraft, rockets and similar vehicles are considered aircraft as long as they are in air space. The South African Space Affairs Act of 1993 provides that "suborbital trajectory" means the trajectory of any object which leaves the surface of the earth due to a launch, but returns to the surface of the earth without completing an orbit around the earth. The United Kingdom set up a taskforce in the Civil Aviation Authority and reviewed commercial spaceplane certification and operations in 2014[38] and Spain drafted a bill on Outer Space Activities, in which private manned suborbital flights

[34] See: R. **Jakhu**/T. **Sgobba**/P. **Dempsey**, (Eds.), The Need for an Integrated Regulatory Regime for Aviation and Space: ICAO for Space (2011).

[35] ITU Resolution 763 (WRC-155) on Stations onboard sub-orbital vehicles, available online at http://www.itu.int/dms_pub/itu-r/oth/0c/0a/R0C0A00000C0022PDFE.pdf.

[36] http://www.icao.int/meetings/space2015/Pages/default.aspx.

[37] http://www.icao.int/meetings/space2016/Pages/default.aspx.

[38] See the UK Government Review on commercial spaceplane certification and operations, available online at https://publicapps.caa.co.uk/docs/33/CAP1189_UK_Government_Review_of_commercial_spaceplane_certification_and_operations_technical_report.pdf.

are regulated. Currently, the USA remains the only state which has enacted a specific national law on the regulation of suborbital flights by amending its 1984 Commercial Space Launch Act.[39] Thereby, the Office of Commercial Space Transportation of the Federal Aviation Administration (FAA) regulates and issues licenses and permits for commercial launches of orbital and suborbital vehicles.

For the purposes of this paper and with the aim of further clarifying the regulatory domestic situation relating suborbital flights, representatives of several countries have been approached and replies have been received from Australia, France, India and Japan to a questionnaire including the following questions[40]:

1. *Are you aware of any suborbital projects in your country?*
2. *What is the current state of the law with regard to suborbital activities in your country?*
3. *Is there respective national legislation? In case there is no existing national legislation: Are you aware of any coming legislation or pertinent discussion on suborbital flights from a legal angle?*

Add. 1. As to the first question concerning suborbital projects in the respective country one negative answer was received from *Australia* whereas the other three countries were reporting on respective action. In *France*, there is the development of a spaceplane of Airbus Defense and a project involving a composite vehicle with a carrier aircraft and an aircraft separated in flight by Vehra of Dassault Aviation.

In *Japan*, besides the development of some sounding rockets by JAXA (the Japan aerospace exploration agency) three types of suborbital rockets have been deployed: The S-310 cruising at an altitude of 150 km, the S-520 at an altitude for 300 km and the SS-520 at about 800 km. S-310 has been launched 45 times from Japan and 10 times from abroad. JAXA, however, does not have a suborbital flight program for touristic purposes.

India does not have a specific suborbital project but the first experimental suborbital flight was conducted on December 18, 2014 in the framework of the Indian Human Space Programme. It went form the Satish Dhawan Space Center in Shrharikota on late 2014. Previously in the years 2004, 2006, 2008 first attempts had been made and at least some documentation has been forwarded.

Add. 2. In *Australia,* the current state of the law with regard to suborbital activities is entailed in the Space Activities Act of 1998 which contains a licensing (authorization) procedure for operating a launch facility in Australia, launching from Australia and overseas. In *France*, space activities are regulated under the Law on Space Operations of 2008 which foresees that each flight will be subject to authorization. The authorization is issued by the Ministry of Research in consultation with the CNES (French Space Agency). In *India*, there is no national space legislation and therefore no specific regulation on suborbital activities. *Japan* has only general national legislation besides which the Explosives Control Act of 1950 and High Pressure Gas Safety Act of 1951 refer wholly

[39] H.R.5382 – Commercial Space Launch Amendments Act of 2004, full text available at https://www.congress.gov/108/plaws/publ492/PLAW-108publ492.pdf.

[40] Many thanks are owed to Steven Freeland, Australia, Philippe Achilléas and Armel Kerrest, France, Kumar Abhijeet, India and Setsuko Aoki, Japan, for filling out the questionnaire.

or partly to the matter as well as some detailed governmental safety rules for the scientific experiments on suborbital flights conducted exclusively by JAXA.

Add. 3. Finally, with regard to legislative projects of the future no immediate need is seen from the *Australian* perspective. In *France*, in 2015, a study group was set on the law to applicable suborbital flights. This Taskforce brought together representatives of the space community and of the aviation community, as well as academics who came to the conclusion that if France adopts a regulatory framework, air law should apply in the first step, especially the rules on experimental gear and that, secondly, a *sui generis* framework could be set up. *India* is currently in the process of drafting its national space legislation on regulating entry of private players in the space. However, in this respect it seems that suborbital flights are not entailed in the draft law. *Japan* hints to its national efforts to enact a National Space Activity Act in early 2015 which was successfully submitted to the Diet on 4 March 2016. In the discussion on the documentation of such rules it was decided not to include any suborbital flights in the future in any kind of space legislation because of human space program not being provided for and no real need to regulate suborbital flight.

State practice shows that especially in Europe, air law is seen as more relevant to suborbital flights than space law. Currently, the majority of the relevant national laws, without specifically regulating suborbital flights, consider them to be subject to the application of air law.[41] In its position paper on privately-funded suborbital spaceflight of 2008[42], ESA expressed the view that human suborbital flight is to be considered high-altitude aeronautics. In 2008, the European Aviation Safety Agency (EASA) issued a position paper stating that civil suborbital operations shall fall under the competences and certification mandate of the Agency. Generally, suborbital activities are very rarely addressed specifically in national legislation which indicates that states have an interest mainly in the scientific and experimental value of such launches. This underlines the observation that the genesis and further development of suborbital launches and the application of suborbital activities are of private nature and will remain a priority for commercial markets and much less for state stakeholders. Thereby, a legal framework for such activities will necessarily need to be addressed both on the national as well as on the international level.

IV. A liability regime for suborbital flights

As no comprehensive legal regime has been elaborated yet and it is still an open question which law shall be applicable to suborbital flights, it is unclear whether the rules on contractual and third-party liability of air law or the liability rules of the law of outer space should be applicable to passengers of a suborbital flight.

Both air law and space law provide for liability. In aviation, contractual liability for passengers and cargo is established by the Montreal Convention and is regulated also by EU law. Third party liability is governed mainly by national law. In space law, the 1972 Liability Convention addresses damages caused by space objects in outer space, in airspace or on Earth. In order for the Liability Convention to be applicable for damages

[41] For an overview of domestic legislative incentives, see R. Moro-Aguilar, National Regulation of Private Suborbital Flight: A Fresh View, FIU Law Review, Vol. 10 (No. 2), 2015.

[42] Full text available at http://esamultimedia.esa.int/docs/gsp/Suborbital_Spaceflight_ESA_Position_Paper_14April08.pdf.

caused by suborbital flights, the suborbital vehicle must be considered a space object. However, even if it could be applicable, this treaty does not include specific rules for the persons onboard a spacecraft and suborbital passengers would thus be left out of its scope.

Thus, currently, no direct adoption of the existing rules of air and space law to suborbital flights can provide a comprehensive liability regime for suborbital flights. It is to be expected that, as the example of the U.S. shows, specific rules for suborbital flights will evolve from national incentives.

Having in mind the scope of investments and the high risks related to aerospace activities, liability and insurance issues will demand detailed solutions in the course of further development of suborbital markets, be it for human or for cargo transportation. Currently, the less complex licensing approach is preferred to certification models because of concerns that the emerging and still fragile commercial suborbital market might be restrained by the costly and lengthy certification procedures.[43] One possible solution to regulate and even minimize liability of the flight operator in the form of contractual liability is provided for in the 2004 U.S. Commercial Space Launch Amendments Act according to which passengers of suborbital flights need to declare an 'informed consent', a statement of the participant that he/she understands the risk and is voluntarily aboard the licensed launch vehicle.

Some authors[44] consider it vitally important for the emerging suborbital activities to tailor both a liability regime and insurance options for flight operators which entail a realistic assessment of risks related to the technology used for suborbital launches.

Looking at the different aspects of liability, it can be concluded with caution that the existing legal avenues do not seem to provide a comprehensive proposal addressing the liability aspects of commercial suborbital activities. Any further proposal must therefore at least partly deal with the creation of a (*sui generis*) contractual liability regime for suborbital flights. Such *sui generis* contractual liability regime could arguably profit from the experiences of the early times or aviation which tried to protect the airline industry through a fault-based limited liability. Alternatively, one could even discuss a policy of informed consent.

V. Perspectives for suborbital industry markets

The application and demand of suborbital reusable vehicles might create a new spaceflight industry as the demand for suborbital services is expected to grow in the next few years.[45] Suborbital flights can carry passengers into (Low-Earth) space – either for human spaceflight experience or for training purposes. Furthermore, suborbital flights

[43] A state practice is indicated again by the USA in the 2004 Space Launch Activities Amendments Act. For further reference, see for example G. Nield/J. Sloan/M. Touré, Certification versus licensing for human spaceflight in commercial space transportation, paper presented at the 2012 International Astronautical Congress in Naples, Italy.

[44] For example, T. Masson-Zwaan in her paper "Liability and Insurance for Suborbital Flights", presented at the 5th IAASS Conference in Versailles, France in 2011.

[45] Study on Suborbital Reusable Vehicles: A 10-year Forecast of Market Demand, Tauri Group (2012); see also D. Webber, Point-to-point sub-orbital space tourism: Some initial considerations, Acta Astronautica 66 (2010), pp. 1645-1651.

can be used for technology test purposes, for scientific and educational purposes, and will become more relevant as small payloads deployment vehicles into (lower) orbits with respect to upcoming New Space activities involving mass-scale/low-weight launches of mega constellations or large numbers of small satellites providing large-scale internet, broadband and Earth observation services.

Moreover, also other types of suborbital transportation can become relevant, such as point-to-point transportation of cargo and passengers between different locations on Earth by flying a parabolic flight which does not complete a full rotation around the Earth. For such purposes, transboundary suborbital flights will cross more than one national airspace which could pose challenges to the national sovereignty of the states overflown and to the (in) applicability of certain freedoms of the air as provided by the Chicago Convention of 1944. The demand for point-to-point transportation may evolve both for passenger transportation, e.g. for urgent business travel, as well as for fast cargo delivery.

However, these new applications of suborbital travel depend, on the one hand, on technological solutions which are needed to minimize risks of failure. On the other hand, it is questionable whether the advantages of fast suborbital transportation will outnumber the difficulties resulting from the distances to spaceports, such as the timely and costly delivery of cargo and/or passengers to or from a spaceport and the financial burden related thereto as spaceports do not and probably will not build up a thick network comparable to airports. It will be a challenge also for air traffic control on both a national and international level to overlook, coordinate and create standards for spaceports and the suborbital logistic infrastructure and to create an air safety mechanism involving suborbital flights.

Conclusion

The update of the 2014 Report of the ILA working group on suborbital flight provides for the conclusion that in comparison to the results of this first report there has not been much development in terms of imposing legally binding rules on suborbital operators. The main aspects analyzed in the first report (applicability of air law or space law, status of the suborbital vehicle and registration, authorization, legal status of space tourists) are still pending legal issues to be decided. Furthermore, the relevant considerations remain the same. However, with the advancement in technological developments and the growing number of successful test flights, it is to be expected that suborbital activities will evolve into a working market and that space tourism as the initially most highly marketed aspect of suborbital activities will be complemented and possibly even outdone by point-to-point transportation services. This will then require an adequate and detailed legal approach including liability questions and legal issues related to spaceport infrastructure.

Therefore, it is recommended that the open legal issues related to suborbital flight are elaborated further by the Committee, with the aim of drafting Guidelines for a Model Law on suborbital activities. Such Guidelines could build up on the aspects already identified and also include aspects of suborbital transportation which might become one of the main applications of suborbital activities and will thus pose the need to address complex problems such as air and space traffic management aspects, infrastructural legal problems of spaceports, coordination of air traffic and suborbital traffic and air safety.

COMMITTEE ON SPACE LAW

WORKING SESSION

Monday, 8 August 2016, 2:00 pm

Chair: Bruce Mauleverer QC (UK)

The Chair opened the meeting, welcomed the participants and made brief reference to the working procedures for the session. He paid tribute to Professor Mateesco Matte, a widely-known scholar and president of the Canadian Branch, with whom he had the pleasure of working during the 1982 ILA Conference in Montreal. The Chair then gave the floor to the Committee Chair, Professor Maureen Williams (HQ).

Professor Williams asked for a moment of silence in tribute to three Committee members, space law pioneers, who had passed away recently, namely Professors Božidar Bakotić (Croatia), Nicolas Mateesco Matte (Canada) and Gennady Zhukov (Russia). She then thanked the Committee members for their contributions, Professor Stephan Hobe (Germany) for his excellent work as Committee Rapporteur and Mr Bruce Mauleverer QC for accepting to chair the current working session.

Professor Williams referred initially to the Committee's terms of reference. The central topics included dispute settlement, legal aspects of suborbital flights, satellite data in international litigation (new applications) and recent developments on space debris. She reminded attendees that the terms of reference added, *in fine*, a recommendation to "keep a general brief over further developments during the term of the mandate". In this context two items were discussed, namely (a) space security and cyber security, and (b) asteroid mining in light of the US recent Commercial Space Launch Competitiveness Act of 25 November 2015 and a Statement from the Board of Directors of the International Institute of Space Law (IISL) on 20 December 2015, in clear response to the US law.

On dispute settlement, the idea was to explore the effectiveness of the 2011 Optional Rules for Arbitration of Disputes relating to Outer Space Activities, drafted by a group of experts in 2010-1, on which the Committee officers and some of the Committee members had been invited to collaborate. The general view of the Committee was that the Rules should not be modified and should remain in their present reading so far. The Committee members continued to create awareness of the existence of these Rules, highlighting their procedural nature and the wide space they left to respect the autonomy of the parties when applying them. It should also be noted that these Rules covered a gap in the Outer Space Treaties when enabling non-governmental entities to use their mechanism which was not the case in the previous UN treaties. The way a "compromise" system could work within the context of the Rules was currently a matter of discussion by the Committee. This central topic would continue under examination during the next biennium.

Regarding new developments in the use of satellite data which, as with the previous topic, remained under permanent review by the Committee, questions surrounding the protection of privacy continued on the agenda given the general, growing concern about the far-reaching possibilities of the latest space technologies. Relevant case law from the European Court of Human Rights was examined on these matters and from national courts of European countries, including the UK and Italy. In this quest, Professor Williams had joined the ILA Committee on International Law and Sea Level Rise and the

Rapporteur took part in the Committee on Non State Actors to add an interdisciplinary approach to the new developments in the use of satellite data.

As to space debris, also under permanent review by the Committee since the adoption of the *ILA Instrument on the Protection of the Environment from Damage caused by Space Debris* (1994), the scientists – mainly members of the Scientific and Technical Subcommittee of the Committee on the Peaceful Uses of Outer Space (COPUOS) – were consulted to determine its consistency with the current international landscapes. Their reports were most favourable. The Committee noted that, with increasing frequency, reference was made in this field not only to the need for mitigation but also a need for removal. Studies became involved in this new possibility to be carried out in the framework of international law. A slight but important step forward was the involvement of the UN Office for Outer Space Affairs (OOSA) in the compilation of a compendium for access to updated information on space debris. To this end, the OOSA Secretariat maintained a page on its website. Professor Williams recommended space debris to continue under review by the Committee considering the new possibilities stemming from the above-mentioned compendium.

Finally, in the field of new technologies, Professor Williams addressed the issue of space security and cyber security, in line with the terms of reference of the Committee to keep a watching brief on new developments, in this case a new global security threat (GST). Communication networks were an attractive target for a terrorist attack using cyber technology and so were earth observation satellites. The world of today was unsafe and satellite services were key targets. The prevailing opinion was that the United Nations was the natural forum for the development of global policies on space security and cyber security given the close dependency of latest generation technologies, such as robots, on both space and cyber areas. Professor Williams referred to the continuing work that was being carried out by the Royal Institute of International Affairs (Chatham House London) in recent years, where she participated, and the Committee agreed that they should continue focusing on this global threat.

The Chair thanked Professor Williams for her presentation covering the issues contained in Part I of the Committee's report and then gave the floor to Professor Hobe for his presentation of Part II of the report addressing the legal aspects of suborbital flights.

Professor Stephan Hobe (Germany) said that his presentation was actually an update on the report submitted to the 2014 Washington conference. It addressed the definition of suborbital flight, the current concepts for SRLVs (Suborbital Reusable Launch Vehicles), existing projects, applicable law, the liability regime, and the perspectives for suborbital industry markets.

No legally binding definition of suborbital flights had yet been accepted. The definition suggested by the International Civil Aviation Organisation (ICAO) – a flight up to a very high altitude not sending the vehicle into orbit – had not been accepted in any legally binding document, national or international. Their main characteristics were (a) that they were parabolic flights and (b) they had no full orbital rotation. They involved vertical takeoff, vertical landing (VTVL) and horizontal take-off, horizontal landing (HTHL). The most relevant current projects were Virgin Galactic, XCOR, Blue Origin, Masten Space and UP Aerospace. Virgin Galactic and XCOR, VTVL based, were among the most successful flights of the kind.

There were, so far, neither international agreements on suborbital flights nor a legally binding demarcation line between airspace and outer space, the latter having been over the years on the agenda of COPUOS without results. Initiatives by ICAO, the International Telecommunication Union (ITU) and UNOOSA reflected an understanding of the interaction between the uses of airspace and outer space.

On the national level, some legal rules had been adopted. Australia had set 100km as the boundary between airspace and outer space and the USA had specific regulation, issuing permits via the Federal Aviation Authority. Belgium had excluded suborbital flights from the space law scope; the United Kingdom had established a task force under its Civil Aviation Authority and for Germany all craft within airspace were aircraft.

As to State practice, replies to a questionnaire circulated by the Committee for further clarification were received from Australia, France, India and Japan. France and Japan were involved in suborbital projects. Australia, France and Japan had legislation on the matter. Australia saw no immediate need for specific legislation. France considered air law should apply first, later a *sui generis* framework could be set up. India was in the process of drafting its national space legislation, which did not seem to include suborbital flights. Japan was enacting a National Space Activity Act, and would not be including suborbital flights in future legislation as it saw no need for their regulation at this stage.

State practice showed, so far, that most national relevant laws – without specifically regulating suborbital flights – considered them within the air law regime. National legislation rarely addressed these flights. In 2008, the European Space Agency (ESA) had stated that human suborbital flights should be considered as high altitude aeronautics and the European Aviation Safety Agency (EASA) placed civil suborbital operations under the competences and certification of the Agency.

The air and space law liability rules were not directly applicable to suborbital flight. Rules would probably evolve from national initiatives and detailed solutions were required due to the investment scope and high risk of aerospace activities. Proposals would have to deal with the creation of a (*sui generis*) contractual liability regime (fault-based limited liability) for suborbital flights, which could profit from the early time experience in the aviation field.

Professor Hobe said that a new spaceflight industry might develop as an increase in the demand for suborbital services was expected. Transboundary suborbital flights would pose challenges to national sovereignty and the applicability of certain freedoms of the air as established by the 1944 *Chicago Convention on International Civil Aviation* and other complementary agreements. Technological solutions were needed as well to minimise risk failure. Air traffic control would have to deal, on both the national and international level, with the creation, coordination and monitoring of spaceport standards and logistic infrastructure guaranteeing air safety mechanisms.

Since the Committee's 2014 report, there had not been much development on legally binding rules for suborbital operators. However, the technological progress and increasing successful test flights would probably turn suborbital flights into a working market and space tourism would be the most highly marketed aspect of suborbital activities. An appropriate, detailed legal approach would be necessary. The open legal issues should

be further addressed with a view to drafting guidelines for a model law on suborbital activities. These guidelines might develop specific aspects and include others relating to suborbital transportation, such as air safety, air and space traffic management, infrastructural legal problems of spaceports and air and suborbital traffic coordination.

The Chair thanked Professor Hobe for his presentation and invited comments from the floor.

Professor Mahulena Hofmann (Luxembourg) congratulated Professor Hobe on his presentation and said that she preferred referring to suborbital flights as "non-orbital flights" as their characteristic element was the possibility of reaching outer space. As to liability, non-orbital flights may, if operated frequently, pose a threat to space objects in the low orbits – as was the case with space debris – so, in case of damage, the 1972 *Convention on International Liability for Damage Caused by Space Objects* should apply. Regarding the impact of these activities on the space environment, it was important to observe the principle of avoidance of harmful interference with the space activities of other States.

Professor Irmgard Marboe (Austria) wondered whether suborbital vehicles should be registered. They did not fulfil the criteria of Art IV of the 1974 *Convention on Registration of Objects Launched into Outer Space* but did this not, by itself, exclude the application of space law? She suggested renaming suborbital flights as "non-orbital flights" as they could reach an altitude of 1000 km and this was certainly not "below" Earth orbit. She added that not having the delimitation issue solved should not become a barrier to the development of a national and international legal framework for suborbital flights.

Professor Marco Pedrazzi (Italy) referred to the wording "only partly take place in outer space". This description, which added to the lack of agreement on delimitation, had turned into a problematic situation. He was in favour of drafting guidelines and considered that they should be discussed by both space and aviation lawyers.

The Chair gave the floor to Professor Hobe for his reactions.

Professor Hobe said that for decades there had been lengthy discussions on delimitation and different theories brought up, so the process had turned into a vicious circle. He wished to concentrate on future State practice. A starting point would be national space legislation and there were examples like Australia (100km). International organisations would also provide useful guidance. As state practice showed, this was more than an aviation problem and triggered highly complicated discussions. A real need to delimitate did exist, and there would also be issues of transportation involved. As to the chance of collision, private international law might also become applicable. Professor Hobe noted the importance of registering space/suborbital objects for reasons of identification and ensuing liability issues in case of an accident.

Professor Marboe saw the model law as a very good idea, opening the door for States to consider having national legislation on the topic. In the case of non-orbital flights, drafting national laws would appear a sensible move for States, especially as the activity would be a national one. The case would be different if the suborbital transportation activity involved different geographical points and going across various airspaces.

Professor Williams considered that linking the legal aspects of suborbital flight to delimitation issues would mean going round in circles and hinder advances on the matter. At this stage, attention should be paid to the doctrine and it would be useful to analyse positions and the development of the industry, setting aside, for the moment, the need for delimitation, which was not so urgent. Moreover, there was no political will in this sense. As to definitions, she favoured a description at these early stages as definitions tend to set limits whereas descriptions are non-exhaustive. Guidelines seemed the best option and hopefully State practice would increase.

Professor Hobe said that it would be useful to focus on customary international law. For thirty years the international community had been unable to draft agreements. Security was certainly an issue but there was no statement on this from the international community. A model law would provide recommendations for legislators but should that be the procedure? Should they encourage States to come up with their own solutions? On this point he had mixed feelings.

Dr Ulf Haeussler (Germany), on delimitation, said that security concerns might still play an important role, but what exactly would that role be taking into account the emerging technological progress arising from, for example, venture capital projects in the context of "New Space"? For instance, craft deployed to just above 100 km in order to launch CubeSats into low Earth orbit would either be aircraft or spacecraft depending on delimitation, and the available options were significantly different if small craft were intended to carry out launches for military and/or intelligence purposes.

Dr George Anthony Larson (US) asked whether Art XI of the Outer Space Treaty (ie, the 1967 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* or OST) required disclosing the location of the mining activity prior to the commencement of the mining operation.

Professor Hobe said that it was possible to monitor space flights and highlighted the advantage of point to point transportation and the importance of the financial sides. Space was underdeveloped as far as space commercialisation was concerned.

The Chair suggested moving on to the conclusions and the proposal for guidelines for a model law. He asked whether the recommendation on page 17 of the report appealed to attendees.

Dr Haeussler asked whether the Committee had considered having an international convention.

Professor Williams, in response to this, referred to the different ILA conventions produced over time. The PCA had been inspired in the 1998 proposal for a convention on dispute settlement related to space activities. In 2012, at the Sofia Conference, Guidelines on a Model Law on national space legislation had been adopted. Also, at the 1994 Buenos Aires Conference, an international instrument on the protection of space debris had been adopted and the Committee had chosen to use the term "instrument" in order to leave questions on its binding or nonbinding nature to be decided at a later stage. In fact, at this moment, the trend was to use the term "guidelines" and this is how they were being circulated within COPUOS in the form of Conference Room Papers (CRPs).

The Chair asked whether there were any objections to drafting guidelines for a model law on suborbital flights.

Professor Pedrazzi noted that there was not much State practice and reiterated that a serious approach to the issue of delimitation required a debate by both air and space lawyers.

Professor Hobe stressed that a recommendation for guidelines should encourage States to enact national legislation. International air law was very clear, not so space law, especially in the area of contractual liability. States should be given guidance and an idea of the applicable theories.

Professor Marboe asked whether it was necessary for the guidelines to touch upon the question of delimitation.

Professor Hobe replied that the idea was mainly to provide some guidance.

The Chair enquired whether the Committee was in a position to draft guidelines for a model law and if consensus had been reached on the future work of the Committee on this subject.

Dr Haeussler thought it useful, when drafting guidelines, to identify the subject matter or issues which States could not address on their own and compile them.

Professor Williams recalled that at the moment there was no resolution for submission to the Conference because an extension of the Committee's mandate had been requested and agreed.

Professor Pedrazzi, suggested organising a meeting or conference bringing together both air and space lawyers. The feedback would be very useful.

The Chair announced that the Committee would go ahead with the drafting of guidelines for a model law on suborbital flights.

Professor Williams clarified that, in the present report, her comments on security were still at an exploratory stage. The Committee, anyway, would continue discussing this issue as a new development and in accordance with its terms of reference.

The Chair suggested moving on to the topic of space mining. There would be three introductory presentations by Professors Hobe, Williams and Hofmann, and then the floor would be open for discussion.

Professor Hobe said that the US Commercial Space Launch Competitiveness Act reopened a long debate on the legality of resource mining on celestial bodies. This was because it envisaged the facilitation of commercial exploration and commercial recovery of space resources by US citizens and conveyed rights on US citizens to possess, own, transport, use, and sell the asteroid resource of space resource obtained "in accordance with applicable law, including the international obligations of the United States".

Commercial space mining activities seemed to be on the agenda and there was heavy pressure from the US industry to have national space law on the matter. Could, however, the United States (or any other state) regulate these questions on its own by means of national legislation?

It was clear that appropriation by claims of sovereignty in outer space was prohibited. Article II of the OST prohibited national appropriation of outer space and celestial bodies by means of use or occupation or by any other means. However, the interpretation of the wording of Article I(2) of the OST, according to which the exploration and use of outer space and celestial bodies was to be free, made it clear that the appropriation of territory in outer space and on celestial bodies was prohibited, whereas the commercial use and, thus, mining on celestial bodies, be it of renewable on non-renewable resources, was not explicitly prohibited. According to the adjudication of the Permanent Court of International Justice in the 1927 *Lotus* case, what was not prohibited was allowed. Thus, according to the OST, mining space was allowed.

However, the situation might have changed after the adoption of the OST. According to Article 11 of the Moon Agreement (ie, the *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* or MOON), the moon and its resources were the common heritage of mankind. The precise meaning of the wording "common heritage" – also used in the *United Nations Convention on the Law of the Sea* for the deep seabed – was not entirely clear. The MOON foresaw that an explicit legal regime for lunar mining was to be set up internationally and the basic concepts of this regime were laid down in its Article 11(7). However, Article 11(3) stated that natural resources in place could not become "property of any State, international intergovernmental or non- governmental organization, national organization or non-governmental entity or of any natural person". It was disputed whether this provision was to be interpreted as a moratorium. It could, nevertheless, be clearly seen that the MOON was much more restrictive as far as lunar mining was concerned.

Thus, mining of space resources was not expressly prohibited by the OST whereas the MOON most likely set some restriction.

The MOON had been ratified by 16 States only (not the US) whereas the OST had 104 ratifications to date. Due to the low number of ratifications, it could not be stated that the economic regulation in the MOON had emerged into customary international law. The US, therefore, was not bound by the MOON and was consequently covered by the legal regime of the OST only, which clearly set no severe restrictions on the mining of celestial bodies.

With this in mind, IISL adopted by consensus, in December 2015, a position paper on space resource mining concluding that the US national law on space mining could be seen as one possible interpretation of the OST. Nevertheless, whether such interpretation would be shared by other States was still an open question. Whether national mining activities in space could be regulated unilaterally by single States through national legislation needed, therefore, to be taken into consideration.

The current legal situation was not satisfactory as many legal questions remained open. Whether the United States interpretation of Art II of the OST was followed by other States would be central to the future understanding and development of the non-appropriation principle.

Another fundamental question was the effect of this unilateral legislative measure by the US on a future legal order for the exploitation of resources of celestial bodies and of outer space. To answer this question, it must again be considered that the OST did not openly

allow any kind of lunar exploitation. As stated in the IISL position paper, the limitations in Art II of the OST were not very explicit when it came to resource exploitation. According to fundamental rules of treaty interpretation as mentioned above, these limitations were arguably not precise enough in order to effectively limit the freedom of commercial use as guaranteed by Article I(2) of the OST. However, this provision and, more precisely, Art 11 of the MOON, clearly expressed that outer space must be considered an international common space, a *res communis omnium*, meaning that, in principle, national legislation and unilateral exploitation was to be avoided. It was rather for the international legislation process to set up an order for the exploitation of outer space and celestial bodies which struck a fair balance of guaranteed freedoms and limitations, necessary to keep the benefits of space travel and space exploitation for the benefit of all mankind. This was the specificity of the international legal commons, as in the legal regime for the deep seabed and Antarctica. For this reason, no State was entitled to unilaterally enact a specific order for the usage of these international commons. Any unilateral act contrary to the *res communis* orientation of outer space could even be considered an abuse of rights. The US recognised this implicitly when it maintained that its domestic legislation aimed at being in accordance with "the international legal obligations of the US". Such obligations demanded the drafting of an international order for the exploitation of outer space and celestial bodies as an international, and not unilateral, effort.

Professor Hobe concluded that the US initiative was not contrary to international law, but at the same time did not prejudice any kind of future legal order for the use of this international common.

Professor Williams referred to her comments on the US Commercial Space Launch Competitiveness Act made in the framework of the IISL Board of Directors during the drafting of the Statement mentioned in her earlier intervention.

On the international field, the legal nature of natural resources of outer space, the moon and other celestial bodies was still undefined. In 1968 Bin Cheng's authoritative opinion was that:

to the extent to which outer space and celestial bodies constitute '*res extra commercium*', by analogy with the rules underlying the freedom of the high seas, the appropriation of the natural resources thereof merely forms part of the freedom of exploration and use, and is not prohibited.

Yet, the analogy with the freedom of the high seas as applied to resources from outer space, the moon and other celestial bodies, was now far more complex than in 1968, when Cheng's contention might have been better understood and accepted. In fact, the appropriation of natural resources from the high seas was referring to a limited area on planet Earth whereas in the case of outer space and celestial bodies the area was incommensurable. In today's world, particularly when the MOON confirmed by its title that it intended to cover "other celestial bodies" as well – whether discovered or otherwise – the international community was doubtful on the possible application of the first come, first served criterion to incommensurables.

The question was remindful of the time when the principle "first come, first served", concerning geostationary orbital positions in the 1980s, was dominating the international scenarios and the ITU had taken care of the issue.

The new US legislation referred strictly to asteroid resources and, as observed by the IISL, it clearly stated that those activities should be carried out in accordance with applicable law and international obligations of the US. This clarification written into the new law was of major importance.

It might be useful to have in mind that the US internal regulations were, usually, stricter than rules of international law. Professor Williams referred to Art 46 of the 1969 *Vienna Convention on the Law of Treaties* (provisions of internal law regarding competence to conclude treaties), emphasizing Art 46(2), which provided that a violation of internal law was manifest if it would be "objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith".

By no means was the mention of natural resources made in Art 11(1) of the MOON, or considering them "common heritage of mankind", a rule of customary international law, nor was it on its way to becoming one. Rather, it was a stumbling block for the MOON to gain support from the international community. On this point, the precedent set by Part XI of UNCLOS, concerning the "Area", was a good illustration. Today, only sixteen States were bound by the MOON.

Professor Williams concluded that, in light of the current situation regarding the legal nature of natural resources from outer space, the US legislation was consistent with international law and should be seen as an interpretation of Art II of the OST. Other interpretations might follow and would be welcome. In the US legislation, the ban on claims of sovereignty over outer space, the moon and other celestial bodies, remained untouched. Interesting, for its implications, was the Statement of IISL Board of Directors in 2009 when considering that a specific legal regime for the exploitation of natural resources from outer space should be elaborated on the basis of present international space law, for purposes of clarity and legal certainty in the near future.

Professor Williams quoted a personal view whereby the time was ready – although perhaps not the political moment – to give Art II of the OST and the controversial sides of the MOON a more positive spin. In this quest a down-to-earth discussion surrounding some special kind of "ownership" appeared opportune – perhaps using different or new terminology to avoid confusion and misinterpretations. This would help addressing the problem in its prime colours. In this challenge, international cooperation would have a major role to play.

The Chair thanked Professors Hobe and Williams and highlighted that this was an extremely interesting topic.

Professor Hofmann was then given the floor to talk on her experience on the matter. She pointed out that the scarcity of specific resources on the Earth and the need to supply space flights in outer space sped up the development of methods for the extraction of resources from celestial bodies. Several States had plans under way such as the US, China, Japan and, recently, Luxembourg.

The international legal framework for the extraction of space resources was based on the OST and the MOON, both concluded under the auspices of the UN. The OST allowed the use of celestial bodies and their parts (Art I) but prohibited appropriation by claim of sovereignty, by means of use or occupation, or by any other means. The MOON

contained further details on the non-appropriation regime related to celestial bodies, prohibiting any appropriation of natural resources "in place" (Art 11), and envisaging an international regime to govern their exploitation "as such exploitation [was] about to become feasible" (Art 11). At the same time, it allowed the collection and removal of samples of mineral and other substances on celestial bodies (Art 6) and made clear that these substances could be used for the support of scientific missions (Art 6). Most probably, it also allowed for appropriation of natural resources of celestial bodies which were not "in place" (Art 11).

The MOON has been adhered to by 16 States so far. The OST, on the other hand, was a very broadly internationally recognised legal source, binding 104 States and its substantial provisions were considered customary international law. The main issue was, therefore, how its non-appropriation principle could and should be interpreted in relation to the extraction and use of space resources. This question had several elements, but could be summed up as follows: was the extraction of resources from celestial bodies at the same time an appropriation of celestial bodies? There were no convincing arguments for a positive answer, so it must be answered in the negative. The present space resources programmes did not reveal any intention to occupy or appropriate any part of celestial bodies by the States Parties internationally responsible for these resource-related activities. Moreover, the vast number of asteroids and other objects of interest made it highly unlikely that the activity on one mining site would hamper the exploitation of the same territory of a celestial body by an entity from another State; even for such a case, the OST already provided a remedy in the form of international consultations (Art IX).

In addition to international treaty rules, a question in connection with the planned space resources extraction and use was whether the national, consistent practice of the entities under the jurisdiction of several States active in space mining was able to contribute to the development of a rule of international customary law to govern such activities. If this went in line with the respective *opinio juris*, it would theoretically be possible; however, several States such as the Russian Federation and some Latin American countries objected to unilateral solutions in the 2016 sessions of the Scientific and Technical Subcommittee and Legal Subcommittee of COPUOS and in other fora.

Therefore, the decisive legal source remains the OST, which required States Parties to "authorize and supervise" national activities in outer space, whether they were carried out by governmental agencies or by non-governmental entities (Art VI). In accordance with this provision, several States drafted – or were drafting – appropriate national legislation on space resources. The 2015 US legislation anticipated a specific authorisation regime for the future, and entitled US citizens to possess, own, transport, use and sell space resources. In Japan and the United Arab Emirates, legislation on the use of space resources was under preparation.

Luxembourg was also active in this new field. In May/June 2016, the Luxembourg government signed a Memoranda of Understanding (MoUs) to develop activities related to space resources utilisation with Deep Space Industries and Planetary Resources. These MoUs went back to the government meeting in June 2015 which supported space mining activities, accompanied by deliberations relating to their most appropriate legal framework. To analyse the relevant legal provisions, the government set up an international study team, coordinated by the University of Luxembourg, to conduct a study of the

applicable legal norms and possible solutions. As Luxembourg was a State Party to the OST, the study team recommended that Luxembourg adopt legislation implementing Art VI of the OST and be open to international negotiations in relevant fora establishing a cooperation framework in accordance with the preamble to the OST. In May 2016, the Luxembourg government decided to begin drafting two pieces of legislation – a general space law and a law dealing specifically with space resources. Work on these two projects was progressing and the legislation was expected to be effective in 2017.

Like in the ILA, the issue of rights to space resources was in the focus of several international bodies at present. COPUOS would be dealing with this in 2017, the non-governmental Hague Space Resources Group discussed this issue regularly and the IISL Board of Directors published a balanced statement on its website. This subject would also be discussed at an IISL session of the 2016 International Astronautical Congress in Guadalajara, Mexico. All these initiatives would lead to a clearer picture of the international positions on its regulatory framework.

It could therefore be concluded that, in the absence of arguments to the contrary, the extraction and use of space resources did not contradict the non-appropriation principle of the OST as the utilisation of space resources did not represent "appropriation of celestial bodies" *stricto sensu*. It certainly did not violate the non-appropriation principle of the MOON in the case of sample collection, use of minerals to support missions, and most probably in cases of utilisation of natural resources "out of place". It did infringe the MOON in cases of appropriation of space resources "in place" and in cases of rejection by the appropriate State Party of any credible steps leading to the establishment of an international regime governing the exploitation of these resources. However, in line with the fundamental principle *pacta sunt servanda*, these potential violations concerned exclusively the 16 States Parties to the MOON. For non-Parties, the MOON was not in a position to create any moratorium on the extraction of space resources, as for those non-Parties the point of reference on the legality of space mining lay solely in the OST.

To conclude, Professor Hofmann noted that new space activities not envisaged by the OST – such as on-orbit services or active space debris removal – were emerging practically annually. These areas would require thorough international discussion and a dynamic interpretation of the international legal provisions adopted in the beginning of the space era.

The Chair thanked Professor Hofmann for a very good presentation.

Professor Marboe noted that private initiatives were encouraging the development of space law. New Zealand, for instance, had recently joined COPUOS and Luxembourg was drafting national legislation. She pointed out that many presentations at Stanford University that, at the time, had seemed pioneering referred to activities which were now almost a reality. It was also important to put into practice the objective of the benefit for all countries, for instance, by the sharing of information. The benefit of mankind clause should be strengthened as well. The MOON, with only 16 State Parties thereto, was problematic. Why, when the instrument itself stated that it was for the benefit of all countries, had not more developing countries ratified it?

Professor Hobe observed that States no longer wished to accept multilateral treaties but preferred to begin by the drafting of national legislation. The original idea of the MOON

was establishing an international regime if these activities became feasible. There was, he added, no statement on the protection of the environment in that agreement.

Dr María del Luján Flores (Uruguay) agreed with Professor Hobe that a global/international interest issue could not be regulated through national legislation. Article I of the OST and the preamble thereto made this clear. The principle of non-appropriation in Art II should also be given due attention. It was necessary to establish an international regime for the exploitation of natural resources from space. Space resource exploitation, given the progress in science and technology, has turned from a remote possibility into a more likely one. Therefore, the creation of an international regime that implied the participation of all States, as foreseen in the MOON, not only assured the best management of natural resources and protection of the environment, but also prevented the adoption of unilateral decisions. It was also a matter of equity, particularly intergenerational equity.

Professor Hofmann commented that the US legislation required the observance of international law and most certainly the environment would be taken into account.

Professor Pedrazzi said that it was regrettable that the international community was divided on the issue of space mining. The US law and the Luxembourg project on one side and, on the other, the States adhering to the MOON and opposing the US position made international consensus for an international regime a challenging objective. As to the proposal for Luxembourg to develop an international regime, what was the idea?

Professor Hofmann clarified that Luxembourg would never oppose discussing an international regime possibility.

Mr Dipak Bhattacharyya (India) turned attention to the question of jurisdiction in respect of dispute settlement arising from losses of space ventures. In some cases, the claim settlement was vitiated due to a jurisdiction issue. Ms Kalpana Chowla, an Indian astronaut, had lost her life and neither the US nor India had undertaken the claim settlement for loss of life as the contention was on the place where the accident had occurred.

Dr Souichirou Kozuka commented that, unlike in the case of suborbital flights, an international aspect necessarily came up with moon resources in the sense that the resource exploitation could be consented by an entity from another State, and whether that State recognised a private right to the exploited resource would be open to question. The 1883 *Paris Convention for the Protection of Industrial Property* might help as precedent.

Professor Hofmann mentioned that the resources would not be brought to Earth.

Professor Marboe referred to the case of States not recognising the property of space resources by other States. In the copper cases, in Germany, the States had considered there was a blatant breach of international law. This could be taken as a presumption that property over space resources was not recognised.

The Chair asked for further comments on space mining.

Professor Williams noted that no more topics could be added to the Committee's terms of reference but this did not rule out discussions by the Committee and the analysis of new developments occurring during its mandate.

The Chair remarked that it had been an extremely interesting session and gave the floor to Professor Williams for details on future work of the Committee.

Professor Williams clarified that the terms of reference did not include space mining or space security issues. However, the Committee would continue exploring these topics as they represented a challenge of major dimensions today. This course of action was possible in light of the terms of reference of the Committee (*in fine*). The other topics, namely dispute settlement, satellite data in court, new developments of space technologies and space debris, including the effectiveness of the Compendium maintained by the OOSA Secretariat, would continue under permanent study.

Professor Marboe added a comment on *clauses compromissoires*, suggesting the inclusion of this possibility in space contracts for future disputes in order to promote the Optional Rules for Arbitration of Disputes relating to Outer Space Activities. The Committee could perhaps address the problem of active space debris removal (ADR) and possibly engage in drafting rules on the matter.

The Chair invited the Committee officers to give their concluding remarks.

Professor Hobe commented that, if there were more commercial activities, there would be more disputes in the future. As to space mining, it was important to follow the latest developments, keeping a close look on state practice and the development of national space legislation on the matter.

Professor Williams thanked the participants for their contributions. She mentioned the issue of privacy and the recent trend in UK courts, highlighting that they were more inclined to protect the right of privacy in response to interpretations of freedom of information in extreme terms as had been the Sunday Times decision by the European Court of Human Rights in 1979. She then thanked the Chair for presiding over the meeting.

The Chair thanked the Committee officers, the attendees, and the Session Reporter and declared the meeting closed.

Session reporter: Viviane Contin-Williams (UK)

PROTECTION OF PRIVACY IN PRIVATE INTERNATIONAL LAW

WORKING SESSION

Monday, 8 August 2016, 2.00pm

Chair: Professor Catherine Kessedjian (France)

The Chair announced that it was a double pleasure for her to be presiding over the working session. First, this was a topic with which everyone, as citizens, was concerned. Second, it was an opportunity to give credit to Professor Berkhard Hess, with whom the Chair had worked for many years (including on the Committee on International Civil Litigation and the Interests of the Public).

The Chair mentioned that she dreamed of a time when the titles of ILA committees gave up specifying public or private international law. For the present Committee, the topic could simply be "protection of privacy", allowing the Committee to shape the topic however it wished. There were certainly public international law aspects of the protection of privacy.

The Chair observed that, on the basis of available material, the focus of the Committee was the privacy of *individuals*. It was fair to say that privacy also concerned companies. So, before handing the floor to the Chair of the Committee, the Chair posed the question to the Committee – was the Committee also interested in the privacy of legal persons? This was an issue of increasing importance. As evidence of this, the Chair referred to a report in the *Wall Street Journal* that she had read on the plane to Johannesburg about the difficulties facing the Italian energy company, Enel SpA, in trying to keep its data within the European Union in its dealings with Amazon.

Professor Berkhard Hess (Germany) took the floor to explain the ongoing work of the Committee. He introduced the two Co-Rapporteurs, and thanked them for their work so far.

Professor Hess proceeded to explain how the Committee had evolved and what the main issues were. He referred to a 2004 article by James Whitman entitled "The Two Western Cultures of Privacy: Dignity versus Liberty", which discussed the difference in the concept of privacy between continental Europe (where it was a broad concept with constitutional underpinning, particularly as borne out in the jurisprudence of the European Court of Human Rights) and the United States (where the concept is defined in terms of liberty of individuals from incursions by the state). The mandate of the Committee was broader. The focus was on the relations between individuals, and it was clear that the Committee needed to enlarge its approach. In this regard, Professor Hess made reference to breaches of privacy in cyberspace, noting that data exchange and protection were particularly important online.

In response to the question put by the Chair in her introduction, Professor Hess noted that the idea was not to be restricted to private international law, but rather to take the whole picture into account in the programme of work. The Committee wanted to address a range of scenarios, including the use of social media, the situation of consumers as the weaker party, and the position of minors.

At its first meeting in Luxembourg in September 2014, the Committee delineated and enlarged the approach to its work. It would approach its work from a comparative law perspective, enlarging the concept of privacy to encompass data protection and related issues. The meeting was held in the sidelines of a conference hosted by the Max Planck Institute entitled "The Protection of Privacy in the Aftermath of the Recent Judgments of the CJEU", which covered the recent decisions of the Court of Justice of the European Union (CJEU) in the cases of *Google Spain*, *Digital Rights Ireland* and *eDate Advertising*. The conference also covered recent developments in the US and the UK in the area of defamation.

The second meeting of the Committee was held in February 2015, at which answers to a first questionnaire were circulated. The meeting featured a comparison of the different concepts of privacy in national systems.

The third and most recent meeting of the Committee was held in February 2016. It focussed on procedural law issues as well as the eventual output of the Committee in the form of guidelines.

Professor Hess noted that initial ideas were taking shape about possible rules relating to jurisdiction as well as available remedies. A second questionnaire on this issue was circulated to Committee members to get an idea of national solutions, and a preliminary text was subsequently drawn up. Now in Johannesburg, the Committee expected to tackle the issue of applicable law, based on a text drawn up by Professor Jan von Hein. It also planned to survey recent decisions and legislative action. With respect to legislative action, Professor Hess mentioned the General Data Protection Regulation (Regulation (EU) 2016/679), which had been adopted in April 2016. With respect to recent decisions, Professor Hess mentioned the recent decisions of the US Court of Appeals for the Second Circuit in *Microsoft Corp v United States*, of the CJEU in *Verein für Konsumenteninformation v Amazon EU Sàrl*, and of the European Court of Human Rights in *Arlewin v Sweden*.

Dr Cristina Mariottini (US) gave a presentation on some of the basic concepts and definitions that informed the work of the Committee.

An interim report had been drafted within the Committee on substantive aspects of privacy in national systems. The idea was to look at substantive law to understand how it affected procedural law and private international law (eg, matters of material and personal scope, standing etc). Responses to a questionnaire circulated to this end revealed that the concept of privacy in national systems had its origins in a variety of sources, from constitutional rules to legislation in areas of private, criminal and administrative law. At the same time, the role of courts (including regional courts) was significant in defining the scope of privacy and in balancing competing rights and interests, such as the freedom of expression and access to information.

The responses to the questionnaire also reflected the differences in the concept of privacy as described by James Whitman in the article to which Professor Hess had earlier referred. In broad terms, responses from continental Europe and Brazil showed that protection of privacy was concerned with the right to dignity, whereas the response from the United States showed a concern with liberty from government intrusion. Dr Mariottini

made reference to the 1954 decision of the Federal Court of Justice of Germany (*Bundesgerichtshof*), which extrapolated from Arts 1 and 2 of the Basic Law of Germany a right of personality. Subsequent decisions of the court had drawn a link between the protection of privacy and personality rights with the expression of an individual's dignity. Dr Mariottini also made reference to the 1867 decision of the Paris Court of Appeal in the Dumas case, in which the court stated that where an individual had consented to an image being taken but the image was too revealing, the individual had the right to withdraw consent subject to the individual indemnifying the image owner for consequent loss. In this case, the right to privacy trumped the right to property. The case demonstrated starkly the differences between the French approach to privacy and the approach in the United States. In the United States, a person could not renege on consent given. The right of publicity there meant that a person's image was a market commodity.

The Committee would be looking into mass media violations of privacy, the most interesting aspects of which were occurring in the online environment. The Committee would also be looking into new social media, and how violations of privacy in that context was redefining liability and standing. One example was the liability of internet content providers for user generated content (which was often uploaded anonymously). Another example was the liability of search engines and the right to erasure as evidenced by the 2014 decision of the CJEU in *Google Spain*. A further example was the 2011 decision of the Court of Milan which found Google liable for defamation because of the operation of its autocomplete algorithms.

Finally, Dr Marionetti made reference to the 2015 decision of the English Court of Appeal in *Google v Vidal-Hall*, which she characterised as a landmark case along the long and winding road towards conceptualising breaches of privacy as a common law tort rather than as a matter of equity. Hitherto, English courts had used equitably remedies for breach of confidence to provide relief for claims for breach of privacy. She cited the statement by the court that "there is nothing in the nature of the claim [for misuse of private information] itself to suggest that the more natural classification of it as a tort is wrong". However, she acknowledged that the decision was ultimately about characterising breach of privacy for the purposes of *procedural* rules relating to the service of process outside the United Kingdom in tort claims (ie, for jurisdictional purposes), not about the substance of the claim as a matter of English law.

The Chair opened the floor for discussion.

Professor David Stewart (US) emphasised that one challenge in dealing with the Committee's mandate was precisely the different notions of privacy among the various legal systems. There was no single concept, nor harmonious approach to jurisdiction and remedies.

The Chair queried whether this was an opportunity for the ILA to craft a definition of privacy that would be useful in multiple jurisdictions. She asked attendees whether this would be a futile undertaking.

Professor Hess responded that the Committee had not given up, but it was a real challenge. Basic concepts were different among different legal systems, as highlighted by Dr Mariottini in her presentation.

The Chair then queried what the end goal of the Committee was.

Professor Hess responded that the Committee would like to propose a resolution to the ILA that provided guidelines on how to deal with recurring conflicts that were being experienced everyday. The guidelines would address jurisdiction and applicable law. The Committee was approaching the task with caution and was taking its time as befit the subject matter.

Professor Stewart added that it was not the goal of the Committee to formulate a unified concept of privacy, but rather, from the starting point that there were differences between legal systems, to come up with mechanisms for protection. He expressed the hope that, in the course of its work, the Committee would continue to reach out beyond the US and continental Europe so as to understand how the concept was approached elsewhere, eg, in the Middle East and in Asia.

The Chair agreed that the Committee was too "occidental" in outlook and that there was a need for it to work on outreach.

Professor Pedro de Miguel Asensio noted that there was a need to reach consensus on the meaning of the concept of "personality rights" in the international context. A lack of consensus had seen the concept of personality rights expressly excluded from the scope of the EU's Rome II Regulation (Regulation (EC) 864/2007), and defamation being excluded from the scope of the proposed treaty that was being developed under the auspices of the Hague Conference on Private International Law (HCCH) as part of the "Judgments Project".

The Chair observed that this intervention touched on something that had always felt strange her, namely that all international organisations with a harmonisation mandate stopped work when they were confronted with an issue that was too difficult to tackle. She gave the examples of sales contracts and the transfer of property. It seemed that privacy was one such difficult issue that no one wanted to tackle. She queried which organisation – UNIDROIT, UNCITRAL or the HCCH – would be best place to tackle the issue of privacy. In her view, it would be the HCCH.

Professor Mariottini agreed.

The Chair then suggested that the Committee develop persuasive arguments to convince the HCCH to tackle the issue.

Professor Hess responded that the whole starting point for the Committee was that no organisation had addressed the issue. The goal of the Committee was to develop common denominators and to formulate guidelines. Otherwise, its work would have no impact.

Professor Héctor Valverde Santana noted that privacy was a fundamental right in Brazil. He agreed that it was a difficult concept to define. In response to a query from the Chair, he added that in many cases, including one involving Google, the courts in Brazil were being asked to attempt a definition.

Professor Jan von Hein gave a presentation on jurisdictional issues.

As noted by Professor Hess, a second questionnaire had been circulated to Committee members that dealt with private international law issues relating to privacy (eg,

jurisdiction, applicable law). It focussed on whether there were specific rules in national systems for jurisdiction in personality rights/privacy claims. In sum, most jurisdictions had developed solutions that focussed on adapting or modifying general rules.

In the EU, the Brussels I bis Regulation (Regulation (EU) 1215/2012) contained unified rules on jurisdiction over claims for breaches of personality rights and privacy. However, the Regulation did not bring about a complete unification of these rules as it did not apply to defendants domiciled in third States. Here, existing national rules applied (in the case of Germany, the 19th century code of civil procedure continued to apply). In effect, it was national rules that applied to a large amount of litigation, notably claims against multinational companies headquartered in the United States (eg, Amazon and Google). The exception to this was Italy, which, in a 1995 reform, extended the rules in the then 1968 Brussels Convention to third State defendants. Still, there was some controversy in Italy whether the reference in Italian law to the 1968 Convention should be given an ambulatory meaning so as to apply to the Brussels I Regulation (and now the Brussels I bis Regulation).

In most States, there were no jurisdictional rules specific to privacy. Rather, breach of privacy was treated as a tort and the jurisdictional rules relating to tort claims would be applied. In the EU, there were no specific jurisdictional rules in the Brussels I bis Regulation, but there were in the General Data Protection Regulation (see Art 79(2), which reflected the general jurisdiction and "centre of main interest" approach).

One example of how national systems were adapting and modifying jurisdictional rules was the case law of the CJEU. The CJEU had formulated rules to deal with violations of personality rights by conventional media (the socalled "mosaic principle"). However, in *eDate Advertising*, this principle had been reduced in favour of a "centre of main interest" approach. While legislators had not introduced anything in particular, *eDate Advertising* marked a paradigm shift, which had been confirmed in subsequent case law of CJEU (notably in the *Wintersteiger*, *Pinckney* and *Hejduk* cases). The modification of jurisdictional rules in *eDate Advertising* only applied to personality rights, not IP or other internetspecific rights.

Another example of adaptation and modification was in the UK with respect to libel tourism. The UK had become a popular forum for bringing defamation claims against media outlets, even where the claim bore little connection with the UK. (As a side note, Professor von Hein noted that this might seen as a bizarre strategy for litigants given the continued application in the UK of the double actionability rule in defamation claims.) In response, the UK parliament had enacted the *Defamation Act 2013*, s 9 of which provided that English courts did not have jurisdiction over defamation claims unless England was "clearly the most appropriate place" in which to bring the claim. This was effectively a codification of the rule of *forum non conveniens*.

In a vast majority of national systems surveyed, some variant of the rule based on *forum delictii commissii* (understood broadly to cover the *forum actus* and the *forum damni*) applied. In the UK, service out of the jurisdiction was possible where the wrongful act occurred in the jurisdiction. In the US, jurisdiction existed where the effects of the wrongful act were felt in the jurisdiction.

In several jurisdictions, the courts had handed down decisions addressing a multiplicity of forums where internet publications were concerned. Reference had already been made to *eDate Advertising*. Professor von Hein also referred to the decisions of the Federal Court of Justice of Germany in "New York Times" (2 March 2010, VI ZR 23/09) and "Seven Days in Moscow" (29 March 2011, VI ZR 111/10) (post on German website by US resident in Russian). In these decisions, the focus of the court was not on habitual residence but on whether there was a collision of conflicting interests of the parties in the forum. Here, the court stressed the need for foreseeability.

Professor von Hein offered some tentative conclusions with regard to jurisdiction:

1. The foreseeability of the forum was important. In the wake of the *eDate Advertising* decision, the EU legislature inserted Recital 16 into the Brussels I bis Regulation, which stated that "[t]he existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen".
2. One should be wary of applying different rules for different media. In the modern world, the same content was being distributed by different channels. It should not make a difference the channel by which one consumed that content.
3. The mosaic principle should be abolished. It was generally better to narrow down potential forums and allow the plaintiff to sue for the whole damage in a single forum. Another advantage of narrowing down potential forums was that it would facilitate the mutual finetuning of rules of jurisdiction and applicable law. Here, there were several practical reasons for favouring the application of the *lex fori* in claims for breach of privacy, bearing in mind its strong underpinnings in national constitutions.
4. It was questionable whether there was a need for jurisdictional rules to favour the plaintiffs. After all, the plaintiff was not always the weaker party, as evidenced by the recent high profile case involving complaints by Turkish President Recep Tayyip Erdoğan against the German comedian Jan Böhmermann.

Professor Hess warned against the use of labels such as "general jurisdiction" and "specific jurisdiction".

The Chair noted that few factors of privacy protection went to establishing general jurisdiction as currently defined. If the concept of general jurisdiction was developed, it could be possible to obtain entire relief in a single forum for worldwide violations. The only incentive was for the plaintiff to go to the defendant's forum.

Professor Hess responded that this was a most interesting point. While the mosaic rule might work in IP claims, it was not needed and should be abolished in privacy claims. Then again, the distinction between general and specific jurisdiction did not play a big role.

The Chair quizzed Professor Hess on the last point. If the distinction did not matter, why maintain it? The ILA must be future oriented. If it considered that the distinction had no bearing in practice, we should forget about it. General jurisdiction played a limited role in claims for violations of personality rights. In the CJEU cases, jurisdiction coincided with the place of acting; to be precise, as specific jurisdiction. The Brussels I bis Regulation

only came into play where the wrongful act was carried out in a State different to the State of the defendant's domicile. If one were to define wrongful acts as being committed in the publisher's principle place of business, this would usually coincide with general jurisdiction. However, publishers might have their domicile or seat in one State and circulate their newspapers, broadcast, or upload/host content in other State. In this scenario, there would be practical value to have general jurisdiction as the default rule. This would also have consequences for the applicable law.

The Chair posited that, where the internet was used, more difficult issues arose. In particular, it was more difficult to "locate" general jurisdiction.

Professor von Hein responded that it might be easier to define place of a company in online issues.

The Chair agreed, if the website met international standards set by UNCITRAL. The Chair then raised for discussion the connection between the language of the website and jurisdiction.

Professor von Hein referred back to the "Seven Days in Moscow" case, which involved a post in Russian dealing with Russian issues, clearly directed at Russia, but hosted by a German website. There was no close connection to Germany, so the German court declined jurisdiction.

Professor de Miguel Asensio agreed that language may be a relevant factor in jurisdictional decisions. While the preamble to the Rome I Regulation (Regulation (EC) 593/2008) noted that language was an irrelevant consideration for jurisdiction purposes, the EU General Data Protection Regulation acknowledged that it was an important consideration for choice of law purposes.

Professor de Miguel Asensio continued to give a presentation of the General Data Protection Regulation. The Regulation had been discussed for many years before finally being adopted in April 2016. It would only apply from May 2018. While based on the same principles underlying the 1995 Data Protection Directive, some significant changed were introduced by the new Regulation, including new provisions on jurisdiction and applicable law as well as an emphasis on methods of enforcement.

Privacy was a fundamental right in the EU. This fact had significant implications for private international law. For one, it was part of the EU's public policy and rules on privacy constituted its mandatory provisions.

While the new Regulation provided higher standards of protection for "data subjects", these protections were only enjoyed by natural persons. Nevertheless, the Regulation was important for business activities.

Data protection traditionally involved two mechanisms of enforcement. The first mechanism was public enforcement by actions taken by national supervisory authorities, whether on application by a data subject or on its own motion. The second mechanism was private enforcement by the data subject instituting civil proceedings. The *Google Spain* case was an example of public enforcement, involving actions taken by the Spanish supervisory authorities on application by an aggrieved data subject. That data subject could have taken their complaint to the civil courts, where they could have obtained

compensation, a remedy not available under public enforcement. Yet private enforcement was more costly and burdensome. Public enforcement was easier, and could be initiated by a simple email. The *Google Spain* highlighted the distinction between public and private enforcement.

Another significant change was that the new regime was established under a Regulation. The old regime was established under a Directive, and therefore relied on 28 different national regulatory systems. The new regime introduced a single regulatory system. This was significant from a choice of law perspective, as there was no need to determine which law applied in a given case as there was a single, harmonised, law (ie, the Regulation).

The new Regulation also marked a change in approach to territorial scope. In this regard, Art 3 of the Regulation was to be compared to Art 4 of the 1995 Directive. The role of Art 3 of the Regulation was to determine the extent to which "controllers" and "processors" were required to respect EU law, and the competence of EU authorities to enforce that law. Article 3(1) provided that the Regulation applied to controllers and processors established in the EU. The notion of "establishment" was broad, involving "the effective and real exercise of activity through stable arrangements" (see Recital 22). There was therefore no need for an entity to have a branch in the EU to be considered as having an establishment there. In *Google Spain*, the issue was whether a US company (Google, Inc) was a controller for the purposes of EU legislation. The establishment was not Google, Inc, but Google Spain SL, which was a subsidiary that simply sold advertising. However, in view of the relationship between parent and subsidiary, the processing of data was done in the context of the activities of Google's establishment in the EU. Article 3(2) introduced an alternative rule for applying the Regulation to controllers and processors that were not established in the EU. The rule was based on whether activities were directed at EU citizens.

While the new Regulation established a single regulatory regime, it also gave rise to a new problem from a private international law perspective. By pursuing a onestop shop approach for regulatory action, which favoured companies who wished to deal with a single regulatory authority, the Regulation posed a problem for data subjects. For instance, if Facebook was based in Ireland, the data subject would be required to bring a complaint to the Irish supervisory authority. Now, not all supervisory authorities were equally resourced, and not all shared the same leadership in applying data protection law from the perspective of the data subject.

The new Regulation contained provisions dealing with jurisdictional issues, notably Art 79. These were relevant for data subjects seeking compensation. Compensation was not available when seeking a remedy using the public enforcement mechanism. Article 79 could be used to obtain an injunction. Article 79 was also a specific rule on jurisdiction for the purposes of the Brussels I Regulation, meaning that it prevailed over the jurisdictional rules in that Regulation. Some concerns had been raised about the interaction between the establishment of the data processor – one of the connecting factors to establish jurisdiction under Art 79 – and their domicile. Here, the Regulation distinguished itself from *eDate Advertising* by making no reference to "centre of main interest". Moreover, the Regulation did not provide for proceedings to be brought in another Member State where damage was suffered, nor contemplate what effect a choice of court agreement would have where that agreement covered both contractual and noncontractual claims.

The Chair noted that it was not at all surprising that the General Data Protection Regulation, which was prepared by the DirectorateGeneral for Internal Market, did not take into account private international law considerations, a matter which was dealt with by another DirectorateGeneral. The Chair drew a comparison with the development of the Service Regulation (Regulation (EC) 1393/2007), where private international law experts were not invited to attend discussions. It was left to private international law academics to write a letter to the European Commission to explain that private international law issues were already dealt with in the Rome and Brussels regimes. This led to the draft being amended to include references to these other EU regulations. It appeared that, for the development of the General Data Protection Regulation, there had been a lack of communication between the different parts of the European Commission.

Professor Hess responded that the jurisdictional rules in Art 79(2) of the General Data Protection Regulation were novel so far as they started with the concept of "establishment". This provided for a potentially huge enlargement of jurisdiction in internet cases. Together with the rules of extraterritorial application, the Regulation marked a large expansion of EU data protection law. The Committee would be considering whether this approach, unilaterally adopted by the EU, was the right solution for an international instrument.

The Chair exclaimed that it certainly should not be. If the Committee were ultimately to recommend the adoption of such rules in its guidelines, one would expect to see strong justification for that recommendation in the accompanying report.

Professor Hess reassured the Chair that he was not pre-empting the Committee's consideration of the issue, and was only surveying relevant developments. For now, he suggested that the concept of "establishment" might be worth exploring further.

The Chair invited attendees to react to these EU developments.

Professor Stewart took up the invitation by noting that he was struck by how insensitive Art 3 was to the concerns of third countries. The extraterritorial operation of the Regulation was rather astonishing. On the one hand, he could understand why Art 3 was phrased the way it was; on the other hand, he had a sense that the drafters might not have been aware of how the provision might be taken by third countries. It was an invitation to conflict.

Dr Ruth Atherton asked the panel to comment on the impact of the General Data Protection Regulation on efforts to increase data sharing, which was a focal point in global health.

Professor de Miguel Asensio responded that data that was usually shared in the health context did not fall within the definition of "personal data" because it was deidentified. Health data was sensitive data, which was subject to special measures of protection. Here, there were no significant changes introduced by the Regulation. Professor de Miguel Asensio then referred to the 2015 decision of the CJEU (in the *Schrems* case), which invalidated the EU's Safe Harbour framework. A new agreement between the EU and US in the wake of that decision provided that, if a US company was not regarded as having an adequate level of privacy protection, the transfer of personal data to that company was not allowed without authorisation or the giving of certain guarantees. No change to the Regulation was necessary.

The Chair noted that there was still some time before the Regulation commenced application, so there was time to rehearse issues that might arise. She agreed that health was an important issue.

Professor Hess made reference to another case brought by Mr Schrems. That case concerned a class action against Facebook representing thousands of consumers. The issue was whether, because the claim was pursued as a class action, it was unable to be brought in the forum of the lead consumer. The case was currently before the Austrian Supreme Court, and the issue was expected to be referred to the CJEU. A further question posed by Professor Hess was the impact of the jurisdictional rules in Art 79 of the General Data Protection Regulation. The Committee would address this issue.

The Chair invited Professor von Hein to present on applicable law rules.

Professor von Hein noted that the focus was on the *lex fori* and *lex loci delicti*. Historically, there was a close relationship between jurisdiction and choice of law. In many legal systems, both jurisdiction and choice of law rules for personality cases were based on some variant of *lex loci delicti*. In the UK, the double actionability rule, which was still in force for defamation cases, acted as a ceiling. In Germany and Italy, the principle of ubiquity applied to choice of law. In Europe, concepts of close connection and a multiplicity of forums influenced choice of law rules. The overall goal was an international harmony of decisions.

The *lex fori* had several advantages. It reduced the time and cost of litigation, it produced a judgment of higher quality, and promoted foreseeability of result for defendants (eg, media outlets). Moreover, it reduced the need to resort to public policy, and public policy was part of the law of the forum. At the same time, the *lex fori* suffered the disadvantage of promoting forum shopping, although this had been addressed in the EU through harmonised rules on jurisdiction.

Professor von Hein referred back to the decision of the Federal Court of Justice of Germany in "New York Times". In that case, the question was whether the place of damage was Germany because the defamatory article could be accessed online in Germany. The court developed the innovative test of a collision of interests. The court reasoned that this occurred in Germany as the plaintiff was domiciled in Germany and the article concerned the affairs of his company based in Germany. From this, Professor von Hein noted that, while the English approach favoured defendants, the German approach favours plaintiffs. But at the end of the day, despite diametrically opposed underlying approaches, the law of the forum was always applied. Professor von Hein also referred to the 1997 decision of the French Court of Cassation in *Gordon & Breach*.

Professor von Hein expressed the view that there were substantial arguments to justify the application of the *lex fori*. Contrary to other areas of law, personality rights were significantly influenced by constitutional values. He noted that a paper was being developed internally for the Committee, which would develop this idea further.

The Chair asked whether the report would, in its discussion about jurisdiction, say anything about the doctrine of *forum non conveniens* or similar theories that allowed courts to decline jurisdiction or dismiss proceedings, as this might have an impact on applicable law.

Professor Hess responded that the Committee had not finally discussed this issue.

The Chair encouraged the Committee to at least make a note of this in the report, even if it was not covered in the resolution.

Professor von Hein observed that there were other areas where judicial discretion was creeping in to determinations of jurisdiction. Identifying the "centre of main interest" already invited the exercise of some discretion.

The Chair noted that building discretion into jurisdictional rules was not the same as *forum non conveniens*. In some jurisdictions, applying the doctrine required consideration of the law applicable to the underlying claim.

On another point, the Chair expressed her favour for applying the *lex fori*, which she noted was contrary to the French tradition. However, if this rule were to make its way into international guidelines, it might mean that the fight at the jurisdictional level would be even more difficult as there would need to be a really "proper" forum, an idea expressed by Albert Ehrenzweig. Determining the forum in which the claimant wished to enforce their rights determined the proper forum. By jurisdictional rule alone, it would be possible to balance the interests of the defendant in foreseeability and the interest of the plaintiff in the accessing a remedy. The issue was whether it was possible to craft a jurisdictional rule that did not rely on applicable law rules to act as a counterbalance.

Professor Hess responded that this was a realistic goal and a direction in which the Committee could head. He added that Professor von Hein's arguments were convincing, and that statistics would be influential.

Dr Atherton queried whether there were areas of law where this approach could be more challenging. In areas such as intellectual property and inventorship, there were substantial differences in the law between forums, and a *lex fori* approach could have a significant impact on these areas of law.

Professor Hess agreed that there were differences, and that these differences needed to be bridged.

Professor von Hein added that territorialism played a much greater role in intellectual property. Personality rights were different.

In response to earlier comments by the Chair, Professor von Hein noted that he did not have a single rule in mind for applicable law. The courts could deviate from it, for instance, the law of the habitual residence of both parties could apply where both parties shared the same habitual residence, regardless of where proceedings were brought. However, failing any such special circumstances, the *lex fori* would apply.

Professor Stewart asked Professor von Hein about the role of public policy. In many cases, issues of privacy might well be treated as the public policy of the forum.

Professor von Hein responded that, if the *lex fori* were applied, there would be no need to refer to public policy of the forum.

Professor Stewart added that he could think of US cases that discussed conflict of public policy.

Professor von Hein responded that the Committee would need to consider how much courts take into account foreign mandatory rules when determining jurisdiction. He referred to the case of a Greek teacher working in Germany whose salary was cut by Greece as an austerity measure. The question was whether the German Federal Labour Court should take into account Greek law. This case was the first time that the labour court had referred a matter to the CJEU.

The Chair noted that there were many different areas of law – corporate social responsibility was an example – where hard or soft mandatory rules were being developed. These would need to be taken into account.

Dr Mariottini gave a final presentation on ongoing work at the HCCH on developing a new treaty on the recognition and enforcement of judgments as part of the "Judgments Project".

The Chair noted that, given the scope of that project, the Committee's work would not be picked up by the HCCH. She thanked the panel and attendees for their participation.

Reporter: Alexander Kunzelmann (Australia)

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

BASELINES UNDER THE INTERNATIONAL LAW OF THE SEA

Members of the Committee

Captain J Ashley Roach (USA): *Chair*
Professor Donald Rothwell (Australia): *Rapporteur:*

Judge D H Anderson (UK)
Alternate: Mr Tim Daniel
Gilberto Marcos Antonio Rodrigues (Brazil)
Dr Nuno Antunes (Portugal)
Professor Frida Armas Pfirter (Argentina)
Dr Kaare Bangert (Denmark)
Ms Emmanuelle Cabrol (France)
Alternate: Dr Paul von Muhlendahl
Mr C M Carleton (UK)
Alternate: Dr Edwin Egede
Dr Robin Cleverly (UK)
Ms Simona Drenik (Slovenia)
Professor Erik Franckx (HQ)
Dr Antoine Grima (HQ)
Professor Teresa Infante-Caffi (Chile)
Ambassador Marie Jacobsson (Sweden)
Professor Atsuko Kanehara (Japan)
Alternate: Dr Kentaro Nishimoto
Professor Natalie Klein (Australia)
Professor Doris Koenig (Germany)
Suzanne Lalonde (Canada)
Coalter Lathrop (USA)
Dr Atip Latipulhayat (Indonesian)
Mr Richard Meese (France)
Judge Dolliver Nelson (UK) – Nominee of Chair*
Professor John Noyes (USA)
Mr Simon Olleson (UK)
Dr A G Oude Elferink (Netherlands)
Professor Alexander Proelss (Germany)
Professor Davor Vidas (Norway)
Alternate: Mr Oystein Jensen
Professor George Walker (USA)
Professor Sienho Yee (HQ)

* Judge Nelson passed away on 18 July 2016

SECOND REPORT (2016)

Background

1. The International Law Association (ILA) Committee on Baselines under the International Law of the Sea was formed with the approval of the ILA Executive Council in November 2008. The Committee's final report was considered at the Sofia Conference (2012) and in Resolution No. 1/2012 the 75th Conference of the ILA noted the conclusions of the Committee and requested the Secretary-General of the ILA to forward the Report to relevant Parties. The Committee's original four-year mandate ended in 2012.

2. The Committee was formed on the basis of a proposal with a two-part mandate: first, to "identify the existing law on the normal baseline" and, second, to "assess if there is a need for further clarification or development of that law."[1] The need to identify, and possibly to clarify or develop, the existing law on the normal baseline arose in response to the phenomenon of sea level rise likely to accompany climate change, and in particular

[1] *Proposal for the establishment of a new committee on baselines*, para. 7.

the effect this may have on low-lying, small island developing States.[2] The need was also considered to arise with respect to the artificial extension of existing coasts[3] and the issue of baselines along ice-covered coasts. In addition to concerns raised by these phenomena, the importance of identifying the existing law on the normal baseline was highlighted by two international maritime delimitation cases – *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (ICJ Judgment 2007)[4] and *Guyana/Suriname* (Annex VII Arbitral Tribunal award 2007)[5] – in which the location of the normal baseline was in question.

3. In pursuit of these objectives, the Committee drafted an internal discussion document for consideration at the August 2010 ILA biennial meeting in The Hague. The draft final report was circulated to Committee members on 18 January 2012 and was discussed during an inter-sessional Committee meeting in Hamburg, Germany on 16 and 17 March 2012, and the final report of the Committee was considered at the 2012 Sofia Conference and adopted by Resolution No. 1/2012.

4. Two matters were identified during the conclusion of the final report. The first was a recognition that substantial territorial loss arising from sea-level rise is an issue that extends beyond baselines and the law of the sea to encompass additional areas of international law. Resolution No. 1/2012 acknowledged that issue by noting that it "requires consideration by a committee established for the specific purpose of addressing this broad range of concerns".[6] In response, a proposal for the establishment of a new ILA Committee on International Law and Sea-Level Rise was submitted to ILA Headquarters with Professor Davor Vidas (Norwegian Branch) as proposed Chair, and Professors David Freestone (UK Branch) and Jane McAdam (Australian Branch) as the proposed Co-rapporteurs. The Executive Council of the ILA endorsed that proposal and that Committee has now commenced its work plan.

5. The second matter that was identified in the 2012 Committee's Report was the desirability of a further exploration of the international law of the sea addressing 'straight baselines' under an extended mandate of the Committee on Baselines under the International Law of the Sea. This arose due to 'straight baselines' not being considered in any detail in the 2012 Committee Report. A related matter was 'archipelagic baselines' under Part IV of the 1982 United Nations Convention on the Law of the Sea (LOSC)[7] and related state practice with respect to those baselines. In addition, a view existed amongst Committee members that the work of the Committee on baselines would not be complete if its deliberations were ultimately limited to issues principally associated with Article 5 of the LOSC.

---

[2] Ibid para. 4.

[3] Ibid para. 5.

[4] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras) [2007] ICJ Rep 659.

[5] *Award of the Arbitral Tribunal in the Matter of an Arbitration between Guyana and Suriname* (Guyana v. Suriname) 17 September 2007, XXX RIAA 1, [2008] 47 ILM 166.

[6] Resolution No. 1/2012 [8].

[7] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) ('LOSC').

6. It was therefore proposed that the ILA Committee on Baselines under the International Law of the Sea have its mandate expanded for a further 4 years during which time it would consider the following matters:

1. The interpretation and relevant state practice of Article 7 of the 1982 United Nations Convention on the Law of the Sea regarding the method adopted by States of drawing straight baselines.
2. The interpretation and relevant state practice of Article 8 (2) of the 1982 United Nations Convention on the Law of the Sea regarding the effect arising from the establishment of straight baselines within waters previously not considered internal waters and the consequences thereof for innocent passage.
3. The interpretation and relevant state practice of Article 10 of the 1982 United Nations Convention on the Law of the Sea relating to the method adopted by States of drawing straight baselines within a bay.
4. The interpretation and relevant state practice of Article 13 of the 1982 United Nations Convention on the Law of the Sea as it relates to the method adopted by States in relying upon low-tide elevations in the drawing of straight baselines, and the consistency of that practice with Article 7 (4) of the Convention.
5. The interpretation and relevant state practice of Article 14 of the 1982 United Nations Convention on the Law of the Sea as it relates to the matters noted above with respect to how States rely upon a combination of methods in determining baselines, including the normal baseline as provided for in Article 5 of the Convention and as considered in the Committee's 2012 Sofia Conference Report.
6. The interpretation and relevant state practice of Article 47 of the 1982 United Nations Convention on the Law of the Sea regarding the method adopted by States in the drawing of archipelagic baselines.

7. The then Director of Studies, Professor Chinkin, asked the Executive Council to agree to an extended mandate until 2016 and that extension was duly granted.[8] Captain J. Ashley Roach, JAGC, U.S Navy (Retired) (USA) was appointed as Chair and Professor Donald R. Rothwell (Australia) was appointed as Rapporteur.

8. The Work Plan of the Committee is divided into three phases. The first phase, which culminated in a First Report, focussed on the question of straight and archipelagic baselines as provided for in Articles 7 (Task 1) and 47 (Task 6) of the LOSC. A First Interim Report was prepared for circulation and discussion at the ILA American Branch conference in New York on 26 October 2013. The Rapporteur then prepared a draft of the First Report for circulation in December 2013 inviting comments from Committee members prior to finalisation in February 2014.[9] During the Committee meeting at the Washington

[8] International Law Association, Executive Council Meeting Minutes, 10 November 2012.

[9] In preparing the First Report the Rapporteur was supported with research assistance provided by students from the ANU College of Law, Australian National University. The support and assistance of those students is acknowledged. Zoe Winston-Gregson acted as a research assistant in the later stages of that project and also made a contribution along with a team of ANU College of Law students who contributed to the research and writing of parts of the First Report who included Alice Bolt, Alice Bradshaw, Jacqueline Edwards, Anita Gupta, Sam Osborne, Nishadee Pereva,

Conference, the First Report was finalised and the Work Plan for the period 2014-2016 was agreed upon.

9. The second phase, which culminates in this Second Report,[10] includes addressing the questions raised in para. 6, items 2, 3, 4 and 5, which were not considered in the First Report.[11] This Second Report follows the format of the First Report and uniformly considers each relevant article through its historical background, text, and analysis of the text by way of state practice, decisions of courts and tribunals, and commentary.

10. At the March 2016 Inter-sessional meeting of the Committee it was decided to seek an extension of the Committee's mandate for a further two years. A workplan was put before the Director of Studies, Professor Brus, for the period 2016-2018 justifying the two year extension on the basis of:

- the need to undertake a more complete review of state practice;
- the need to take into account the potential for dispute settlement of baseline disputes;
- the need to take into account the potential impact of the decision of the Philippines v China Annex VII arbitration on the South China Sea;
- the need to assess the distinction between islands, rocks and low-tide elevations; and
- the need to complete an assessment of some outstanding aspects of the Committee's mandate as outlined in 2012

Professor Brus supported this proposal. Accordingly, this Second Report does not reflect the decision of the Philippines v China Annex VII arbitration on the South China Sea.

The Committee also agreed to continue to explore the following issues:

1. The interpretation of Article 7(2) with respect to deltas and unstable coastlines;
2. The meaning of 'main islands' in Article 47(1);
3. The legal consequences arising when the status of an archipelagic State and that State's capacity to proclaim archipelagic baselines is disputed; and
4. The significance and relevant state practice with respect to Article 50 and the drawing of closing lines for the delimitation of internal waters within an archipelagic State.

The Committee remains open to extending its mandate to consider:

- the interpretation and relevant state practice with respect to Article 9 dealing with mouths of rivers.

The Committee also acknowledges that in addition to straight baselines, the LOSC and relevant state practice in the law of the sea include closing lines, and straight lines and

---

Andrew Read, Russell Schmidt (Summer Research Scholar), Kai Scott, Sasha Silberstein, Marc Vandenbrooke, Anna Whitton, and Clara Wilson.

[10] A draft of this report was circulated to the Committee on 30 May 2016 with minor comments received by 6 June 2016 taken into account; more substantive comments have been held over until the Final Report of the Committee scheduled for 2018.

[11] In preparing the Second Report the Rapporteur acknowledges the research assistance of Jacqueline Edwards.

other lines (including those predicated on Articles 9 and 10 of the LOSC, as well as on historic claims) on the basis of which outer limits of maritime zones are delineated. Finally, in this Report the terms 'miles' and 'nautical miles' have been used interchangeably.

II. Article 8(2)

A. Relevant Historical Background

11. The International Law Commission (ILC) in its Draft Articles recognised that in instances where the drawing of straight baselines enclosed as internal waters areas which had previously been considered part of the territorial sea or high seas, a right of innocent passage would remain where "the waters have normally been used for international traffic."[12] When this issue was considered at UNCLOS I in Geneva, a separate article was agreed upon for insertion in the Convention on the Territorial Sea and the Contiguous Zone which directly considered internal waters. It provided as follows:

> Article 5
>
> 1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
>
> 2. Where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in Articles 14 to 23, shall exist in those waters.

12. Paragraph 2, which is the forerunner to Article 8(2) LOSC, was proposed at UNCLOS I by the UK.[13] The UK position on this matter would have been influenced by the outcome in the 1951 *Fisheries* case[14] and subsequent developments in state practice and through the work of the ILC regarding straight baselines.

B. LOSC Text

13. At UNCLOS III there was ongoing support for the retention of Article 5 of the Convention on the Territorial Sea and the Contiguous Zone, subject to adjustment to reflect modifications to the law of the sea regime which were occurring. Accordingly, there was consensus for the retention of a modified version of Article 5(2) which became Article 8(2) in the final text. It provides as follows:

> *Article 8*
>
> *Internal Waters*
>
> 2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had

[12] International Law Commission, 'Articles concerning the Law of the Sea with commentaries' (1956), art 5 (3).

[13] A/CONF.13/C.1/L.62/Corr.1 (1958), art 5, para 6, UNCLOS I, III Official Records 228 (UK).

[14] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116; see discussion in Gerald Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea: Part 1 – The Territorial Sea and Contiguous Zone and Related Topics' (1959) 8 *International and Comparative Law Quarterly* 73, 78-79; Fitzmaurice was the deputy-leader of the UK delegation at UNCLOS I..

not been previously considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

C. Analysis of Article 8(2)

1. Text

14. There is minimal difference in the text between Article 5(2) of the Convention on the Territorial Sea and the Contiguous Zone and Article 8(2) of the LOSC. There remains a connection between the provision and the relevant Article providing for the drawing of straight baselines (Article 7). It follows that Article 8(2) is only activated once Article 7 straight baselines have been established. Article 8(2) does not, like its predecessor, make precise reference to other maritime zones other than internal waters. The effect is therefore that the waters enclosed within baselines either were or were not previously considered to be internal waters. As observed in the *Virginia Commentaries*, "the comprehensive formula employed by the new Convention was clearly intended to cover the exclusive economic zone (or exclusive fishing zones) in addition to the territorial sea and high seas, and possibly also a contiguous zone."[15] The effect of enclosing certain waters by way of Article 47 archipelagic baselines does not fall within the remit of Article 8(2).

2. State Practice

15. An analysis of domestic instruments implemented by State parties to the LOSC clearly indicates that it is generally accepted that the drawing of straight baselines will transform the legal status of the enclosed waters into internal waters.[16] It is equally possible to conclude that the codified and customary right of innocent passage is generally recognised. A frequently referenced example of state practice is the Minches, a passage between the Outer and Inner Hebrides, where the UK acknowledges that ships of foreign states enjoy the right of innocent passage.[17] In contrast, acceptance of the extension of the right of innocent passage to newly-defined internal waters is comparatively rare.

16. The state practice of Costa Rica is a possible exception. Pursuant to decree 18581-RE, Costa Rica recognises that the right of innocent passage applies in its internal waters "in accordance with the principles and norms of international law."[18] Notably the decree implies that the decision to extend innocent passage into the State's internal waters was predicated upon the fact that "several Important (sic) ports on the Pacific

---

[15] Satya N. Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* Vol II (Martinus Nijhoff, Dordrecht, 1993) 107.

[16] See, eg, *Law No. 18.565 amending the Civil Code with regard to maritime space* (Chile) 13 October 1986, art 593; *Law on the Territorial Sea and the Contiguous Zone* (China) 25 February 1992, art 2; *Act on the Delimitation of the Territorial Waters of Finland* (Finland) No 463 (as amended by Act No 144/1965, Act No 322/1966 and Act No 981/1995 adopted in Helsinki on 18 August 1956) s 3.

[17] United Kingdom, *Parliamentary Debates*, House of Lords, 5 February 1987, col 400 (Baroness Young) debating the Territorial Sea Bill; see also Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* 2nd (Martinus Nijhoff, Leiden, 2005) 10; Sophia Kopela, *Dependent Archipelagos in the Law of the Sea* (Martinus Nijhoff, Leiden, 2013) 90.

[18] *Decree 18581-RE concerning straight baselines in the Pacific Ocean* (Costa Rica) 14 October 1988, art 3.

coast" are located on the Costa Rican coastline.[19] On this basis, it may not be possible to attribute the Costa Rican decree to an appreciation of Article 8(2), but rather to the practical exigencies of Pacific trade. This conclusion is supported by the ambiguous language of the decree, which provides that "the right of innocent passage to ships of all nations is permitted [in internal waters], in accordance with the principles and norms of international law", a statement that fails to distinguish between internal waters delimited by applying the system of normal baselines and those generated by straight baselines.[20] Some irregularities have also been identified in the practice of Belize, Denmark, Cyprus, Ireland, Honduras and Slovenia.[21]

17. Several States observe a right of innocent passage in internal waters enclosed by straight baselines by administrative rather than legislative means.[22] For example, "Australia and South Africa recognise the right of innocent passage in the waters enclosed by straight baselines."[23]

3. Case Law

18. There does not appear to be any instance of a court of tribunal having applied Article 8(2) to date with respect to recognising the right of innocent passage following the drawing of an Article 7 straight baseline. The International Court of Justice did, however, in the *Land, Maritime and Island Frontier* dispute between El Salvador and Honduras, recognise that the right of innocent passage applied in all of the Gulf of Fonseca (an historic bay).[24] The internal waters enclosed by the bay closing lines and "all waters of the Gulf [were found to be subject to the right of innocent passage by virtue of] the exigencies and resulting history of a three-State but relatively small bay, with its problems of navigational access."[25] This decision provides an example of an analogous circumstance where the drawing of a baseline which thereby confirmed the status of the enclosed waters as internal did not impair a pre-existing right of innocent passage.

4. Commentary by Publicists

19. Publicists have noted the exceptional nature of the right of innocent passage conferred by Article 8(2). Adi states that Article 8(2) "preserve[s the right of innocent passage] in the internal waters [in a manner that is] identical to the case in the territorial

---

[19] Ibid.

[20] Ibid.

[21] Kopela, *Dependent Archipelagos in the Law of the Sea* (2013) 89 has identified the following as further examples of States that 'recognise a right of innocent passage through internal waters enclosed by straight baselines in their national legislation regarding straight baseline systems or the regime of the territorial sea': *Maritime Areas Act 1992* (Belize) art 12(1)(c); *Act No 200* (Denmark) 7 April 1999, art 4 (for the Little Belt, Great Belt and the Sound); *The regulation of the Innocent passage of ships in the territorial waters law* (Cyprus) 2011, art 3(2); *Sea Fisheries and Maritime Jurisdiction Act 2006* (Ireland) s 86; *Act on Honduran Maritime Areas* (Honduras) Legislative Decree 172-33, 30 October 1999, art 1(3); *Maritime Code (PZ)* (Slovenia) 23 March 2001, art 6.

[22] Ibid 89-90.

[23] Ibid 90.

[24] *Land, Maritime and Island Frontier Dispute (El Salvador v Honduras: Nicaragua intervening) (Judgment)* [1992] ICJ Rep 351, 607.

[25] Ibid.

waters in terms of alien navigation."[26] Kopela is of the view that, given the lack of a clear distinction between the juridical nature of "other" internal waters and those enclosed by straight baselines, "it is difficult to establish whether states treat navigation in their internal waters as a right of innocent passage belonging to third states or part of their discretion to allow navigation and entry into their internal waters and ports."[27] The conclusion of Kopela with respect to Article 8(2) is that the provision is indicative of an emerging principle of customary international law, a conclusion that is supported by the unchallenged adoption of Article 8(2) at UNCLOS III.[28]

20. Smith invokes Article 8(2) in support of the principle that baselines should not exceed 24 nautical miles:

> This implication [that baselines are limited to 24 nautical miles or less] is reinforced by article 8(2) which guarantees the right of innocent passage in areas converted to internal waters by straight baselines … Preservation of innocent passage carries over pre-existing rights in waters that were territorial in nature before the application of straight baselines. Given this theme of linkage to territorial waters, it follows that, as a rule, no straight baseline segment should exceed 24 miles.[29]

D. Conclusion

21. In the absence of extensive state practice relating to Article 8(2) it is difficult to make firm conclusions, other than to observe that there is little evidence to suggest that the recognition of the right of innocent passage within waters enclosed by Article 7 straight baselines that previously were not considered internal waters is contentious. Notwithstanding the characterisation by publicists such as Smith that Article 8(2) seeks to "preserve" a right of innocent passage within waters newly enclosed by Article 7 straight baselines, Article 8(2) does not require that the right of innocent passage have been previously accepted. Rather, Article 8(2) addresses waters that were previously not considered to be internal waters. Therefore, whether the coastal State had or had not previously acknowledged the right of innocent passage within those waters is irrelevant to the state of the right following the establishment of Article 7 straight baselines.

III. Article 10

A. Relevant Historical Background

22. The ILC considered the status of bays with respect to baselines and made provision for those circumstances in Article 7 of the Draft Articles. That provision sought to define a bay, including its relevant dimensions, and allowed for the drawing of a line across the mouth of the bay not exceeding 15 miles. Larger bays could have a closing line, including a combination of closing lines, drawn within the bay. These provisions did not apply

---

[26] Mazen Adi, 'The Application of the Law of the Sea and the Convention on the Mediterranean Sea' (United Nations Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, New York, 2009) 16.

[27] Kopela, *Dependent Archipelagos in the Law of the Sea* (2013) 90.

[28] Ibid 93. For a discussion of the implications of a customary equivalent of Article 8(2) to non-member States, see further ibid 90-93.

[29] Robert W. Smith, 'Limits in the Seas: Straight Baselines Claim: China' (9 July 1996) No. 117 *Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State* 1, 5; as to the status of whether straight baselines are limited in their length to 24 miles, see the discussion in the *First Report* (2014) [36-37].

in the case of 'historic bays', a matter on which the International Law Association had commented in 1926 and 1928.[30]

23. The ILC's recommendations formed the basis for what became Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. Article 7 contained six sub-paragraphs and retained the principal provisions of the ILC draft, though the entrance points of the bay were extended to 24 miles. Article 7, and its provisions for the drawing of closing lines within or across a bay, did not apply in the case of historic bays or where Article 4 straight baselines were drawn.

B. LOSC Text

24. Article 10 of the LOSC repeats the text of Article 7 with some very minor variations. All of the key components of the regime for baselines within a bay are retained.

Article 10

Bays

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of this Convention, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purposes of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 nautical miles, a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions do not apply to so-called "historic bays", or in any case where the system of straight baselines provided for in article 7 is applied.

---

[30] Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* 2nd (Martinus Nijhoff, Leiden, 2005) 115 referencing M.P. Stohl, *The international law of bays* (Martinus Nijhoff, The Hague, 1963) 306-307.

C. Analysis of Article 10

1. Text

25. Article 10 provides a mechanism for the drawing of straight baselines within a juridical bay. Two types of bays are excluded from Article 10: a) bays shared by two or more States;[31] and b) historic bays.[32] Neither of these two exceptions are therefore assessed. Article 10(2) defines a juridical bay providing some general guidance as to size and indentation from the coast. A semi-circle test is applied on the basis of a semi-circle whose diameter is a line drawn across the mouth of the bay. The line is determined from the low-water mark of the natural entrance points of the bay. With respect to determining the entrance points of the bay, the *Virginia Commentaries* observed that: "Such points, however, are not always easy to determine because some bays have a number of such points and others possess smoothly curved entrances on which no single point is distinguishable."[33]

26. Different outcomes arise if the distance between the natural entrance points is less than or greater than 24 nm. If less than 24 nm then a closing line is drawn across those entrance points and the waters on the landward side of the line are considered internal waters. If greater than 24 nm then a straight baseline of 24 nm shall be drawn within the limits of the bay.

2. State Practice

27. Contemporary evidence of State practice suggests that adherence to the provisions of Article 10 remains varied in practice. While it is possible to identify examples of juridical bays that satisfy the definition in Article 10,[34] there are a number of instances of state practice where States have sought to draw straight baselines across the entrances to gulfs and bays which exceed the provisions of Article 10. Examples include Libya's claims with respect to the Gulf of Sidra, which has been rejected by a number of states as having any basis of claim as an historic bay, or a juridical bay subject to a closing line,

---

[31] Westerman asserts this provision was "necessary in order to prevent large bodies of water such as the Mediterranean or Baltic seas from technically becoming juridical bays under Article 7": Gayl Shaw Westerman, *The Juridical Bay* (Oxford University Press, Oxford, 1987) 79.

[32] See generally on historic bays L.F.E. Goldie, "Historic Bays in international law: an impressionistic overview" (1984) 11 *Syracuse Journal of International Law and Commerce* 211-273; "Historic Bays: Memorandum by the Secretariat of the United Nations" (United Nations Conference on the Law of the Sea, 24 February – 27 April 1958) UN Doc. A/CONF.13/1.

[33] Nandan and Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* Vol II (1993) 117.

[34] See, eg, Brian Melchior and Kevin Baumert, 'Limits in the Seas: Mauritius: Archipelagic and other Maritime Claims and Boundaries' (8 July 2014) No. 140 *Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State* 1, 6 – with the exception of Mathurn Bay, the six bay closing lines put forward by Mauritius in the 2005 Regulations to the *Maritime Zones Act 2005* satisfy the "semi-circle test" and do not rely upon closing lines in excess of 24nm. Grenada's 28 bays equally satisfy both requirements: Brian Melchior and Kevin Baumert, 'Limits in the Seas: Grenada: Archipelagic and Other Maritime Claims and Boundaries' (28 March 2014) No. 135 *Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State* 1, 3.

including by Australia, France, Germany, Italy, and the United States.[35] In 1966 Argentina drew straight baselines across the mouths of the San Jorge and San Matias gulfs which were also subject to protest by the United States on the basis that neither met the test as a juridical bay under the provisions of the Convention on the Territorial Sea and the Contiguous Zone.[36] Protests have also been lodged by the United States with respect to the length of the closing lines drawn across bays by Mauritania,[37] Sudan[38] and Costa Rica.[39] The US has also objected to the use of straight baselines to delimit waters off the mainland coast of Portugal and the Azores on the grounds that the baselines relied upon "do not enclose juridical bays or lie in localities which meet the legal requirement that the coastline is deeply indented and cut into."[40]

28. Churchill and Lowe have identified New Zealand, Papua New Guinea, Samoa and Vanuatu as States whose domestic legislation conforms to the Article 10 definition of bays and the specifics of the semi-circle test.[41] It is observed that references to bays in the domestic legislation of other LOSC State parties "either fail … to define a bay and/or fail … to prescribe the maximum limit of the closing line."[42] In spite of this inconsistency, Churchill and Lowe maintain that it is not possible to "conclude from this … that the practice of these States is necessarily contrary to the Conventions."[43] Churchill and Lowe argue that such a conclusion could only be based upon clear evidence of how these domestic provisions are applied in practice.[44] Writing in 1999, Churchill and Lowe noted that due to the limited evidence of relevant State practice it was impossible to reach a conclusion as to the degree of fidelity between State practice and Article 10.[45]

29. A more recent assessment of state practice by Prescott and Schofield (2005) reached the conclusion that "Article 10(2) presents most governments with few difficulties because they alone are responsible for interpreting this Article. They consider potential

---

[35] J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims* 3rd (Martinus Nijhoff, Leiden, 2012) 46-47, 129.
[36] Ibid, 129.
[37] Ibid, 130.
[38] Ibid.
[39] Robert W. Smith, 'Limits in the Seas: Straight Baselines Claim: Costa Rica' (17 August 1990) No. 111 *Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State* 1, 7 citing the Text of United States Protest Note to Costa Rica, 18 December 1989.
[40] Robert W. Smith and J. Ashley Roach, 'Limits in the Seas: United States Responses to Excessive National Maritime Claims' (9 March 1992) No. 112 *Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs* 1, 32 quoting a diplomatic note transmitted by the American Embassy at Lisbon, based on instructions found in 1986 State telegram 266998.
[41] R. R. Churchill and A.V. Lowe, *The Law of the Sea* 3rd (Manchester University Press, Manchester, 1999) 54 citing *Territorial Sea and Exclusive Economic Zone Act 1977* (New Zealand) ss 2 and 6; *National Seas Act 1977* (Papua New Guinea) Schedule 1; *Territorial Sea Act 1971* (Samoa) No 3, ss 2 and 6, *Maritime Zones Act No 23 of 1981* (Vanuatu) ss 1 and 4 which has since been repealed by the *Maritime Zones Act No 6 of 2010* (Vanuatu) ss 1 and 4 (the substantive of the provisions remains unchanged from the 1981 Act).
[42] Churchill and Lowe, *The Law of the Sea* 3rd (1999) 54-55.
[43] Ibid, 55.
[44] Ibid.
[45] Ibid.

bays, apply the precise semi-circle test in the second sentence and if it is passed the bay is closed."[46] The practice of Australia and Mauritius is assessed by Prescott and Schofield as being consistent with the Article 10(2) test.[47] In the case of the UK, the Territorial Sea (Baselines) Order 2014 proclaims certain baselines adjacent to the UK, Channel Islands and Isle of Man in which the provisions of Article 10 are specifically endorsed.[48]

30. In some instances where Article 10 has been applied to bays that do not meet the definition of an Article 10 juridical bay, the normal baseline (as defined by the low-water line) has been identified as an appropriate substitute.[49]

3. Case Law

31. The International Court of Justice in the *Land, Island and Maritime Frontier* case determined that the provisions of Article 10 "might be found to express general customary law."[50] The case provided some relevant statements on the legal status and effect of the closing line used to delimit the Gulf of Fonseca. These are extracted below. The closing lines of the Gulf of Fonseca are drawn from Punta Amapala (on the coast of El Salvador) to Punta Cosigüina (in Nicaragua).[51] As the Gulf of Fonseca extends from the coast of one State to another, the Gulf does not satisfy the test for a juridical bay.[52] The Court concurred with the generally accepted conclusion that the Gulf of Fonseca is an historic bay.[53] While the provisions of Article 10 do not apply to historic bays, the case's discussion of the effect of closing lines on the delimitation of surrounding maritime zones is equally applicable to juridical bays.

32. The Court concluded that bay closing lines were effectively the Gulf's 'ocean limit' and accordingly acted as the "baseline for whatever régime lies beyond it".[54] While the Court accepted El Salvador's submission that bay closing lines were acceptable as a line "depicting the ocean limit of the Gulf of Fonseca," it found that this limit must logically share the character of a baseline under international law.[55] Following on from this conclusion, the territorial seas of Honduras and El Salvador must be calculated from the Gulf of Fonseca's closing lines, and must not include waters enclosed by the bay closing lines.[56] Thus "maritime belts within the Gulf may properly be regarded as the internal waters of the coastal State, not being subject to joint sovereignty, and even though subject, as indeed are all the waters of the Gulf, to rights of innocent passage that owe their origin

[46] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 117.
[47] Ibid.
[48] *The Territorial Sea (Baselines) Order 2014* (2014 No. 1353) (UK) 'Explanatory Note'.
[49] See, eg, J. Ashley Roach and Robert W. Smith, 'Limits in the Seas: Taiwan's Maritime Claims' (15 November 2005) No. 127 *Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State* 1, 12 referring to 'a shallow indentation of the northwest coast that includes the mouth of the Tan-shui River leading to Taipei.'
[50] *Land, Maritime and Island Frontier Dispute (El Salvador v Honduras: Nicaragua intervening) (Judgment)* [1992] ICJ Rep 351, 588. See also Churchill and Lowe, *The Law of the Sea* 3rd (1999) 42.
[51] *Land, Maritime and Island Frontier Dispute (El Salvador v Honduras: Nicaragua intervening) (Judgment)* [1992] ICJ Rep 351, 588.
[52] Ibid.
[53] Ibid.
[54] Ibid, 604.
[55] Ibid.
[56] Ibid, 607.

to the exigencies and resulting history of a three-State but relatively small bay, with its problems of navigational access."[57] The Court concluded that to calculate the territorial sea from a point other than the Gulf's closing line "would be incompatible with the legal status of a bay."[58] The Court resolved the issue of overlapping coastal State jurisdiction by concluding that "the legal situation on the landward side of the closing line is one of joint sovereignty, [thus] all three of the joint sovereigns [Nicaragua being the third] must have entitlement outside the closing line to territorial sea, continental shelf and exclusive economic zone."[59] The Court conceded that the Parties may choose to divide the zone of shared jurisdiction into three distinct areas.[60] The key principle that may be extracted from the judgment is that bay closing lines are of the same legal "character" as baselines.

33. Honduras' acceptance of the Court's findings is evidenced by the following Executive Decree: "On the Pacific Ocean, the straight baseline is the proportional sector appertaining to Honduras on the baseline common to the three coastal States of the Gulf of Fonseca, which in turn is part of the line drawn across of the said Gulf, between Punta Amapala in El Salvador and Punta Cosigüina in Nicaragua, in accordance with the terms of the Judgment delivered by the International Court of Justice on 11 September 1992."[61]

34. The most prominent domestic courts that have considered and assessed the status of bays are those in the United States in cases involving Louisiana, Mississippi, Alaska, Florida, Texas, Maine, and Rhode Island.[62]

4. Commentary by Publicists

35. Prescott and Schofield assess the application of Article 10 to single State bays. They observe, based on their analysis at the time (2005), that there are 25 'coastal indentations', other than estuaries, that coincide with the coastal termini of international boundaries,[63] and conclude that "[i]t does seem discriminatory that states with sovereignty over a bay can take advantage of Article 10 whereas two states with sovereignty over a bay of exactly the same proportions are prevented from agreeing to close it."[64]

36. Westerman highlights the relationship between the delimitation of bays and expansionist policies, arguing that "many states have declared sovereignty over bays of increasing size as one strategy for maximising national control over waters previously considered high seas."[65] Westerman's understanding of the relationship between bay delimitation and inter-State conflict may be approached as a possible explanation for

---

[57] Ibid.
[58] Ibid.
[59] Ibid, 608.
[60] Ibid.
[61] *Executive Decree No. PCM 007-2000* (Honduras) 21 March 2000, art 1, B.
[62] See eg *United States v Louisiana* 394 US 11; *United States* v *Alaska v United States* 422 US 184; *United States v Maine* 469 US 504; *United States v California* 381 US 139; see the discussion in particular in M.W. Reed, *Shore and Sea Boundaries: the Development of International Maritime Boundary Principles through United States Practice* Vol 3 (US Government Printing Office, Washington, 2000); and analysis in Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 118-121.
[63] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 113, Table 6.1.
[64] Ibid.
[65] Westerman, *The Juridical Bay* (1987) 5.

continued academic and national interest in the interpretation of Article 10 and relevant state practice.[66]

37. A significant body of literature addresses the Article 10 conditions that define a juridical bay, especially in the context of litigation that has arisen before the Supreme Court of the United States involving federal and state authorities. The discussion which follows considers issues that publicists have considered in a more general context.[67]

a. "Natural entrance points" of an indentation

38. Churchill and Lowe have identified Article 10's ambiguous reference to a bay's 'natural entrance points' as a likely source of difficulty in the 'practical application' of the provision.[68] Referring to the English Court of Appeal decision in *Post Office v Estuary Radio Ltd*,[69] the authors submit that "neither set of points [put forward by the parties] seems very obviously to be the 'natural entrance points' of the [Thames] estuary."[70] While the Court of Appeal accepted the Post Office's submission that Naze and Foreness were natural entrance points and thus sufficient to meet the juridical test of a bay,[71] Churchill and Lowe's contention implies that the identification of a bay's natural entrance points is a matter of degree.[72]

39. Prescott and Schofield are of the view that in the case of a "classical bay shape with a narrow mouth between two headlands, the natural entrance points will be obvious".[73] In these instances, the points will possess a name such as cape, point, head or bluff leading to the selection of a 'mathematical point' along the coast. As such, in their view: "It seems that the precise natural entrance points should be selected after the study of large-scale charts, maps and air photographs and then a visit to the feature."[74] In those instances where the natural entrance points are not as readily apparent, Prescott and Schofield are of the view that this would not ordinarily result in controversy, observing that "[s]ince the selection of natural entrance points is the sole responsibility of the country concerned, this is not a situation that is likely to cause difficulties or uncertainties."[75]

b. The semi-circle test

40. Writing in the context of Article 10's antecedent provision in the Convention on the Territorial Sea and the Contiguous Zone, O'Connell argued that the semi-circle test is an arbitrary means of defining a juridical bay.[76] O'Connell intimated that the provision fails to give effect to geographical variations that do not detract from an indentation's essential characteristic as a "bay":

---

[66] Ibid.
[67] A detailed analysis of issues associated with bays appears in O'Connell, *The International Law of the Sea* Vol 1 (Clarendon, Oxford, 1982) 389-416.
[68] Churchill and Lowe, *The Law of the Sea* 3rd (1999) 42.
[69] [1968] 2 QB 740
[70] Ibid.
[71] *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, 760.
[72] Churchill and Lowe, *The Law of the Sea* 3rd (1999) 42.
[73] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 129.
[74] Ibid.
[75] Ibid.
[76] O'Connell, *The International Law of the Sea* Vol 1 (1982) 393.

> [i]t is possible to have a shallow bay attenuated on either side or one side of the headlands whose area is as large as that of the semi-circle; or a deep V-shaped bay whose depth is greater than that of the diameter, but whose area is less than that of the semi-circle. Why the one should be a bay and the other not defies scientific enquiry, and hence the area comparison, useful as it may be in many situations, and plausible as it appears to be on superficial examination, cannot be regarded as a device of customary international law.[77]

41. O'Connell notes that the ambiguous "relationship between the two sentences of Article 7(2)" [the forerunner to Article 10(2)], the latter of which contains the semi-circle test, fails to clarify whether the relevant tests are to be applied.[78] Drawing upon the conclusion in the *Louisiana Case* that Article "7(2) plainly treats the semicircle test as a minimum requirement,"[79] O'Connell concludes that the test should be approached as "a secondary and additional condition which may, or may not, be fulfilled by measuring a bay against the requirements of the first sentence."[80] O'Connell further criticises the requirement that a bay is "to contain land-locked waters," arguing that a literal reading of this provision would "restrict … the category of bays … to very few actual bays in the world" whereas a common-sense interpretation "adds nothing to the result achieved by applying the semi-circle test."[81]

42. Prescott and Schofield refer to the "simple principle of the semicircle test" found in the second sentence of Article 10(2),[82] and give emphasis to the linkage between Article 10(2) and Article 10(3) as giving effect to the principle outlined in Article 10(2). In their view, "[t]he three sentences in Paragraph 3 present no difficulties for most countries when the central authority has no aversion to creating internal waters and extending its territorial seas,"[83] but concede that when the semicircle test has been subject to scrutiny in the context of litigation before the United States Supreme Court "each of the three sentences can provide many pages of evidence and long hours of debate."[84]

D. Conclusion

43. While the status of a juridical bay in the modern law of the sea within which a straight (closing) line may be drawn has a long history as reflected in both the Convention on the Territorial Sea and the Contiguous Zone and the LOSC, state practice in applying Article 10 is varied and has proven to be contentious. Though the International Court of Justice in the *Land, Island and Maritime Frontier* case considered the provisions of Article 10 to reflect "general customary law", state practice suggests that some States take an expansive view as to what is a juridical bay for the purposes of Article 10, paragraphs 2 and 3. A particular difficulty that arises with Article 10 is the multiple criteria a coastal State must apply in order to determine that the indentation along the coast is a juridical bay. Given the ambiguity that exists with those criteria it is unsurprising that there exist

---

[77] Ibid.

[78] Ibid.

[79] *United States v Louisiana,* 394 U.S. 11, 54.

[80] O'Connell, *The International Law of the Sea* Vol 1 (1982) 394.

[81] Ibid. On the need for 'land-locked waters' see also Mitchell P. Strohl, *The International Law of Bays* (Martinus Nijhoff, The Hague, 1963) 56.

[82] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 121.

[83] Ibid, 122.

[84] Ibid; see also the discussion on these aspects of Article 10 in Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Baselines* (United Nations, New York, 1989) [67-72].

variations in state practice and that the drawing of straight (closing) lines within certain bays has been the subject of protest.

IV. Article 13

A. Relevant Historical Background

44. The status of drying rocks and shoals was considered by the ILC and was reflected in Article 11 in the Draft Articles. At UNCLOS I the ILC draft text of Article 11 was not endorsed and in its place Article 11 of the Convention on the Territorial Sea and the Contiguous Zone addressed low-tide elevations.

B. LOSC Text

45. Article 13 of the LOSC repeats verbatim Article 11 of the Convention on the Territorial Sea and the Contiguous Zone. While there was some early debate at UNCLOS III with respect to the text of the article, consensus was reached for retention of the Geneva text as follows:

Article 13

Low-tide elevations

> 1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
>
> 2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

C. Analysis of Article 13

1. Text

46. There are three dimensions to Article 13. The first is the definition of a low-tide elevation. A low-tide elevation has the following elements:

- it is naturally formed;
- it is an area of land;
- it is surrounded by water;
- it is above water at low-tide; and
- is submerged at high tide.

No reference is made to the composition of the feature other than that it is 'naturally formed'. The generic term 'low-tide elevation' may therefore encompass a rock, a shoal or some other similar feature.[85] No connection is drawn between Article 13 and the Article 121 'Regime of Islands', though a feature which geologically is properly characterised

[85] These various features are assessed in *Territorial and Maritime Dispute* (Nicaragua v. Colombia) (Judgment) [2012] ICJ Rep 624.

as a rock may for the purposes of the law of the sea be properly characterised as either a 'low-tide elevation' if it is submerged at high tide, or an Article 121(3) rock if it is above water at all times. The determining juridical characteristic is therefore whether the rock is or is not submerged at high tide. Importantly, no reference is made to the size or composition of the feature other than it being "an area of land".

47. The second is the significance of a low-tide elevation for the purposes of the baseline. In this respect the location of the low-tide elevation is determinative as to its capacity for being used as the basepoint for measuring the breadth of the territorial sea. To that end, the low-tide elevation must wholly or partly fall within the breadth of the territorial sea as measured from the mainland or an island. If that requirement is met then the low water line on the elevation may be used as the basepoint. An exception to this rule applies in the case of those low-tide elevations beyond the breadth of the territorial sea which have had a lighthouse or similar installation built upon them so that they are now permanently above sea level. In those instances straight baselines may be drawn to and from the low-tide elevation consistently with Articles 7(4) and 47. The other Article 7(4) exception is where the drawing of such baselines has received general international recognition.[86]

48. The third dimension relates to the maritime zone generated by a low-tide elevation. A low-tide elevation is not considered to be part of the coast and does not generate a distinctive territorial sea, but the low-water line may be used as the basepoint for measuring the breadth of the territorial sea if it falls within the territorial sea generated from the mainland or an island. Whether the low-tide elevation is utilised as the basepoint may depend on whether it is the most outer lying low-tide elevation within the territorial sea of the mainland or an island. If the low-tide elevation is relied upon as the basepoint for the territorial sea, it can also be the basepoint from which other maritime zones are proclaimed. Article 13(2) makes clear that if the low-tide elevation is situated at a distance which exceeds the breadth of the territorial sea from the mainland or an island, then it has no territorial sea of its own.

2. State Practice

49. It is possible to identify a number of coastal States whose relevant legislation and practice deviates from the LOSC principles regarding baselines associated with low-tide elevations, though it is difficult clearly to differentiate whether the state practice relates to Article 13 low-water line baselines or Article 7(4) straight baselines, partly arising from inaccurate charting. China has relied upon "eight low-tide elevations … that cannot be used to determine the territorial sea because no part of any of these low-tide elevations are within 12 miles of the mainland or an island."[87] Furthermore, none of these elevations possess lighthouses or similar structures that would justify the drawing of straight baselines, nor have these baselines received general international recognition.[88] Saudi Arabian legislation relevant to basepoints is similarly inconsistent with Article 13, as it "appears

[86] Note also that Article 47 (4) addresses the drawing of archipelagic baselines to low-tide elevations.
[87] Robert W. Smith, 'Limits in the Seas: Straight Baselines Claim: China' (9 July 1996) No. 117 *Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State* 1, 6.
[88] Ibid; it is acknowledged that the circumstances as they existed in 1996 may have now altered.

to allow low-tide elevations wherever situated to generate a territorial sea."[89] States such as New Zealand and Trinidad and Tobago have created ambiguity with respect to how they characterise low-tide elevations for the purposes of measuring the breadth of the territorial sea by having enacted legislation equating low-tide elevations with an island.[90]

50. States including Japan and Mexico have implemented legislation that closely observes the provisions of Article 13.[91] Churchill and Lowe have noted that "some States appear to accept the use of low-tide elevations as basepoints, regardless of whether lighthouses or similar installations have been built on them."[92]

3. Case law

51. The International Court of Justice considered the issue of low-tide elevations in its 2001 judgment on the *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*,[93] where the ICJ determined that Article 13 reflected customary international law.[94] The dispute between Qatar and Bahrain rested on the issue of whether Fasht al Dibal (a low-tide elevation) could "be appropriated in accordance with the criteria which pertain to the acquisition of territory."[95] Qatar maintained that a territorial claim cannot be made in relation to a low-tide elevation; Bahrain claimed the converse.[96] The Court confirmed that "a low-tide elevation situated in the overlapping area of the territorial sea of two States, whether with opposite or with adjacent coasts [may be used by both States] for the measuring of the breadth of their territorial sea."[97] As both States would benefit from reliance upon the low-tide elevations for delimitation purposes, "the competing rights derived by both coastal States … would by necessity seem to neutralize (sic) each other."[98] Bahrain claimed that it held a superior title to the low-tide elevations "in the sea between Bahrain's main islands and the coast

---

[89] Churchill and Lowe, *The Law of the Sea* 3rd (1999) 55 citing Royal Decree concerning the Territorial Waters of the Kingdom of Saudi Arabia (Royal Decree No. 33 of 16 February 1958), arts 1 and 5.

[90] *Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1997 as amended by Act No 146 of 1980* (New Zealand) s 5(2); *Territorial Sea Act 1969, No 38 of 6 December 1969* (Trinidad and Tobago) art 5(2).

[91] UN Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs (2008) Bulletin No. 66 *Law of the Sea* 71ff extracting the *Enforcement Order of the Law on the Territorial Sea and the Contiguous Zone* (Japan) (Cabinet Order No. 210 of 1977, as amended by Cabinet Order No. 383 of 1993, Cabinet Order No. 206 of 1996 and Cabinet Order No. 434 of 2001), arts 2(3) and 2(5) (which defines low-water elevations according to art 13(1) of LOSC); *General Act of 31 December 1941 on National Property* (Mexico) (as amended in January 1982), art 29(II).

[92] Churchill and Lowe, *The Law of the Sea* 3rd (1999) 39-40 citing 'Limits in the Seas: Straight Baselines: Saudi Arabia' (8 June 1970) No. 20 *The Geographer, Office of the Geographer, Directorate for Functional Research, Bureau of Intelligence and Research* 1; 'Limits in the Seas: Straight Baselines: Syria' (10 October 1973) No. 53 *The Geographer, Office of the Geographer, Bureau of Intelligence and Research* 1.

[93] *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Merits)* [2001] ICJ Rep 40.

[94] Ibid 100 [201].

[95] Ibid, 100.

[96] Ibid.

[97] Ibid, 101.

[98] Ibid.

of the Qatar peninsula" and was thus able to exercise sovereign rights over these areas.[99] In support of this contention Bahrain claimed that the legal status of low-tide elevations is analogous to that of islands under the law of the sea.[100] The Court noted that "[i]nternational treaty law is silent on the question whether low-tide elevations can be considered … "territory" " and that "the few existing rules [in the law of the sea] do not justify a general assumption low-tide elevations are territory in the same sense as islands".[101] The Court rejected Bahrain's submission that a low-tide elevation is susceptible of a claim to territorial sovereignty, supporting this finding with a reference to the rule in Article 13(2) that low-tide elevations situated beyond the limits of a State's territorial sea do not themselves generate a territorial sea.[102] On this basis the Court concluded that neither Bahrain nor Qatar were able to rely upon the low water line of the low-tide elevations "in the zone of overlapping claims" for the purposes of drawing the equidistance line between the two States.[103]

52. The ICJ also recently assessed Article 13 in its 2012 judgment in *Territorial and Maritime Dispute* (Nicaragua v. Colombia)[104] and confirmed that low-tide elevations within 12 nautical miles of an Article 121(3) rock could be used for the purpose of delimiting the territorial sea.[105] In that regard, it can be recalled that Article 13(1) makes no distinction regarding the territorial sea generated from an island.

4. Commentary by Publicists

53. Prescott and Schofield have commented on the location of the low-tide elevation within the confines of the territorial sea. They have observed that "[a] strict interpretation of the phrase means that to be used as a baseline, a low-tide elevation must lie within, or at least partially within, the territorial sea generated from the normal baseline of the mainland or an island."[106] Accordingly, in their view "[l]ow-tide elevations that lie outside the territorial sea generated from the mainland or an island cannot be used to generate a further area of territorial sea"[107] and as such a low-tide elevation that meets this qualification cannot be used for the drawing of a baseline to extend the territorial sea so as to encompass other low-tide elevations which are beyond the normal baseline.

54. Churchill and Lowe provide further support for the principle that "it is not possible to "leapfrog" from one low-tide elevation to another."[108] The authors confirm that a State may not extend its territorial sea where "a low-tide elevation is situated at a distance less than the breadth of the territorial sea from another low-tide elevation, which in turn is situated less than the breadth of the territorial sea from the mainland."[109] While the authors condemn the practice of "leapfrogging", they recognise that "where a low-tide

[99] Ibid.
[100] Ibid.
[101] Ibid, 101-2 [205-206].
[102] Ibid, 102.
[103] Ibid 102-3.
[104] *Territorial and Maritime Dispute* (Nicaragua v. Colombia) (Judgment) [2012] ICJ Rep 624.
[105] Ibid 693 [182-183].
[106] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 107.
[107] Ibid, 108.
[108] Churchill and Lowe, *The Law of the Sea* 3rd (1999) 48, with reference to art 13(2).
[109] Ibid, 48.

elevation is twelve miles from the mainland, the outer limit of the territorial sea will be twenty-four miles from the mainland."[110]

55. Sir Gerald Fitzmaurice reached a similar conclusion on this issue:

> It is one thing to permit the use of a low-tide elevation to create *in its immediate vicinity* a moderate bulge in what is already territorial sea. But the effect is of quite another kind, and on an altogether different scale, if such elevations (even if within the territorial sea) can be used as departure points for what may be far-flung baselines ranging perhaps thirty, forty, or sixty miles.[111]

D. Conclusion

56. A distinctive feature of Article 13 is that it permits a coastal State to rely upon a maritime feature other than the mainland or an island as the basepoint from which the territorial sea is measured. There is also a direct linkage between Article 13 and Articles 7(4) and 47 (4), which has permitted some coastal States to engage in ambiguous conduct as to which of these provisions they have utilized when they rely upon certain low-tide elevations to measure the breadth of their territorial sea or to draw straight baselines. While Article 13 identifies the essential characteristics of a low-tide elevation there remains the potential for coastal State discretion in characterising a feature as a low-tide elevation. One important element in this process is the level of State discretion in determining the relevant vertical datum. This matter was considered in the 2012 Final Report of the Committee when reviewing Article 5. The issue of whether a low-tide elevation can properly be considered as 'territory' also remains unsettled,[112] though the International Court of Justice has made clear that low-tide elevations cannot be appropriated.[113]

V. Article 14

A. Relevant Historical Background

57. This article had no predecessor in either the work of the ILC or the deliberations at UNCLOS I. At UNCLOS III a proposal was made in 1973 by China for a provision recognising the capacity of a coastal State to "reasonably define the breadth and limits of its territorial sea" with respect to a variety of relevant factors. This eventually formed the basis for deliberation around the capacity of a coastal State to rely upon a series of methods for the determination of baselines.

B. LOSC Text

58. Originally this provision was subsumed within what became Article 7 of the LOSC, but UNCLOS III elected to create an independent article that follows all of the relevant articles dealing with baselines. It provides as follows:

---

[110] Ibid.

[111] Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea: Part 1 – The Territorial Sea and Contiguous Zone and Related Topics' (1959) 87 (emphasis original).

[112] See comments by the International Court of Justice *in Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Merits)* [2001] ICJ Rep 40 [204-209].

[113] *Territorial and Maritime Dispute* (Nicaragua v Colombia) (Judgment) [2012] ICJ Rep 624, 641 [26]; cf. Sienho Yee, "*The South China Sea Arbitration (The Philippines v. China):* Potential Jurisdictional Objections" (2014) 13 *Chinese Journal of International Law* 663, 702 [51].

Article 14

Combination of methods for determining baselines

The coastal State may determine baselines in turn by any of the methods provided for in the foregoing articles to suit different conditions.

C. Analysis of Article 14

1. Text

59. While Article 14 is short, it provides to a coastal State reassurance as to how it can go about determining its baselines. To that end the following points can be made. First, the coastal State 'may' determine baselines in this manner. This removes doubt as to whether a coastal State must rely upon a combination of baseline techniques and confirms that depending on particular circumstances a coastal State may determine its baselines solely in reliance upon the Article 5 normal baseline method, or on the Article 7 straight baseline method. Second, the baselines can be determined by any of the methods provided for in the 'foregoing articles'. Here the use of the words 'in turn' is of significance. The *Virginia Commentaries* observed in this respect that:

> The expression "in turn" is rendered *en fonction des différentes situations* and in similar terms in other languages. The English expression must therefore be assumed to mean something along the lines of "according to the circumstances" or "to suit different conditions".[114]

This view is reinforced by the chapeau and its title "Combination of Methods for determining baselines". It is also confirmed by the text of the article where it refers to the coastal State adopting these approaches to "suit different conditions" thereby explicitly acknowledging that States will encounter multiple coastal and maritime variables as they assess how to determine their baselines.

2. State Practice

60. General acceptance of the principle that States may exercise discretion when selecting a "baseline methodology" is possibly best evidenced by the variety of delimitation methods employed by coastal States. Few States have adopted legislation to specify that a range of methods may be used to delimit its maritime zones. Mauritius and Mexico are two such exceptions. Article 4(2) of the Mauritian *Maritime Zone Act 2005 (No 2)* specifies that the State may rely upon "straight archipelagic baselines …, normal baselines …, the seaward low-water line of reefs …, straight baselines [or] a combination of [these] methods" to delimit its maritime zones.[115] Similarly, "[t]he limits of the territorial sea [of Mexico] shall be measured from baselines, either normal or straight, or a combination of the two."[116]

---

[114] Nandan and Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* Vol II (1993) 130-131.

[115] UN Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs (2006) Bulletin No. 62 *Law of the Sea* 52ff extracting the *Maritime Zone Act 2005 (No 2)* (Mauritius) 28 February 2005, art 4.

[116] *Federal Act relating to the Sea* (Mexico) 8 January 1986, art 26.

3. Case Law

61. There is no known instance of where an international court of tribunal has had occasion to consider the application of Article 14.

4. Commentary by Publicists

62. Churchill and Lowe note that while it is not possible to prescribe a single method for the calculation of baselines, it is necessary that the rules are applied consistently:

> it is desirable that the rules should be formulated in as precise and objective a way as possible, so that two cartographers, asked to draw the baselines along a particular stretch of coast, would ideally both arrive at the same result. It is also desirable that the waters enclosed by baselines should be of such a nature that the regime of internal waters is as or more appropriate to them than the regime of the territorial sea or EEZ … If the rules are not sufficiently precise, it may be possible for a State to draw its baselines in a generous manner, thus pushing the outer limit of its territorial sea and other zones farther seawards and bringing greater areas of sea within internal waters, thus reducing the areas of sea available for use by other States.[117]

While these statements are not specifically directed to Article 14, they nevertheless imply that coastal State discretion should not be left unchecked.

D. Conclusion

63. In view of the different methods that Part II, Section 2 of the LOSC permits coastal States to rely upon when determining their baselines, Article 14 provides certainty that a combination of methods may be utilised according to different geographical and maritime circumstances. This is appropriate and reaffirms the significance associated with the declaration of baselines for the identification of internal waters and maritime zones including the territorial sea. However, while Article 14 reaffirms coastal State discretion, the baselines methodology selected by a coastal State must be appropriate and adapted to the particular stretch of coastline under consideration.

V. Straight Baselines and Diplomatic Protests

64. The opposability of the limits of the territorial sea established by straight baselines and that of straight baselines themselves largely depend upon an absence of protest from other States. Thus, a survey of protests are very important for the purposes of assessing state practice concerning straight baselines. In this respect, the First Report indicated as follows:

> 30. For the purposes of this Report it is not possible to provide an exhaustive analysis of all relevant state practice. Nor it is possible to discuss the legal grounds on which States may have predicated their recourse to straight (or closing) baselines, as typically that is not made publicly known. Rather mention will be made of some particular examples of state practice in areas that have been the subject to debate.

The report goes on to indicate:

> 41. Not entirely surprisingly, the number of States which have protested relevant state practice in this regard, in proportion to the number of potentially interested States, is very small.

---

[117] Churchill and Lowe, *The Law of the Sea* 3rd (1999) 32-33.

In this regard, the First Report placed reliance upon Churchill who had written in 2005: "at least eight different States and the EU have protested to one or more baseline claims….".[118]

65. Since the First Report the straight baseline (SBL) claims of 80 States were identified. A detailed search for protests thereof uncovered additional objections as set out Table 1. It lists a total of 82 protests or other forms of objection. It shows that the straight baseline claims of 39 States (almost 50% of the total SBL claims) -- all but Iran being parties to the LOSC -- have been objected to by 21 States and the EU/EC (only two of which – Iran and the US – are not party to the LOSC).

66. The Committee may wish to consider what conclusions and recommendations should be drawn from this new data in preparing its Final Report.

Table 1
List of Publicly Available Protests of or Objections to Straight Baselines (SBL)[119]

1. Protest of **Albania**'s 1976 SBL
   - U.S. note 21 July 1989, 1989-1990 Digest 461, LIS No. 116, Roach & Smith 3rd ed. 92
2. Protest of **Argentina**'s 1966 SBL
   - U.S. aide memoire 2 March 1967, Roach & Smith 3rd ed. 129 & n. 148
3. Protest of **Cameroon** 1962 SBL
   - U.S. note Feb 1963, Roach & Smith 3rd ed. 94-95
4. Protest of **Canada**'s SBL
   - U.S. note of 1 November 1967 re Labrador & Newfoundland, Roach & Smith 3rd ed. 96-97
   - U.S. note of 25 April 1969 re Nova Scotia, Vancouver Island and Queen Charlotte Island, Roach & Smith 3rd ed. 96-97
   - Canada's 1985 Arctic SBL
   - U.S. statements 10 January and 26 February 1986, II Cumulative Digest 1785, Roach & Smith 3rd ed. 111-112
   - UK on behalf of the EC note No. 90/86, 9 July 1986, Roach & Smith 3rd ed. 112
5. Protests of **China**'s 1996 and 1998 straight baseline claims
   - Philippines and Viet Nam notes verbale 17 May and 6 June 1996 objecting to PRC statement of 15 May 1996, LOSB No. 32, at 88 & 91 (1996)
   - U.S. note 21 August 1996, LIS No. 117, Roach & Smith, *Straight Baselines* 62-63
   - Viet Nam note verbale 6 August 1998 re Paracels, LOSB No. 38, at 54-55 (1998)

---

[118] Robin R. Churchill, "The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention" in Alex G. Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Brill, Leiden, 2005) 91,108.

[119] Of particular note in reviewing these protests is that the following States not only protested the SBL claims of other States as not complying with article 7 of the LOSC, but themselves received protests of their SBL claims as not complying with art 7: Pakistan (by India). India (by Pakistan); Oman (by Iran). Iran (by Qatar); Saudi Arabia (by UAE). UAE (by Saudi Arabia); Saudi Arabia (by Iran) Iran (by Saudi Arabia); China (by Vietnam); Viet Nam (by China)

- Viet Nam letter to UNSG, A/68/980 Annex, 22 August 2014
- Protests of China's 2012 claim around the Spratly Islands:
- Japan note verbale 24 September 2012, LOSB No. 80, at 39 (2013)
- U.S note 7 March 2013, 2013 Digest chapter 12, 369-370

6. Protest of **Colombia**'s 1984 SBL system
   - U.S. note 14 July 1988, II Cumulative Digest 1786-1787, Roach & Smith 3rd ed. 83-84
7. Protest of **Costa Rica**'s 1988 SBL
   - U.S. note 18 December 1989, LIS No. 111, 1989-1990 Digest 461-462, Roach & Smith 3rd ed. 83
8. Protest of **Cuba**'s 1977 SBL
   - U.S. protest 5 July 1983, II Cumulative Digest 1787-1788, Roach & Smith 3rd ed. 102-103, 116, 118
9. Protest of **Denmark**'s 1976 SBL around Faroe Islands
   - U.S. notes 12 & 18 July 1991, vol. II, 1991-1999 Digest 1583, Roach & Smith 3rd ed. 108
10. Protest of **Djibouti**'s 1985 SBL claim
    - U.S. note 22 May 1989, II Cumulative Digest 1796, 1989-1990 Digest 459-460, LIS No. 113
11. Protest of **DPRK**'s 1977 claim
    - USUN note 4 January 1990, LOSB No. 15, at 8-9 (1990), 1989-1990 Digest 462
12. Protests of the **Dominican Republic**'s 2007 baseline claim
    - U.S./UK note 18 October 2007, 2007 Digest 641-643, LOSB No. 66, at 98-99 (2008)
    - U.S. and UK notes 26 October 2010, 2010 Digest 522-524
    - U.S. note 18 January 2012, 2012 Digest 421-422
13. Protest of **Ecuador**'s 1951 straight baseline claim
    - UK protest 14 September 1951, IV *Anglo-Norwegian Fisheries Case Documents* 589-590
    - Protest of Ecuador's 1971 SBL
    - U.S. protest 24 February 1986, Roach & Smith 3rd ed., 105, 109 (Galapagos), 121
    - Germany protest November 1986 (Galapagos) (unpublished)
14. Protest of **Egypt**'s 1990 straight baseline claims
    - U.S. diplomatic note 13 June 1991, vol. II, 1991-1999 Digest 1580-1582, LIS No. 116
15. Protest of **Guinea**'s 1964 SBL
    - U.S. protest 4 December 1964, Roach & Smith 94 (1980 decree uses LWL)
16. Protest of **Guinea-Bissau**'s 1985 straight baseline claim
    - Senegal note verbale 27 May 1986, LOSB No. 8, at 24 (1986)
    - Guinea-Bissau note verbale response 21 August 1986, LOSB No. 8, at 23
17. Protests of **Honduras**' 2000 straight baseline claim
    - El Salvador note DM/No. E-05, 27 April 2000, excerpted in LOSIC No. 12, at 37
    - Guatemala note 2 June 2000, excerpted in LOSIC No. 12, at 37
    - Nicaragua note 12 May 2000, excerpted in LOSIC No. 12, at 37

- Guatemala note 1 September 2009, LOSB No. 71, at 46 (2010)
- U.S. note 28 March 2003, 2004 Digest 705-710, LIS No. 124

18. Protest of **India**'s 2009 baseline claim
    - Pakistan note verbale 6 December 2011, LOSB No. 78, at 33 (2012)
19. Protests of **Iran**'s 1973/1993 straight baseline claim
    - USA protest note 11 January 1994, LOSB No. 25, at 101-103 (1994); vol. II, 1991-1999 Digest 1583, LIS No. 114 Annex 3
    - Iran reply note verbale No. 224 of 24 May 1994, LOSB No. 26, at 35-38 (1994)
    - Germany (on behalf of EU and acceding States) demarche 14 December 1994 and note verbale 11 September 1995, LOSB No. 30, at 60-61 (1996)
    - Iran note verbale No. 641/1206 of 3 May 1995 justifying its SBL, LOSB No. 31, at 37-38 (1996)
    - Saudi Arabia note verbale of 25 July 1996, A/50/1023 Annex, LOSB No. 32, at 90 (1996)
    - Iran letter of 18 October 1996 replying to Saudi Arabia note verbale, A/51/545, 23 October 1996, LOSB No. 33, at 86-87 (1997)
    - Qatar note verbale 20 August 1996, A/50/1034 Annex, LOSB No. 32, at 89-90
    - Iran letter 18 October 1996 replying to Qatar note, A/51/546, 23 October 1996; LOSB No. 33, at 87-88
    - Kuwait letter of 26 August 1996, A/50/1029, 29 August 1996, LOSB No. 32, at 88
    - Iran letter 18 October 1996 replying to Kuwait letter, A/51/544, 23 October 1996, LOSB No. 33, at 86
    - UAE letter of 26 August 1996, A/50/1033, 3 September 1996, LOSB No. 32, at 91
    - Iran letter of 18 October 1996, replying to UAE letter, A/51/547, 23 October 1996, LOSB No. 33, at 89
    - US note verbale 6 April 2000, LOSB No. 43, at 105 (2000)
    - Iran note of 23 October 2006, 2007 Digest 637
    - U.S. reply note of 12 March 2007, 2007 Digest 637-638
20. Protest of **Italy**'s 1977 SBL
    - U.S. protest 10 December 1986, II Cumulative Digest 1793, Roach & Smith 3rd ed. 100
21. Protest of **Japan**'s 1996 SBL
    - U.S. note 17 December 1998, LIS No. 120, Roach & Smith, *Straight Baselines* 64-65
22. Objection to **Kenya**'s 2005 and earlier SBL
    - Somalia Application instituting proceedings before ICJ concerning maritime delimitation in the Indian Ocean, 28 August 2014, para. 13, http://www.icj-cij.org/docket/files/161/18362.pdf
23. Protest of **Libya**'s 1973 SBL Gulf of Sidra
    - U.S. protest 1974, 1974 Digest 293-294
    - U.S. note to UNSG 10 July 1985, LOSB No. 6, at 40 (1985), II Cumulative Digest 1762-1771, 1793-1794, 1810
24. Protest of **Mauritania**'s 1988 SBL

- U.S. note 25 January 1990, 1989-1990 Digest 461, Roach & Smith 3rd ed. 130

25. Protest of **Mexico**'s 1968 SBL in Gulf of California
    - U.S. protest 23 July 1969, Roach & Smith 3rd ed., 105-106, 116, 118
26. Protest of **Burma**'s 1977 SBL claim
    - U.S. note 6 August 1982, II Cumulative Digest 1781, Roach & Smith 3rd ed. 116-117
    - UK protest in 1993 (unpublished)
    - Protest of **Myanmar**'s 2008 straight baseline claim around Co Co and Preparis islands
    - Bangladesh note verbale 6 July 2009, LOSB No. 70, at 61 (2009)
27. Protest of **Nicaragua**'s 2013 SBL claim
    - Costa Rica letter to UNSG 23 October 2013, A/68/548, 25 October 2013, http://undocs.org/A/68/548, http://www.un.org/ga/search/view_doc.asp?symbol=A%2F68%2F548
    - Colombia letter to UNSG S-GACIJ-13-044275, 1 November 2013, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn99_2013_col.pdf
    - U.S. diplomatic note No. 070 of 6 March 2014, 2014 Digest chapter 12, pages 30-31
28. Protest of **Oman**'s 1982 SBL
    - Iran note 4 February 1983, LOSB No. 1, at 38 (1983)
    - U.S. note 12 August 1991, vol. II, 1991-1999 Digest 1583, LIS No. 113 Annex 5
29. Protest of **Pakistan**'s 1997 baseline claim
    - India note verbale No. NY/PM/444/3/97 24 February 1997, LOSB No. 34, at 46 (1997)
    - India note verbale 22 May 2001, LOSB No. 46, at 90 (2001)
    - U.S. note 17 August 1997, LIS No. 118, Roach & Smith, *Straight Baselines* 63-64
30. Protest of **Portugal** 1985 SBL on mainland coast
    - U.S. protest 25 August 1986, Roach & Smith 3rd ed. 104-105
    - Protest of Portugal 1985 SBL around the Azores
    - U.S. note 25 August 1986, II Cumulative Digest 2068-2069, Roach & Smith 3rd ed. 89, 92, 108
31. Protest of **Republic of Korea**'s 1996 SBL system
    - U.S. protest 23 December 1998, LIS No. 121, Roach & Smith, *Straight Baselines* 61-62
32. Protests of **Saudi Arabia**'s 3 May 2010 baseline claim
    - UAE note verbale 2/6/3 368 to UNSG 5 May 2010, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn77_2010_are_eng.pdf
    - Saudi Arabia note verbale 15 June 2011 replying to UAE protest of 5 May 2010, LOSB No. 76, at 37 (2011)
    - Egypt declaration note verbale 15 September 2010, LOSB No. 74, at 72 (2011)
    - Iran note verbale 14 August 2012, LOSB No. 80, at 36 (2013); A/67/762 Annex 1, 27 February 2013, http://undocs.org/A/67/762

- Saudi Arabia reply note verbale 14 March 2013, A/67/836, 12 April 2013, http://undocs.org/A/67/762
- UAE note verbale WK confidential 3/6/1-181 17 November 2011 (unpublished)
- Saudi Arabia letter to UNSG 21 December 2012, A/67/684 (3 January 2013), http://undocs.org/A/67/684

33. Protest of **Senegal** 1972 SBL
    - U.S. protest 29 November 1989, Roach & Smith 3rd ed. 92, 94
34. Protest of **Sudan**'s 1970 SBL
    - U.S. note 6 June 1989, 1989-1990 Digest 460-461, Roach & Smith 3rd ed. 110-111, 130
35. Protests of **Thailand**'s 1992 straight baseline claims
    - Germany (on behalf of EU) note verbale 23 December 1994, LOSB No. 28, at 31 (1995), Roach & Smith 3rd ed. 64n
    - US note 28 August 2000, 2000 Digest 703-706, Roach & Smith, *Straight Baselines* 56-57, LIS No. 122
36. Protest of **UAE** 2009 straight baselines
    - Saudi Arabia note verbale to UAE 9 August 2009, LOSB No. 71, at 47-48 (2010)
    - Saudi Arabia note of 7 November 2009, LOS B. No. 71, at 50
    - UAE reply note verbale 12 November 2009, LOSB No. 71, at 50-51
37. Protest of **USSR** 1984/1985 SBL
    - U.S. 1988 note, II Cumulative Digest 1796, based on LIS Nos. 107 (1987) & 109 (1988), Roach & Smith 3rd ed. 97
    - Protest of **Russian** SBL closing access to Murmansk
    - U.S. note 1992, vol. II, 1991-1999 Digest 1583, Roach & Smith 3rd ed. 97
38. Protests of **Venezuela**'s 1956 SBL
    - U.S. protest 22 October 1956, Roach & Smith 3rd ed. 122-123
39. Protests of **Vietnam**'s 1982 straight baseline claims (A/37/697, LOSB No. 1, 75-76)
    - China MFA statement 28 November 1982, LOSB No. 1, at 76 (1983), A/37/682-S/15505 30 November 1982
    - U.S. *aide memoire* to UNSG 6 December 1982, II Cumulative Digest 1796-1797, Roach & Smith 3rd ed. 99, 121
    - France note 5 December 1983, LOSB No. 3, at 16 (1984)
    - Germany note June 1984, Roach & Smith 3rd ed. 99 n.105 (unpublished)
    - Thailand note 9 December 1985, LOSB No.7, at 111-112 (1986), A/40/1033, 12 December 1985
    - Singapore note 5 December 1986, LOSB No. 9, at 53-54 (1987), A/41/967 Annex
    - Viet Nam letter 21 January 1986 responding to Thailand's note of 9 December 1985, A/41/99, 22 January 1986
    - Protests of Vietnam's 2012 straight baseline claim
    - U.S. note 7 October 2013, 2013 Digest, chapter 12, 371-372

BASELINES UNDER THE INTERNATIONAL LAW OF THE SEA

WORKING SESSION

Monday, 8 August 2016, 2.00pm

Chair: Frederick Abbott (US)

The Chair introduced himself and explained his function before introducing Captain J Ashley Roach, the Chair of the Committee.

Captain J Ashley Roach (US) explained that the Committee was now dealing with State practice in detail because there was not much evidence available about State practice in 2013, at the time of the Washington Conference. That has since changed, and the Committee found it necessary to revisit the topic. Captain Roach continued with a discussion on the different kinds of lines, noting that the 2016 report focused on 'straight baselines' in Art 7 of the United Nations Convention on the Law of the Sea (UNCLOS) and 'archipelagic baselines' in terms of Art 47 of UNCLOS. Captain Roach drew attendees' attention to the observations of the International Court of Justice (ICJ) that the provisions of UNCLOS are to be interpreted restrictively.

Moving on to empirical data, Captain Roach noted that there were 153 coastal and island States, 79 of which had drawn one or more straight baselines. Many of the straight baselines segments did not comply with one or more of the requirements in Article 7 of UNCLOS. The Committee conducted a preliminary study on straight baseline segments in 2013, the report of which (dated 28 December 2015) was available online. Captain Roach said that reason the Committee looked at straight baselines in this way was because, in the 1951 *Fisheries Case*, the ICJ made no mention of length, and geographers had subsequently found that the longest approved segment was 40 nautical miles (nm). Therefore, in trying to work out what State practice was in regards to straight baselines, the Committee needed to identify which segments were longer than 40nm. The Committee discovered that 31 of the 79 States which had used straight baselines had drawn no segments longer than 40nm. In most cases, this was because they are small coastal States. There were, however, 40 States that had drawn one or more segments longer than 40nm. A total of 262 (plus 7 by Taiwan) straight baselines segments greater than 40nm were discovered; the longest being 300.8nm across the Gulf of Sidra. Captain Roach referred attendees to the study, which contained each one of the States' claims and identified the segments by location.

The Committee also looked at the situation in regards to protests. As commented in the 2014 report, there was not much evidence of what States were saying about what other States were doing. Therefore, the Committee went hunting, and found, based on publically available information, that there were 82 protests or other forms of objection. The straight baseline claims of 39 States had been objected to by 21 States and the European Union/European Community. As wording varied in the process of protests, the worry for those involved in the study was that there was no precise system of protests, and that States just objected on one or more grounds.

Another issue was the requirement in Art 16(2) of UNCLOS that charts be deposited by coastal States with the UN Secretary-General showing the straight baselines. Article 16(2) did not apply to normal baselines. Captain Roach drew attendees' attention to a

graphic that depicted that States that had not yet complied with Art 16(2). He also made reference to Art 6, which dealt with reefs.

Captain Roach indicated that provisions of UNCLOS dealing with mouths and rivers (Art 9) would be considered by the Committee in its final report. However, the Committee did look at provisions dealing with bays (Art 10) and ports (Art 11) in its 2016 report. Article 14 of UNCLOS represented a new development by allowing States to use a combination of methods for determining baselines, depending on where they were, which was very useful. The only State that did not allow this was China, whose territorial sea law only allowed for straight baselines. Captain Roach expressed the opinion that this might partially account for why China had so many straight baselines.

Captain Roach then turned to archipelagos. The provision dealing with archipelagos (Art 47) was new to UNCLOS. It only applied to independent mid-ocean archipelagos. There were some very specific rules in Art 47 about what could be done. The rules relating to archipelagos were much more specific in content than those that applied to straight baselines. There was more complete data available in terms of archipelagos, and the Committee came up with the following findings. First, the water to land ratio of 9:1 to 1:1 was met by the vast majority of the 22 archipelagic States surveyed. There were a few exceptions; for example, Fiji and three of the four Seychelles islands needed to be redrawn. In terms of the segment lengths, Art 47 provided that no segment could be longer than 125nm. While Papua New Guinea had drawn one segment that was too long, it had revised its legislation; however, the legislation had not yet been presented to the PNG legislature, and therefore Captain Roach could not make any definitive comments about it.

Captain Roach recalled that, in terms of segment lengths, up to 3% of the number of segments could exceed 100nm, provided that they were less than 125nm. 21 of the 22 archipelagic States complied with this rule. Captain Roach referred attendees to the data set out in the table contained in the December 2015 report, of which an updated version would soon be available. Once again, there was a need for adequate charting; not all archipelagic States complied with the requirement yet but the percentage of States that had complied was higher than that of the States that complied with the charting requirements of straight baselines.

Captain Roach drew some final conclusions from the study done on State practice. First, the precision in the requirements for archipelagic baselines set out in the first two paragraphs of Art 47 of UNCLOS seemed to be responsible for the widespread adherence to those requirements among archipelagic States. This was in total contrast to the lack of adherence under Art 7. States had claimed more sea areas than they would be entitled to under Art 7, especially if one were to apply the ICJ's approach of restrictive interpretation. The table in the 2015 report identified each segment by State and by location. There was consensus that many straight baselines did not comply with Art 7, and that the question was how one could change that, which was the big challenge for the Committee.

The Chair opened the floor for questions and comments, specifically relating to Captain Roach's presentation.

Professor Erik Franckx asked how the Committee would account for the fact that not all States publish protest notes.

Captain Roach responded that, as noted in the current report of the Committee as well as in earlier reports, the study dealt only with publically available protests and acknowledged that not all States made their protests publically available. What was revealing in the study, however, was that there was much more out there than just what the EU and the US had done. A list of the protests was available in the 2016 report, representing the data available to the Committee to date.

Professor Clive Schofield (Australia) referred to Captain Roach's analysis of Art 47 and found that one of the systems or subsystems needed reviewing. There seemed to be two systems. He queried whether each individual subsystem had to comply or whether the systems could be combined. He also queried whether the Committee needed to look at each individual group of archipelagic baselines, or whether it could adopt an overview.

Captain Roach responded that one way to analyse archipelagic baselines is that Art 47 refers to one or more archipelagic baselines. It does not refer to one archipelagic group, therefore they needed to be analysed separately and should not be viewed aggregately.

Mr Danilo Suarez pointed to the recent award in the South China Sea arbitration between the Philippines and China. China had indicated that it would not comply with the award. From a military point of view, the Philippines could not enforce the decision; only America could do so, but they only seemed to be interested in enforcing their freedom of navigation. He asked for Captain Roach's insights on the matter.

Captain Roach emphasised that he could not speak for the current or for the next US administration. He took exception to the statement that America was only interested in protecting their freedom of navigation, which was merely one component. Rather, it was a broader question of the rule of law at sea. From a defence point of view, US interests were affected if there was non-compliance with the rule of law, but the US is not the only State affected by navigational restrictions, all users were. The second part of the question on how to help China take an off ramp was more problematic. China had dug a fairly large hole for itself, and senior political leadership in China were not cognisant of the economic effects of their decision. One can only watch and wait as to how this issue would be revolved. Professor Donald Rothwell would have more to say on this later in the session.

Mr Suarez continued the discussion on the South China Sea arbitration by emphasising that there was a serious concern in that, at a recent summit, ASEAN Member States did not show much sympathy towards the Philippines. In his opinion, the US was the only country that could play a vital role in the coming years to enforce the award.

Captain Roach responded that he had had the privilege of addressing ASEAN ambassadors earlier in the year, and they fully understood what was necessary. What was necessary was constant attention to the issue by all those affected. The US could not act alone. In fact, if they were to act alone, it would not be helpful as it would be seen as confrontation between the US and China. It was necessary to figure out ways to get the senior political leaders in China to see that it was in their military and economic interest to comply with the law of the sea and to uphold rather than tear down the arbitral award. There had been worldwide propaganda by China to undermine the rule of law. The more everyone talked about the issue, it would at some point trickle up to the leaders in China

who make decisions. Captain Roach indicated that people in the know believed that it would take a couple of generations to bring about meaningful change. In the meantime, one could not sit on our hands, as China would take advantage of that.

The Chair informed the audience that there would be a chance to circle back to the issue at a later stage in the session. He introduced Professor Donald Rothwell, Rapporteur, who would be discussing baselines in the South China Sea arbitration.

Professor Donald Rothwell (Australia) started by making two opening remarks. First, the session was structured by way of presentations, which sought to reflect this very dynamic area of law. Secondly, the session was not a panel about the South China Sea, which Professor Rothwell asked attendees to keep that in mind. He would speak on a limited aspect of the South China Sea award that touches on the work of the Committee, which it would have to address in its final report in 2018.

Professor Rothwell briefly summarised the key issues of the award: the status of China's claim based on the 9-dash line, the status of islands, rocks, elevations and reefs, and the environmental impact of China's artificial islandbuilding activities. He then focused on baselines. The Award addressed a number of questions that went to the status of maritime features in drawing territorial baselines. They addressed it differently than, for example, the ICJ had done in the *Territorial and Maritime Dispute* case between Nicaragua and Colombia**,** which was another important decision dealing with this area. The award focused on important questions in respect to the characterisation of critical features that were relevant for baseline determinations, and whether some of the features in the South China Sea could generate archipelagic baselines consistent with Art 47 of UNCLOS.

Professor Rothwell pointed out that some of the other issues considered by the Tribunal included the status of Art 13, which deals with low-tide elevations. The Tribunal held that certain aspects of Art 13 needed to be read with Art 121(1), which dealt with islands. In paragraph 305 of the award, the Tribunal held that a low-tide elevation had to be "evaluated on the basis of its natural condition". Professor Rothwell pointed out that this was relevant in terms of artificial islands. The Tribunal further held in paragraph 305 that "as a matter of law, human modification cannot change the seabed into a low-tide elevation or a low-tide elevation into an island" and that "[a] low-tide elevation will remain a low-tide elevation under the Convention, regardless of the scale of the island or installation built atop it". Therefore, a feature, whether a reef or a high- or low-tide elevation, would retain its previous natural condition before the modification. To that end, the Tribunal said in paragraph 306 that it had reached the conclusions on the best available evidence of the previous status of nowmodified reefs, which in itself raised some interesting procedural issues. In terms of characterisation, the Tribunal was mindful of the *Territorial and Maritime Dispute* case and, to a degree, restated many of the conclusions regarding the characterisation of low-tide elevations that the ICJ reached. However, it went further by clarifying aspects of the characterisation of the status of low-tide elevations. In paragraph 309 of the award, the Tribunal made clear that "low-tide elevations do not form part of the land territory of a State in the legal sense. Rather they form part of the submerged landmass of the State and fall within the legal regimes for the territorial sea or continental shelf" and "low-tide elevations cannot be appropriated, although a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself".

Professor Rothwell was pleased that the Tribunal addressed an issue which corresponded with an earlier phase of the Committee's work, namely high-water datum. This was critical in determining whether some of these low-tide elevations could be such based on the tidal characteristics. In paragraph 311 of the award, the Tribunal stated that it:

> sees nothing in the Convention, and no rule of customary international law, that would mandate that the status of low-tide elevations and high-tide features/islands be determined against any particular high-water datum. Accordingly, the Tribunal considers that States are free under the Convention to claim a high-tide feature or island on the basis of any high-water datum that reasonably corresponds to the ordinary meaning of the term "high tide" in Articles 13 and 121.

The Committee's work between 2008 and 2012 addressed the characteristics of Art 5 and the statement by the Tribunal further clarified and advanced the Committee's understanding of some of these aspects. Importantly, the statement suggested that a coastal State had a certain margin of appreciation as to the high-water datum on which it could rely.

Professor Rothwell then turned to the status of Subi Reef, and whether it fell within the territorial sea of Thitu Island and could accordingly be an Art 13 lowtide elevation. One of the significant issues that the Tribunal had to address was the status of Sandy Cay, and it had been presented with conflicting evidence of the existence of Sandy Cay. At different points in time, it did or did not exist. In paragraph 373, the Tribunal came to the conclusion that the absence of a sand cay at a particular point in time was not conclusive evidence of the absence of a high-tide feature, and accordingly took the view that Subi Reef could fall in the potential territorial sea of Thitu Island.

The tribunal did not look at straight baselines in Art 7 in much detail, but it did consider the connection between Art 7 straight baselines and Art 47 archipelagic baselines. The tribunal directly addressed the question of whether or not there would be the potential of drawing archipelagic baselines around a group of islands, known commonly as the Spratly Islands, in the central part of the South China Sea. The tribunal made an obvious point that the Philippines was an archipelagic State from which certain entitlements flowed. China was not an archipelagic State and accordingly it could not draw archipelagic baselines. In paragraph 574 of the award, there was a firm reaffirmation of the critical criteria discussed by Captain Roach in regards to Art 47. Paragraph 576 of the award was particularly interesting for the work of the Committee, as it directly addressed the issue, raised by Captain Roach, as to whether it was possible to argue that State practice in this area had moved on from the provisions of UNCLOS. As the Rapporteur of the Committee, Professor Rothwell found this part of the award especially helpful as it gave firm confirmation that, even though there had been some variations in State practice in this area, the Tribunal was not convinced that, in 2016, a new customary international law rule had formed that would permit a departure from UNCLOS.

By way of conclusion, Professor Rothwell made the point that the Tribunal's award would be significant for the ongoing work of the Committee. He emphasized that these remarks were just his initial reactions, which he had not yet discussed with the members of the Committee. In summary, there had been some developments in the way the Tribunal interpreted Art 13, which was helpful; the award presented some clear statements in terms of the application of Art 47 and presented statements on customary international law.

The Chair opened the floor for questions.

Professor Cymie Payne (US) asked the panel to comment on paragraph 9 of the Joint Declaration signed by Russia and China that confirmed that it was "of utmost importance that the provisions of this universal treaty [ie, UNCLOS] are applied consistently, in such a manner that does not impair rights and legitimate interests of States Parties and does not compromise the integrity of the legal regime established by the Convention".

Professor Rothwell responded that, as this was not a general session of the law of the sea, and as this intervention did not address the matters discussed in his presentation, he would not comment on it at present.

Professor Christopher Ward (Australia) noted, in response to both Professor Payne's intervention and Professor Rothwell's presentation, that the exhaustive nature of the arbitral tribunal and the depth of its analysis in this technical area of law represented a strong affirmation of the rule of international law of which China would be well advised to take note.

Dr Vasco Becker-Weinberg (Portugal) noted that it was interesting that similar work had been done on State practice from a Chinese perspective, looking at every possible norm on archipelagic baselines to justify their position. It was the mirror image of what the Committee had done. The Tribunal's award had been helpful in setting straight that bad examples did not constitute international customary law.

Professor Rothwell responded that, while he had focused only on a small number of paragraphs of the award, there were some interesting implications, from that aspect of the judgment, for a number of States that sought to draw baselines around independent or offshore archipelagos. It was interesting to consider whether the award took into account the practice of States who had, in the view of the Committee, drawn excessive baselines. He queried whether they now had to go back and reassess their baselines to ensure consistency with Art 47 or whether they could take comfort in that it was existing State practice. While the tribunal said that this was the position of Arts 7 and 47 in 2016, in a few years' time, other States might also take expansive views on this point. The test would be whether States made adjustments or retained their excessive baselines and even whether other States lodged protests against excessive baselines in light of the South China Sea Award.

Dr Becker-Weinberg added that Portugal drew archipelagic baselines in 1985 and the US protested, whereas China took Portugal's baseline as valuable State practice.

Professor Schofield noted that there was a seemingly overt statement by the Tribunal that there could be no archipelagic baselines in the Spratly Islands as it would capture too much water to fulfil the ratio test. Yet it recognized that the Philippines was an archipelagic State. Therefore, it seemed as if the Tribunal was not entirely sure that one could not construct a limited series of archipelagic baselines in the Spratly group to form part of a larger archipelago such as the Philippines, were one to imagine that the sovereignty disputes were resolved. This came back to Professor Schofield's earlier intervention as to whether one could view the whole of the State's archipelagic claims or each individual system.

Professor Rothwell responded that the award was silent on territorial issues but hypothetically Professor Schofield was right that, if the Philippines were to have territorial sovereignty over some of those features, as an archipelagic State, it would be able to explore some of those options. Some caution needed to be exercised as to whether or not an archipelagic State could draw more than one complete set of archipelagic baselines which could have quite varying land to water ratios, but in total have appropriate land to water ratios. One of the important aspects of the award that one needed to bear in mind was how the arbitrators constantly referred back to the intents and objectives of UNCLOS. One also needed to remember the prohibition on abuse of rights in Art 300 of UNCLOS.

Professor Schofield added that it was his understanding that, in some of the Philippines' 2009 laws revising their archipelagic baselines, some of the potential archipelagic systems they considered included portions of the claimed features in the Spratly Islands. In the end, it opted not to include those versions of the archipelagic systems, and restricted it to the main islands.

Captain Roach responded that one of the points that the Committee would discuss in its final report was main islands. There were not a lot of main islands in the Spratly Islands.

Mr Suarez again raised the question of how the US could enforce the South China Sea award.

Professor Donald Rothwell responded that, as this was not a general session on the South China Sea Award, he would decline to comment.

Dr Becker-Weinberg asked whether the Committee would consider cases where drawing baselines would achieve the land water ratio objectively but lack unity.

Captain Roach replied that this formed part of main islands and would be discussed in the final report.

Professor Manuel Almeida Ribeiro (Portugal) asked a question about Art 121(3) of UNCLOS dealing with the regime of islands.

Professor Rothwell declined to answer, noting that Art 121 was not within the scope of the current work.

Professor Franckx asked what the relationship was between State practice and the statements of the arbitral award.

Professor Rothwell responded that this was an important question that would have to be addressed in the Committee's final report. The Committee's 2014 report and Captain Roach's discussion of State practice that had been presented indicated that archipelagic States by and large complied with the provisions of UNCLOS when drawing archipelagic baselines. The interesting aspect was where States, relying on Art 7 as a version of Art 47, tried to draw straight baselines around coastal, offshore or mid-ocean archipelagos that were some distance from the metropolitan State. This was the scenario considered by the Tribunal, which dealt with very small and particular features which were distinct from often larger offshore islands that other mainland States had claimed.

David Letts (Australia) queried whether there was a willingness, capacity or place for States that were not party to UNCLOS (such as the US) to similarly deposit charts on the terms of Art 16 to create some form of consolidated information.

Captain Roach responded that the US information was publically available, so it did not find it necessary to go further than that. Art 16 did not apply to normal baselines, and the US did not use straight baselines as a matter of policy. Accordingly, it really was a non-issue for the US.

David Lett interjected that it was, however, an issue for other States.

Captain Roach acknowledged this, adding that, from what he had heard, there were domestic political reasons for not depositing charts. The UN, through the Division for Ocean Affairs and the Law of the Sea (DOALOS), had been active in reminding States of their obligations of due publicity and deposit under Art 16; it could not, however, force States to do so.

Professor David Freestone (United Kingdom) added that, if a nonparty deposited charts with DOALAS, DOALAS would adopt a handsoff approach and possibly ignore the deposit.

The Chair said that there would be time to circle back to the issue at a later stage before introducing Professor Freestone, who was the Co-Rapporteur of the new ILA Committee on International Law and Sea Level Rise.

Professor Freestone commenced his presentation on the new Committee, which had its first meeting in Washington in 2013. The Committee's mandate, to run from 2014 to 2018, was (1) to study the possible impacts of sea level rise and implications under international law of the partial and complete inundation of State territory, or depopulation thereof, and (2) to develop proposals for the progressive development of international law in relation to the possible loss of all or of parts of State territory and maritime zones dues to sea level rise. The Committee would also look at the human impact in terms of forced migration.

Professor Freestone then moved on to a discussion on the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), which considered the main causes of a rise in sea level. In 2007, the IPCC put a modest analysis forward that the seal level would rise up to 75cm by 2100, but a lot of other scientific work projected much higher levels. The post2007 critique said that the Panel was way off, and the International Geographical Union held that the sea level was projected to rise by 5m by 2300. The changes in sea level were also not uniform. The IPCC, in its Fifth Assessment Report, commented that the projections were larger than those in its 2007 Fourth Report because of improved modelling of land-ice contributions. The IPCC now predicted a 1m rise by 2100; this was a conservative estimate with a strong regional pattern. In Greenland, the scientists had been dismayed to find that the ice shelf was melting faster than predicted.

One of the potential impacts of a rising sea level on maritime zones was to move the baseline further up the shore, taking the maritime zones with it. International law recognised the ambulatory nature of baselines. Coastal land might be lost, which led to jurisdictional uncertainty and a loss of resources. In terms of normal baselines under

Art 5 of UNCLOS, the Committee on Sea Level Rise and International Law had taken over the work of the current Committee. Existing law of normal baselines should also be applied to ambulatory baselines. Professor Freestone continued with a discussion on the proposals made by different people to address the issue of sea level rise.

In terms of the issues that the Committee on Sea Level Rise and International Law had to look at for its first report, Professor Freeman noted the Committee did not want to second guess the Baseline Committee as the latter considered *lex lata* while the former's mandate was much more *de lege ferenda* in developing new rules. The new Committee was looking at the advantages of ambulatory or fixed baselines; fixing limits raised the problem that, once fixed, one would have problems with UNCLOS provisions if the baseline moved inland. The Committee would also look at how maritime boundary treaties would be affected by a fundamental change in circumstances, and whether sea level rise was a fundamental change in circumstances.

As a postscript, Professor Freestone noted some recent developments in the area. In July 2015, a number of Polynesian Islands said that they would not move their baselines despite the UNCLOS provisions. In March, the Marshall Islands introduced legislation entitled the *Maritime Zones Declaration Act 2006*, in which it reworded all of its baselines and outer limits, which it said would not be moved once established.

The Chair opened the floor to questions.

Ms Pham Trang asked, with respect to States losing their maritime zones due to sea levels rising, whether they could claim historic title in order to retain their sovereignty and jurisdiction.

Professor Freestone responded that the Committee had not addressed that issue yet, and could therefore not comment. It would be considered in the next report.

Professor Schofield added that the primary, immediate purpose of the Marshall Islands declaration and emerging practice in the Pacific was to establish baselines to delineate limits and limit maritime boundaries with the view to maritime jurisdiction due to surveillance enforcement of fishing. It was, however, also set against the context of sea levels rising and Pacific Oceanscape that overtly said that priority action one was to establish jurisdictional limits but also to change the international law of the sea to secure existing limits.

Professor Freestone noted that the smaller islands of the Pacific were at the cutting edge of this. In Australia, all the baselines had been digitized but there was consensus there that they would not change them.

Clive Schofield added that the Marshall Islands declaration was some 450 pages long and was, in effect, a textualisation of a digital file.

The Chair closed the session as there were no further questions.

Reporter: Clea Strydom

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE 2016

GLOBAL HEALTH LAW

Members of the Committee:

Professor Frederick Abbott (USA): *Co-Chair*
Professor Brigit Toebes (NL): *Co-Chair*
Ellen 't Hoen, LLM (NL): *Co-Rapporteur*
Dr Xavier Seuba: *Co-Rapporteur*

Professor Yoshinori Abe (Japan)
Professor Pia Acconci (Italy)
Dr Ruth Atherton (USA)
Dr Peter Beyer (Germany)
Professor Olivier Cachard (France)
Professor Carlos Correa (Argentina)
Dr Danielle Da Costa Leite Borges (Brazil)
Professor André den Exter (Netherlands)
Professor Lawrence Gostin (USA)
Professor Gian Luca Burci (Italy)
Professor Everaldo Lamprea (Colombia)
Dr Hélène De Pooter (France)
Professor Yukari Takamura (Japan)

FIRST REPORT OF THE COMMITTEE

by Prof. Frederick Abbott and Prof. Brigit Toebes (Part I-IV & VIII),
Ms Ellen 't Hoen LLM (Part IV), Dr Xavier Seuba (Parts V & VII) and
Dr Ruth Atherton, Dr Helène De Pooter and Prof. Gian Luca Burci (Part VI)

I. Introduction

The Global Health Law Committee (GHLC) was established in October 2014. Since that date, the GHLC has actively pursued its mandate toward the progressive development of international law relating to health, including to identify and confirm norms that are relevant to the promotion and protection of public health, and to develop proposals for improving the existing legal and policy framework The GHLC held its first meeting in February 2015 in connection with a substantive program on Global Health Security Challenges that it co-organized in Geneva, and its second meeting in March 2016 in London in connection with the UN Secretary General's High Level Panel on Access to Medicines hearings and dialogue.

In October 2015, the GHLC settled upon four tracks for its short to medium-term work program. These are:

1. Legal issues surrounding access to research materials, including: (a) biological materials, including virus sharing; (b) clinical research surrounding potential outbreaks, e.g., Ebola.
2. Legal issues surrounding access to medicines deemed "essential" by WHO.
3. Legal issues surrounding tensions between trade/investment agreements and global public health, including (but not limited to) IP issues addressed in the tobacco cases,

Canada patent case and data protection cases; the relationship between ICH guidelines and the TBT Agreement, and; the general relationship between international law and innovation.

4. State obligations in the field of health and links with human rights law, including in the fields of non-communicable diseases (including tobacco) and also (progressively) sustainable development (e.g., obligations to assure clean air and water, and to address climate change).

As can be seen from this report, the GHLC has made strong progress in the areas of its work program.

Contrary to, for example, international trade law, international environmental law and international humanitarian law, global health law is not a well-developed field. There is an urgent need for counterbalancing such interests as international trade, industry and commerce against the protection of the health of individuals and populations worldwide. International standard-setting instruments are, increasingly, successfully employed by international organisations, state authorities and civil society organisations to achieve equity in health. For instance the Framework Convention on Tobacco Control (FCTC) has played a key role in advancing tobacco control at the domestic level.[1] In terms of its sources, global health law brings together international standard-setting instruments adopted in the context of the WHO and under human rights law, while health-related legal rules, norms and other (non-binding) standards can also be found in several other branches of international law, including under international humanitarian and environmental laws, and in medical ethics and patients' rights.

The human 'right to the highest attainable standard of health' (the 'right to health') features as a key standard in global health law, as it places the emphasis on the protection of individual health worldwide, and because it emphasises the need to strive for equity in health. The right to health is acknowledged in, *inter alia*, Article 12 of the UN International Covenant on Economic, Social and Cultural Rights (the ICESCR).[2] In 2000, the Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment 14, an explanatory document to the right to health in Article 12 of the ICESCR.[3] Importantly, General Comment 14 recognises that the right to health is not a right to be healthy, but rather a broad human right extending not only to access to healthcare services but also to the underlying determinants of health, including an access to safe and potable water and adequate sanitation, healthy occupational and environmental conditions, and access to health-related education and information.[4] A

[1] Adopted by the World Health Assembly on 21 May 2003, and entered into force on 27 February 2005.

[2] Other right to health provisions can be found, *inter alia,* in Article 12 of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW, 1979) and Article 24 of the Convention of the Rights of the Child (CRC, 1989) and Article 25 Convention on the Rights of Persons with Disabilities (CRPD, 2006).

[3] Committee on Economic, Social and Cultural Rights, *The Right to the Highest Attainable Standard of Health*, UN General Comment No 14 (2000), UN Doc E/C12/200/4 (11 August 2000). While this document is not legally binding and can thus be characterised as a 'soft law' instrument, it is considered authoritative by many scholars and practitioners from the field

[4] General Comment 14 *supra* note 3.

further important component of General Comment 14 concerns the identification of a set of guiding principles that apply with respect to all health-related services: States are to guarantee the availability, accessibility, acceptability and quality of health facilities (the so-called 'AAAQ').[5] [6] Further, General Comment 14 defines a set of legal state obligations to 'respect, protect and fulfil' human rights.[7] Lastly, General Comment 14 defines a set of legal core obligations, minimum essential levels of health services which States have to guarantee 'at the very least'.[8] These principles and guidelines inspire many of the topics addressed by this Committee, including the topics addressed in this report.

II. Global Health Security Challenges: towards strengthening global governance

On February 19, 2015, a group of experts in law, public health, security and medicines, met in Geneva under the auspices of the GHLC and the Global Health Program of the Graduate Institute|Geneva. The group assembled to discuss the global response to the Ebola outbreak of 2014-2015 in West Africa, and the work that needs to be done in order to improve response to pandemic disease threats. Members of the group were associated with multilateral organizations, academic institutions and nongovernmental organizations (including funders), including those that participated in the response. The meeting was organized as an open-ended sharing of ideas. The participants were acting in their individual capacities, and not as representatives of organizations. This summary is a synthesis of the discussion, and intentionally does not identify individual participants and their contributions.

Several important themes emerged from the day-long meeting.

First, there was a general consensus that the single most effective mechanism to improve prevention of and response to pandemic disease is the strengthening of national health systems, and despite recognition of this by the international community, inadequate systematic attention is being directed to this area. Robust public health systems are needed for the diagnosis and detection of disease outbreaks (i.e. surveillance), and for the implementation of measures in response. The building up of national capacity is called for by the International Health Regulation (IHR), but most countries have not implemented the IHR requirements.

Donor governments appear to have priorities other than building up national health infrastructure. The agencies in donor governments responsible for allocating funds are often economic development agencies that do not see a short-term benefit from investments in public health.

The rules governing international procurement organizations may allow flexibility for using a percentage of funding to build up local capacity, but such funding is not sufficient to materially address the gaps. Moreover, the problem of health system capacity is also a matter of training the necessary personnel, and this may be as difficult as finding the funding for such an endeavor.

---

[5] Ibid.

[6] Ibid. Accessibility has four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility (affordability) and information accessibility.

[7] Ibid.

[8] Ibid. These essential service also include the right to essential medicines.

Insufficient attention is paid to encouraging private sector support and investment in building up national health systems in developing countries. Breakdowns in health systems may have significant adverse consequences for enterprise interests, and investments in preventing such breakdowns should be encouraged as prudent business planning.

The question was raised whether a human-rights based response to pandemics and other global health security threats may be useful.

As a consequence of weak national health systems in fragile countries, when urgent circumstances have subsided the transition from donor/international organization pandemic response to the national and local government control can introduce elements of instability. In some cases, dangerous public order situations have arisen.

Some expressed the view that the Ebola crisis may provide impetus for directing resources towards building up national health system capacity, but that this momentum will dissipate as it typically does following an immediate crisis.

Second, there are a number of important issues to address in relation to vaccines, treatments and diagnostics necessary to prevent and control pandemic disease. The potential for outbreak appears to be increasing as pathogens are more frequently jumping the animal to human barrier.

It is important to accelerate the potential development of new vaccines and treatments, and this includes streamlining clinical testing and regulatory evaluation processes. But, in all cases, a baseline of health security must be followed as experience indicates that prospective treatments may be more dangerous than even urgent circumstances would warrant. Vaccines and treatments to address pandemics are often developed with substantial government funding, and there is some question whether high prices for the resulting products are justified. While acknowledging that producers may have opportunity costs for manufacturing facilities, it nevertheless should be possible to arrange purchases on a cost plus basis. Determining cost can be difficult, and establishing advance purchase commitment pricing similarly can be difficult, but these are not insurmountable obstacles. Recognizing that there are multiple mechanisms for funding and development, it is important that vaccines and treatments be priced in a way that permits their distribution to those requiring them.

Point-of-care diagnostics are a very important element of pandemic response, and more attention should be paid to development and distribution of such diagnostics.

Cooperation among national and regional drug regulators has been good, and there does not appear to be substantial need for a new organization or legal mechanism to make that cooperation work. WHO, in particular, is suffering from a lack of adequate financial support for its drug regulatory unit, and faces a shortfall of personnel. This is a serious immediate concern.

Lack of transparency by developers of vaccines and treatments poses problems for R&D efforts, as well as regulators. Some private-sector companies have begun providing more information. National security interests may be playing a role in the lack of transparency, and it is difficult to address this aspect.

There was substantial attention paid to the potential role of convalescent blood plasma (i.e. from patients who had recovered from disease) which appeared to be very promising

in the treatment of Ebola. Convalescent blood has an important advantage in not requiring regulatory approval (or clinical testing) because virtually all blood donors have recovered from some diseases, and use of blood and plasma from such donors is routine. With respect to outbreak of almost any pathogen, convalescent blood may be a logical rapid choice for treatment pending other developments.

The timeline between identification of a new pathogen outbreak and development of a vaccine or treatment needs to be accelerated. While substantial advances have been made in modeling and use of pre-existing platforms, there will still remain a period during which effective treatments are not available.

Drugs, vaccines and diagnostics to address pandemic disease share characteristics with those for "neglected diseases", but with the distinction of being needed to prevent outbreaks in higher income countries. Therefore, funding is made available by high income countries and their enterprises to address pandemics. However, because of the absence of the typical demand pull for treatments, this is an area in which alternative models of R&D may be usefully explored. If such alternative models can be developed and implemented, they may show the way toward new models for more conventional infectious and noncommunicable diseases.

Third, there was an evident lack of coordinated response to the Ebola outbreak. Subsequently, the role of WHO as lead for health emergency response has been confirmed. But, it is worrisome that governments are not inclined to provide significant financial support to WHO consistent with the urgency evidenced by the Ebola Resolution. There is a strong current of thought that major prospective funding governments are not anxious to relinquish authority to WHO in addressing crises.

It was unusual for a nongovernmental organization (MSF) to request military support in terms of personnel and logistics to confront the outbreak in West Africa. However, there was not enough human capacity available to confront the situation, including because a number of the first responders had died from the disease. Money was not the problem. It was human resources.

WHO is not organized to directly act as an emergency responder. It does not have the personnel or resources for that function. Moreover, it is doubtful that member states will be inclined to pay personnel to await a pandemic outbreak.

Communication with the public is an important part of pandemic response. WHO has been paying considerable attention to this area. There is a difficult line between providing adequate warning and triggering potentially excessive reaction. Communications must be very rapid, clear, and accurate, particularly because the public looks to WHO as an authoritative source, and alternative sources may provide unreliable information. The wide adoption of social media communication has heightened the difficulty of messaging during a pandemic outbreak.

The response of the UN Security Council was also unusual, though not necessarily unwelcome because it elevated the profile of pandemic response. That said, the Security Council did not coordinate with WHO, and the establishment of UNMEER effectively bypassed a number of existing UN and other agencies already established to address international emergencies, including of a humanitarian nature. In this regard, the response to the Ebola outbreak appeared to be disorganized and lacking in coordination.

There was largely a consensus against the need for establishing a new international organization to address potential pandemic outbreak. Already there are a proliferation of organizations, and adding another bureaucracy may not improve matters. There are UN agencies mandated to address humanitarian crises, in addition to WHO, and a number of nongovernmental organizations with substantial capacity in this area. What is apparently needed, however, is an improved mechanism for coordination of response. Also, while it is not unusual for military capacity to be used to provide logistical support in response to international emergencies, there should be an understanding about how military forces are used, and how their role differs in relation to civil police forces and customs/border authorities.

A core problem at WHO is the lack of "untied" donor funding. Government donors do not appear to be particularly interested in funding pandemic response. NGOs are acting as first and primary responders, and are also providing large-scale funding to WHO. NGO funders, as government funders, are playing a role in determining the direction of WHO programs. The area of pandemic response cannot be realistically addressed without taking into account the role of non-state actors.

III. GHLC Participation in the UNLP High Level Panel Process

In November 2015, the UN Secretary General appointed a High Level Panel on Access to Medicines (HLP) with a mandate "to review and assess proposals and recommend solutions for remedying the policy incoherence between the justifiable rights of inventors, international human rights law, trade rules and public health in the context of health technologies." The HLP was called upon to deliver a report to the Secretary General by June 2016. In December 2015, the HLP issued a call for contributions to the global public, with such contributions to address the subject matter of its mandate and, in particular, that "promote research, development, innovation and increase access to medicines, vaccines, diagnostics and related health technologies to improve the health and wellbeing of all, as envisaged by Sustainable Development Goal 3, and the 2030 Agenda for Sustainable Development more broadly." The call for contributions contemplated an accelerated time-line, with contributions due for submission in February, a date that was thereafter extended into March. Recognizing a unique opportunity to make a contribution to the development of international law, the GHLC decided that its members might prepare contributions in response to the HLP's call. Two contributions were submitted to the HLP. As a consequence of the relatively short time-line for preparing and submitting the contributions, the GHLC indicated on those contributions that they did not necessarily reflect the views of all of the Committee members, and the contributions included identification of their specific authors.[9] Both contributions were selected for presentation at the hearing of the HLP in London on March 9, 2016, which preceded the GHLC meeting held in London on March 11.

[9] Stating: "The perspectives in the submission made to the UNHLP may not necessarily reflect the totality of views of each member of the GHLC. It is intended to further public dialogue and the development of needed options. Peter Beyer, as current staff at WHO, has recused himself from this submission."

At the hearings before the HLP and its Expert Advisory Group (EAG)[10] in London, GHLC Rapporteurs Ellen 't Hoen and Xavier Seuba presented the contributions and responded to questions. Each of the contributions was well received by the hearing panel.

The following two sections of this report (IV and V) originated in the context of development of contributions to the HLP. Both address subject matter that had earlier been identified by the GHLC as part of its work program.

IV. Legal Issues Surrounding Access to Essential Medicines[11,12]

This section offers a summary of a GHLC contribution to the HLP, incorporating several proposals regarding access to essential medicines, as amended after the presentation and discussions of the proposals at the hearing of the UN High Level Panel held on 9-10 March in London. The amendments reflect the support of several stakeholders to expand the mandate of the Medicines Patent Pool to include all essential medicines. Substantial additional work is required to develop the proposals in detail. The GHLC proposes to do this after the publication of the report by the UNHLP.

The WHO Essential Medicines Concept and the challenges of ensuring access to new Essential Medicines as a component of the right to health in a post TRIPS era

The right to essential medicines is a key component of the right to health as guaranteed under international human rights law. The most important treaty is the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) enshrining the right to health in Article 12. This provision is further interpreted in the non-binding yet authoritative General Comment 14 (2000), which defines the State's legal obligation to provide essential medicines. Other important right to health provisions are contained in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC and General Comment 15), and the Convention on Persons with Disabilities (CPD). The WHO Constitution states in its preambular declaration of basic principles "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."

According to the WHO, essential medicines are: '[T] hose that satisfy the priority health care needs of the population…. selected with due regard to public health relevance, evidence on efficacy and safety, and comparative cost-effectiveness… [and] intended to be available within the context of functioning health systems at all times in adequate amounts, in the appropriate dosage forms, with assured quality and adequate information, and at a price the individual and the community can afford'.[13] (The term Essential Medicines here refers to medicines included in the WHO Model List of Essential Medicines and national Essential Medicines List.)

---

[10] Prof. Abbott, a member of the EAG, also disclosed his role as co-chair of the GHLC.

[11] Report based on the submission to the UN High Level Panel on Access to Medicines (UNHLP) prepared by Ellen 't Hoen LLM, Prof dr Brigit Toebes, Katrina Perehudoff MSc, LLM, and Prof Frederick M Abbott available here: http://www.unsgaccessmeds.org/inbox/2016/2/22/contributionglobal-health-law-committee-of-the-international-law-association.

[12] Dr. Ruth Atherton has recused herself from this portion of the submission.

[13] http://www.who.int/medicines/services/essmedicines_def/en/ . Accessed February 2016.

The WHO published the first Essential Medicines List (EML) in 1977 and has updated the list every two years. The WHO EML guides countries in the selection and provision of essential medicines. Countries are encouraged to develop their own EML and to implement policies to ensure access to these medicines. Today, more than 150 countries have an EML.[14]

Access to essential medicines is a key component of the fulfilment of the human right to health. A study of 186 national constitutions shows that 135 (73%) include provisions on health or the right to health. Some constitutions specifically mention access to medicines.[15] The SDGs include achieving Universal Health Coverage (UHC) and emphasise access to essential medicines and vaccines for all.[16]

Essential medicines should be available, accessible, acceptable and of assured quality.[17] Essential medicines policies have traditionally been rooted in policies to encourage the availability of generic medicines. Countries have sought to keep the prices of essential medicines low by excluding them from patentability. The Andean Community, in 1991, adopted a decision providing that "inventions related to pharmaceutical products included in the List of Essential Drugs of the WHO" shall not be patentable.[18]. India excluded medicines from patentability until 2005.[19] This encouraged the development of a generic pharmaceutical industry that has served as the 'pharmacy of the developing world'.[20] When the Uruguay Round of trade negotiations was launched in 1986, 49 of the 98 parties to the Paris Convention excluded pharmaceutical products from patent protection.[21] Countries varied in the periods of protection granted and/or set out conditions that restricted patent holders' rights.[22]

Adoption of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994 diminished the legal space through which the availability of generic medicines might be assured. TRIPS set out minimum standards for the protection

[14] Hogerzeil, Hans. "Essential Medicines and Human Rights: What Can They Learn from Each Other?" *Bulletin of the World Health Organization Bull World Health Organ* 84.5 (2006): 371-75. http://www.who.int/bulletin/volumes/84/5/371.pdf. Accessed February 2016.

[15] Perehudoff, S. K., Laing, R.O., and Hogerzeil, H. V., "Access to Essential Medicines in National Constitutions." *Bulletin of the World Health Organization Bull. World Health Organ*. 88.11 (2010): 800. http://www.who.int/medicines/areas/human_rights/Perehudoff_report_constitutions_2008.pdf. Accessed January 2016.

[16] UN Sustainable Development Goal 3.8 and 3.b. https://sustainabledevelopment.un.org/sdg3 . Accessed February 2016.

[17] 'AAAQ', see General Comment 14, para 12.

[18] See Article 7(e) of Decision 344, Common Regime on Industrial Property. http://www.sice.oas.org/trade/JUNAC/decisiones/DEC344e.asp . Accessed February 2016.

[19] Indian Patents Act 1970.

[20] SciDevNet. http://www.scidev.net/global/medicine/analysis-blog/private-sector-india-generic-drug-wars.html . Accessed February 2016.

[21] WIPO, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, "Existence, scope and form of generally internationally accepted and applied standards/norms for the protection of intellectual property," *Note prepared by the International Bureau of WIPO*, Revision 15 September 1988 (Original published 5 May 1988), MTN.GNG/NG11/W/24/Rev.1.

[22] Graham Dutfield, *Intellectual Property Rights and the life science industries: A Twentieth Century History (Globalisation and Law),* Hampshire, England. Ashgate Publishing: July 2003.

of intellectual property rights. Members of the WTO may no longer exclude entire fields of technology, such as medicines, from patentability,[23] and a minimum 20-year patent term is obligatory.[24]

The 19th EML edition (2015) contains several important medicines including for the treatment of cancer, tuberculosis (TB) and hepatitis C (HCV) that are widely patented and highly priced.[25]. The high prices of the new essential medicines illustrate the challenges to access in the post-TRIPS era.[26] When WHO labels a medicine as essential governments must act to ensure availability.

Yet, mandatory patenting of new essential medicines has entrenched price-setting power within the commercial industry, reducing the effective authority of governments. Monopoly pricing routinely precludes wide access. There is an embedded conflict between government obligations under human rights law and obligations under IP law.

Political coherence of States' obligations under international intellectual property treaties and obligations to ensure the human right to health.

The introduction of TRIPS coincided with the emergence of the HIV/AIDS pandemic, which fuelled a global campaign for access to medicines.[27]

The global mobilization around HIV focussed on a number of flexibilities contained in TRIPS to bring down the price of medicines. These flexibilities include compulsory licensing (CL), parallel importation, delay and/or non-enforcement of medicines patenting and regulatory data protection by least developed countries, defining patentability criteria to reward meaningful innovation and prevent 'ever-greening' of patents, and implementing exceptions to patent exclusivity.

In 2001 the WTO adopted the Doha Declaration on TRIPS and Public Health expressly acknowledging these flexibilities and making clear that IP protection must not interfere with the protection of public health[28] *[16]*. Paragraph 4 reads: "*We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all*."

---

[23] TRIPS Article 27. Least Developing Countries can delay their obligation under TRIPS with regards to granting and enforcing pharmaceutical patents until at least 2033. See: https://www.wto.org/english/tratop_e/trips_e/ldc_e.htm . Accessed February 2016.

[24] TRIPS Article 33.

[25] http://who.int/mediacentre/news/releases/2015/new-essential-medicines-list/en/

[26] Gray, Andy L., Wirtz, Veronika J., 't Hoen, Ellen F.M., Reich, Michael R., and Hogerzeil, Hans V., "Essential Medicines Are Still Essential." *The Lancet* 386.10004 (2015): 1601-603.

[27] 't Hoen, Ellen., Berger, Jonathan., Calmy, Alexandra., Moon, Suerie., "Driving a Decade of Change: HIV/AIDS, Patents and Access to Medicines for All." Journal of the International AIDS Society J Int AIDS Soc 14.1 (2011): 15

[28] Declaration on the TRIPS Agreement and Public Health. World Trade Organization. WT/MIN(01)/DEC/2. 20 November 2001.

Consistent with the Doha Declaration, developing countries that had ARV patents have widely used TRIPS flexibilities to procure generic ARVs, mostly from India where these products were not patented. In 2010 the Medicines Patent Pool was created to ensure that generic versions of new ARVs continue to be available. Today, first line ARV regimens are available from generic suppliers for US$ 95 – 158,[29] a steep decrease from US$ 10.000 – 15.000 a decade and a half ago. It is estimated that 80% of the people receiving HIV treatment access generic prequalified ARVs. This progress is the result of unprecedented global mobilisation and the absence of medicines product patents in India until 2005.

The use of flexibilities for non-HIV products seems to be more difficult and politically more sensitive. For example when India issued a CL for a cancer medicine it provoked an out-of-cycle review by the US Trade Representative.[30] The MPP has recently expanded its mandate to include HCV and TB, but challenges remain for countries outside the scope of the MPP agreements. For other new essential medicines such regularized access strategies are lacking.

TRIPS-plus requirements (i.e. standards of IP protection higher than those mandated by TRIPS) in regional and bilateral trade agreements roll back much of the positive momentum represented by the Doha Declaration.[31] Investor to State Dispute Settlement (ISDS) mechanisms, often contained in such agreements, are being used by the pharmaceutical industry to contest decisions by national patent offices and courts.[32]

The trend in international norm setting for patents reflects the IP agenda of corporations that seek expansion of their monopoly positions in the market through patents and other market exclusivity mechanism. For example: test data protection rules that prevent the marketing authorisation of generic and biosimilar medicines by a medicines regulatory agency for a certain period of time or marketing exclusivity granted under orphan drug laws.

The progress in access to ARVs has been the result of a unique and unprecedented global mobilisation. Other diseases have not sparked responses at the same scale, which raises the question of how to ensure access to new treatments for hepatitis, tuberculosis (TB), cancer, diabetes and other non-communicable diseases in the face of expanded patent and

[29] Untangling the Web of antiretroviral price reductions: 17th Edition. Médecins sans Frontières. July 2014. http://www.msfaccess.org/sites/default/files/MSF_UTW_17th_Edition_4_b.pdf. Accessed February 2016.

[30] Médecins sans Frontières (MSF) Access Campaign, "Persistent US Attacks on India's Patent Law & Generic Competition," January 2015, https://www.msfaccess.org/sites/default/files/IP_US-India_Briefing%20Doc_final_2%20pager.pdf . Accessed February 2016.

[31] Sell, Susan K. "TRIPS-plus free trade agreements and access to medicines." *Liverpool law review* 28.1 (2007): 41-75. Preferential trade agreements (PTAs) such as the signed but not yet ratified TPP typically contain reference to the Doha Declaration and its paragraph 4 formula regarding non-interference with measures to protect public health, but do not specifically address how conflicts between newly-negotiated and tighter restrictions on use of pharmaceutical and health technologies, and the Doha principles, will be resolved. There are no clearly defined mechanisms for that, and conflicts are inevitable. Future work of the GHLC may include examination of how references to the Doha Declaration in PTAs can most effectively function in addressing TRIPS-plus requirements.

[32] See: http://www.theglobeandmail.com/report-on-business/international-business/us-business/lilly-ramps-up-nafta-fight-over-loss-of-patents/article13223813/ .Accessed January 2016.

exclusivity rights. Affordable essential medicines are crucial to the success of UHC, an important target under the SDGs.

The human right to access to essential medicines – who is responsible for the fulfilment of this right?

Obligations of States parties

States are the primary duty holders under the international human rights treaties. Based on Article 12 ICESCR, they are under a legal obligation to take measures necessary for the prevention, treatment and control of diseases and for creating conditions assuring access to medical services.[33] General Comment 14 explains that States should ensure that medical services, including essential medicines, are available, accessible, acceptable and of good quality ('AAAQ').[34] It identifies access to essential medicines as a legal core obligation of the right to health[35]. According to General Comment 14, the legal core obligation to provide essential medicines is 'non-derogable', which means that non-compliance would result in a *prima facie* violation of the ICESCR.[36] They are also under a legal obligation to ensure that the pharmaceutical industry does not limit people's access to essential medicines (State's 'obligation to protect').[37]

Obligations of the international community of States

States and the international community of States at large are under an obligation to facilitate access to essential medicines in other countries and to provide the necessary aid when required.[38] They are to assist developing countries in realizing their core obligation to provide access to essential medicines to their population.[39] States should prevent third parties, including the pharmaceutical industry, from violating the right to health in other countries.[40] They should ensure that their actions as members of international organizations take due account of the right to health.[41]

Responsibilities of the pharmaceutical industry

The preamble to the Universal Declaration of Human Rights calls on 'every individual and every organ of society' to promote and respect human rights. Similarly General Comment 14 recognizes that the private business sector has responsibilities under the right to health.[42] In line with this it is widely recognized that the pharmaceutical industry carries responsibilities under the right to health.[43] Based on the 'Ruggie Principles' (2008), endorsed by the Human Rights Council in 2011, pharmaceutical companies have

---

[33] Article 12(2) (c) and (d) ICESCR.
[34] CESCR General Comment 14, para 12.
[35] CESCR General Comment 3, para 10; General Comment 14, para 43(d).
[36] CESCR General Comment 14, paras 47 and 48.
[37] CESCR General Comment 14, para 35.
[38] Article 2(1) ICESCR; CESCR General Comment 3, paras 13 & 14, General Comment 14, para 39.
[39] Article 2(1) ICESCR; CESCR General Comment 3, paras 13 & 14, General Comment 14, para 45.
[40] CESCR General Comment 3, paras 13 & 14; General Comment 14, para 39.
[41] CESCR General Comment 3, paras 13 & 14; General Comment 14, para 39.
[42] CESCR General Comment 14, para 42.
[43] Hunt, Paul., Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Health, Paul Hunt, Annex: Mission to GlaxoSmithKline, UN Doc. No. A/HRC/11/12/Add.2 (2009). Available at http://www.who.int/medicines/areas/human_rights/A_HRC_11_12_Add_2.pdf . Accessed February 2016.

the corporate responsibility to respect human rights. This means that they should avoid infringing on the human rights of others and should address the adverse human rights impacts of the activities in which they – or their business relationships – are involved.[44]

Enforcing responsibilities to the human right to health

The tension between IP and human rights is perpetuated by the differences in how these two frameworks are enforced. IP rights enjoy binding enforcement mechanisms at the international level through the WTO Dispute Settlement Mechanism and through ISDS. While both IP and human rights standards are legally enforceable and binding on State parties, the authority of human rights norms is not often recognised within the IP framework. Although WTO dispute settlement no longer insists on a self-contained regime approach, human rights have yet to play a material role. On the other hand, States are held accountable to human rights norms in several authoritative, albeit often non-binding, fora (i.e. CESCR).

Access to medicines as part of the human right to health has been increasingly enforced before domestic courts, with one of the most prominent cases filed by the Treatment Access Campaign seeking access to ARVs in South Africa.[45] Domestic enforcement is highly contingent on a functional national judiciary and patients' own access to justice – both of which may be lacking in countries where access urgently needs to be scaled up. In successful cases where patients cannot afford their medicines, the courts often shift the financial burden from the patient to the State, which must pay for expensive, sometimes patented, medicines, rather than address the root causes of high prices. For example in Brazil, where unplanned government spending on court-mandated medicines grew by 11 times over 2 years, reaching US$47,8 million in 2009.[46] In these circumstances, achieving UHC and health system sustainability becomes a major concern. These shortcomings show that a more equitable solution is needed to address the core issue of how health systems can provide high-priced, essential medicines rather than ease only the symptom of patient affordability through the courts.

A global public policy response that rebalances obligations under human rights law with obligations under IP law is needed to address patent challenges to access to new essential medicines.

Proposals to realign obligations under human rights treaties and IP treaties.

Access to essential medicines is a key component of the right to health. Essential medicines should be available "at a price the individual and the community can afford."[47] The patent status of an essential medicine can be an impediment to achieving an affordable price and to a government's obligation to fulfil its population's right to essential med-

[44] Ruggie report 2011, para 13.

[45] Hogerzeil, Hans V., Samson, Melanie., Vidal Casanovas, Jaume., and Rahmani-Ocora, Ladan. "Is Access to Essential Medicines as Part of the Fulfilment of the Right to Health Enforceable through the Courts?" *The Lancet* 368.9532 (2006): 305-11. Available at http://www.sciencedirect.com/science/article/pii/S0140673606690764

[46] Biehl, João, et al. "Between the court and the clinic: lawsuits for medicines and the right to health in Brazil." *Health Hum Rights* 14.1 (2012): E36-52.

[47] See: WHO definition of Essential Medicines, http://www.who.int/medicines/services/essmedicines_def/en/ . Accessed January 2016.

icines. This is the case when the patent holder refuses cooperation through equitable pricing or licensing of the relevant patents.

The GHLC made the following proposals aimed at reconciling access to essential medicines under the right to health and patent rights for consideration by the High-Level Panel. The proposals should be seen in the context of proposals for reform of the global pharmaceutical R&D framework to ensure financing for R&D while maintaining prices within reach of the people and communities that need access to the innovations.

Establish an Essential Medicines Patent Pool (EMPP) supported by the UN
The EMPP could be modelled after the MPP and hosted by the MPP and pursue public health focused licence terms and conditions.[48] [49] The unmet need for treatments for both communicable and non-communicable diseases justifies the application of the patent pool model beyond only a few infectious diseases.

Companies should license their patents related to essential medicines to the EMPP, which would align with their responsibility to promote and protect human rights.

Both voluntary licensing and CL (Proposal 2) through an EMPP should be coupled with a tiered royalty system to remunerate the patent holder and contribute to R&D expenditure at levels proportionate to GDP. The WHO and UNDP have provided guidelines for the remuneration of non-voluntary use of medical technologies that could be used or further adapted for that purpose.[50]

A patent owner's refusal to license an essential medicine to the EMPP would satisfy the CL grantee's requirement under article 31 of TRIPS to have made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions, recognizing that there is no prior negotiation requirement in cases of national emergency, extreme urgency or public non-commercial use.

The right of states to exempt essential medicines from patenting should be authoritatively recognized by the WTO (Proposal 3), including taking into account obstacles that could arise in the implementation of the EMPP. This would assure that the priority needs of individuals, in accordance with basic human rights principles, are given first priority among interests.

National governments should establish effectively automatic non-voluntary licensing of patents related to medicines on the WHO EML or their national EML
The UN and its specialised agencies in collaboration with the WTO should develop guidance for countries including model legislation to implement the effectively automatic provision of CL for essential medicines. This effectively automatic non-voluntary system should be implemented immediately and should be integrated with the EMPP when the latter is established.

Compulsory licensing of patents related to essential medicines is possible under TRIPS. The Doha Declaration specifies: "Each Member has the right to grant compulsory licences

[48] For details see: www.medicinespatentpool.org . Accessed February 2016.
[49] Frederick M. Abbott, Intellectual Property and Public Health: Meeting the Challenge of Sustainability. *The Graduate Institute*. Geneva (2011).
[50] http://www.who.int/hiv/amds/WHOTCM2005.1_OMS.pdf . Accessed February 2016.

and the freedom to determine the grounds upon which such licences are granted." While Article 31 (a) of the TRIPS Agreement requires that CLs should be considered on their individual merits, a legal mechanism meeting that requirement may employ identification as an essential medicine as the means through which the individual merits of a licence are determined.[51] [52] Export of the predominant part of essential medicines produced under such a CL should be understood to fall within the August 30 2003 'waiver'/pending amendment inserting article TRIPS 31*bis*, satisfying the requirement for authorization of export of medicines produced under a CL.

Authorize exemption of essential medicines from patenting

The WTO Ministerial Conference should provide an authoritative interpretation of articles 27 and 30 of TRIPS to allow Members to exclude essential medicines from patentability. The UN General Assembly should adopt a resolution urging the WTO to take this action.

The priority needs of individuals for access to essential medicines should take precedence over commercial interests, and should be facilitated. The recommended authoritative interpretation would demonstrate unqualified recognition by the international community of the priority of human rights over commercial interests.

Conclusion

Impact on policy coherence and advancing human rights

All three proposals will increase policy coherence by strengthening the human rights aspects of access to medicines and by providing effective remedies to patent barriers to generic low-priced essential medicines.

Impact on public health

The impact on public health is expected to be significant. High prices are a serious impediment for providing new essential medicines as is evidenced by the global rationing of new antivirals for the treatment of HCV, challenges of access to new ARVs in countries excluded from voluntary licence agreements and the lack of cancer treatment. While affordability is only one aspect of ensuring access to medicines, lack of affordability is often the single most important barrier.

V. The Framework Convention on Pharmaceutical Innovation[53,54]

The GHLC submitted to the HLP a proposal for the adoption of a Framework Convention on Pharmaceutical Innovation, followed by optional protocols touching upon intellectual property management, funding for innovation, regulatory aspects of pharmaceutical approval processes, and international cooperation in science and technology.

---

[51] Cf. Reichman, J.H., Hasenzahl, C., Non-voluntary Licensing of Patented Inventions Historical Perspective, Legal Framework under TRIPS, and an Overview of the Practice in Canada and the USA. Issues paper number 5; Geneva: UNCTAD-ICTSD Project on IPRs and Sustainable Development. 2003

[52] Correa, Carlos María. *Integrating public health concerns into patent legislation in developing countries*. Geneva: South Centre, 2000. Available: http://apps.who.int/medicinedocs/pdf/h2963e/h2963e.pdf Accessed February 2016.

[53] See: http://www.unsgaccessmeds.org/inbox/2016/2/22/contributionxavier-seubaon-behalf-of-global-health-law-committee-of-the-international-law-association.

[54] Dr. Ruth Atherton has recused herself from this portion of the submission.

The changing landscape for pharmaceutical innovation

Innovation policies, processes and structures must be adjusted to respond to technological and social changes taking place in a rapidly evolving global society. The linear innovation model has been replaced by a more complex framework, where many actors intervene at several different stages of the innovation chain. Scientific and technological advances, pressing social needs, increased competition, and the ever-evolving role of the state, have prompted the emergence of innovation models pulling together competences and talents of very diverse stakeholders. Innovation has become highly cumulative, and frequently requires collaboration in open, inclusive, and enabling environments. As such, innovation reaches unprecedented levels of sophistication. However, the needs of large segments of the population remain unmet and the overall sustainability of the pharmaceutical innovation system is at stake.

Pharmaceutical innovation refers to the introduction of new products and processes that create value for health. While innovation is difficult to measure, this definition is a useful starting point. Presently, networks of innovators, often of a global nature, have recourse to a wide range of legal and managerial tools that integrate the innovation toolbox. Such a toolbox exists and is administered in the context of specific policy, economic, legal, regulatory, and cultural settings, both of national and international scope. Indeed, both "proximal" (or downstream) and "distal" (or upstream) determinants of health, including health innovation, may be conditioned by international treaties.[55]

Tools and stakeholders relevant to innovation give a sense of the magnitude of the challenge. Numerous tools have been deployed to promote pharmaceutical innovation, mention commonly being made to public funding, intellectual property, regulatory processes, availability of venture capital, ownership of innovation 'platforms' and 'infrastructure', science and engineering education, technology transfer, competition, prizes, 'open' strategies, and liability rules.[56] On the other hand, the range of actors in the production of innovative goods mirrors that of stakeholders involved in the policy aspects of innovation. International organizations, states, companies, and researchers pursue complementary goals, including the provision of public goods, the maximization of social welfare, the enhancement of firms' competitiveness, and the advancement of science. The promotion of policy options that strengthen interaction and complementarity between those tools and stakeholders is crucial both at the national and international levels.

Framework Convention

Innovation in the area of health is produced and governed by a combination of national and international policies and regulations in a wide array of areas, and spans across several legal regimes, notably international health law, human rights law, and international economic law.

The model of a framework convention followed by protocols is often pursued in contexts of technical complexity and uncertainty. The framework convention is in fact an umbrella

[55] D. W. Bettcher, *et al.,* "Global trade and health: key linkages and future challenges", *Bull World Health Organ*. 2000; 78(4): 521–534.

[56] S. M. Benjamin, A. K. Rai, 'Fixing Innovation Policy: A Structural Perspective', *The George Washington Law Review,* vol. 77, 2008, p. 2.

treaty that enshrines core values and fundamental principles, facilitating initial consensus on a number of central points while leaving technically complex aspects for additional protocols.

A core element of the Framework Convention on Pharmaceutical Innovation would be the portrayal of pharmaceutical innovation as a common interest of mankind. It would also identify core principles, relevant stakeholders, and the areas of relevance to pharmaceutical innovation where further normative action is required. Specific and complex topics relating to intellectual property management, regulatory aspects of pharmaceutical approval processes, funding, and international cooperation in science and technology, would be approached independently in additional protocols.

Previous proposals to set up a treaty on pharmaceutical innovation have been of varying scope and have targeted a wide array of topics, including clinical trials, medical ethics, transparency, open innovation, funding for research, and international cooperation on science and technology.[57] Global common values and objectives cut across these proposals and the proposed Framework Convention on Pharmaceutical Innovation.

The proposed treaty would be a public health and human rights-based global instrument. First, it would recognize that innovation in the area of pharmaceuticals is a common interest of mankind. Second, the right of everyone to the enjoyment of the highest attainable standard of physical and mental health[58] provides a useful legal basis and analytical framework to address practices, regulations, and policies with an impact on health, including pharmaceutical innovation. Pursuant to this right, its interrelated and essential elements' and the legal obligations resulting from it, states have the obligation to cooperate –including by means of normative action– and to act locally to enhance meaningful and accessible health innovation to prevent, treat and control epidemic and endemic diseases.

Protocol on intellectual property management

Intellectual property is a tool to stimulate innovation provided that it is finely combined with social norms, government intervention, and competition.[59] Fulfillment of the instrumental purpose of the intellectual property system depends on its actual design and management of intellectual property assets. Some key elements should be included in the Protocol on intellectual property management.

---

[57] See, for all, WHO, *Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property*, 2011, 28 (2.3) (c); WHO, R*esearch and Development to Meet Health Needs in Developing Countries: Strengthening Global Financing and Coordination, Report of the Consultative Expert Working Group on Research and Development: Financing and Coordination*, 2012.

[58] Enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; and elaborated further in Committee on Economic, Social and Cultural Rights*, General Comment nº 14, The Right to the highest attainable standard of health*, 11/08/2000, E/C.12/2000/4.

[59] WIPO, *World Intellectual Property Report – Breakthrough Innovation and Economic Growth*, Geneva: WIPO, 2015, p. 14.

First, patent statutes have commonly adopted broad language with respect to patentability. This room to maneuver needs to be preserved, since it is ultimately related to innovation output, which is both product and country-contextual. In this regard, the Framework convention would explicitly acknowledge such freedom.

Next, a reminder of the flexibility existing with respect to patent post-grant measures of relevance to innovation would be also meaningful. In the Framework Convention these references may be broad and merely quote the Doha Declaration on the TRIPS Agreement and Public Health, whereas more detail could be provided in the proposed protocol on intellectual property management. In this same context, patent approval processes may also be enriched by giving special status to patents relating to priority health needs.

Third, collaborative innovation models, based on cooperation to foster the development of knowledge, rely heavily on intellectual property management and balancing of stakeholder incentives. In this sense, new approaches to intellectual property sharing and management are currently instrumental to promote efficiency and cooperation. Successful international models include the Medicines Patent Pool, which could be supplemented by key principles to adjust intellectual property management to contemporary values and needs, in particular transparency with respect to patent status and licensing conditions.

Protocol on pharmaceutical innovation financing

The proposals for financing innovation, in particular the identification of a sustainable source of funding, put forward in 2012 by the Consultative Expert Working Group on Research and Development could be the starting point for the 'financing protocol' of the Framework Convention on Pharmaceutical Innovation. They included discussion on a 'governmental agreement to contribute to the global cost of R&D, considering each nation's level of development, size of economy and capacity to pay' and delinkage between the costs of innovation and the price of pharmaceuticals, a key concept bridging access and innovation. Whether the funds collected would be devoted to prizes, grants or directly publicly-funded research should be addressed in the protocol.[60]

Protocol on administrative and technical measures

Medicines' regulatory agencies and entities responsible for financing drugs play a relevant role in innovation policies. Their specificities and topics of regulation (technical standards, medicines purchasing) deserve independent attention. On the one hand, there are policy, governance, and normative aspects relating to international quality, safety, and efficacy of medicines that need to be addressed. This is particularly the case of the inclusiveness of international standard-setting processes and the way certain standards impact the development of new drugs. On the other hand, a range of instruments and measures normally implemented at the national level could gain additional recognition in an international treaty. These instruments and measures include procurement agreements, advanced market commitments, conditions of access to government funded research, priority review vouchers, and free access to test data information.

[60] Evidence shows, however, that direct subsidization may be the most effective response to inadequate innovation incentives and costly adaptation. K. Maskus, *Research and Development Subsidies: A Need for WTO Disciplines?,* E15Initiative. Geneva: ICTSD&WEF, 2015.

Protocol on science and technology cooperation

International scientific cooperation is key to fulfill the potential of pharmaceutical research. Proposals on the adoption of an international treaty to facilitate and promote the development of science and technology have been on the table for the last two decades,[61] while bilateral agreements and scientific programs also promote scientific and technological international cooperation, and may be a source of inspiration and funding. The protocol on science and technology cooperation could address i) rules on research subsidies in areas of public health interest; ii) an agreement to place 'into access pools the patented results of publicly funded research that develops knowledge capable of supporting applied science and R&D, especially in areas of common global concern';[62] iii) measures enabling cooperation between research centers; iii) compromises to facilitate international mobility of scientists; iv) design of agendas of common interests and priority setting in accordance with public health priorities; v) measures to stimulate technology transfer between developed and developing countries; vi) criteria and to support and access to publicly funded research and tax advantages; and vii) facilitating access to scientific resources.

Which international structure and adoption process

An instrument of this caliber needs broad international support, including states with research-based economies, emerging economies, as well as countries with pressing health needs. It also requires involvement of numerous international organizations, companies supplying different segments of the pharmaceutical market, scientists, and non-governmental health organizations.

Prior complex international normative processes were materialized through a range of conferences over a considerable number of years. In the case of pharmaceutical innovation, discussion has advanced since the nineties. The proposal put forward aims at providing the structure and mechanisms, and some update, to proposals previously made. Already existing initiatives, developed by multiple stakeholders in international organizations, civil society, the private sector, and academia, would fall under the scope of the proposed new regime. The task would be twofold: coordinating and going further when necessary, while constructing broad-ranging stakeholder incentives to participate.

The Framework Convention, negotiated in the context of international conferences, could establish a light coordination mechanism in charge of monitoring the action of concerned stakeholders. The coordination mechanism could be based on the recommendations put forward by the Consultative Expert Working Group on Research and Development and stakeholders described therein, and could also benefit from the experience of already existing small and functional international authorities or regulatory groups.

---

[61] J. H. Barton, 'Integrating IPR Policies in Development Strategies', Stanford University ICTSD-UNCTAD Dialogue, The Rockefeller Foundation's Bellagio Conference Center, 30 Oct.-2 Nov. 02, p. 3; T. Hubbard T, J. Love, 'A new trade framework for global healthcare R&D', *PLoS Biol* 2004: 2(2): e52. doi:10.1371/journal.pbio.0020052.

[62] K. Maskus, K. Saggi, *Global Innovation Networks and their Implications for the Multilateral Trading System*, E15Initiative, Geneva: ICTSD and World Economic Forum, 2015.

VI. Legal Issues Surrounding Access to Global Health Research Materials

Overview

Recent Ebola outbreaks and pandemic risks[63] underscored significant gaps in global preparedness for outbreak prevention and response[64]. These events highlighted the lack of available treatments, vaccines and diagnostics to assist communities and individuals exposed to pathogens. Unfortunately, product research and development timelines and economics[65] infrequently align with the accelerated needs of affected individuals and communities in the context of a public health outbreak or emergency. Product development efforts are optimally effective when enabled long prior to the needed interventions. These efforts begin with access to research materials.

From a legal perspective, this public health need is confronted with the absence of one or more dedicated international instruments addressing access to a breadth of human pathogens and biological research materials in general terms (the Pandemic Influenza Preparedness (PIP) Framework being an exception to this gap); and the lack of uniform legal environment to promote medical research for global health accompanied by swift product development, particularly in the context of a public health emergency of international concern (PHEIC) or other health emergency. This is in contrast with other areas where states have established multilateral normative schemes to manage resources of common interest, as for example the FAO International Treaty on Plant Genetic Resources for Food and Agriculture. The lack of dedicated instruments means that the legal status of human pathogens and clinical samples and the rights and obligations of states with regard to their management, exploitation and sharing, fall under a number of existing international legal instruments and regimes largely established and implemented for the pursuit of interests and objectives other than public health. This situation, in turn, raises the risk of fragmentation and possible conflicts among different rules, and of unpredictability as to whether and how human pathogens will actually be made available for public health purposes.

This section examines the legal and contextual issues surrounding access to global health research materials in the context of product development aimed at global health and identifies potential benefits to amending existing instruments or developing new instruments or tools.[66]

---

[63] Jonas, O., World Development Report (2014) Background Paper Pandemic Risk http://www.worldbank.org/content/dam/Worldbank/document/HDN/Health/WDR14_bp_Pandemic_Risk_Jonas.pdf

[64] Moon, et al. Lancet (2015) 386, 2204-21; Gates, B. N Engl J Med (2015) 372:1381-84 ; personal interviews on were also conducted with members of University of Nebraska Medical Center, including within the center's Pathology, the Public Health Laboratory, Biocontainment Unit, international research, legal, compliance, regulatory and leadership teams. See http://www.unmc.edu/; http://www.unmc.edu/publichealth/news/ebola-community.html ; http://www.nebraskamed.com/biocontainment-unit/ebola

[65] See e.g., Pronker, E. S., Weenen, T. C., Commandeur, H., Claassen, E. H. J. H. M., & Osterhaus, A. D. M. E. (2013). Risk in Vaccine Research and Development Quantified, *PLoS ONE*, *8*(3), e57755; see also Adams, C. P. and Brantner, V. V. (2010), Spending on new drug development. Health Econ., 19: 130-141.

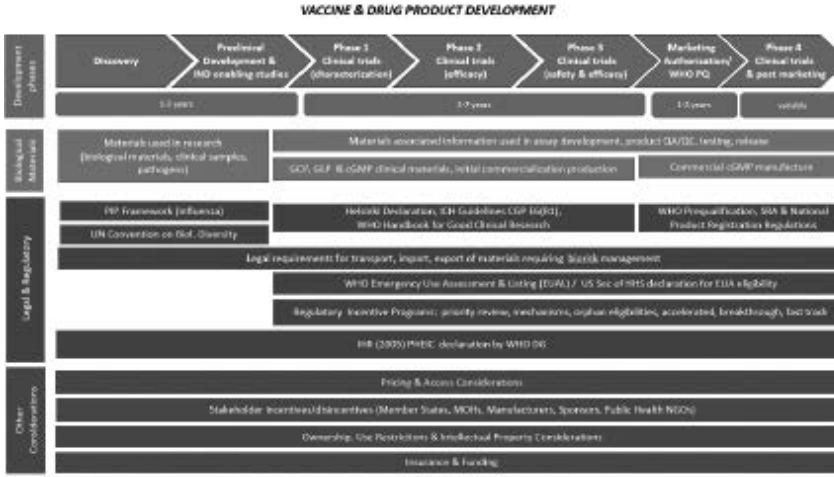
[66] This paper is not intended to provide a compilation of all laws, regulations and considerations related to access to global health research materials, but is intended to highlight areas for consideration in the context of benefiting global health stakeholders and communities.

These include:

- The need for prompt and safe sharing of biological materials, data and information, including human pathogens and clinical samples to facilitate research and development of therapeutics, vaccines, diagnostics aimed at public and global health measures;
- The legal, regulatory and contextual considerations that overlay global product development and the need to balance bio-risk management; and
- Consideration of incentives to drive products development aimed at beneficial global health outcomes.

Product Development Overview & Uses of Global Health Research Materials

Acknowledging the important public health benefit of affordable and accessible therapeutics, vaccines and diagnostics, the sharing of biological materials for global health research is examined here in the context of the product development process. As illustrated in Figure 1, product development begins in the discovery phase encompassing research to elucidate disease biology, targets and molecules that have the potential to ameliorate, prevent or detect a disease of interest.[67]



Product development targeting infectious and pandemic disease requires access to biological materials which are the causative agent of the disease. In the case of vaccine development, for example, access to the pathogen is essential to provide antigens, nucleic acids and sequence information essential to identifying potential vaccine candidates, assays and diagnostics. Concomitantly, as discussed further below, the need for biosafety and biosecurity remain central to the management, sharing and use of these materials.

Following the discovery phase, and before progressing into humans, molecules with the highest potential are extensively studied in animal and *in vitro* models during

[67] Special thanks to Murray M. Lumpkin, MD, MSc. for input and critical review of paper.

pre-clinical research. Pre-clinical research seeks to minimize the risks of introducing product candidates into humans. In the US, for example, these studies form the basis for an Investigational New Drug (IND) application, a prerequisite to the clinical development phase.

If successful in the preclinical phase, product candidates may enter clinical development phases. During clinical phases, product candidates are characterized and examined for safety and efficacy in human subjects (beginning with health volunteers and progressing into an applicable patient populations). Biological samples from human subjects (such as blood, sputum or other tissue samples) collected attendant to clinical trials can provide insights to understanding the etiology, pathology and epidemiology of the disease. These materials, as well as portions of the pathogen and information derived from each, may also be used in assay development, product quality assurance/quality control, and product release in support of manufacturing.

Upon achieving clinical evidence of safety and efficacy through phase 3 trials and if the product can be produced in a quality manner in compliance with cGMP standards, marketing authorization for the product may be sought from the applicable regulatory agency (usually in the country of manufacture or a stringent regulatory agency that will be a reference agency for follow-on authorizations), followed by WHO Prequalification if applicable, and national registrations in the countries where the product will be used. Finally, if required, phase 4 trials and post marketing studies will follow product registration. The timeline for the product development and its cost have been detailed by others, but is generally understood as taking close to a decade with average costs in the hundreds of millions of dollars (USD) or more[68].

Legal and Regulatory Frameworks Applying to Biological Materials for Global Health Research

As described above, access to pathogens is a critical initial step in the development of therapeutics, vaccines and diagnostics. Similarly, human biological samples provide critical insights in product development. As pathogens and human biological materials for global health research have both overlapping and different legal considerations, we example them separately.

Pathogens

Public health is largely confronted with the absence of one or more dedicated international legal instruments requiring states and other actors to cooperate and share human pathogens for the benefit of public health (the PIP Framework being an exception to this gap)[69]. In the case of pathogens, such as viral agents, several legal constructs provide context.

The UN Convention on Biological Diversity (CBD)[70] is based on the principle of sovereignty over genetic resources and the right of each Party to regulate access to them

[68] See e.g., DiMasi et al., J. Health Econ. (2003) 22: 151–185; Drug Inf. J. 2004; 38: 211–223; Adams, C. et al, J. Health Econ. (2010) 19: 130–141; Avorn, J. .N Engl J Med (2015) 372:1877-1879

[69] See e.g., Abbott, F. "An International Legal Framework for the Sharing of Pathogens: Issues and Challenges" (2010)

[70] Adopted in 1992, 196 parties as of early June 2016.

through mutually agreed terms. The primary purpose of the CBD was to fight biopiracy and ensure both effective management and preservation of a shrinking pool of genetic and biological resources as well as access to benefits for countries sharing them. The CBD is based on a bilateral approach to sharing of resources between states. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (NP)[71] implements in detail the benefit access and sharing provisions of the CBD. Its Article 4 para. 4 foresees a carve-out from its applicability in the following terms: "*Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, this Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument*."[72] Accordingly, the CBD and NP leave open the question of whether certain pathogens, particularly those which could lead to the declaration of a PHEIC (or potentially those requiring higher levels of biosecurity), should fall outside the scope of the CBD and whether an alternate legal framework could serve as such a specialized instrument.

The PIP Framework[73] addresses the need for pandemic influenza pathogens[74]. This non binding instrument regulates the sharing of influenza viruses both within and outside the existing network of WHO laboratories and collaborating centres. It also establishes channels to ensure the sharing of benefits deriving from the use of viruses and/or the services of the network for both preparedness and response in case of pandemic flu outbreaks. The framework embodies an innovative approach, including private companies, laboratories and academic institutions in its scope besides states. It contemplates the conclusion of legally binding Material Transfer Agreements (MTAs) between parties providing and accessing the virus as the tool to guarantee the fulfilment of the objectives of the Framework. The UN General Assembly has recently recalled the importance of the cooperation at the global level in fully implementing the PIP Framework (A/RES/70/193).

Future possibilities and areas of research:

- *Clarify whether the PIP Framework constitutes or may provide the basis for a 'specialized instrument' under NP Article 4.*
- *Revision of the PIP Framework: expansion of its scope (pathogens other than pandemic influenza viruses) and development of further incentives to encourage industries to conclude MTAs.*
- *Alternatively, negotiation of a new international treaty along the lines of the FAO Treaty establishing a multilateral mechanism to share human pathogens.*
- *Inclusion in the IHR of a clear obligation to share pathogens.*

---

[71] Adopted in 2010, in force as of October 2014, with 77 Parties as of early June 2016.

[72] Under the CBD, "Genetic resources" means genetic material of actual or potential value. "Genetic material" means any material of plant, animal, microbial or other origin containing functional units of heredity.

[73] Adopted by the World Health Assembly (WHA) in 2011 under Article 23 of the WHO Constitution.

[74] Due to their high mutation rate, new strains evade immunity obtained from prior vaccinations and necessitate biannual refinement of the antigenic composition of the vaccine to address current circulations of the virus, http://www.who.int/wer/2012/wer8747.pdf

Clinical Materials

Unlike pathogens, the biological materials from human subjects (including clinical samples) are subject to laws, regulations and guidelines[75] aimed at the protection of individual subjects' rights, safety and well-being. While international principles, standards and guidelines including the Declaration of Helsinki [76] and International Conference on Harmonization (ICH) Guidelines for Good Clinical Practice (GCP)[77] are broadly accepted, human subjects research is regulated nationally[78]. The simultaneous application of these international and national regulations, as well as the application of different national standards and processes can significantly increase the complexity of multi-site, multi-jurisdictional trials and similarly impact the management and subsequent use and sharing of biological materials collected attendant to such trials.

Use restrictions on human biological materials are also directly impacted by the context of their collection, the specific patient informed consent and the potential biohazards the sample may create. These cells and tissues are typically collected in different contexts, including: during treatment/diagnosis, as donations for another recipient, in research (including human subjects research, clinical trials and educational purposes) or the manufacture of biological products[79]. These contexts together with the applicable patient informed consents serve as legal and ethical covenants between patients and researchers and define the parameters of allowable use that will follow the human samples[80]. For example, informed consent may detail the destruction, storage and the allowable or

[75] See International Compilation of Human Research Standards, 2016 Edition, complied by: Office for Human Research Protections, U.S. Department of Health and Human Services

[76] In US, the Declaration of Helsinki is embodied in the Common Rule (45 CFR part 46, and FDA counterparts 21 CFR 50 and 21 CFR 56) which details the protection of human research participants. These regulations requires IRB review and informed consent for research obtaining private information from living individuals. Human biological materials are governed by Department of Health and Human Services, Office for Human Research Protections (OHRP) http://www.hhs.gov/ohrp/. In the EU, clinical trials are governed by Regulation No. 536/2014 of the European Parliament and of the Council on Clinical Trials on Medicinal Products for Human Use. Human biological materials are further governed by Directive 2004/23/EC on Setting Standards of Quality and Safety for the Donation, Procurement, Testing, Processing, Preservation, Storage, and Distribution of Human Tissues and Cells, which also calls for mandatory consent.

[77] Global principles of clinical trial conduct include International Conference on Harmonization (ICH) Guidelines for Good Clinical Practice (GCP), which assure that the principles of the Helsinki Declaration in protection of subjects' rights safety and well-being. GCP is typically a prerequisite to marketing authorization. ICH Guidelines for Good Clinical Practice E6(R1) describe the responsibilities of all participants including investigators, sponsors (including their CROs), monitors and Institutional Review Boards (IRB)/Independent Ethics Committees (IEC) and include the requirement for informed consent of trial subjects. Additional international guidelines include WHO's Handbook for Good Clinical Research Practice (GCP): Guidance for Implementation (2005) and CIOMS International Ethical Guidelines for Biomedical Research Involving Human Subjects (2002)

[78] *Fundamentals of U.S. Regulatory Affairs, 8th Ed (2015).*

[79] *C. Petrini J Blood Medicine 2012:3 87-96; Fundamentals of U.S. Regulatory Affairs, 8th Ed (2015), at 337.*

[80] In the absence of express agreements to the contrary, US Courts have generally held that ownership rights over clinically excised or donated tissues is relinquished by the patient or research subject. *See* Allen et al Clinical Chemistry 56:11 1675-82, at 1678 (2010). Further, while secondary research with such tissue may be subject to IRB approval, patient consent may on a case-by-case basis, be

impermissible secondary uses of the samples[81]. Within the bounds of the uses permissible under the patient informed consent, human samples must also be managed in accordance with the applicable biohazards guidelines[82].

Accordingly, to enable sharing for broad scientific and R&D purposes, clinical researches optimally anticipate the potential future uses and seek patient consent accordingly. However, given that individuals within single or multiple-site trials may consent to different scopes of use, the subsequent research, sharing and analysis of these samples and information can be significantly constrained.

In the recent Ebola virus outbreaks, the lack of existing therapies, vaccines and diagnostics highlighted the misalignment between product development timelines and the needs of patients and public health systems in the context of a public health emergency. Given no products approved for Ebola Virus Disease (EVD) existed at the time of the outbreak, the global health community and regulators were required to rely upon clinical trial procedures or emergency use authorizations in order to provide specific new treatments to patients.

Emergency Use Authorizations

Recognizing the need for applicable regulatory and public health bodies to act swiftly for the benefit of patients, emergency use authorizations serve to mimic marketing authorizations, but apply specific temporal and use limitations. While emergency use does not supplant the need for full clinical trials, nor imply approval by a Stringent Regulatory Authority or WHO pre-qualification, these procedures import clinical trial elements, including risk-benefit analysis, data collection and evaluation, informed consent and national sovereignty over drug/vaccine/diagnostic approvals. For example, in the US, FDA's Emergency Use Authorization (EUA) procedure[83] is allowable following the Department of Health and Human Services (HHS) Secretary's issuance of a determination of public health emergency or significant potential for public health emergency. During the Ebola emergency, WHO adopted a similar principles of emergency use, known as Emergency Use Assessment and Listing (EUAL)[84] which are allowable in the context of a PHEIC when no licensed medicine, vaccine or diagnostic is available and certain minimum requirements are met, including Good Manufacturing Practices (GMP)[85] manufacture and intent to seek WHO PQ in the future. Data is assessed for reasonable likelihood that quality, safety and effectiveness outweigh foreseeable risks and uncertainty in light of the PHEIC. The EUAL process may also include from an expert Advisory Committee (AACEUM).

---

waived by the applicable IRB, particularly in cases where individually identifiable information is dissociated from the materials. *Fundamentals of U.S. Regulatory Affairs, 8th Ed (2015).*

[81] See e.g., http://www.who.int/rpc/research_ethics/informed_consent/en/; http://www.who.int/rpc/research_ethics/Informed%20consent%20for%20sample%20storage.doc?ua=1

[82] See e.g., http://www.cdc.gov/vhf/ebola/healthcare-us/laboratories/specimens.html

[83] http://www.fda.gov/EmergencyPreparedness/Counterterrorism/MedicalCountermeasures/MCMLegalRegulatoryandPolicyFramework/ucm411445.htm

[84] http://www.who.int/medicines/publications/druginformation/issues/WHO_DI_29-3_NormsStandards.pdf?ua=1; http://www.who.int/medicines/news/EUAL-vaccines_7July2015_MS.pdf

[85] http://www.who.int/medicines/areas/quality_safety/quality_assurance/production/en/; http://ec.europa.eu/health/documents/eudralex/vol-4/index_en.htm

These hybrid tools may be essential in public health emergencies when time is of the essence for vulnerable patients and affected public health systems. Emergency use recognizes the need for applicable regulatory and public health bodies to promptly act in public health and other emergency situations, with a presumption that failure to act may be deemed unethical. It also encompasses the perspective that the community, when faced with a public health emergency, is willing to tolerate a greater risk of the unknown (less available of data) given the counterbalance of the known significant risk inherent in the public health emergency. In such settings, in light of the potential increased clinical risks, informed consent becomes even more critical, but what constitutes that consent and how it is obtained in the context of a public health emergency demands an approach, like the emergency authorization itself, that recognizes the realities of the public health emergency and the risks, not only to the individual patient, but to the community at large that an individual patient may represent.

Given the complexity, cost and perceived liabilities of international clinical trials, little incentive exists for private sector biotechnology and pharmaceutical entities to serve as sponsor[86] of clinical trials in the context of a PHEIC. From a product development perspective, a gap also exists between the emergency use and conventional approval processes, since the emergency use authorization ceases upon termination of the emergency declaration. This gap serves as a disincentive for product developers in the context of health emergencies, particularly as patients may already face high mortality and morbidity due to the underlying pathogen. To fill such a gap, in recent Ebola PHEIC, WHO recently took on an expanded role in a clinical trial aimed at ameliorating Ebola Virus Disease when no other sponsor was willing to conduct the trial in Guinea[87].

This role for WHO was also arguably consistent with the IHR. Under the IHR, adopted by the WHA in 2005, states must develop capacities for surveillance, assessment and response. While the IHR do not address sharing of pathogens or clinical trials and associated biological materials, it calls for WHO's unique role as the guardian of public health[88]. IHR entrust the WHO to detect, assess and respond to public health emergencies of international concern and other public health risks. Indeed, states have often looked to WHO to play a coordinating and normative role in this regard, or even to assume an operational role for the approval and distribution of vaccines and medicines.

Future possibilities and areas of research:

- *Consider the potential benefit of WHO further defining an optional role in clinical trials (such as serving as a clinical trial sponsor) in the limited circumstances when a product manufacturer is unable or unwilling to do so.*
- *Consider whether the role of WHO in serving as a clinical trial sponsor might be relevant in other circumstances taking into account potential advantages for public welfare.*

---

[86] A "Sponsor" of a clinical trial is the company, person, institution or organization that takes responsibility for the initiation, management and/or finance or resources for the clinical trial. *Fundamentals of U.S. Regulatory Affairs, 8th Ed (2015);* https://www.clinicaltrialsregister.eu/doc/EU_Clinical_Trials_Register_Glossary.pdf

[87] Henao-Restrepo, Ana Maria et al. Lancet 2015:386: 857-66.

[88] *See* Gostin and Friedman Retrospective (Lancet 2015:385:1902-09) – Envisioning a global health framework with robust national health systems with "an empowered WHO at its apex."

Transport & Transfer of Materials: Biosafety, Biosecurity and Biorisk management

While it is generally recognized that the conditions of transport, storage and use of pathogenic biological agents must meet the appropriate biosafety[89] and biosecurity[90] requirements in light of the specific biorisk[91] presented, national and subnational/local standards vary widely and can create operational barriers that impede research or result in the spoilage of research materials. Developing as well as developed countries are not exempted from criticism or operational challenges regarding their biosecurity and biosafety standards.[92]

Over the past decade, increased attention to scientific, operational and legal guidelines have been applied to biorisk management. While not meant to be an exhaustive review, the following provide example of frameworks and standards that warrant consideration as related to the transport of materials.

In 2003-2004, the laboratory-acquired SARS-CoV infections in Singapore triggered a demand for international biosafety guidance. In response, the WHA in 2005 adopted resolution WHA58.29 on Enhancement of laboratory biosafety[93]. The WHO further developed guidance on biorisk management[94] as well as a *Strategic Framework for Action (2012-2016)*[95] aiming towards the development of sustainable global, regional and national plans relating to laboratory biorisk management. Similarly, in Europe, the *Laboratory Biorisk Management Standard (CWA 15793:2011)*[96] is registered with the European Committee for Standardization (CEN). In Canada, the Canadian Biosafety Standards, recently updated, sets out managment requirements for the safe handling and storing of human and animal pathogens and toxins.[97] In the US, the Federal Select Agent

---

[89] Biosafety (which concerns the "containment principles, technologies and practices that are implemented to prevent the unintentional exposure to biological agents or toxins or their accidental release) more directly addresses the protection of researchers and actors along the product development pathway (http://apps.who.int/iris/bitstream/10665/70878/1/WHO_HSE_2012.3_eng.pdf).

[90] Biosecurity (which describes the "protection, control and accountability for biological agents and toxins … to prevent their loss, theft, misuse, diversion of or unauthorized access or intentional unauthorized release") extends the zone of protection to the national and international public (*id.*)

[91] http://www.cdc.gov/biosafety/publications/bmbl5/BMBL5_sect_IV.pdf

[92] In 2015, the Hudson Institute published its analysis of the US national state of defense against biological attack and infectious disease, finding the nation "dangerously vulnerable" to a biological event. In a 2008 publication by the House of Commons, the Veterinary Laboratory Agency underlined that some current biological containment facilities in the UK "require significant capital investment to bring them to acceptable bio-containment standards." See House of Commons, Innovation, Universities, Science and Skills Committee, *Biosecurity in UK research laboratories*, Sixth Report of Session 2007-08, vol. II.

[93] WHA58.29 on Enhancement of laboratory biosafety (2005).

[94] WHO, *Biorisk management: Laboratory Biosecurity Guidance*, WHO/CDS/EPR/2006.6, September 2006.

[95] WHO, *Laboratory Biorisk Management: strategic Framework for Action 2012–2016*.

[96] CWA 15793:2011. Guidelines for the Implementation of the CWA 15793:2008 (CWA 16393:2012) have been adopted to assist States in understanding the CWA 15793.

[97] http://canadianbiosafetystandards.collaboration.gc.ca/

Program[98] oversees the storage, use and transfer of human and animal biological agents and toxins which have the potential to pose a severe threat to public health, including viral agents such as Ebola virus.[99]

The *UN Model Regulations on the Transport of Dangerous Goods (18th ed)*[100] issued by the Committee of Experts on the Transport of Dangerous Goods (UNCETDG) – a committee of the UN Economic and Social Council – set forth international modal regulations on air, rail, sea, road and post. Parts 2, 4, 5 and chapter 6.3 relates to infectious substances[101]. Many states have adopted the *UN Model Regulations* in their entirety or with varriation, to stand as their national dangerous goods legislation.

In addition, independent quality systems such as ISO 17025:2005 and ISO 9001:2000 as well as trade organizations[102] provide further guidance and assurance that valid audit trails and verifiable storage systems exist for all dangerous pathogens received at, transported and held within organizations[103].

Future possibilities and areas of research:

- *Compilation of legal and regulatory requirements, or development of a uniform set of biorisk standards in order to increase consistency in the application of biosafety and biosecurity measures across different services and laboratories.*

Bioterrorism & Synthetic Biology

While vaccine development has traditionally relied on molecular biology techniques as means to capture and elucidate viral antigens from pathogens for use in vaccines, an additional layer of complexity is given by advances in biotechnology, in particular genetic sequencing and molecular biology. In view of the increasing ability of many scientific institutions to sequence and synthetically reconstruct nucleic acids, proteins and biomolecules, reliance on sharing physical samples for such research may one day be fully obviated. Progress in biotechnology may soon make synthetic construction of complex pathogens and biomolecules based on publically available genetic sequences and information, a concrete reality.

---

[98] http://www.selectagents.gov/

[99] http://www.selectagents.gov/SelectAgentsandToxinsList.html

[100] ST/SG/AC.10/1/Rev.18 (Vol. I) & (Vol. II), 2013. These *UN Model Regulations* are subject to biennial amendments. In December 2014, UNCETDG agreed on further changes for the 19th revised edition (ST/SG/AC.10/1/Rev.19 (Vol. 1) & (Vol. II), 2015), which will come into force in 2017.

[101] These recommendations are addressed to governments and to the international organizations concerned with safety in the transport of dangerous goods. For the purpose of the *UN Model Regulations*, "infectious substances"(*i.e.* "substances known or reasonably expected to contain pathogens. Pathogens are defined as microorganisms (including bacteria, viruses, rickettsiae, parasites, fungi) and other agents such as prions, which can cause disease in humans or animals") are assigned UN numbers and proper shipping names according to their hazard classification and their composition. The packaging, labelling and documentation requirements vary from a category to another. The shipper, the carrier and the receiver have specific responsibilities in ensuring successful transportation. The WHO has provided for an overview of the roles of these actors in its *Guidance on regulations for the Transport of Infectious Substances 2015-2016 (*WHO/HSE/GCR/2015.2), applicable as from 1st January 2015.

[102] See e.g., http://www.iata.org/whatwedo/cargo/dgr/Pages/download.aspx

[103] House of Commons, Innovation, Universities, Science and Skills Committee, *Biosecurity in UK research laboratories*, Sixth Report of Session 2007-08, vol. II.

The first synthetic virus creation (polio) was reported in 2002[104]. Subsequent laws, such as the variola amendment[105] enacted in the US in 2004 banned the synthesis, use, transfer or possession of the smallpox (variola) virus with penalties of 25 years to life in prison. Similarly, the WHO Independent Advisory Group mentioned below recommended that the recreation of variola virus should be prohibited[106]. While legal prohibitions to such research may impede a biorisk concerns from compliant actors, a legal instrument may not achieve avoidance of intentional bioterrorism acts. In 2015, a WHO Independent Advisory Group on Public Health Implications of Synthetic Biology Technology Related to Smallpox prepared a report[107] to the WHO DG detailing the health implications of a synthetic smallpox development. The Scientific Working Group concluded that "it would be possible to recreate variola virus" from relatively simple chemicals and laboratory equipment. Accordingly, the report emphasized the "importance of the core capacities required by the International Health Regulations (2005)" calling for increased capacity for detection, disease control, biosecurity and risk communication. The report highlighted the need for "increased biosafety and biosecurity in laboratories stock inventories, strengthened regulatory frameworks and their implementation, coordination between sectors including health, judiciary, law enforcement and customs." In the context of biorisk management, bioterrorism must be integral in the considerations as applied to biological materials. Therefore, in addition to the legal frameworks, diligence and coordination of the global community must seek to ensure biorisk management of this and similar pathogenic agents is achieved.

Future possibilities and areas of research:

- *Increase awareness of biorisk through trainings and clear guidelines.*
- *Consider the potential benefit and learnings from smallpox virus, including limited number of authorized repositories capable of ensuring appropriate biorisk management.*[108]
- *Consider the importance of integrating genetic sequencing and molecular biology of highly pathogenic agents into regulatory and policy development on biosecurity and on limiting access to dangerous pathogens solely for public health purposes.*

Other Considerations

Ownership, Use Restrictions & Intellectual Property

Ownership and use restrictions, including intellectual property, need express consideration when contemplating the sharing of biological materials for global health research. An initial step to this analysis requires answering the questions of 'what use limitations must

[104] http://www.sciencemag.org/news/2002/07/poliovirus-baked-scratch

[105] 18 U.S. Code § 175c

[106] http://www.who.int/csr/resources/publications/smallpox/synthetic-biology-technology-smallpox/en/

[107] http://apps.who.int/iris/bitstream/10665/198357/1/WHO_HSE_PED_2015.1_eng.pdf

[108] http://apps.who.int/iris/bitstream/10665/198357/1/WHO_HSE_PED_2015.1_eng.pdf ; see also House of Commons, Innovation, Universities, Science and Skills Committee, *Biosecurity in UK research laboratories*, Sixth Report of Session 2007-08, vol. II: calling for "a secure system for assuring protection to those put under pressure from outside to source material from a containment facility" and "Training staff in biosafety [as] an essential element for the safe operation of any high containment facility"

be accounted for when contemplating sharing for the intended purpose?' In the absence of express agreements to the contrary, US Courts have generally held that ownership rights over clinically excised or donated tissues are relinquished by the patient or research subject[109]. However, as described herein, patient consents may detail use limitations.

Intellectual property also plays a role along phases of R&D. While the development of pharmaceutical patents may occur along the product development phases, many occur in the earlier end of the product development timeline (such as during the discovery of new molecules and methods). Accordingly, the contemplated research uses must be analyzed in light of the desired activities and in light of the jurisdictional limitations of the applicable patents, if any. For the purpose of this discussion, however, an IP analysis is merely one component that needs consideration.

At a different normative level, existing contractual practices impact the conditions upon which biological materials are shared. The widespread practice among laboratories, research centres, universities and private companies is under cover of a material transfer agreement (MTA) or similar agreement. Such agreements are customary in the transfer of biological samples and detail the responsibilities of the parties in providing, receiving and safely managing the materials. In many cases these MTAs may contain clauses that specify the permissible use of the biological material or detail the intellectual property rights related to the materials or their use. By way of example, the ownership claims and restrictions imposed by the MTA[110] of Erasmus Medical Center to share the MERS-CoV virus was well publicized and noted by the WHO DG.[111]

Incentives/disincentives for stakeholders

The development of therapeutics, vaccines and diagnostic for global health applications requires a spectrum of stakeholders including academic and clinical researchers, clinical researcher organizations, product manufacturers, regulatory agencies, members states, distributers, NGOs, funders, intergovernmental organizations and agencies, including WHO. Each of these stakeholders play a unique role along the product development and delivery pathway. Creating an environment that encourages sharing of research materials and product development aimed at global health must also take into account the existing stakeholder incentives and disincentives beyond the legal considerations. While not the focus of this discussion, these include, among others, the cost of and timelines of product development, product liability and indemnification concerns of product developers,[112] pricing considerations balancing with broad product accessibility. Accordingly the importance of operational and incentive alignment with legal frameworks must not be overlooked.

---

[109] See Allen et al., Clinical Chemistry 56:11 1675-82 (2010)

[110] http://www.twn.my/title2/intellectual_property/info.service/2013/ipr.info.130512/22227717951a47369b9515.pdf

[111] http://www.who.int/dg/speeches/2013/world_health_assembly_20130527/en/

[112] In the US, US National Childhood Vaccine Injury Act (NCVIA) of 1986 (streamlined 'no-fault' compensation system) and the National Vaccine Injury Compensation Program (VICP) addresses adverse events due to VICP covered vaccines provides a model aimed at encouraging vaccine manufacture. http://www.hrsa.gov/vaccinecompensation/index.html

VII. Regulation, Trade and Public Health[113]

International standard-setting in pharmaceuticals

International harmonization

A range of activities are conducted at the international level to guarantee the safety, quality, and efficacy of medicines. These activities include, among others, the harmonization of pharmaceutical nomenclatures, the standardization of pharmaceutical compositions, the adoption of harmonized guidelines relating to activities in the preclinical, clinical, production and distribution phases of the medicines' chain, and the harmonization of documentation submitted for approval of pharmaceutical products.

International harmonization of information concerning medicines' tests and trials fulfills an important public health objective. In effect, harmonization avoids the repetition of tests already carried out, or tests very similar to other already carried out. Such a repetition gives rise to avoidable risks for human health and generates unnecessary expenses. Despite these widely shared objectives, international harmonization can hardly be total. Diverging standards are justifiable and sometimes necessary from the public health point of view in a number of areas and for a number of reasons, including genetic differences, climate conditions, or different scientific approaches to quality, safety, and efficacy. However, the risk and unintended consequence may be the use of technical standards to erect entry barriers to foreign competitors.

Harmonization of technical standards relating to pharmaceutical products has historically taken place in multilateral, regional and bilateral forums of public nature, and also in the context of public-private partnerships and initiatives. In addition to the normative dimension, harmonization has an institutional side. Cooperation between health agencies in matters relating to drug registration and control is more and more frequent, and different initiatives have been developed in parallel, frequently involving regulatory agencies where similar market conditions and public health situations prevail.

In this context, it is timely to reflect upon the so-called international standards of reference, and the current prominence, in that regard, of the standards adopted by the International Council for Harmonization of Technical Requirements for Pharmaceuticals for Human Use (ICH). The ICH is not only a very original initiative and the most productive source of international pharmaceutical standards, but it also underwent very relevant changes in 2015. After briefly describing the ICH, its guidelines and recent reform, the relationship between a number of pharmaceutical standards and norms on ethics, human rights, and trade will be addressed. For that purpose, the World Trade Organization (WTO) Agreement on Technical Barriers to Trade (TBT) will play a crucial role.

International standard-setting organizations

Even though institutional sources of international pharmaceutical regulation are not too numerous, there exists still a rich diversity. In addition to the World Health Organization (WHO) and its two major experts' committees dealing with pharmaceutical standardization (the WHO Committee on Biological Standardization and the WHO Committee on Specifications for Pharmaceutical Preparations), the International Organization for Standardization (ISO), the Organization for Economic Co-operation and Development

[113] Dr. Ruth Atherton has recused herself from this portion of the submission.

(OECD), and the already mentioned ICH, to name the most relevant ones, adopt international standards of relevance in the pharmaceutical sector .[114] There are also professional organizations such as the World Medical Association (WMA) and the *Council for International Organizations of Medical Sciences* (*CIOMS*) that develop important pharmaceuticals standards, in particular standards relating to good clinical practices.

Mapping active stakeholders in the area of international standardization reveals the diverse nature of standard-setting organizations. Some of them are multilateral organizations of either unrestricted membership, such as the WHO, or close and limited membership, this being for instance the case of the OECD. Others, by contrast, are private non-profit organizations, of heterogeneous membership, namely ISO, WMA and ICH.

International Council for Harmonization

The ICH is the most interesting and influential standard-setting organization in the area of pharmaceuticals. In 25 years of action it has adopted about 90 guidelines[115] that have been regularly updated and generally implemented both in ICH Member states and in many other countries that do not participate in the ICH process. In fact, the influence of ICH standards expands well beyond its actual members for a number of reasons. Indeed, non-ICH regulatory authorities may decide adopting ICH guidelines, they may be considered the international standards of reference pursuant to WTO law, or they may be endorsed by other international standard setting organizations, this being notably the case of the WHO.

Among the features of the ICH, the high level of implementation of the guidelines it adopts, as well as the dynamism and productivity in terms of the number of the guidelines produced, stand out. Regulatory members participating in the ICH are engaged in implementing the ICH standards, which do not go through any further internal discussion once adopted. Another feature of the ICH is the sophistication of its standards. There is consensus that the ICH standards are in themselves both of great quality and demanding. This does not exclude, however, concerns regarding the coexistence of some ICH guidelines and international trade norms, human rights norms, and ethical standards.

Changes at the International Council for Harmonization

The ICH is an interesting organization in terms of nature and membership. Up until October 2015, only innovative industry associations of the United States, Japan and the European Union, together with regulatory authorities of the same countries and region, were full members of the ICH. The WHO, Canada and the European Free Trade Association (EFTA) were just observers. The "ICH process" was essentially a closed one, with the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) acting as Secretariat. For contemporaneous accounts of independence and conflicts of interest that situation was hardly sustainable, not to mention the absence

[114] Moreover, some initiatives of national nature have great influence on activities conducted abroad. This is the case of some pharmacopeias, notably the U.S. Pharmacopeial Convention, the European Pharamocopoeia and the British Pharmacopoeia.

[115] About 30 on safety, plus numerous annexes; 12 on quality; 20 on efficacy; and 8 multidisciplinary documents. *See* the ICH production at http://www.ich.org/products/guidelines.html (accessed May 2016)

of regulatory authorities of the rest of the countries of the world, and the absence of representatives of generic industry associations.

The ICH has gone through very relevant changes in recent times. These changes have impacted on its nature as organization, its membership, the name of the managing bodies, and the norm-setting process, among other aspects.

First, the ICH is not anymore a "process" administered by IFPMA but a non-profit association. Second, regulatory members and industry members are not anymore on equal footing, since the latter have lost the power to propose and adopt standards -however, they can still appoint experts to all regulatory projects, which gives considerable leverage. Third, new regulatory members have been included on equal footing as the three foundational regulatory members. This is the case of the regulatory agencies of Canada and Switzerland, and it will probably be also the case of the other regulatory authorities of EFTA member states, and also the EFTA itself. Moreover, the door is open to a limited number of other regulatory authorities that must, however, fulfill demanding conditions.[116]

The impact of these changes may be crucial for the global acceptance of the ICH guidelines. Some aspects however may be contentious. First, previous guidelines remain untouched, and with them, the discrepancies with respect to the actual need of some standards and their relationship with trade, human rights, and ethical norms, and with policies aimed at promoting the local production of pharmaceuticals in developing countries. Second, the new 'Council' will be scrutinized for its inclusiveness of countries, companies, and consumers that had no representation in the previous 'Conference'. In this respect, the demanding conditions to become (non-founding) regulatory and industry members, as well as observers, are key. In this respect, it is worth mentioning that since 2014 some regulatory authorities in emerging economies -Argentina, Brazil, India and Colombia- have discussed the creation of a parallel standard-setting process. Third, the relationship between the ICH and the WHO presents some important questions. Perhaps the most fundamental among these, if WHO has the constitutional mandate to adopt the same type of guidelines that the ICH adopts,[117] should WHO merely observe and endorse the ICH guidelines or, rather, should it become the alternative and truly global standard-setting process?

Relationship with other areas of international law

The impact that international pharmaceutical standards have on ethics, human rights, and trade norms is of central importance. Whereas the stated purpose of harmonization is to reduce the costs of developing medicines, ensure the quality, safety, and efficacy of medicines, and avoid the repetition of preclinical and clinical assays, the content of the harmonized standards may be in tense relationship with ethics, human rights, trade and competition norms.

---

[116] They must have made substantive contributions to previous ICH guidelines and must accept and implement key ICH guidelines. The latter include six guidelines on stability, the critical guidelines on good manufacturing practice and the delicate guidelines on good clinical practice. More analysis is needed in this respect, but taking into consideration the participation on the three last assemblies of the ICH, candidates include Republic of Korea, Brazil, China and Singapore.

[117] *See* Article 2(u) of the WHO Constitution

With respect to ethics and human rights, the guidelines on good clinical practice adopted by the ICH are the case in point. This is an area where a rich normative *acquis* existed when the ICH started its work. In the last fifty years professional and scientific organizations have adopted rules that apply to many steps of the drug development process, and in particular to clinical assays. The guidelines of the WMA and CIOMS are particularly well-known, but are not, by any means, the sole ones. Moreover, a reduced but very important in substance number of international treaty and customary norms apply to clinical assays, some of them dating back to Nuremberg trials. However, in a number of aspects, the ICH guidelines seem to depart from these norms. For instance, ICH E6 does not address, or seems to addresses differently, important ethical requirements stipulated in the Declaration of Helsinki relating to the use of placebos[118] and also regarding the continuation of therapies once the trial is concluded.[119]

With respect to effects on international trade, the use of technical standards to restrict international trade is a matter of concern. Think for instance about a standard relating to purity. If such a standard does not impact on safety and efficacy, it should be of no interest whether the requirement of purity is set at 99% or 98.8%. However, adopting one or the other percentage may impede the entrance of products into the national market and be considered, therefore, a protectionist measure. Indeed, if the ICH adopts such a standard, if it becomes the international standard of reference, and members transform it into national regulations, activities taking place in countries that did not adopt the ICH guideline will be affected. For instance, the trade of companies based in non-ICH countries with ICH members will be disrupted.

The relevance of the WTO Agreement on Technical Barriers to Trade

The TBT is aimed at ensuring that national regulations do not become unnecessary barriers to trade. In order to do so, it establishes that national regulations –by definition, mandatory- cannot be more trade–restrictive than the levels established in international standards of reference. The latter are not identified, nor are international standard-setting organizations. On the contrary, the TBT Agreement sets forth some basic criteria. Fundamentally, it establishes that national regulations must satisfy the "necessity test", that is, they cannot be more trade-restrictive than necessary to fulfill a legitimate objective. Pursuant to Article 2.5 of the TBT, whenever a technical regulation is adopted to achieve one the legitimate objectives explicitly mentioned, including the protection of human health, and the national regulation is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

In this regard, with respect to the "international standard of reference", the increasing importance of the ICH, the declared objective of expanding guidelines to non-ICH states (and the fact that some non-ICH states actually adopt them), the consensus that generally characterizes the adoption of the standards, and the fact that the WHO is also endorsing

[118] While Article 32 of Declaration of Helsinki provides for the limited use of placebo in clinical trials, the ICH GCP and ICH Choice of Control Group guidelines adopt a more open stance and accept the use of placebo may change in different jurisdictions

[119] While the Declaration of Helsinki establishes that specific recommendations should be made for the continuation of treatments beyond the trial, these requirements are absent from ICH guidelines.

ICH guidelines, may result in the perception that ICH are, in effect, the international standards of reference.

This is very important because national regulations will have in principle to be based on the ICH guidelines. Certainly, the TBT is concerned about trade restriction. For instance, it would be applicable if good manufacturing practices adopted internally were more demanding than those existing in international standards of reference. For this reason, states where sophisticated pharmaceutical companies are based may be tempted to increase the level of exigency of international standards using their leverage in the ICH. In this way, they will be able to endorse national regulations that satisfy international standards and that only some companies can satisfy. Situations may be, however, more complex. What happens, however, if the standards adopted are not more demanding but just different? This may occur in areas where, even if some international standards exist, countries hold different views. Likewise, what happens if those standards are just more competitive? In those cases, and contrary to the argument of some companies in recent battles relating to biosimilar products regulations, ICH standards would just not apply.

VIII. Conclusion and Future Work

This report includes the initiation of GHLC study of global health security challenges, and the results of its first meeting on this subject; an analysis and recommendations with respect to access to essential medicines that reflects a contribution made to the UN HLP, as amended based on stakeholder suggestions; an elaborated proposal for a Framework Convention on Pharmaceutical Innovation and related protocols, also reflecting a contribution made to the UN HLP; a detailed analysis and recommendations with respect to access to research materials, and; a study and suggestion for further exploration regarding key regulatory issues affecting the production and distribution of medicines, including trade-related aspects. GHLC members recognize the urgency of addressing issues involving the links between health and human rights law, issues concerning noncommunicable diseases, and obligations to protect the environment and address the health impact of climate change. The GHLC expects to further address all of these issues as it continues with its work program. We have made a good start.

GLOBAL HEALTH LAW

WORKING SESSION

Tuesday, 9 August 2016, 9.00am

Chair: Professor Dapo Akande (UK)

The Chair introduced the three panellists – Professor Frederick Abbott, Co-Chair of the Committee, Dr Ruth Atherton, member of the Committee, and Dr Xavier Seuba, Co-Rapporteur of the Committee.

The Chair informed attendees that the first report of the Committee was available online from the ILA website.

Professor Frederick Abbott (US) introduced himself and welcomed attendees.

Professor Abbott started his presentation by referring to the mandate of the Committee. He mentioned that the main objective of the Committee was to bring forward international health law as a field of international law.

He then laid out some points on the breadth and complexity of the field. First of all, the protection and promotion of health encompassed a wide range of subject matter, including:

- the establishment and functioning of national healthcare systems
- mechanisms for the production and distribution of health goods and services, including cross-border movement
- innovation and access to health-related technologies
- preparation for, and responses to, health emergencies
- the impact of environmental degradation and climate change
- disparate treatment of groups.

Few areas were as heavily regulated as healthcare, as exemplified by the following:

- implementation of national healthcare schemes, including access to goods and services, insurance and reimbursement
- approval of new health technologies, including medicines
- regulation of production and distribution, including approval of manufacturing facilities, supply chain, prescribing and pricing
- regulation of professional services, including cross-border provision
- innovation and transfer of technology, including patents and regulatory market exclusivity, and related competitive market aspects
- the systems of regulation are interrelated.

With regards to the nexus between trade and public health, the following points were made:

- The establishment of the WTO and the adoption of the TRIPS Agreement represented a “sea change” in the international regulation of public health. Before then, half of the countries in the world exempted pharmaceuticals from patenting, whereas afterwards, it basically is a given that patent protection would be provided.

- Authority to make rules directly affecting important health interests were moved from the international organisation regulating health (WHO) to the international organisation primarily devoted to promoting mercantile interests (WTO).
- Trade negotiations since the formation of the WTO, including preferential trade agreements, had an increased focus on restricting public health flexibilities (as exemplified by the recent TransPacific Partnership Agreement (TPP). Rules on the extension of market exclusivity to biologic drugs was the most contentious element of the TPP negotiations
- Other key aspects included investor-State dispute settlement and intervention in public health formularies/reimbursement determinations.

Professor Abbott informed attendees that the Committee had initially decided to focus on four subject matter tracks, namely:

- legal issues surrounding access to research materials, including biological materials and results of clinical research
- legal issues surrounding access to essential medicines
- legal issues surrounding tensions between trade/investment agreements and global public health
- State obligations in the field of health and links with human rights law, including non-communicable diseases and sustainable development.

The first major activity of the Committee was to co-organise a multi-stakeholder meeting on global health security in Geneva in February 2015 in the midst of the West African Ebola crisis. The Committee managed to bring to the table all the relevant actors, including Médecins Sans Frontières (MSF), WHO, people involved in the development of new vaccines, and an array of organisations working to put together a response to the crisis. The idea was to come up with potential changes to the legal framework that might be beneficial in light of the crisis and with a view to future events.

Professor Abbott proceeded to address a few highlights of the meeting. There was a strong consensus on the fact that the top priority for improving responsiveness was to invest in building up national healthcare systems (surveillance, response, training of personnel). There was a critical need to accelerate research and development as well as approval pathways for new vaccines and treatments. There was a critical need to improve the management of crisis intervention services. In this regard, Professor Abbott pointed to the fact that MSF had to ask the US military to intervene and provide on-the-ground support and intervention. He noted that it was not a question of money (MSF is a well-funded organisation); rather, the problem was that there were insufficient trained people and there was no organisation that could build hospitals, train staff and protect them. It was difficult to coordinate the interactions between, and transition from, military authorities to civil authorities. WHO was not specifically a on-the-ground response organisation, and had very limited staff for that.

Other highlights included the need to integrate work of international organisations and NGOs, without establishing new international organisations. Moreover, it was acknowledged that the recent Zika outbreak represented the latest challenge to the emergency response system, and would certainly not be the last.

The second major activity of the Committee was participation in the process of the High Level Panel on Access to Medicines (HLP), which had been appointed by the UN Secretary General in November 2015. The HLP called for submissions, and members of Committee prepared two submissions:

- access to essential medicines authored by Ellen 't Hoen, Professor Brigit Toebes and Professor Abbott (as well as by Katrina Perehudoff, who is not a Committee member)
- Framework Convention on Pharmaceutical Innovation and Related Protocols authored by Xavier Seuba

Professor Abbott noted that the number of submissions received exceeded expectations. Both submissions authored by members of the Committee were selected for presentation at HLP hearings in London. Professor Abbott then proceeded to summarise the first submission on access to essential medicines, as set out in the Committee's first report.

Professor Abbott noted that the process of the HLP had been fascinating, and pointed to the fact that not only developing countries struggled with the issues. For example, the Netherlands made a very detailed presentation about the challenges the country faced with regards to access to essential medicines, its pharmaceutical budget, and its aging population. He noted that there were many submissions related to the need to prioritise the right to health as a human right.

Professor Abbott ended his presentation by informing attendees that Committee members had expressed interest in formulating a draft resolution for adoption by the ILA based on the anticipated HLP report. However, as of 8 August 2016, the report had not been issued.

The Chair opened the floor for questions on Professor Abbott's presentation.

Mr Steven van Hoogstraten (Netherlands) asked if a draft of the HLP report was available.

Professor Abbott responded that there was no draft available, but that both submissions made by Committee members were available on the ILA website.

Mr Dipak Bhattacharyya (India) noted that 70% of the Indian population did not have access to any essential medicines due to high prices. Furthermore, there was no reference to alternative medicines. He mentioned that there should be more discussion on alternative medicines in the global health scenario. He asked the panellist whether there were any concerted efforts to address these issues. He noted that high prices set by patent holders was preventing the general public from accessing medicines. Any report or presentation of the Committee should take these issues into account. Mr Bhattacharyya also expressed concern at the lack of representation from China on the Committee.

Professor Abbott noted that most of the work of the Committee so far had been directed at improving accessibility to medicines. He pointed to the fact that the Committee's primary submission precisely addressed this issue. He also pointed to the fact that the Indian government allocated a very low proportion of its budget to assure accessibility of medicines (less than almost every other country in comparable circumstances). Therefore, one could not talk about what was going on in India without talking about governmental budgeting priorities. While the domestic pharmaceutical industry in India had been very

successful, there had not been much effort in channelling those medicines to the wider Indian population as compared to exporting them. India was a very complex picture and there was a lot of work to be done.

Professor Abbott added that a lot of attention was being paid to the topic of alternative medicines. For example, in China, 25% of the medicines budget went to providing these types of medicines (traditional Chinese medicines). The Committee had not been very much involved in this topic, but was aware of its importance.

Mr Xavier Seuba (Spain) noted that, in the 2000s, the WHO organised an event on the topic of alternative medicines and promoted the adoption of national policies on traditional medicines. Admittedly, there had been little research on this, particularly from a legal perspective. The topic had not yet received the attention of the legal community.

Mr Bhattacharyya referred to the fact that India had an infant mortality rate of 25% as evidence that these issues were very pressuring for the country.

Dr Ruth Atherton (US) thanked Mr Bhattacharyya for raising important questions. She then proceeded to give a presentation on the legal issues surrounding access to research materials, including biological materials, and the results of clinical research.

To begin with, Dr Atherton offered a definition of global health research materials as pathogens (viruses, bacteria, microorganisms that cause disease) and clinical materials (human biological samples such as blood or tissues). She then explained why access was needed. The primary goal of global health research was to bring medicines, vaccines and diagnostics to people in need. Access to these research materials was a critical step in the process of developing new therapeutics.

She gave the example of the early work of Edward Jenner in England in inoculating a child against smallpox by collecting samples of fluid from cowpox lesions, which set the stage for all vaccinations worldwide. That work involved access to pathogens (cowpox and smallpox) and access to clinical material (the milk-maid who had contracted cowpox and the child who was inoculated). Dr Atherton showed how the importance of access began at the fundamental level of access to the pathogens and clinical materials to develop new therapies and vaccines.

Today, higher standards existed, a global desire for information and material sharing to allow access was widely increased, and a complex array of considerations – including pricing and stakeholder incentives – arose for global product development.

Dr Atherton referred to the way in which the Ebola crisis highlighted continuing gaps in access to medicines and vaccines, particularly for those who were more vulnerable. Unfortunately, product development timelines were not aligned with the needs of patients and communities undergoing a crisis. Product development needed to be optimised for the needs of the patient. The uncertain legal situation involving the pathogens and clinical materials needed for new therapeutics, vaccines and diagnostics led to an unpredictability as to whether and how these materials would be shared.

Dr Atherton then discussed the question of how these research materials were to be used. To illustrate she referred to "development phases" for medicines and vaccines, which began with the discovery in order to identify the target molecules that have the potential

to lead to future products. This was followed by extensive study of the molecules with the highest potential in animals and in-vitro models during the pre-clinical phase. If this was successful, candidates could progress into clinical development, where they were analysed for safety and efficacy. These studies were done in humans, beginning with health volunteers typically and progressing into appropriate patient populations. Trials became increasingly costly as they progressed. The goal was to prove to regulatory agencies that a marketing approval was justified, that the product was safe and effective, and that the risk-benefit analysis tipped towards the patient. Along the way, patient samples were collected and helped in identifying the causes, manifestations and incidences of these diseases. Both types of materials could be used in aspects of product development. While timelines varied and costs were debated, it was generally understood that this process could take a decade and cost hundreds of millions of dollars.

Dr Atherton next addressed the relationship between the stakeholders and the regulatory and legal framework for both pathogens and clinical materials. With regard to pathogens, there were two important frameworks – one that was very broad, and one that was specific to a single pathogen. The *Convention on Biological Diversity* (CBD) was based on the principle of sovereignty over genetic material and provided for access to that material on terms mutually agreed by States Parties. Genetic material was defined to mean "any material of plant, animal, microbial or other origin containing a functional units of heredity" (Art 2). A principal objective was to fight biopiracy. There was also the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization*, which further implemented details of the CBD. On the other end of the spectrum was the Pandemic Influenza Preparedness Framework. This was a specific non-binding framework that provided for the sharing of viruses and contemplated the role of private companies, academics and laboratories in addition to States.

With regard to clinical materials, there were international principles including the *Declaration of Helsinki* and the International Council for Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use. Both of these processes were broadly accepted, but human subject research was regulated nationally. By way of illustration, the International Compilation of Human Research Standards enumerated over 1,000 laws, regulations and guidelines that govern the topic in 120 countries. Differences in these regulations created highly complex legal and operational problems for multijurisdictional trials concerning the subsequent sharing and use of materials. Materials need to be transported from the site of collection to the site of research. Here, one must examine the role of bio-risk, bio-safety and bio-security. In this context, bio-terrorism and bio-security could not be overlooked. The first synthetic polio virus was reported to be made in 2002, and subsequent laws enacted in the US banned the synthesis, use, transfer or possession of smallpox virus with penalties up to life imprisonment. Similarly, a WHO advisory group recommended that recreation of the polio virus should be prohibited. Legal prohibitions might not achieve avoidance of intentional bio-terrorism attacks. This must be part of the access considerations of the Committee.

Finally, Dr Atherton referred to other considerations that needed to be taken into account, including the broad spectrum of stakeholders that were needed to develop important therapeutics. Academics, clinical researchers, States, NGOs, funders, intergovernmental organisations each played a role in product development. Creating an environment that

encouraged sharing and distribution must take into account existing incentives and disincentives beyond legal considerations. Dr Atherton concluded by noting that, while the focus of her presentation did not allow for a full analysis of various factors – including cost and timelines, liabilities inhibiting the development of medicines, and prices that must be balanced to allow product accessibility – these factors must not be overlooked.

The Chair opened the floor for questions on Dr Atherton's presentation.

Mr Bhattacharyya noted that patients were being used as guinea pigs for the trials of international pharmaceutical companies. This harmful syndrome on the underdeveloped masses happened a lot, especially in India. In the previous two years in India, trials had been put forward without notifying patients of harmful side effects. The world was focused too much on the Zika virus while India battled with dengue fever. Every day, 105 individuals died from dengue fever. There should be a watch dog to monitor occurrences of epidemics in other areas of the world. Mr Bhattacharyya agreed with Dr Atherton about access.

Dr Atherton thanked Mr Bhattacharyya for his intervention. She acknowledged that she did not give enough attention in her presentation to the issue of informed consent, and acknowledged the expertise of Mr Bhattacharyya on this issue. Informed consent was one of the most critical principles of medicine and became particularly important in the context of a vulnerable populations. The compilation of laws referred to in her presentation was largely driven by the complexities and importance of informed consent. The laws around clinical trials had evolved to ensure protection of the patient. So it was disheartening to hear that this was potentially not occurring in the way that all of us would like to see done.

Dr Atherton noted that the focus of her work was to look upstream at the creation of medicines. She acknowledged that, once the regulatory approval was received, the hard work began.

With regards to dengue fever, Dr Atherton noted that it was something of which she was well aware in her role at the Bill & Melinda Gates Foundation. There were organisations trying to eliminate dengue fever. Obviously, neglected tropical diseases were a critical part of access, and medicines needed to be provided to treat patients in need.

Dr Seuba reacted to the issue of informed consent. Informed consent was a customary rule of international law, finding expression in the Nuremburg trials and in international treaties. The Committee would find sources of international health law in various places (including the WHO and WTO). Some of these sources were probably too old, while pharmaceutical standards had evolved into a very important source. There were now more sophisticated rules to apply in the context of clinical trials.

Dr Atherton noted the intersection between technology and informed consent, particularly in that it was becoming more common for consent to be videotaped or recorded in some electronic manner. There were only a few jurisdictions that had jurisprudence on the matter. The interaction was an important and developing area to monitor.

Dr Seuba presented on two parts of the report that he had authored. The first concerned the submission to the HLP on the adoption of a Framework Convention on Pharmaceutical

Innovation. The second concerned international standardsetting in the area of pharmaceuticals. He noted that the HLP submission allowed the Committee to reflect on the broader relationship between public international law and innovation, more particularly pharmaceutical innovation.

The HLP submission advocating the adoption of a Framework Convention on Pharmaceutical Innovation conveyed the following:

- It highlighted the various legal regimes influencing innovation – it responded to the multifaceted nature of pharmaceutical innovation and identified a mechanism to facilitate international coordination and also to foster legal development or international normative action.
- It argued that the relationship between innovation and public international law went beyond intellectual property. Norms found in several international legal regimes impacted on pharmaceutical innovation, including international human rights law, international health law, and international economic law.

Dr Seuba noted that it was not easy to draw up the proposal in a single document as it identified topics that related to very different areas. The objectives of the proposal outlined the following:

- the Convention would facilitate the adoption of clear principles and basic understandings, enable and promote the development of complex legal tools, and prompt the cooperation of diverse stakeholders
- like in other areas of public international law where framework conventions had been developed, the proposal would facilitate the codification of fundamental principles and reach consensus on central points in the fraemwork convention, and address complex topics and more technical areas in specific and independent instruments (protocols)

Dr Seuba noted that there were a number of pillars in the proposed Framework Convention, namely:

- human rights basis for international normative action in the area of health innovation
- recognition of health innovation as a common interest of the mankind
- definition of pharmaceutical innovation as the introduction of new products and processes that create value for health
- identification of relevant stakeholders, a coordination mechanism, and areas of further normative action in additional protocols

Dr Seuba explained to attendees the different kinds of protocols, as outlined in the report.

Dr Seuba mentioned that there was an intense relation between public international law and pharmaceutical innovation, which was reflected in this report. Both the normative technique and mechanism to develop the proposal were typical of public international law. Moreover, at least eight international organisations or programs were relevant for the purposes of the adoption of the new regime.

Dr Seuba explained the special relevance of WTO law to the proposal. In this regard, he noted that TRIPS was relevant to IP management, the General Agreement on Trade in Services (GATS) was relevant to facilitating the international mobility of scientists, the Agreement on Subsidies and Countervailing Measures (ASCM) was relevant to the acceptability of subsidies in health-related areas, and agreement on Technical Barriers to Trade (TBT) was relevant to conditions for drug development.

Dr Seuba noted that the international structure and adoption process could not happen without the support of stakeholders. The success of an initiative of this caliber required broad international support, including:

- States with research-based economies, emerging economies, as well as countries with pressing health needs
- international organisations
- companies supplying different segments of the pharmaceutical market
- scientists
- non-governmental health organisations

The Framework Convention would be negotiated by means of international conferences. Previous partial attempts would be the source and point of departure. A light coordination mechanism would be in charge of monitoring the action of concerned stakeholders.

The Chair opened the floor for questions on Dr Seuba's presentation. He kickstarted discussions by querying the interaction between the Framework Convention and existing areas of law. Dr Seuba's presentation noted that proposal would in part clarify certain matters in the WTO agreements, but the Chair queried whether legally this would actually work. One of the aims of the proposal was presumably to take some of this discussion outside existing mechanisms and to put it into the new mechanism. However, unless all WTO members were to become party to the proposed Framework Convention, there would be a potential conflict between these existing treaties and the Framework Convention and protocols. Then the question would be the extent to which the WTO dispute settlement system and other systems would be able to take these protocols into account in interpreting the WTO agreements.

Dr Seuba responded that he had given some thought to this issue. He thought that the protocols would be the right place to reach compromise by participating member states to precisely address these type of issues in the context of relevant institutions and organisations. He thought that it was perfectly possible to achieve this objective. The other response was that having on board the relevant organisations was the best way to distribute these functions. The idea was to coordinate existing mechanisms and organisations that so far addressed health related issues.

Mr van Hoogstraten queried the problem that the proposed Framework Convention would actually be solving. Why create a whole new structure with 190 countries if there was an existing structure and the only problem was with coordination.

Dr Seuba agreed that coordination was a problem but that it was not the only problem. Existing organisations had a clear mandate to carry out specific tasks. Having a common

document identifying clear principles and clear objectives would facilitate responding to the health needs and innovationrelated concerns.

Professor Locknie Hsu (Singapore) intervened with two questions for the panel. The first concerned managing corruption with respect to pharmaceutical innovation; the second concerned the use of sovereign wealth funds for funding.

Professor Abbott responded that, while the proposed Framework Convention did not address corruption, the Committee did have a strong interest in competition law and competition law principles. The Committee had been looking closely at procurement clauses and practices, and noted that one key element globally in reducing costs and improving supply chains was to increase transparency in procurement processes. This was something that would be incorporated more directly into the Committee's inquiry, and was work that the UN Development Programme was doing on the ground right now.

With respect to the second question, Professor Abbott was not sure whether the Committee had specifically reflected on a potential role of sovereign wealth funds. These funds could be looked at in terms of contributions to reforms and innovation processes and whether that could fit into some type of delinkage proposal or factored in to push-pull mechanisms in the development of new medicines. Professor Abbott posited that in Singapore, a lot of biotech innovation was being funded by sovereign wealth funds.

Dr Seuba mentioned that sovereign patent funds were a new and contentious tool that was being used by States such as China, Singapore and France. The Committee had not yet researched this area from a legal point of view because it was still a new initiative.

Professor Abbott asked Professor Hsu to unpack her question on sovereign wealth funds, and whether she had something specific in mind.

Professor Hsu responded by noting that the Norwegian sovereign wealth model worked well for Norway. This model might assist the Committee in getting new stakeholders to fund expensive research.

Professor Abbott thanked Professor Hsu for this suggestion.

Dr Atherton cited an example of funds in Japan that specifically targeted global health innovation. Where innovators were partnering with industries in States, it allowed them to access a variety of sovereign funds or co-funding for global health. There were a few models out there that were starting to take hold, so it is something to monitor with interest.

Professor Abbott observed that much of the public private partnership (PPP) funding was coming from development funds, such as the Dutch development fund and the British development fund. Those are contributions made without an expectation of return on investment. In the Middle East, a number of wealthy governments are investing in health, the funds for which were coming from sovereign wealth funds

Dr Atherton thought that some of these funds were looking at specific returns and criteria for returns so they were operated more as a venture capital style investment as opposed to PPP, which tended to be more grant like.

Mr Bhattacharyya (India) suggested having a country specific protocol rather than a general protocol. India had the biggest corruption in the healthcare over the past three years. In the last two years, its rural health funds from WHO, UN and other rich countries had been defalcated. Things were going beyond imagination. Where was this money going? There should be a system in place that monitored how the money was being spent. The Committee should push for more transparency as the underprivileged were suffering from the mismanagement of funds.

Dr Seuba thanked Mr Bhattacharyya for his intervention, and suggested that it might be useful to have a bilateral treaty, for example, between India and the US. South to south initiatives took place, but the ideal situation would be a global convention.

Professor Abbott responded to Mr Bhattacharyya by adding that the Committee could highlight this as a general problem in the hope that pointing it out would help those in the country to put pressure on government to address the issue. From the outside, it was very difficult to know what one would suggest that would help address and identify the problem. The World Bank did a large scale study on the issue in India. What the Committee could do to help from the outside was a very good question, and one on which further reflection was needed.

Dr Seuba continued with his presentation on the second part of the report that he authored –international standardsetting in the area of pharmaceuticals. In parallel to the debate relating to innovation and access, there was another scientifically complex debate touching upon the quality, safety and efficacy (QSE) of medicines. Whereas the former frequently focused on IP, the latter essentially related to technical standards. Marketing authorisation of medicines depended on the satisfaction of standards of national and international origin. QSE of medicines was certified through laboratory tests and clinical trials on animals and persons as well as the fulfillment of manufacturing, distribution and management standards.

Dr Seuba noted that, in the area of international harmonisation, we find the harmonisation of pharmaceutical nomenclatures, the standardisation of pharmaceutical compositions, the adoption of harmonised guidelines relating to activities in the preclinical, clinical, production and distribution phases of the medicines chain, and the harmonisation of documentation submitted for pharmaceutical registration. The purpose of international harmonisation in this field was to:

- avoid the repetition of tests already carried out, or the conduct of tests very similar to others already carried out
- accelerate the entry of products into the market
- avoid the creation of entry barriers to foreign competitors.

Dr Seuba then referred to the public institutional dimension of international harmonisation, referring to the international standard-setting organisations referred to in Part VII of the report, including the development of the International Council for Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH).

Dr Seuba explained the relevance of the WTO Agreement on Technical Barriers to Trade, as set out in Part VII of the report.

Dr Seuba also mentioned some controversy associated with ICH, namely:

- the risk that the ICH process results in excessively demanding standards
- the risk that the ICH blocks debate on presently contentius scientific issues
- conflict or missmatch with human rights and ethical standards (as drawn out in Part VII of the report).

Dr Seuba added that the ICH must be praised for the adoption of high quality standards, but added that its membership and external participation should be broadened. Other countries should become full members, associations of patients and consumers should join as observers, as should generic manufacturers' associations.

Dr Seuba finished his presentation by questioning the role of the WHO, in view of Art 2(u) of its Constitution, which provides that WHO's functions included the development, establishment and promotion of international standards with respect to food, biological, pharmaceutical and similar products.

Professor Abbott thanked the chair for facilitating the session. He then referred to the beginning of his presentation, where we identified four basic thematic areas which included access to research materials, access to essential medicines, tenstions with trade/investment agreements, and links with human rights law. The Committee had made good progress in each of these areas. Of course, with this Committee and with the ILA in general there was a resource limitation. Global public health was a huge area with hundreds of subtopics, of which many were highly specialised. The Committee only had 14 members, and there were limitations on how much they could do. For the moment, our mission was to move each of this areas forward progressively, while addressing the systemic impact of climate change on the environment and the potential for degradation of public health.

The Chair thanked attendees for their participation.

Reporters: Lucia Berro and Faith Olaseinde

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

USE OF FORCE

Members of the Committee:

Sir Michael Wood (UK): *Chair*
Professor Noam Lubell (UK): *Rapporteur*

Dr Constantine Antonopoulos (Hellenic)
Alternate: Dr Efthymios Papastavridis
Professor Masahiko Asada (Japan)
Alternate: Professor Tadashi Mori
Dr Niels Blokker (Netherlands) – Nominee of Chair
Professor Pierre Bodeau-Livinec (France)
Professor Theodore Christakis (France)
Paul Colagiuri (Australia)
Dr Francisco Coutinho (Portugal)
Professor Alena Douhan (Belarusian)
Professor Armando Gallo Yahn Filho (Brazil)
Professor Noemi Gal-Or (Canada)
Alternate: Professor Christopher Waters
Professor Svetlana Vladimirovna Glotova (Russia)
Dr James Green (UK)
Professor Wolff Heintschel Von Heinegg (Germany)
Professor Christian Henderson (UK) – Nominee of Chair
Mr Sophocles Kitharidis (Australia)
Professor James Kraska (USA)
Professor Claus Kress (Germany)
Professor Jang Hie Lee (Korea)
Professor Ielbo Marcus Lobo de Souza (Brazil)
Mr P B Mauleverer QC (UK)
Dr Martin Mennecke (Denmark)
Professor Koichi Morikawa (Japan)
Dr Josef Mrazek (Czech Republic)
Professor Sean Murphy (USA)
Professor Eric Myjer (Netherlands)
Professor Mary Ellen O'Connell (USA)
Professor Inger Osterdahl (Sweden)
Alternate: Dr Pal Wrange
Professor Anne Peters (Switzerland)
Alternate: Ms Krisztina Huszti Orban
Professor Tom Ruys (Belgium)
Dr Arman Sarvarian (UK) – Nominee of Chair
Professor William Schabas (Ireland)
Dr Christian J Tams (Germany)
Professor Jennifer Trahan (USA)
Professor Ruth Wedgwood (USA)
Professor Siobhan Wills (Ireland)
Ms Elizabeth Wilmshurst (UK)
Mr Samuel Wordsworth (UK) – Nominee of Chair
Dr Misa Zgonec-Rozej (Slovenia)

Draft Report on Aggression and the Use of Force (May 2016)

The current draft is the latest version containing the updates and revisions by the Chair and Rapporteur following the last meeting of the Committee, and is being presented to the Committee members for further discussion at the Johannesburg conference. The Committee has held four meetings thus far, at the University of Essex, at the Sofia ILA conference, at the University of Cambridge, and at the Washington ILA Conference. Most members of the Committee have contributed to the report, whether at the meetings or in writing, and twelve members prepared background research papers which contributed to the drafting process. The fifth Committee meeting will take place at the Johannesburg

conference, and the outcome of discussion should move forward the final drafting of the report for adoption at the next ILA conference.

Part A: Context

A.1. Introduction

The Committee's mandate concerns the international law on the use of force (*ius ad bellum*); it does not deal with international humanitarian law or international human rights law, though these fields of law may be engaged in any particular case.

On one view the rules of international law on the use of force are relatively easy to state, though they can be difficult to apply in practice. The rules are to be found in the United Nations Charter, in other treaties, and in customary international law.[1] The Charter contains, among the Principles of the United Nations, a prohibition of the threat or use of force (Article 2, paragraph 4) and this indisputably is part of customary international law. The Charter refers to two not unrelated circumstances in which the prohibition does not apply. First, forcible measures may be taken or authorized by the Security Council, acting under Chapter VII of the Charter. Second, force may be used in the exercise of the right of individual or collective self-defence, recognized in Article 51 of the Charter, if an armed attack occurs. A further exception that has been suggested, but which remains controversial, is the use of force to avert an overwhelming humanitarian catastrophe (sometimes referred to as 'humanitarian intervention'). This is not mentioned in the Charter, and would have to be found, if at all, in customary international law. Force used at the request or with the consent, duly given, of the government of the territorial State is not a true exception: it is discussed below. The use of force in retaliation (punishment, revenge or reprisals) is illegal.

Together with the obligation to resolve disputes peacefully,[2] the prohibition of the use of force in Article 2(4) is a cornerstone of the United Nations Charter.[3] In the pre-Charter era of the League of Nations, the Covenant of the League adopted a formulation that failed to meet its objective, in part by focusing on the prohibition and regulation of 'resort to war'

---

[1] The political organs of the United Nations, in particular the General Assembly, have contributed to the law through consensus resolutions: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration) (GA res. 2625 (XXV)); Definition of Aggression (GA res. 3314 (XXIX)); Declaration on the Non-use of Force 1988 (GA res. 42/22). So too has the International Court of Justice in a series of judgments and advisory opinions: *Corfu Channel (United Kingdom* v. *Albania)*; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*; *Legality of the Threat or Use of Nuclear Weapons* advisory opinion; *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda)*: see C. Gray, "The International Court of Justice and the Use of Force", in C J Tams, J Sloan (eds.), *The Development of International Law by the International Court of Justice* (2013), pp. 237-261. See also Eritrea-Ethiopia Claims Commission, *Jus ad bellum* awards: 45 I.L.M. 430 (2006): see Murphy, Kidane & Snider, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (OUP, 2013).

[2] UN Charter Articles 2(3) and 33.

[3] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, *judgment, I.C.J. Reports 2005*, p. 168, at p. 223, para.148.

and thus giving rise to arguments that it allowed uses of force not declared as war.[4] The UN Charter rectified this, broadening the prohibition by prohibiting the threat or use of 'force', as opposed to the narrower 'war'.

Accordingly, the meaning of 'force' requires clarification. More specifically, there are two key matters which must be addressed: i) what is the nature of the prohibited force; and ii) whether the aim for which the force is used is a determining factor in its prohibition. We consider these questions below, as well as the meaning of the concept of 'armed attack' for the purpose of the right of self-defence and the possibly autonomous concept of 'aggression'.[5]

A.2. Clarification of the different *jus ad bellum* terms and concepts

'Use of force'

The substantive nature of force was the subject of much debate during the drafting of the UN Charter, but while there were proposals to include economic pressure as a form of force, these were not accepted.[6] Coercive measures *per se* are not equated with the type of force envisaged in Article 2(4), although they may violate other prohibitions, such as the principle of non-intervention.[7] Article 2(4) is generally accepted as referring to the use of 'armed' or 'physical' force.[8] This interpretation was confirmed in the list of

[4] I. Brownlie, *International Law and the Use of Force by States* (OUP: Oxford, 1963), pp. 59-60.

[5] The literature is vast. See, for example, C H M Waldock, "The Regulation of the Use of Force by Individual States in International Law" (1952) 81 *Recueil des Cours* 455; D W Bowett, *Self-Defence in International Law* (1957); I Brownlie, *International Law and the Use of Force by States* (1963); T M Franck, *Recourse to Force. State Action Against Threats and Armed Attacks* (2002); C Gray, *International Law and the Use of Force* (3rd ed., 2008); Y Dinstein, *War, Aggression and Self-Defence* (5th ed., 2012); O. Corten, *Le droit contre la guerre* (2nd ed., 2014) – for an earlier edition in English, see O. Corten, *The Law Against War. The Prohibition on the Use of Force in Contemporary International Law* (2010); *The Oxford Handbook of the Use of Force in International Law* (ed., M. Weller, 2015). The *Institut de Droit International* (through its Tenth Commission – Present Problems of the Use of Force in International Law) has worked on a number of use of force issues and adopted four resolutions: Self-defence (27 October 2007, Santiago); Humanitarian action (27 October 2007, Santiago); Military assistance on request (8 September 2011, Rhodes); Authorization of the use of force by the United Nations (9 September 2011, Rhodes): see also the 'Complementary Report' on 'Humanitarian intervention/humanitarian actions' by the Secretary General of the Institut, Joe Verhoeven, for the Tokyo session in 2013.

[6] 6 U.N.C. I. O. Docs. 334, 609 (1945); Doc. 2, 617 (e) (4), 3 U.N.C.I.O. Docs. 251, 253-54 (1945); Y. Dinstein, *War, Aggression, and Self-Defence* (Cambridge, Cambridge University Press, 5th ed., 2012), p. 88.

[7] Cf to earlier discussion of concepts

[8] E.g. L.M. Goodrich and E. Hambro, *Charter of the United Nations: commentary and documents* (Boston: World Peace Foundation) (1946), at 70; Schrijver, 'Article 2, paragraphe 4' in Cot et al (eds.), *La Charte des Nations Unies* (3rd ed., 2005), pp. 437-466: A. Randelzhofer/O. Dörr, 'Article 2(4)', in B. Simma *et al.* (eds.), *The Charter of the United Nations: a Commentary. Vol. I* (OUP) (2012), pp. 200-234, at MN 16-27; R. Higgins, *Problems and process: international law and how we use it* (Oxford: Clarendon Press) (1994), at 248; Y. Dinstein, *op. cit.*, supra n. 4, at 88; American Law Institute, *Restatement of the Law – Third. The Foreign Relations Law of the United States* (St. Paul, American Law Institute Publishers) (1990), at 383; H. Wehberg, 'L'interdiction du recours à la force. Le principe et les problèmes qui se posent', 78 *Recueil des Cours* 1951-I, 68-69; A. Constantinou, *The right of self-defence under customary international law and Article 51 of the UN*

examples appearing in the Friendly Relations Declaration.[9] The latter also clarifies that the prohibition of force extends to *indirect* force such as arming rebel groups.[10]

The reference in Article 2(4) to force "against the territorial integrity or political independence of any state" has been at the heart of arguments supporting use of force in circumstances that could be claimed as having other objectives (e.g. humanitarian intervention).[11] This interpretation, however, has two notable flaws. First, an examination of the *travaux* of the Charter demonstrates that the inclusion of the reference to territorial integrity or political independence was not intended to narrow the prohibition. Rather, it was an addition intended to emphasise and recognise the equal sovereignty of weaker or post-colonial states.[12] Second, Article 2(4) goes on to state "or in any other manner inconsistent with the Purposes of the United Nations". It is clear that "the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase 'or in any other manner' was designed to ensure that there should be no loopholes."[13]

A final question is whether there is any threshold of seriousness below which a use of force does not fall within the Article 2(4) prohibition. There is some indication from State practice and case-law that there is indeed a *de minimis* threshold.[14] For example, law enforcement activities such as the enforcement of a State's fisheries jurisdiction, kept within a limit of reasonableness and necessity,[15] may not qualify as a use of force. Of course, a law enforcement situation may evolve into one of prohibited use of force.[16]

The relatively wide net cast by Article 2(4) is part of the UN Charter's overall objective to reduce the use of force by states to the point where it can only take place with UN authorisation or in self-defence against an armed attack. Nonetheless, even a wide interpretation of force under Article 2(4) has its limits. Economic pressure, as noted earlier, is excluded from the notion of force in this context. The limitation to armed or physical

---

Charter (Brussels: Bruylant) (2000), at 36-37; D. Kritsiotis, 'Topographies of force', in Y. Dinstein and M.N. Schmitt (eds.), *International law and armed conflict exploring the faultlines: essays in honour of Yoram Dinstein* (Leiden: Martinus Nijhoff) (2007), pp. 29-77, at 68.

[9] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970. (1970) *U.N.Y.B.* 787

[10] Ibid; Nicaragua.

[11] See later discussion on humanitarian intervention, self-defence against non-state actors, rescue of nationals.

[12] Brownlie notes that it was "not intended to be restrictive, but, on the contrary, to give more specific guarantees to small states and that it cannot be interpreted as having a qualifying effect." I. Brownlie, *International Law and the Use of Force by States* (OUP: Oxford, 1963), p. 267

[13] *U.N.C.I.O.* Vol. 6, at 334-335; *Corfu Channel* case.

[14] *Nicaragua*; *Guyana v Suriname*; Eritrea-Ethiopia Claims Commission, *Jus ad bellum* awards: 45 I.L.M. 430 (2006).

[15] Cf. *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999,* p. 10, at p. XXX, para. 155. In *Spain v. Canada*, the ICJ accepted that Canada's action was in the nature of law enforcement (and hence precluding the Court's jurisdiction) rather than a use of force; but note *Guyana v. Suriname*, where – controversially – an arbitral tribunal regarded a coast guard vessel instructing an oil rig to leave a disputed maritime area as a threat to use force.

[16] Ruys, supra n. xx, pp 12,13; For another view, see J.A. Green, 'Self-Defence: A State of Mind for States?' (2008) 55 *Netherlands International Law Review* 181.

force, however, faces certain challenges in light of recent and potential future developments, such as inter-state cyber operations.

'Armed attack'

"Armed attack" signifies a threshold for an act that provides the trigger for the exercise of the right of self-defence, thus requiring an understanding of which acts qualify as armed attacks. Conflation of the term with 'use of force' can have dangerous implications. The comparatively wide approach often advanced with regard to the prohibition of force is understandable in light of the Charter's aims to minimise the recourse to force. However, if 'force' and 'armed attack' were to be seen as one and the same, the more acts that are banned as a result of being considered 'force', the more acts would have to be accepted as 'armed attacks' which trigger the right to self-defence – thereby widening the circumstances in which states can justify forcible action and leading to the opposite of the Charter's intentions. On the other hand, it may be regarded as dangerous to see a gap between "use of force" and "armed attack", since doing so arguably invites coercion below the threshold of "armed attack", knowing that the other side cannot respond.[17]

"Armed attack" therefore requires a definition of its own. There is some controversy with regard to a number of elements. The first is whether there is a threshold which can be measured in terms of scale and effects and whether this excludes so-called 'minor border incidents'. In the *Nicaragua* judgment the ICJ asserted that it was necessary "to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."[18] In paragraph 195, the Court explained that the difference between 'armed attacks' and less grave forms of the use of force was primarily one of 'scale and effects' and gave an example of acts which did not constitute armed attacks, but which could nonetheless qualify as less grave forms of the use of force, that is, 'assistance to rebels in the form of the provision of weapons or logistical or other support.'[19] These statements have given rise to controversy and the Court's exclusion of 'mere frontier incidents' has come in for particular criticism.[20] State practice indicates that small-scale border attacks involving the use of lethal force are not excluded from the concept of 'armed attack' and may give rise to the right of self-defence[21] Overall, it would

[17] For a US view, see Taft, "Self-Defense and the Oil Platforms Decision", 29 *Yale J. Int'l L.* 295 (2004); see also Matheson, *International Civil Tribunals and Armed Conflict* 252-55 (2012).

[18] ICJ, *Nicaragua, loc. cit.,* supra n. 2, at para. 191. See J.A. Green, *The International Court of Justice and Self-Defence in International Law* (Oxford: Hart Publishing, 2009), at 31-36.

[19] ICJ, *Nicaragua, loc. cit.,* supra n. 2, at para. 195: "Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States." In the *Oil Platforms* judgment, the Court repeats the distinction between "the most grave forms of the use of force" and "other less grave forms", and reaffirms that only the former qualify as 'armed attacks' ICJ, *Oil Platforms, loc. cit*., supra n. 2, at paras. 51, 64.

[20] As one distinguished author put it, "[*T]here are frontier incidents and frontier incidents. Some are trivial, some may be extremely grave*." G.G. Fitzmaurice, 'The Definition of Aggression', (1952) 1 *I.C.L.Q.*, pp. 137-144, at 139.

[21] See, for example, statements by Pakistan, Thailand, Cambodia, and Israel, in relation to border incidents. In particular, the 2006 conflict between Israel and Hezbollah in Lebanon and Israel included disagreement over the initial categorisation of the opening incident in July 2006, which might be considered as a 'border incident'. The majority of States speaking on this matter appeared to support the invocation of Article 51 self-defence by Israel (including eleven of the Security Council

appear that the determining criteria would more appropriately be centered upon questions of scale and effects of the attack rather than proximity to a border fence.

A further controversial issue is whether hostile intent must be displayed. Evidence can be drawn from the Definition of Aggression, the case-law of the ICJ and State practice to support the argument that *mens rea* is a relevant factor for determining whether an 'armed attack' has occurred. [22] Yet the better view might be that while hostile intent is not an essential element of an armed attack, the existence of mistake or accident is highly relevant in deciding whether the use of force in self-defence is necessary.

Another question is whether a number of incidents which alone might not be armed attacks might be seen as together being an armed attack: the so-called accumulation of events theory. There is some, not entirely consistent, evidence in support of the theory, but it has not been widely accepted. The accumulation of attacks is however relevant from the point of view of proportionality: if a state uses force in self-defence against an attack which is the latest in a series, the assessment of the proportionality of its response may be in relation to the series of attacks, not simply the last one.

Finally, can attacks against state interests or nationals abroad be considered armed attacks against the state? The question of the protection of nationals is dealt with in section B.2.c below. As regards emanations of a State such as embassies and warships, practice indicates that no territorial nexus is needed, and attacks on them, and also in some circumstances on merchant vessels, may constitute armed attacks for the purpose of self-defence.[23]

'**Aggression'**

Consideration of the concepts of 'force' and 'armed attack' shows that the two are not the same assuming that there is a gravity threshold for acts to qualify as armed attacks. Thus while every 'armed attack' will constitute a 'use of force' the reverse is not the case. The question arises of where the concept of 'aggression' fits in.

During the Charter negotiations, the term 'aggression' was found to be too controversial for use in demarcating the scope of the right of self-defence; instead that right was made contingent on what was regarded as the more neutral concept of 'armed attack'[24] 'Aggression' was however used in the Charter in a different context, notably as one of the three circumstances listed in Article 39 (together with 'threats to the peace' and 'breaches of the peace') in which the Security Council might use its enforcement powers. The Definition of Aggression adopted by the General Assembly in 1974 is expressly not intended to define the concept of armed attack. But the relationship between aggression and armed attack is not clear.

Is there a separate and autonomous legal meaning of 'aggression' in the post-1945 era? In the instances in which it appears in the Charter, it might be regarded as a mere

---

members), although many of them simultaneously expressed concerns over the proportionality and nature of Israel's response. For discussion of these cases see Ruys book pp.156-157, 452-453. See also discussion of the differing views in Gray pp.177-183.

[22] Ruys p 29

[23] Ruys, pp 32-34 For merchant vessels, see ICJ, *Oil Platforms, loc. cit*., supra n. 2, at §§ 64, 72.

[24] Ruys p 15

'institutional provision, indicating the circumstances in which the UN Security Council may exercise its Chapter VII powers, rather than a provision creating rules of primary international law. It is noted, for instance, that the related concepts of 'threat to the peace' or 'breach of the peace' are not regarded as triggers of State responsibility[25] International case-law is not of help, a finding of aggression being notably absent from the judgment in *DRC* v *Uganda.*

While the 1974 GA Definition of Aggression has in Article 1 an almost exact copy of Article 2(4) of the Charter, indicating a similarity in the drafters' minds between aggression and prohibited use of force, for most of the post-Charter period the concept of aggression has not been addressed in the *ius ad bellum* perspective, attention being focused on 'force' and 'armed attack'. One author has opined that 'even if there is evidence that supports the continued existence of 'aggression' as an autonomous legal concept giving rise to State responsibility, it has arguably remained a dormant concept for most of the Charter era.'[26]

The question arises whether the position has changed since the adoption in 2010 of amendments to the Statute of the International Criminal Court which define the crime of aggression for the purpose of that Court (the Kampala definition). This brings us to the relationship between the *ius ad bellum* and the crime of aggression. It is important to consider whether the distinctions between the Kampala definition and the *ius ad bellum* will have any implications for the latter.[27]

Under the Kampala definition, the crime of aggression is constituted by 'the planning, preparation, initiation or execution', by a person in authority, of an act of aggression by a State, but only it that act of aggression 'by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'. It is this additional qualification or 'threshold' which provides the essential distinction between the crime of aggression on the one hand and State aggression under the *ius ad bellum* on the other... As well as criticisms of this threshold on the ground that it is obscure and difficult to interpret,[28] there have been more fundamental objections. On the one hand it is argued that the threshold results in a definition of the crime which does not reflect accurately the customary law crime of aggression which was confined to participation in a war of aggression; instead of the threshold, a requirement of a special intent (to conduct, for example, an aggressive attack) would have assisted to align the crime more nearly to the customary law crime. On the other hand, it is argued that there should have been neither threshold nor special

---

[25] Ruys p 39

[26] Ruys

[27] See M. O'Connell and M. Niyazmatov 'What is aggression? Comparing the jus ad bellum and the ICC statute' *JICJ* (2012) 189; S Murphy, "The Crime of Aggression at the ICC", in *Oxford Handbook on the Use of Force* (M. Weller ed., 2015); C. Kress 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus', 20 *EJIL* (2009) 1129 (written before the adoption of the Kampala amendments, but focusing on aspects of the draft amendments which were subsequently adopted without change).

[28] M. Milanovic: 'What exactly, for instance, makes an act of aggression 'by its character, gravity and scale … a manifest violation of the Charter of the United Nations?' The vagueness of these terms is, well, manifest.' *JICJ* (2012) 165 at 170.

intent: participation in *any* breach of Article 2(4) may constitute, it is said, a crime in customary international law.[29]

As the Kampala definition stands, however, the *crime* of aggression to be prosecuted under international criminal law is thus given a narrower definition than the *act* of aggression under the *ius ad bellum*. In broad terms, the description of the act of aggression is similar to the formulation in Article 2(4) of the Charter, although departing from it in insignificant respects, as did the 1974 Definition. An 'understanding' which was adopted at the same time as the Kampala definition states that 'aggression' is 'the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.'[30]

Concerns have been expressed that the Kampala definition of the crime of aggression, negotiated under political pressure, may harm the *ius ad bellum* definition of aggression. It has been suggested that the definition of the crime should have followed exactly the *ius ad bellum*, and that the Kampala definition will undermine the compliance pull of the *ius ad bellum*. Under this view, 'public international law experts are right to be concerned about the rise of two competing definitions of aggression in public international law. They especially need to be concerned about the newer ICC definition eclipsing the *ius ad bellum* definition.'[31]

Others suggest that the *ius ad bellum* will not be weakened and that, on the contrary, the amendment to the ICC Statute may in practice have a stronger deterrent effect on individuals who direct the affairs of governments. The very existence of the ICC jurisdiction is likely to have an impact on the Security Council and on governments and that impact will be even greater if prosecutions are brought. The ICC will be an additional judicial actor in the system. Further, there is an argument that the Kampala definition has now helped to confirm aggression as a legal concept giving rise to state responsibility under international law. First, the definition of the crime predicates a finding that the state concerned has committed an act of aggression and, second, the definition in some sense gives normative weight to the 1974 GA Definition.[32]

An 'understanding' adopted at the Kampala conference sought to address any concern that the new definition of aggression might prejudice existing law:

> It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.[33]

Whether or not the Kampala definition of the crime departs from the customary law definition, the threshold of 'manifest violation' is relevant only to the crime over which

---

[29] M. O'Connell and M. Niyazmatov 'What is aggression?'
[30] RC/Res. 6, Annex III, Understanding No. 6.
[31] See also Murphy.
[32] Ruys 48
[33] RC/Res. 6, Annex III, Understanding No. 4.

the ICC will have jurisdiction. It does not affect the definition of 'acts of aggression' and it should not lead to a diminished appreciation of the *ius ad bellum* constraints on States.

Part B: Lawful uses of force

The UN Charter contains provision for two exceptions to the prohibition on the use of force in Article 2(4): Security Council authorization; and self-defence.

B.1 Security Council authorization

While Chapter VI of the Charter deals with the pacific settlement of disputes, Chapter VII concerns action with respect to threats to the peace, breaches of the peace, and acts of aggression, and Chapter VIII provides that the Council may utilize regional organizations for enforcement action under its authority (Article 53).[34] Force used with the authorization of the Security Council under the Charter does not fall within the prohibition of the use of force. Resolutions authorizing States, or in some cases international organizations, to take 'all necessary means' or 'all necessary measures' will usually be prefaced by an express determination of the existence of a threat to international peace and security (Article 39). There is usually a reference to Chapter VII, or to Article 42, but this is not essential. What is essential is a wording in a Council decision that authorizes the use of force. The resolution by its mandate describes the task that is to be performed by the authorized operation and will frequently require reports to the Council on the conduct of the mission.

Resolutions authorizing the use of force are adopted under Chapter VII of the Charter, and almost always contain an express reference to Chapter VII (or provisions thereof).[35] In order to act under Chapter VII, the Council must determine the existence of a threat to the peace, breach of the peace, or act of aggression, and such a determination is normally included in the authorizing resolution. The most crucial element is the language of the resolution, which indicates both whether force has been in fact been authorized, and if so by whom and for what purpose.

Resolutions authorizing one or more States or international organizations to use force often refer to the taking of 'all necessary means' or 'all necessary measures', which is generally understood to include the use of force.[36] Such resolutions ought to be clearly drafted, though sometimes the need for agreement within the Council can lead to unfortunate ambiguities.[37] To interpret a resolution regard may be had to all the circumstances, and recourse may be had inter alia to statements made by Council members at the time of adoption.[38] There is no such thing as an 'implied authorization' to use force: force has either been authorized or it has not.

---

[34] Article 53 contains the important proviso that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."

[35] It is often thought that a reference to Chapter VII implies the use of force. That is not the case, as the Council may make recommendations under Chapter VII as well as decide on measures to be taken, and the measures it may decide upon include those not involving the use of armed force (Article 41).

[36] E.g., xxxxxx.

[37] See the controversy over the interpretation of SCR 1441 (2002) and the military operation against Iraq in March 2003.

[38] On the interpretation of Security Council resolutions, see *Kosovo* opinion, para. 94.

The degree of Council oversight of such authorized operations raises important policy questions. Among the questions that arise are the breadth of the authorization (mandate); the nature of any requirement to report to the Council; and whether a particular authorization is time-limited.[39] The reluctance of some states to authorize the use of force in Syria in 2013 may have stemmed from what they saw as overbroad interpretations of earlier authorizations.

It has been suggested that Security Council endorsement should be seen as politically desirable, even in cases of self-defence (and need not affect the right of self-defence).[40]

B.2 Self-Defence

Resort to self-defence is the second exception to the prohibition on the use of force in Article 2(4) of the UN Charter.[41] Since the principle, though not its conditions and qualifications, is uncontroversial, it is common for states against which accusations of aggression are levelled to assert that their use of force was a lawful act of self-defence.[42]

The formulation of the right to self-defence in the UN Charter reflected the tension between recognising the right of states to defend themselves, while not creating too wide an opening in the ban on force whereby claims of self-defence might become the pretext for unlawful force. Accordingly, Article 51 of the Charter was formulated thus:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Article 51 includes a number of restrictions and regulations, and while an armed attack is a necessary trigger for the exercise of lawful self-defence, it is not in itself sufficient – once the right is triggered it is then further regulated by various legal constraints. The role of the Security Council in maintaining global peace and security remains prominent even during the exercise of self-defence. The state must immediately report its exercise of self-defence to the Security Council, thereby encouraging the Council to act if it has not done so already, and placing the matter in the public arena. While failure to report could support an evidentiary claim that the action was not one of self-defence, such a failure is not itself a substantive breach that invalidates the exercise of the right to self-defence.[43]

---

[39] Blokker, 'Outsourcing the use of force: towards more Security Council control of authorized operations?' in *The Oxford Handbook of the Use of Force in International Law* (ed., M. Weller, 2015), pp. 202-226.

[40] L. van den Herik, N. Schrijver (eds.), *Counter-Terrorism Strategies in a Fragmented International Legal Order. Meeting the Challenges* (2013), p. 715; see Security Council resolution 2249 (2015) of 20 November 2015.

[41] The reference in Article 51 to an "inherent" right could also support viewing it not merely as an exception, but also as an independent and pre-existent rule.

[42] E.g. Ethiopia-Eritrea; Iran-Iraq; DRC –Uganda; Israel-Iraq reactor;

[43] J. Green, 'The Article 51 Reporting Requirement for Self-defense Actions' *Virginia Journal of International Law*, 55, 2015; Gray p. 122; Ruys, pp. 70-72.

Article 51 provides that the right to self-defence may only be exercised until "the Security Council has taken measures necessary to maintain international peace and security". Again, this is in line with the Security Council's role as envisaged by the Charter. The Article does not elaborate on what these measures might be,[44] but by specifying that these are measures "necessary to maintain international peace and security", an element of effectiveness is assumed. Accordingly, should the Security Council, for example, adopt a resolution condemning the attack but which does not contain measures capable of obviating the need for self-defence, the right to self-defence would be presumed to continue. Security Council resolutions may call for – or even demand –a ceasefire, and the Council has the power to require States, including the defending State, to cease all use of force.[45] If the initial attacking state complies with the Council's demands, then failure by the victim state to cease its own use of force may risk changing its conduct from lawful self-defence into an illegal use of force.[46]

B.2.a Necessity and Proportionality

Action taken in self-defence must adhere to the requirements of necessity and proportionality. These are fundamental principles, and the International Court of Justice has noted that: "[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law."[47] The application of both necessity and proportionality presupposes that the measures are being taken for a legitimate end. If a state commits a prohibited use of force, it cannot then argue that the measures were lawful on the basis of necessity and proportionality; the analysis on the basis of these principles only enters the frame if the measures can in principle be presented as self-defence. There are two primary approaches to defining the legitimate aims of action taken in self-defence: halting and repelling an existing attack; and preventing the continuation of further attacks (as well as ending any existing attack).[48]

The notion that self-defence can only be used to end the current attack resonates with the ideals behind the UN Charter, by minimising the possibilities for lawful recourse to force.[49] There is, however, also significant support and practical reason to accept that

[44] These would include the possibility of Chapter VII enforcement measures of collective security. H. Kelsen, 'Collective Security and Collective Self-Defense under the Charter of the United Nations' 42 AJIL 783 (1948) p.793.

[45] Dinstein pp.238-239; C. Henderson and N. Lubell 'The Contemporary Legal Nature of UN Security Council Ceasefire Resolutions', *Leiden Journal of International Law*, Volume 26, Issue 2, 2013.

[46] D. Bowett, Self-Defence in International Law, pp.196-197; questions in this regard were raised in the context of Security Council resolutions and measures during the 1990-1991 Gulf War: "The intent of the Council as expressed in its decision would determine whether the right to use force in self-defense had been suspended by the Council" and that "[s]ignificantly, no government contested the ultimate right of the Council to prohibit all military action by a state, even if defensive." Oscar Schachter, United Nations Law in the Gulf Conflict, 85 *Am. J. Int'l L.* 452, 458-9 (1991)

[47] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (8 July 1996), [1996] *I.C.J. Reports*, para.41; ICJ, *Nicaragua, loc. cit.,* supra n. 2, at para. 176; *Democratic Republic of the Congo* v. *Uganda, para. 147.*

[48] For a detailed analysis with further possible approaches, see D. Kreztmer "The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum" 24 *European Journal of International Law* 235, 2013.

[49] Ibid

self-defence measures may also take into account the need to make sure that the attacker doesn't simply briefly or deceptively momentarily refrain from operations while planning to continue attacks. It would appear therefore that while self-defence does not automatically justify 'all-out' war to destroy the enemy, the forcible measures can include the need to defend the state from the continuation of imminent attacks, and not only repel the attack of the moment.[50] The risk of abuse will be reduced by two considerations: if the initial armed attack is over, there is more opportunity for the Security Council to be in a position to take measures that would prevent the need for further self-defence. Moreover, the underlying principle in such circumstances is that any measures taken in self-defence must adhere to the principle of necessity.

In the context of self-defence, the principle of necessity requires that the self-defence measures be required in order to achieve the legitimate ends sought. Its origins are often traced to the 1837 *Caroline* incident and the ensuing exchange between Britain and the United States.[51] In this exchange, the following was noted:

"It will be for it to show, also, that the local authorities of Canada,- even supposing the necessity of the moment authorized them to enter the territories of the United States at all,-did nothing unreasonable or excessive; *since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.*"[52]

And

"Undoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the "*necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation*."" [53]

In practice, 'no choice of means' is interpreted as requiring that forcible measures be the only available effective measures for self-defence. It does not mean that extensive non-forcible measures must always be attempted, as there may be circumstances such as an ongoing barrage of missiles in which such options cannot reasonably be explored in time and are manifestly futile in the specific context. However, should there be an option of non-forcible measures which would alleviate the need for force while achieving the defence of the state, then forcible measures would not be necessary.[54]

---

[50] This is separate from the question of anticipatory action when there has not previously been an armed attack. See below discussion on anticipatory self-defence.

[51] This revolved around an incident in which involved the British took forcible measures against Canadian rebels in US territory. R. Jennings "The Caroline and McLeod Cases" 32 AJIL 82 (1938).

[52] *Letter from Mr. Webster to Lord Ashburton*, Department of State, Washington, 27th July, 1842, text available on http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm. Italics added.

[53] *Letter from Mr. Webster to Lord Ashburton*, Department of State, Washington, 6th August, 1842, text available on http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm.

[54] "The reason for stressing that action taken in self-defence must be *necessary* is that the State attacked (or threatened with imminent attack, if one admits preventive self-defence) must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force. The point is self-evident and is generally recognized; hence it requires no further discussion." *Addendum – Eighth report on State responsibility by*

The principle of proportionality is additional and separate to necessity. In essence, *necessity* requires the question 'are the self-defence measures necessary in order for the state to defend itself'. Although it is not often used in this manner,[55] *proportionality* should present a different question of whether 'the effects of the measures taken are excessive in relation to that defensive necessity'. Proportionality is a formula requiring the balancing of two elements against each other.[56] It might be said that the measures taken in self-defence must be proportionate to the armed attack which preceded them. Notwithstanding, the preferred position is that the measures be balanced in light of the aims of the self-defence. As examined above, the legitimate aims in this context are to halt any ongoing attack and prevent the continuation of further attacks.[57]

Many of the debates over adherence to the proportionality principle in specific cases have in fact been questions of necessity rather than proportionality.[58] In other words, they have spoken of (dis)proportionality when taking the view that the forcible measures were not necessary in order to defend the state.[59] This is, in fact, a question of the principle of necessity rather than proportionality. In order to asses proportionality, there is a need to weigh the relative interests against each other, thereby assessing whether the harmful effects of the force taken in self-defence is outweighed by achieving legitimate aims.[60] Accordingly, the proportionality criterion requires that the necessity of acting in self-defence be balanced against the harm caused by so doing.

B.2.b Anticipatory Self-Defence[61]

Whether or not a state may rely on self-defence in order to take forcible measures prior to an armed attack is one of the clearest instances in which the line between self-defence and unlawful use of force is most often debated.[62] The English-language version of the Charter provides that the right to self-defence is available "if an armed attack occurs". A temporal aspect is reflected in the use of the word "occurs", which appears to rule out

---

Mr. Roberto Ago, Special Rapporteur -the internationally wrongful act of the State, source of international responsibility (part 1) (32nd session of the ILC (1980)), U.N. Doc. A/CN.4/318/Add.5-7, Extract from the Yearbook of the International Law Commission:-1980vol. II(1) para. 120; see also analysis of practice in J. Green *The International Court of Justice and Self-Defence in International Law* (Oxford: Hart, 2009) pp.76-80; ICJ, *Oil Platforms, loc. cit*., supra n. 2, at para 76.

[55] Analysis in Kreztmer, *supra,* n.49.

[56] The variables in the formula will vary and proportionality requires different elements to be measured depending on the legal context, with differences between international human rights law, the ius in bello, and the ius ad bellum.

[57] Ago report, para. 121; Berman, Greenwood, Shaw, Wood, all in E. Wilmshurst, *Principles of International Law on the Use of Force by States in Self*-Defence – working paper, The Royal Institute of International Affairs, October 2005, pp.52-57.

[58] Analysis in Kreztmer, *supra,* n.49.

[59] E.g. Israel-Lebanon.

[60] Kreztmer, *supra,* n.49.

[61] The associated terminology is itself a subject of debate. The most often used terms are 'anticipatory', 'pre-emptive', and 'preventive'. There are differing interpretations and differentiations between these terms, none of which can claim to be objectively correct. For the purposes of this report, 'anticipatory' is used as a general term for all self-defence measures taken prior to an armed attack; 'pre-emptive' is used in connection with measures claimed to be defend against future attacks even if said attacks are not imminent or specific.

[62] E.g. Osirak attack

the possibility of taking action in self-defence in advance of an armed attack occurring.[63] The ensuing debate over the legality of anticipatory self-defence has – since the adoption of the Charter – been one of the most hotly contested issues surrounding the right to self-defence under international law.[64]

Positions in the past were likely to advocate one of two possibilities: first, that Article 51 of the Charter has firmly shut the door on any possibility of anticipatory action, and that recourse to self-defence will only become available if an armed attack has occurred.[65] Second, there was the view that allowed for self-defence in the face of imminent attacks.[66] A relatively wide interpretation of the latter position was adopted by the Bush administration following September 2001, with particular reference to 'rogue states', terrorists, and weapons of mass destruction. [67] However, apart from limited state support and a number of commentators, this expanded interpretation received scarce support. There is still a debate between supporters of the original two positions stated above, but recently support seems to be increasing for the view that the right to self-defence does exist in relation to manifestly imminent attacks, narrowly construed.[68] This position has received further validation in the reports of the UN Secretary General, although there does not appear to be a clear majority for either side of the debate.[69]

---

[63] While it is the English version of the Charter that is at the heart of the debates and most often at the centre of discussion, the French version (and Spanish) appears to present a less restrictive temporal phrase ("dans le cas où un Membre des Nations Unies est l'objet d'une agression armée").

[64] Contrast, for example, the views of D. Bowett *Self-Defence in International Law* (Manchester, Manchester University Press, 1958), pp.191-192, and I. Brownlie, *International Law and the Use of Force by States* (OUP: Oxford, 1963) pp.275-278; see below discussion. Supra, Bowett & Brownlie; for some of the earliest discussion see H. Grotius *On the Law of War and Peace De Jure Belli ac Pacis*, Translated by A. C. Campbell, London, 1814, Book II, Chapter 1, V.

[65] J. Kunz "Individual and collective Self-Defense in Article 51 of the Charter of the United Nations" *AJIL* Editorial Comment p.872 (1947), p.878.

[66] D. Bowett *Self-Defence in International Law* (Manchester, Manchester University Press, 1958), pp.191-192.

[67] *The National Security Strategy of the United States of America* The White House, September 2002, p.15; see also discussion over widening the scope of anticipatory self-defence, in J. Bybee "Authority of the President Under Domestic and International Law to Use Military Force Against Iraq" *Memorandum Opinion for the Counsel to the President*, October 23, 2002, *Volume 26 of Opinions of the Office of Legal Counsel*, pp. 194-95; A. Arend "International Law and the Preemptive Use of Military Force" 26 *Washington Quarterly* 89 (2003), pp.97-98; add UK gov ministers at the time (Reid?)

[68] "The Chatham House Principles of International Law on the Use of Force by States in Self-Defence" 55 *Int'l & Comp. L.Q.* 963 2006, p.965; C. Greenwood, V. Lowe, P. Sands, M. Wood, all in E. Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* – working paper, The Royal Institute of International Affairs, October 2005; "It is therefore the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote." Attorney General of the UK, Lord Goldsmith, House of Lords, 21 April 2004. Hansard, 21 April 2004, column 370; ; see also analysis of views in T. Ruys *Armed Attack and Article 51 of the UN Charter* Cambridge University Press, 2010, pp.324-342.

[69] "A More Secure World: Our Shared Responsibility" *Report of the Secretary General's High-level Panel on Threats, Challenges and Change* UN 2004, para.188; See also "Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack

Accordingly, although the matter remains unsettled, there may be reason to accept that when faced with the clear and present danger of a specific imminent attack, states may engage in measures to defend themselves in order to prevent the attack. Any such measures would have to conform to all the earlier stated requirements of necessity and proportionality which will further constrain the anticipatory use of force, and must give primacy to effective measures by the Security Council. If a state engages in forcible measures self-described as anticipatory self-defence but in fact not as the result of a need to prevent an imminent attack, it will not be able to avail itself of justification by self-defence and its use of force must be examined in light of the prohibitions on use of force and aggression.

B.2.c Self-Defence against Non-State Actors

An additional controversial area in the realm of self-defence is the question of resort to self-defence against non-state actors located in other states. The use of force in such circumstances is not a new phenomenon and has occurred in numerous situations over the past two centuries.[70] The legal debate in the context of self-defence has, however, become a prominent issue following the attacks against the US in September 2001. One approach to self-defence assumes that its primary relevance is in the context of armed attacks by states (or groups acting on behalf of a state).[71] Nonetheless, Article 51 does not specify that the armed attack which gives rise to self-defence must have been carried out by a state, and therefore leaves room for a textual reading that includes attacks by non-state actors. Moreover, there is considerable state practice stretching back to the *Caroline* and more clearly since 2001, which lends support to the claim of self-defence in such circumstances.[72] Ultimately, this rests upon the notion that self-defence is a right that exists in order that states are able to protect themselves when attacked from outside their borders. The source of attack does not change the fact that the state must be able stop it from causing harm. There is no unanimous agreement on this issue at the present stage, although there is growing recognition – including through state practice – that there are certain circumstances in which a state may have a right of self-defence against non-state

---

as well as one that has already happened." *In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, delivered to the General Assembly*, UN Doc.A/59/2005 (Mar. 21, 2005), para124; but see reactions of a significant number of states who were opposed to a temporal widening of the right to self-defence, including Pakistan, Mexico, Turkey, as discussed in Ruys, pp.339-341.

[70] The Caroline case 1837, US troops sent into Mexico 1916, US strikes in Pakistan, Somalia and Yemen, Israel v Hezbollah, DRC Uganda, Turkey Kurdish rebels in Iraq, Ethiopia Somalia.

[71] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Adv. Op., 9 July 2004, [2004] I.C.J. Rep. para.139.; J. Kunz "Individual and collective Self-Defense in Article 51 of the charter of the United Nations" *AJIL* Editorial Comment p.872 (1947), p.878; M. Bothe, "Terrorism and the Legality of Pre-emptive Force" 14 *E.J.I.L.* 227 (2003), p.233; S. Alexandrov *Self-Defense Against the Use of Force in International Law* (The Hague: Kluwer Law International, 1996) pp.182-3; G. Simpson, in E. Wilmshurst *Principles of International Law on the Use of Force by States in Self-Defence* The Royal Institute of International Affairs, Chatham House, October 2005, pp.27-28.

[72] For example, US operations against Al-Qaida in Afghanistan and the support this received from other states, Iran and Turkey (separately) against Kurdish groups in Iraq, Israel against Hezbollah in Lebanon and Islamic Jihad in Syria, Ethiopia in Somalia, and others. See analysis in N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP, 2010), ch.1-3.

actors operating extraterritorially.[73] The military operations on Syrian territory against the so-called Islamic State have, in particular, demonstrated the readiness of a number of states to invoke Article 51 in the context of operations against a non-state actor.[74]

Nonetheless, the modalities of how self-defence might be carried out in this context does raise considerable challenges. A key question in this regard is that allowing for self-defence against non-state actors located in a third state can appear to allow states forcibly to violate the territorial integrity of that state, when the latter is not necessarily guilty of any unlawful act. The state in which the non-state actor is located (the host state) is likely in these circumstances to consider itself a victim of unlawful force. Consequently, the debates over self-defence against the non-state actor itself is inextricably wedded to the question of whether this violates the prohibition of use force against the host state. Care must be taken not to conflate a number of issues in this regard: i) whether, conceptually, a state may invoke the right to self-defence following an attack by an extraterritorial non-state actor; ii) what steps must be taken before any such right can be exercised; iii) whether force against the non-state actor can be distinguished from force against the state; iv) whether the host state might be in violation of international law due to the activities by the non-state actor; v) if so, whether this justifies force against the host state itself.

While the first two issues can be dealt with separately,[75] the last three are often intertwined. The simple fact that a non-state actor was operating from its territory does not automatically open the host state to lawful forcible measures against it by the victim state. Indeed, claiming such a position would risk neglecting the implications created by allowing for force directly against a state that might not be responsible for the initial armed attack.[76] If the armed attack by the non-state actor can be attributed to the host

[73] Greenwood, Franck, Dinstein, Schmitt; O. Schachter "The Extraterritorial Use of Force Against Terrorist Bases" 11 *Hous. J. Int'l L.* 309 (1988-1989), p.311; F. Berman, D. Bethlehem, C. Greenwood, V. Lowe, A. Roberts, P. Sands, M. Shaw, all in *Chatham House Principles of International Law*; S. Murphy "Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?" 99 *A.J.I.L.* 62 (2005) pp.64,67-70; *ibid* for examples of state practice.

[74] See letters to the Security Council by Canada, Turkey, the UK, the US, Australia, France, and Denmark: Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, S/2015/22; Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, S/2015/563; Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, S/2015/688; Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, S/2014/695; Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, S/2015/693; Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2015/745; Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council, S/2016/34;These letters reflect a mixture of claims relying on collective self-defence and individual self-defence. Either way, even claims of collective self-defence in aid of Iraq must still rest on the recognition that Iraq had the right to engage in cross-border self-defence against IS.

[75] *Supra*, n.48-61, n.71-74 and accompanying text.

[76] This is a particular danger for smaller/weaker states. D. Ahmad "Defending Weak States Against the 'Unwilling or Unable' Doctrine of Self-Defense" Journal of International Law and International Relations 2013

state, then the right to self-defence will be equally against the state. However, without attribution of the armed attack, the host state may have been in violation of other rules of international law – particularly Security Council resolution 1373[77] – but it is mistaken to say that such a violation automatically allows for forcible measures against the host state. Not all violations in the *ius ad bellum* lead to self-defence. Accordingly, if the armed attack is only attributable to the non-state actor, the victim state may have a right to self-defence against the armed group, but not against the state.

Differentiation must be made, therefore, between force against the non-state actor as opposed to force against the host state.[78] For example, an air attack against an isolated camp of the non-state actor might have little effect on the host state itself.[79] In practical terms, this amounts to a differentiation between forcible measures taken *against* the host state, as opposed to forcible measures taken *within* the host state. However, this distinction does not absolve the need to ensure that Article 2(4) is not violated. The preferred approach to Article 2(4) of the Charter aims to prevent any such semantic exception to the prohibition on the use of force. Indeed, such a distinction is not dissimilar to certain arguments aiming to justify humanitarian intervention as not violating Article 2(4). No matter how temporary and limited the incursions are, they will still fall within the scope of Article 2(4).[80] Accordingly, using force within the territory of another state – even if the forcible measures are limited to strikes against a non-state actor – must be considered as within the notion of force as it exists in Article 2(4) of the Charter. Distinguishing between forcible measures *within* but not *against* the state does not, therefore, provide a solution for the *ius ad bellum* concerns.[81] As a consequence, use of force in such circumstances will not be lawful unless justified by self-defence or Security Council authorisation.

Self-defence against non-state actors must adhere to all the requirements and restrictions placed on the exercise of self-defence generally. It can only be triggered by an armed attack, and the debate over the required gravity threshold for determining an event as an armed attack may, arguably, require a particularly high threshold in the context of triggering a right to self-defence against non-state actors.[82] Moreover, its exercise is conditioned by the requirements of necessity and proportionality.[83] In the current context, necessity requires that, if possible, the host state be given the opportunity to halt and prevent the

[77] S.C. Res. 1373 (2001), adopted by the Security Council at its 4385th meeting, on 28 Sept. 2001.

[78] For example, note Canada's position that "Canada's military actions against ISIL in Syria are aimed at further degrading ISIL's ability to carry out attacks. These military actions are not aimed at Syria or the Syrian people, nor do they entail support for the Syrian regime", as well as Australia, both at *supra*, n.76.

[79] Columbia v FARC in Ecuador; Israel v Islamic Jihad in Syria.

[80] A. Randelzhofer "Article 2(4)" in B. Simma, (ed.) *The Charter of the United Nations, A Commentary* (Oxford: OUP, 1994), pp.117-8.

[81] There will however remain a difference with regard to the *ius in bello*, since the classification of a conflict as international or non-international will largely rest on the question of the parties to the conflict. If there is no fighting between the two states but only between the victim state and the armed group, then this may be classified as a non-international armed conflict. See discussion and debates in Wilmshurst classification chapters

[82] See discussion in C. Kress, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts', 15 *Journal of Conflict & Security Law* 2, 2010, p.249; Lubell pp.50-51.

[83] See above section B.2.a on necessity and proportionality.

attacks by the non-state actor through its own law enforcement or other lawful means. Reference is sometimes made in this context to requiring that the host state be unable or unwilling to take adequate action against the non-state actor.[84] Rather than being relied upon as a new justification for resort to force, the unwilling or unable test should be viewed as a component of the necessity criteria. It is an additional test that must be satisfied when taking action against a non-state actor on the territory of another state, and does not obviate the need to adhere to all other obligations attached to the exercise of self-defence. Even after seeking resolution through the host state proves futile, forcible measures by the victim state must be proportionate and be limited to those strictly necessary in the context of self-defence against the non-state actor. Accordingly, even if accepting the right of self-defence against non-state actors, if the forcible measures taken by the victim state unnecessarily include use of force directly against the host state, this may be an instance in which self-defence comes in conflict with Article 2(4).[85] The situation has an added layer of complexity when the non-state actor is operating from more than one state. In such circumstances, a legitimate claim to engage in self-defence on the territory of one state does not provide automatic licence to use force on the territory of other states; the *ius ad bellum* rules as stated above must be applied anew each time.

The debate over self-defence in these circumstances is not settled, and definitive practice is yet to emerge. It must be noted in this context, that the Security Council has the power to take action directed against threats to the peace by armed groups, and has taken measures of this nature in the past.[86] By acting decisively in future situations of such type, the Council could reduce the risk of States taking matters into their own hands.

B.3. Rescue of Nationals Abroad

The rescue of nationals abroad has long presented a challenge to the application of the rules on use of force. It is the subject of contrasting opinions, numerous cases with inconsistent state practice, and ambiguous case-law.[87] The first question to be asked is whether the sending of armed forces to rescue nationals on the territory of another state is an act

[84] See letters by Australia, Canada, Turkey, US, *supra*, n.75; Deeks

[85] See, for example, debates over Israel's actions against Hezbollah in Lebanon in 2006. There is strong argument that Israel had the initial right of self-defence against the Hezbollah, but many critics argue that the nature of Israel's response went beyond the necessary; see also separate opinion of Judge Simma in DRC v Uganda, paras.13-14.

[86] The Security Council has directly addressed armed groups in a number of resolutions, for example when demanding that "the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization", UNSC Res. 1244 (1999); The Council has authorized action in a number of situations involving violence by armed groups, for example in Somalia, UNSC Res. 1725 (2006), and in the Democratic Republic of the Congo, UNSC Res. 1484 (2003).

[87] See recent examination of debates and analysis provided by Kress; see for example also N. Ronzitti, 'Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity'; W. Friedmann, 'United States policy and the crisis of international law', 59 *American Journal of International Law* (1965); L. C. Green, 'Rescue at Entebbe – Legal Aspects', 6 Israel Yearbook on Human Rights (1976), p. 312; *L. Henkin*, 'The invasion of Panama under international law: a gross violation', 29 *Columbia Journal of Transnational Law* (1990), pp. 293-*317; R. Wegdwood,* 'The use of armed force in international affairs: self-defense and the Panama invasion, 29 *Columbia Journal of Transnational Law* (1991), pp. 609-628; T. Ruys, *'"The* Protection of Nationals" Doctrine Revisited, 13 Journal of Conflict & Security Law (2008), pp. 233-271.

within the scope of use of force covered by Article 2(4) of the UN Charter. If so, then there is a need to enquire whether there are legal grounds for allowing such operations, or whether they might be a violation of Article 2(4) of the UN Charter.

Arguments for excluding such operations from the scope of Article 2(4) rest mainly upon the notion that the force is not intended to jeopardise the "territorial integrity or political independence" of the other state. This, however, appears to contradict the widely accepted approach to Article 2(4) which, as explained earlier, should include any forcible measures on the territory and without the consent of the other state.[88] Notwithstanding, while adhering to this approach to Article 2(4), there may be room to describe certain rescue operations as not consisting of a use of force, for example in the case of operations to evacuate nationals from within general unrest or conflict (as opposed to situations in which they are being attacked or held by a specific party)[89]. Acceptance of such an approach would be enhanced in cases in which the sending state does not engage in any hostilities and in particular if there was at least an attempt to seek permission and if the territorial state does not actively object to the evacuation operations.[90]

If the operations involve direct use of force, then it must be viewed as within the scope of Article 2(4).[91] If so, for such operations to be lawful, there must exist independent grounds that justify them. A number of possibilities have been raised over the years, including the notion of a separate right to conduct rescue operations, reliance on the principle of necessity, and self-defence. While there has been some support for the first two of these,[92] the prevailing view is that, in the post-Charter era, only self-defence can provide for legal recourse to unilateral force that would otherwise violate Article 2(4).[93] Accordingly, to trigger the right to self-defence, it would be necessary to establish the occurrence of an armed attack. As discussed, armed attacks can include actions outside the victim state's territory,[94] although there is disagreement whether attacks against the nationals of a state are included.[95] The view that they are is stronger if it is clear that the nationals have been attacked directly as a result of their nationality and are seen by their attackers as individual manifestations of their state.[96]

Reliance on the self-defence justification will also require abiding by the restrictions placed on the exercise of self-defence. The question of a threshold for armed attack will be pertinent in this case.[97] Crucially, any operations will be subject to the self-defence principles of necessity and proportionality. These must be adhered to strictly in order

[88] See earlier section on scope of 2(4) and similar discussion in sections on self-defence against non-state actors, and on humanitarian intervention.

[89] 'non-combatant evacuation operations' as opposed to 'forcible hostage rescues'. See S.Day, T.Ruys, C.Kress.

[90] See examination of cases in Kress (e.g. Lebanon 1976, Chad 1990, Libya 2011).

[91] See sections A.2 and A.3.

[92] N. Ronzitti, 'The Expanding Law of Self-Defence', 11 Journal of Conflict & Security Law (2006), p. 354; D. Bowett, "The Use of Force for the Protection of Nationals Abroad", in A.Cassese, ed., The Current Legal Regulation of the Use of Force, (Martinus Nijhoff, 1986), p. 43.

[93] Kress

[94] Aggression 3d

[95] See examination of opinions and practice in Kress

[96] Dinstein p.258

[97] See section A.3.

to prevent the possibility of abusing claims of rescuing nationals as a cover for forcible operations with ulterior motives.[98]

B.4. Consent

The existence of consent may provide an additional lawful basis for a state's armed forces to enter and/or be stationed on the territory of another state. Yet, it should not be thought of as an exception to the prohibition of the use of force. The exceptions of Security Council authorisation and self-defence (as discussed above) remain a violation of state sovereignty, but are excused violations. On the other hand a state's use of force on the territory of another state upon its consent involves no violation of state sovereignty *ab initio*. If consent to the deployment of military personnel is validly given, there is no use of force against the host State.

However, while we may talk of the absence of a violation of *state* sovereignty, it is rather *governmental* authority which is at stake. Indeed, states are permitted in principle to use force in another state, providing it is at the invitation or with the consent of the *government* of the state concerned.[99] One might suggest that this provides a legal basis for the use of force as the government is the legitimate representative of the people of the state concerned. However, it operates as a legal basis for forcible measures as much in the context of autocratic regimes as it does in those which operate under a democratically elected government. Conversely, non-governmental forces are not able to invite or consent to the use of force, whether directly or indirectly, upon the territory of a state. Indeed, the ICJ has held that there is no 'right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State'.[100] Notwithstanding, this relatively simple statement of the law is deceptive in that the identity of those providing consent, the parameters of consent, the determination of its existence, and the implications of its withdrawal raise considerable questions in relation to the prohibition of force.

The fact that a government of a state is able to provide consent to the use of force upon its territory opens up questions with regard to identifying the government. The entity consenting to the use of force may be the *de jure* governmental authority even if it no longer controls some or all of the state's territory. In other words, it represents the constitutional government and/or democratically elected power. An entity may also obtain governmental power through exercising effective control over the territory and population of a particular state.[101] External recognition by other states may affect the

---

[98] See debates over US Grenada, Panama; Russia-Georgia. The latter also raises the question of how to define 'nationals'. It has been suggested that there must be a genuine link between the state and the nationals, and it cannot include 'manufactured nationality'. Kress paper; Russia-Georgia report; J.A. Green, "Passportisation, Peacekeepers and Proportionality: The Russian Claim of the Protection of Nationals Abroad in Self-Defence" in J.A. Green and C.P.M. Waters (eds.), *Conflict in the Caucasus: Implications for International Legal Order* (Basingstoke, Palgrave Macmillan, 2010), 54-79.

[99] *Nicaragua* [1986] ICJ Rep 14, 126, at 246

[100] *Nicaragua* [1986] ICJ Rep 14, 126, at 206; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 227 [164] ('*Armed Activities*').

[101] As a matter of international law, effective control is arguably the determinative factor for governmental authority. As stated in the *Tinoco* case, it is 'independence and control' that entitles

international legitimacy of a governmental regime.[102] Thus, if an opposition force were to demonstrate large scale effective control over territory within a state and/or receive widespread recognition as the government of the state concerned then it might arguably be lawful *per se* for it to consent to the use of force within its borders.

Requests or approval coming from members of a *previous* government no longer in office, or from the military/intelligence services rather than highest echelons of current government, will not suffice.[103] For consent to be recognised as emanating from the state, it must be freely given by the appropriately authorised highest levels of the lawful government.[104] Furthermore, consent must be given prior to the entry of the armed forces into the state,[105] and situations of apparent contradiction between public denial of consent occurring alongside secret approval by the same government, are a matter for evidentiary proceedings for determination of the said consent.

Generally speaking, consent can allow for the sending of armed forces into a state following the request by its government for assistance in quelling an insurrection.[106] It has been argued, however, that if such internal unrest is to reach the level of a civil war then assistance to either side is prohibited, unless one side is being given assistance in which case it might be possible for states to counter-intervene on the side of the other.[107] However, the apparent acceptance as lawful by the international community of Russia's support for the Assad regime in Syrian civil war might suggest otherwise. In addition, if the requesting government is attempting to quash a legitimate struggle for self-determination then consent will not legitimise the use of force by the sending state.[108] Although there may have been some ambiguity about providing support to groups fighting to achieve an internationally recognised right to external self-determination, or in cases of popular

---

an entity to be classed as a national personality: see Aguilar-Amory and Royal Bank of Canada Claims (1923) 1 RIAA 369, 381 (William H Taft). James Crawford has also noted, in reference to this arbitral decision, that '[i]n the case of governments, the "standard set by international law" is so far the standard of secure de facto control of all or most of the state territory': Crawford, Brownlie's Principles, at 152.

[102] See Shaw 454–9.

[103] See debates over Soviet intervention in Afghanistan, alleged agreements between US and Pakistani agencies over drone strikes, and the invitation by exiled President Yanukovich to Russian forces to enter the territory of Ukraine in 2014.

[104] This would usually be the head of the government or foreign minister. On the challenges in determining the required authority, see C. Gray *International Law and the Use of Force* (Oxford: OUP 2008), pp.98-99; G. Hafner (Rapporteur), Sub-group on Intervention by Invitation, 10th Commission, Present Problems of the Use of Force in International Law, Institut de Droit Internetional – Session de Santiago (2007), 25 July 2007, Pedonne, 246-250,264; O. Corten, The Law Against War, (Hart 2010) pp.262-266.

[105] Report of the International Law Commission, 53rd session, 2001, Doc. A/56/10, GAOR 56th session, Suppl. No 10, 73; Corten, pp.267-269.

[106] M. Shaw, *International Law*, 6th ed, p.1151; State practice shows that states are more likely to provide assistance when the insurrection is supported by a third state, or if their own interest are threatened. Antonopoulos, see also Shaw 1152.

[107] Gray 81.

[108] Declaration on Friendly Relations; Shaw 1148.

mass uprisings against abusive regimes, it is generally prohibited to forcibly intervene on behalf of a rebel movement.[109]

In the absence of the requisite consent from the government, the sending of armed forces will violate the prohibition on the use of force. There may also be circumstances in which consent is given but a violation nevertheless ensues. This can occur if the sending state uses force in a manner going beyond the scope requested and agreed to by the territorial state.[110] If consent has been given and is subsequently withdrawn, failure by the sending state to proceed with removal of armed forces will be in violation of international law. Should the remaining troops engage in hostilities or forcibly resist the territorial state, then this may be an unlawful use of force.[111] If, however, they remain within the military bases previously established by consent – especially during a period of negotiations over procedure for withdrawal – then their mere presence would not necessarily be an unlawful use of force, even though it may be a violation of state sovereignty and allow for non-forcible counter-measures.[112]

Part C: Particular issues

C.1. Humanitarian intervention

The term 'humanitarian intervention' refers to the forceful intervention for humanitarian purposes by a third State or States to save the people of a State from their own Government's action or inaction.

The UK Government was a leading proponent of an exceptional and strictly limited justification for the use of force by states to avert an overwhelming humanitarian catastrophe – not, it should be noted, a general right of humanitarian intervention.[113] The claim was first made in relation to the establishment of the safe havens in Northern Iraq in the spring of 1991.[114] It was 'the underlying justification of the No-Fly Zones' in northern and southern Iraq. And it was restated in the following terms in 1998 in connection with the events unfolding in Kosovo:

> There is no general doctrine of humanitarian intervention in international law. Cases have nevertheless arisen (as in northern Iraq in 1991) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council's express authorisation when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases would in the nature of things be exceptional and would depend on an objective assessment of the factual

---

[109] Shaw 1152; See examination of practice in Gray 59-64; see also related discussion in section on humanitarian intervention. There has, however, been some debate as to whether this prohibition is restricted to direct forcible intervention and the provision of arms and training, or whether it also extends to non-lethal equipment and supplies.

[110] Res 3314; see analysis in Antonopoulos.

[111] There was some debate as to whether the movements of Russian troops beyond their bases in Sevastepol in Ukraine was a violation of Article 3(e) of the Definition of Aggression (1974) given that no shots were fired.

[112] Antonopoulos

[113] S Murphy, *Humanitarian Intervention: the United Nations in an evolving world order* (1996); C Greenwood, "Humanitarian Intervention: The Case of Kosovo" (1999) 10 Finnish Y.B.I.L. 141; S Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (2001).

[114] (1992) 63 B.Y.I.L. at 827-828.

> circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.[115]

The Secretary-General's High-level Panel's report *Our common future* of 2004, and the Secretary-General's report *In larger freedom* of 2005, did not mention such a right. The ensuing General Assembly debate in April 2005 offered no support; those who addressed the question of humanitarian intervention saw it as a matter to be decided upon by the Security Council, not one where unilateral action was permitted. There was no hint of a unilateral right in the 2005 World Summit Outcome. In the final analysis, it may be that the claims made in 1991 and 1999 rested on some exceptional justification of necessity, such as is found in domestic legal systems, rather than on a positive rule of law.[116] Notwithstanding, the claims were repeated in 2013.

Among a number of initiatives stimulated by the need for internationally agreed action to avert extreme humanitarian emergencies, the most influential was the International Commission on Intervention and State Sovereignty, whose 2001 report was entitled *The Responsibility to Protect*.[117] The Secretary-General's High-level Panel endorsed (at paragraph 203):

> the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.

The Panel went on to propose that the Security Council adopt guidelines as to when it should act. This was proposed expressly to ensure the legitimacy of the Security Council's actions, not their legality. The Secretary-General's report *In larger freedom* was in similar terms. In the event, however, the Security Council did not adopt such guidelines. Nor did the General Assembly support their adoption.

In paragraphs 138 and 139 of the 2005 World Summit Outcome, the Heads of State and Government noted that '[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.' They went on to say that 'the international community, through the United Nations' also has the responsibility to use appropriate peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations. The key sentence then follows:

> In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

---

[115] Baroness Symons, *Hansard HL Debs.*, WA 139-40, 16 November 1998: B.Y.I.L., 69 (1998), 593.

[116] Note however that there is convincing support for the view that the use of force cannot be justified on the basis of necessity. See authorities quoted by Ruys p.13.The United States appears not to have embraced such a right. See M Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War* (2006) at 139.

[117] *Report of the International Commission on State Sovereignty and Intervention: The Responsibility to Protect* (2001). This was preceded by a report by the Danish Institute for International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (1999).

This sentence merits careful analysis. As a political commitment, the passage on 'responsibility to protect' in the 2005 World Summit Outcome is potentially significant. What is significant, legally as well as politically, is that in the 2005 World Summit Outcome the General Assembly, that is to say, the membership of the United Nations as a whole, confirmed that enforcement action to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity is within the remit of the Security Council.[118] By 2005 the power to authorize intervention for humanitarian purposes was well established in the practice of the Security Council, and any remaining doubts should have been removed by the 2005 World Summit Outcome. In fact, the Assembly went further. It clearly said that it expected the Security Council to take action in appropriate cases, and the Security Council itself has acknowledged this.[119]

C.2. Cyber-operations

Much has been written in recent times about cyber operations in relation to the prohibition of the use of force.[120] The regulation of such operations within an existing armed conflict and the protection of individuals from its effects are matters for other branches of international law.[121] There is, however, also concern over the possibility that cyber operations might fall within the scope of use of force under the *ius ad bellum*, and over the implications of such a determination. At the outset, it should be clear that types of cyber operations vary considerably and the vast majority of them will fall outside the realm of 'force'. For example, a large proportion of cyber operations entail hacking into networks in order to retrieve classified information.[122] Other types of operations include those designed to disrupt networks, as seen for example in the operations directed against

[118] It may be recalled that as recently as 1993, Rosalyn Higgins wrote that "[n]otwithstanding the risk that unilateral intervention for humanitarian purposes is open to abuse, it is far from clear that such action can properly be authorized by the United Nations.": R. Higgins, *Problems and Process: International Law and How We Use It* (1994), 254.

[119] Security Council resolution 1674 (2006) reaffirmed paragraphs 138 and 139 of the 2005 World Summit Outcome Document, as was recalled in Security Council resolution 1706 (2006) on Darfur.

[120] See, for example: M. Waxman, "Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)" 36 *Yale Journal of International Law* 421 (2011); M. Schmitt "Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework" 37 Columbia Journal of Transnational Law 885 (1999); M.E. O'Connell "Cyber Security Without Cyber War" 17 *Journal of Conflict and Security Law* 187, 2012; International Group of Experts, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, "Ch.II: The Use of Force" (M. Schmitt gen. ed., Cambridge University Press 2013); H. Harrison Dinniss *Cyber Warfare and the Laws of War* (Cambridge University Press, 2012); H. Lin, "Offensive Cyber Operations and the Use of Force" 4 *J. Nat'l Security L. & Pol'y* 63, 2010;

[121] In particular international humanitarian law and international human rights law.

[122] For example the hacking into government or military networks, such as the 'Titan Rain' incident in 2003 when US Defense facilities, NASA labs, Lockheed Martin, and other systems were hacked into and lost many terabytes of information (Chinese sources were alleged to have been behind this operation),R. Clarke and R. Knake *Cyber War: The Next Threat to National Security and What To do About It* (HarperCollins 2010), pp.58, 125-6. There have been a number of other such incidents originating from various sources, including those known as 'Solar Sunrise' and 'Moonlight Maze', as well as Operation 'Buckshot Yankee'. For the latter, see "Cyber-Intruder Sparks Massive Federal Response — and Debate Over Dealing with Threats" E. Nakashima, *Washington Post* December 9, 2011; for a detailed list of these and others, see H. Harrison Dinniss *Cyber Warfare and the Laws of War* (Cambridge University Press, 2012), Appendix 1.

Estonia and Georgia which included incidents described as denial of service attacks, leading to severe disruption of media, government and banking systems.[123] Infiltration of networks can also be designed to cause harm, and the Stuxnet worm is alleged to have led to physical damage to centrifuges at the Iranian nuclear facilities.[124] Incidents of this nature (most of them unreported) constitute the majority of known types of cyber operations to date and, other than rare exceptions,[125] the major efforts to regulate and control the risks from cyber operations should therefore be in branches of law other than those relating to force and armed conflict.[126]

Nonetheless, if cyber operations directly cause significant damage, the question arises whether they can be said to constitute an armed attack giving rise to a right of self-defence on the part of the victim state. First, cyber operations can take place as part and parcel of a wider kinetic attack, as was said to have happened in the Israeli attack on an alleged nuclear development site in Syria.[127] In such cases they are one component of a wider operation clearly involving use of physical force, and can be assessed within the examination of the wider incident. Second, there is the potential for cyber operations alone to directly cause serious harm.[128] Scenarios include using cyber operations to open the flood-gates of a dam; causing a missile defence system to attack inwards; and the ultimate doomsday scenario of causing the meltdown of a nuclear reactor. Unlike the more common hacking into networks to sabotage or steal information, these operations are designed directly to cause significant harm which may result in massive casualties. In such circumstances, an emerging view is that cyber operations may constitute an armed attack if their scale and effects mirror those of a traditional kinetic attack.[129] Any such conclusion must be reached with great caution: a wide interpretation of Articles 2(4) and 51 of the Charter in this context may affect the interpretation and debate surrounding other areas of the law of use of force as detailed in this report. Nor does the 'scale and effects' criterion give much guidance in view of the questions over the correct thresholds for the separate notions of 'force' and 'armed attack', as discussed above. As noted, the vast majority of known cyber operations do not reach the thresholds for either use of force or armed attack. Moreover, if a conclusion were to be reached that a cyber operation could properly be termed an armed attack, it should be recalled that self-defence does not

---

[123] See detailed discussion in E. Tikk, K. Kaska and L. Vihul *International Cyber Incidents: Legal Considerations*, CCD COE Publications, 2010.

[124] D. Sanger "Obama Order Sped Up Wave of Cyberattacks Against Iran" *New York Times,* June 1, 2012.

[125] The case of Stuxnet, for example, might be considered by some as falling within the scope of force or even armed attack. See

[126] See analysis in M.E. O'Connell "Cyber Security Without Cyber War".

[127] Clarke and Knake, *supra*, n.124, pp.1-8.

[128] Even individuals with a personal agenda have demonstrated the potential for using computer networks to gain control of complex systems and unleash serious damage. For example, see the case of an Australian individual who caused the dumping of sewage into rivers, leading to serious harm to the local environment, R. O'Harrow Jr "Search Engine Exposes Industrial-Sized Dangers" *The Sydney Morning Herald* June 4, 2012. In another case, a disgruntled employee disabled the system for detecting oil pipeline leaks off the Californian Coast, D. Kravets "Feds: Hacker Disabled Offshore Oil Platforms' Leak-Detection System" *Wired* 18 March 2009; See also R. Allison "Hacker attack left port in chaos" *The Guardian*, 7 October 2003.

[129] Tallinn manual, pp.54-61.

require using the same means as the attack which provided the trigger for its exercise: determining that a cyber operation was an armed attack would therefore unleash the possibility of kinetic force in self-defence.

A particular challenge is raised in this regard by potential cyber operations which cause a major stock exchange to crash or disable the functions of critical infrastructure. There are contrasting opinions on whether this might be considered a use of force, or even an armed attack.[130] On the one hand – and as noted above – economic pressure is not considered to be within the scope of the prohibition on use of force, and financial harm is not usually considered as passing the threshold of armed attack. It could therefore be argued that such operations should be excluded from the scope of armed attacks. It will however remain the case that other rules of international law will likely have been violated, including the principle of non-intervention and economic and trade agreements. On the other hand, disabling vital infrastructure goes beyond actions such as economic embargoes, as it involves direct invasive measures into the system of another state in order to cause internal harm; moreover the harm caused could have severe consequences for the state and despite no direct physical effects the harm might be similar as if a missile had struck the infrastructure. The law and past interpretations in other contexts may appear to point against such operations constituting armed attacks, but the absence of state practice in relation to major cyber operations against critical financial infrastructure makes it difficult to draw definitive conclusions. It may be that future events could dictate the evolvement of the law in unforeseen directions.

Lastly, one of the greatest concerns over cyber operations is that, unlike kinetic attacks for which the origin is usually apparent, the victim state may face great difficulties in identifying the attacker. The accepted rules on state responsibility will apply, but their application will require uncovering the necessary facts in order to attribute the acts to a particular state.

C.3 The Environment and Use of Force

The notable increase in environmental awareness in the years since the formulation of the United Nations Charter necessitates an examination of the relevance of the environment to the use of force and aggression. Parallels exist between environmental harm and the issue of economic pressure raised earlier. Insofar as both might involve harm to another state in the absence of direct physical effect, it could be argued that environmental harm should fall outside the scope of the Article 2(4) prohibition on the use of force. There may, however, be a difference between the two, since it is conceivable that environmental harm can be used as a tool for *direct* causation of significant damage on a scale equivalent to that which is commonly accepted as a use of force; deliberate poisoning or contamination of rivers or other sources of drinking water or the atmosphere are possible examples in this regard. Accordingly, there may be a basis to argue that using the environment to cause direct effects similar to those of physical force could be within the scope of Article 2(4) and of the prohibition of the use of force.

Other situations which can be envisaged include circumstances in which a state takes action that leads to environmental and human harm across the border, but in which the harm is an indirect consequence rather than the primary purpose. In such circumstances a claim

[130] Tallinn manual, pp.56-57.

of aggression will be hard to sustain, although there will be room for the examination of numerous other rules of international law and potential grounds for state responsibility for the harm caused.[131]

In addition to human harm caused through environmental damage, there is a separate question over harm to the environment itself. There is no doubt that protection of the environment has become a matter of concern for international law both within and outside the context of inter-state conflict.[132] Indeed, in such cases the environmental harm may well have violated a range of international law prohibitions and the responsible state may be liable through various forums. This is, however, unlikely to enter the scope of the prohibitions on the use of force.

Conclusions

It has occasionally been suggested that the rules of international law on the use of force are dead.[133] This may be an exaggeration, but it reflects – or reflected – a real concern. From Iraq to Crimea, there has been concern over the resort to force in dubious legal circumstances. At the same time, there was growing concern at the failure to respond adequately to modern security threats (not least, transnational terrorism and the proliferation of weapons of mass destruction) and to humanitarian catastrophes (such as in Rwanda, Darfur and Syria). Such concerns have led some to push the boundaries of the law, arguing for a unilateral right to use force preventively or for humanitarian purposes, and for implied or retrospective authorization by the Security Council for the use of force.

An important question is whether there are significant shortcomings in the traditional body of rules on the use of force by States. Is the law as it is the law as it ought to be? Are existing rules adequate to meet current threats, especially from terrorist groups and weapons of mass destruction?

The General Assembly of the United Nations, at the level of Heads of State and Government, responded to this question in its 2005 World Summit Outcome document. The Heads of State and Government reaffirmed:

> that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.[134]

It seems that, in the view of the Heads of State and Government, the rules on the use of force in the Charter (and in customary international law), when properly interpreted

---

[131] See for example dispute between Colombia and Ecuador over the herbicide use by Colombia, ICJ *Aerial Herbicide Spraying (Ecuador v. Colombia)*. The case was removed from the Court's list following an agreement between the parties. *ICJ Press Release 2013/20*, 17 September 2013; See Principle 21, 1972 Stockholm Declaration, and the Trail Smelter arbitration, US v Canada (1928).

[132] AP1; environmental treaties and agreements

[133] For example, M J Glennon, "Why the Security Council Failed" (May/June 2003) Foreign Affairs 16; M J Glennon, "How International Rules Die" (2005) 93 Geo. L.J. ,939.

[134] General Assembly res. 60/1, para. 79. This followed similar statements by the Secretary-General's High-level Panel in its report *A more secure world: our shared responsibility* (A/59/565), paras. 185-203; and by the Secretary-General in his report *In larger freedom: towards development, security and human rights for all* (A/59/2005), paras. 122-126.

and applied, are adequate to meet new challenges. What is needed are not new rules, but political will on the part of States, including members of the Security Council and potential troop-contributors. The 2005 World Summit Outcome thus offered one response to a debate that took off after 9/11 questioning the effectiveness, the relevance, and even the existence of rules of international law on the use of force.

A further danger for the rules on the use of force has been discussed above, namely that the traditional interpretations of 'armed attack' are being widened to encompass kinds of inter-State harm that do not come within the Purposes and Principles of the Charter. If harm which causes damage to a state's economic interests, its environment, or its infrastructure are all to be characterised as 'armed attacks', however the damage was delivered, the scope of justifiable use of force in self-defence could be unacceptably enlarged.

The UN Charter goal of collective peace and security is dependent upon strict adherence to the international law on use of force. It is essential that the scope of the prohibition on the use of force be interpreted in a manner suited to achieving its aim, otherwise the maintenance of international peace and security will be impossible.

USE OF FORCE COMMITTEE

WORKING SESSION

Tuesday, 9 August 2016, 9.00am

Chair: Professor Duncan French (UK)

The Chair introduced himself and welcomed attendees to the second day of the conference. He provided a brief outline of the structure that the session would follow and then gave the floor to the Rapporteur to present the draft report and lead a general discussion on the report.

Professor Noam Lubell (UK) started by explaining what had been done with the report and what still needed to be done.

He reminded attendees that the use of force in international law was a highly controversial area of international law and was not an easy task for the Committee. The reason for this controversy lay in the fact that there was adverse repercussions if the decision to use force subsequently proved to be erroneous.

Professor Lubell acknowledged the wide range of views in relation to the use of force, but noted that the Committee's task was not to merely acknowledge these divergent views but to also try to strike a balance between juxtaposing opposing views and offering informed viewpoints on critical aspects of the use of force. He expressed appreciation to the members of the Committee for a productive meeting that was held on 8 August 2016, and highlighted that the draft report was going to see further changes as a result of that meeting.

Before going through the main points of the report, Professor Lubell informed attendees that it was a preliminary report and that both the structure and substance would change considerably as a result of the discussions during the present session and the Committee's meeting planned for February 2017. Essentially, the plan was to start off by setting out the centrality of the prohibition of use of force. The opening statement and key issues in the introduction and the conclusion would entail a discussion on the importance of the prohibition on the use of force.

Among other things, the report sought to bring clarity to the various concepts used as well as the ambit of interpretation. For example, there were sometimes certain elements of confusion among the different terms that were used in the *ius ad bellum*. When one spoke of use of force, armed attack and aggression, one would find that people, seasoned commentators and even international bodies to a certain extent used these terms interchangeably in a manner that was not helpful to the debate. As such, the intention of the report was to bring some clarity with regard to the terms that were used.

The report first pointed out that the key aspects to the concept of "use of force" were in line with Art 2(4) of the UN Charter. This was generally accepted as referring to the use of armed or physical force rather than, for instance, economic pressure. In addition, the reference in Art 2(4) to territorial integrity and political independence of any State should not be taken to be a limiting phrase; rather, it was meant to be an absolute and all-inclusive prohibition. Looking at the history of why this phrase was inserted, it was clear that it was meant to ensure that the prohibition on the use of force would not become too narrow.

There was some support for the view that there was a *de minimis* threshold on the use of force and there might be some things that fall below use of force. The use of force was thus set out as the wider of all the various notions in the *ius ad bellum* in the report.

In the case of "armed attack", if interpreted too widely, it would open doors to self-defence in circumstances beyond those intended. For that reason, the report would define "armed attack" narrowly. There was some concern that, if the concept of armed attack was interpreted to be much narrower than the concept of use of force, a State could be subjected to use of force and not have the right to self-defence. Controversy over the notion of a gap between the two concepts was acknowledged and reflected in the report. It was pointed out that armed attack, as mentioned by the ICJ, was meant to be a graver form of use of force.

In the case of "aggression", there was a remarkable level of inconsistency in both definition and scope. The initial attempt was to see whether one could say, in a fairly straightforward manner, that aggression mirrored either use of force or armed attack. That would have been neater than saying that it was a third category in the *ius ad bellum.* Negotiations on the UN Charter revealed a hesitance to use aggression for armed attack, and it was found that armed attack would be technically a better term of art that could be used. Ultimately, aggression ended up being used as a procedural trigger in Art 39 rather than as part of the definition in Art 2(4) or Art 51.

Aggression, as a legal term of art, played a role in the context of international criminal law, notably within the International Criminal Court (ICC). There was an international criminal law definition of aggression. However, that was not the same aggression as the one that was often referred to in the *ius ad bellum* and State practice outside the international criminal law context. Outside that context, there appeared to be inconsistency in the manner in which the concept was used. Sometimes it was used in the context of use of force and other times it was used in the context of an armed attack. The Committee would differentiate between the ICC definition and the general *ius ad bellum* definition, paying particular attention to the scope and ambit of the terms "use of force" and "armed attack".

Professor Mary Ellen O'Connell (US) drew Professor Lubell's attention to the need for the report to reflect definitions of terms such as "armed conflict" and "use of force" as contained in the Committee's previous reports.

Professor O'Connell also reminded attendees that in the meeting held on 8 August 2016, it had been agreed that the proscription of aggression was a *jus cogens* norm. Hence, the report should reflect the implications of this classification.

Finally, for completeness, she proposed the inclusion of general principles, which included an assessment on proportionality, *jus cogens*, the UN Charter, as well as customary international law positions on the use of force.

The Chair, after acknowledging Professor O'Connell's submissions, returned to the discussion on the *de minimis* requirement for the use of force, noting the example of the Russian jet that went into Turkish territory. The issue was whether there was a use of force or whether it was the State exercising police powers. He questioned whether that would be an example of the question of whether the use of force required a boundary violation to be applicable.

The Chair highlighted that when people talked about the *de minimis* threshold, they were referring to situations that might be closer to law enforcement than the conflict-type situations. There was thus a debate on whether there was a threshold or not. If there was no threshold, that would be one of the reasons to maintain the gap between use of force and armed attack, because one would not want to call any of these incidents an armed attack.

Professor Alfred Soons (Netherlands) proposed that the report's definition of the use of force should be expanded to further clarify the notion of the use of force. He queried the examples of the *de minimis* threshold provided in the report, and whether they were related to the *de minimis* threshold or to the international use of force. In his opinion, it seemed that it was more a question of the nature of the use of force. He suggested exploring the distinction between the international use of force and national law enforcement. For him, the *de minimis* rule was more important for the international use of force issue and the examples of law enforcement could serve a purpose of indicating the difference between international use of force in the Charter regime and the law enforcement regime, which had its own practice.

Professor Lubell indicated that the differentiation between police law enforcement and international use of force was not as straightforward. He suggested that it could perhaps be clearly reflected in the report.

Professor Chang-Wee Lee (Korea) suggested that the Committee pay more attention to the use of nuclear technology and nuclear weapons in the use of force.

The Chair noted Professor Lee's concern and suggested that this be addressed when the session dealt with cyber operations.

Professor Lubell proceeded to the section of the report dealing with Security Council authorisation. The bottom line was that "force used with the authorization of the Security Council under the Charter [did] not fall within the prohibition of the use of force." The determining criteria was not in the reference to Chapter VII of the UN Charter but rather the wording in the Security Council resolutions, which needed to be very clear in allowing for the use of force. The Committee took the position that there was no such thing as implied authorisation to use force. Use of force is either authorised or not.

Professor Lubell stated that selfdefence was central to the use of force and aggression, because when any State was of using force unlawfully, in almost all cases, it would claim that their conduct was justified on the grounds of self-defence. Understanding these rules and how self-defence worked was critical if one wanted to have any clarity on the prohibition on the use of force. He noted that the report briefly looked at Art 51 of the UN Charter and pointed out some key issues, including the issue of reporting to the Security Council. The report noted that the failure to report to the Security Council in itself did not invalidate the exercise of selfdefence; however, it could harm the State's case when evidentiary support was required.

Professor Lubell then outlined the concepts of necessity and proportionality as discussed in the report. Necessity was the requirement that the self-defence measure be necessary. Proportionality was a separate and additional requirement in the exercise of self-defence. In essence, proportionality was a balance between two elements, as seen in any area of the law when measuring one factor against another. Thus, the report noted that the

proportionality criterion required that the necessity of acting in self-defence be balanced against the harm caused by doing so.

He referred to anticipatory self-defence, which is recognised as a highly contested issue surrounding the right to self-defence. Professor Lubell emphasised that the Report rejected the wider pre-emptive approach to anticipatory self-defence, which was endorsed for a while by the US, in particular by the administration of President George W Bush post-9/11. However, the increase in the support for the notion of anticipatory self-defence in the context of manifestly imminent attacks, construed as narrowly as possible in recent years, was recognised by the Committee.

The Chair invited further questions and contributions.

Professor O'Connell suggested a change to the structure of the report. She proposed that proportionality and necessity be moved to a general section so that they also apply to Security Council authorisations of the use of force.

Professor Lubell reiterated that the report was in its preliminary phases and that the structure would be revisited.

He proceeded to outline the report's position on responding to self-defence against non-State actors. By way of example, he noted the tension that existed in this respect.

On the one hand, one found a situation where a State was subjected to an armed attack from outside its borders and needed to defend itself. Even if that armed attack could not be attributed to the host State, but only coming from an armed group, the State would argue that it was subjected to an armed attack and would argue for the right to defend itself in the absence of other remedies.

On the other hand, if the armed attack could be attributed to the host State, allowing for self-defence, this would seemingly be a breach to the territorial integrity and harm of the State.

Professor Lubell, in line with the report, then briefly discussed the circumstances under which an armed attack could be attributed to the host State.

Dr Hannah Woolaver (South Africa) noted that the section on the use of force against non-State actors could be further clarified. She noted Professor Lubell's recognition of the tension between the possible existence of the right to self-defence and the protection under Art 2(4) of the UN Charter. By recognising this tension, the inevitable conclusion should be that the right to use force in self-defence was still an unlawful use of force contrary to Art 2(4). In her opinion, the report could simultaneously support the right to self-defence against non-State actors and at the same time recognise that the use of force against a host State (hosting an armed group) was unlawful under the Charter.

Dr Woolaver suggested that an engagement with the ICJ jurisprudence on defining attribution to a State as an element of the definition of armed attack would be helpful. She also suggested that the Committee address the Security Council's latest practice of calling on States to use force against terrorist actors but at the same time not expressly authorising such actions (eg, UNSC Resolution 2249).

Professor Lubell recognised Dr Woolaver's comments and noted the different views on the tension within the Committee. He stressed that the Committee recognised this tension but at the same time noted the view that there were those cases that left a State with no other option but to use force against an armed group that operated from another State's territory.

In relation to structural and substantive changes to the report, Professor Lubell stated that the report was still work in progress.

Dr Christian Tams (Germany) suggested a closer scrutiny of the relationship between Art 2(4) and Art 51 of the UN Charter in the case of an attack by non-State actors. He concurred with Dr Woolaver that recent Security Council practice (eg, encouraging military action against the socalled Islamic State without authorising it) must be given due attention in the report. According to Dr Tams, any use of force under Art 51 that was not proportional was unlawful as proportionality was a key element of validity.

Professor O'Connell affirmed the position stated by Dr Woolaver, finding that her structural argument was accurate. If a State attempted to justify use of force, prevailing upon Art 51 as as an exception to the general prohibition, and it did not meet the requirements of necessity and proportionality, it became an unlawful use of force and therefore a violation of Art 2(4). What the report was reflecting was really a question of attribution and whether attribution was required to the territorial State before use of force could be exercised against a non-State actor. She suggested that that could be clarified in the report.

Professor Lubell indicated that the issue in the ICJ case of *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* was whether it had been claimed that the attacks were attributable. The Court refrained from taking a position on whether there was a right of self-defence against an armed group when it was not attributable. It claimed that it was not settled and decided not to rule on the issue. Professor Lubell stressed the importance of reflecting the debate in the report in light of the different opinions of Committee members.

The Chair added that the use of force against non-State actors was a highly contentious issue and there were numerous perspectives to be explored.

Professor Lubell proceeded to outline the report's position on the rescue of nationals abroad and stated that the report would not endorse the argument that this action falls outside the scope of Art 2(4). He added, however, that the report considered the argument that in some circumstances the rescue of nationals abroad was an evacuation operation that involved no force and the host State – although it might not have explicitly consented –did not object. Although questionable, one could argue that this would not fall within the ambit of Art 2(4). However, if there was any force involved then this would fall within the scope of Art 2(4) and the only way to justify such actions in the absence of the consent of the State would be to establish that there had been an armed attack. One would have to ask the question whether attacks on nationals abroad could be considered an armed attack against the State. This would possibly be the case if the attack was clearly a result of their nationality and they were attacked in the context of being seen as individuals of their State.

Professor Lubell then briefly outlined the question of consent and suggested that this section be moved elsewhere in the report. He noted the many complexities of identifying the government that gave consent and that this was a complex question in international law that could not be dealt with fully in the report. He highlighted that the report clearly indicated that consent needs to be given freely and from the appropriate, authorised highest levels of government. Although in theory it would seem that States could give consent to allow for other States to assist, there were arguments that one should not intervene in a civil war at all (even on the side of the State) unless another State had intervened on behalf of a rebel group. The Committee recognised this view.

In addition, it was recognised that if the requesting government was attempting to quash a legitimate struggle to self-determination, the consent would not legitimise the use of force. It was decided in the Committee meeting on 8 August that there were some areas that would need to be added and strengthened in the report. A particular area was the situation in which a State gave consent to another State to use force on its territory but that force was force that would have been unlawful for the State to do itself; whilst it might not be a violation of sovereignty in terms of use of force, consent did not make something unlawful lawful. There could also be situations where there was consent to the use of force initially but subsequently withdrawn or the force went beyond the consent given. In these situations, there could be an unlawful use of force.

Professor Christopher Waters (Canada), referring the earlier discussion on the rescue of nationals abroad, asked if it was indeed the case that arguments were stronger when nationals were seen as individual manifestations of their State. He stated that if this was the case, the report must cite State practice in this regard.

Professor Waters further recommended that the report strengthen its position on sham operations associated with the rescue of nationals abroad.

Professor Lubell noted Professor Waters' recommendations.

Dr Woolaver asked whether the Committee had considered including considerations of whether consent needed to be public or whether consent given privately was sufficient. She found that this was an issue that was increasingly being confronted such as the use of force in Pakistan. She wondered if public protest by a State against use of force to which it had privately consented had implications for its legality.

Professor Lubell maintained that Dr Woolaver's question was very interesting and one that the Committee had not discussed in relation to its inclusion in the report. He stated that consent could potentially be valid whether it was given publicly or in private. The key issue was likely to be whether the consent could be evidenced.

The Chair asked whether international organisations had a right to rescue employees in emergency situations.

Professor Lubell expressed the opinion that if the rescue of nationals abroad fell within Art 2(4) and could only be justified by recourse to self-defence, then to allow for that, one would have to argue that international organisations had a right to self-defence as a freestanding right of the organisation as opposed to the Member States.

In relation to the report's section on humanitarian intervention, Professor Lubell stated that its formulation was still under discussion. He noted that, as it stood, there was perhaps too much emphasis on the UK's position. This was because the UK was one of the few States that had made bold statements in relation to the right to humanitarian intervention.

Dr Vasilka Sancin (Slovenia) on the section on humanitarian intervention and recommended that there be a separate sub-chapter on it. She also asked whether the word "through" in the sentence cited in the report from the 2005 World Summit Outcome ("[i]n this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter…") was used intentionally to give options for interpretation in a manner that the situation would have to be addressed or submitted through the Security Council. She queried what would then happen in a case where a decision in the Security Council was blocked.

Professor Lubell mentioned that, with regards to responsibility to protect (R2P), it was not envisaged that it required a separate section because R2P was much wider than humanitarian intervention. The elements that related to use of force were essentially the same as those on the debate on humanitarian intervention. He also agreed that, when dealing with these matters, it was important to be aware of the negotiations behind the scenes on how to word the arguments.

Professor Lubell then proceeded to deal with cyber operations. The Committee agreed that cyber operations be included in the report. The reality, noted in the report, was that the vast majority of cyber operations did not fall within the realm of the use of force. The principal question asked was whether cyber operations could constitute an armed attack and the position taken was that in most cases they would not, although in some cases cyber operations occurred alongside kinetic operations. As such, there was usually no question of a standalone cyber operation being an armed attack. It was recognised that cyber operations could constitute an armed attack if their scale and effect mirrored those of a traditional kinetic attack. In such cases, it was important to recognise that if a cyber-attack was considered an armed attack then there could be room for kinetic self-defence.

He noted in this regard that a cyber-attack on a stock exchange was in principle not an armed attack. However, should a major attack of this kind take place with dire consequences, States might respond to it in ways not seen thus far.

In relation to the environment and the use of force, Professor Lubell noted the debate concerning the inclusion of this section in the report in the context of use of force. The report noted that environmental harm could be used as a tool for direct causation of significant damage (eg, if one State deliberately poisoned the river flowing into another State).

Professor Lubell finally moved to the conclusions of the report, which remained to be finalised. The key was to reiterate that the law on the use of force, particularly the prohibition on the use of force, remained fundamental to world order. Whilst exceptions existed, care in how they were addressed and interpreted should be taken. The report would also take the position that the Security Council should adequately address such matters.

The Chair invited further questions and comments on the draft report.

Dr Hitoshi Nasu (Australia) stated that the draft report appeared to be a collection of past and current debates on various aspects of the use of force in international law, drawing rather uncritically on the ICJ's jurisprudence that was developed in light of a particular set of circumstances that existed at the time. He recommended that the Committee consider revisiting some of the traditional criteria developed in the ICJ's jurisprudence, particularly the attribution test and the gravity test in light of contemporary political circumstances and technological advancement with an eye to establishing whether these remained practical and valid.

Professor O'Connell stated that the strength of the report was its sticking to the current law and not taking progressive perspectives and possible normative developments.

Professor O'Connell questioned the concept of a cyber attack and wanted to know what constituted a cyberattack in the context of cyber operations versus kinetic attacks. She proposed that that perhaps this should not be included in the report.

Professor Waters concurred with Professor O'Connell and suggested the removal of the reference to an attack on the stock exchange. He argued that it was too hypothetical and confusing.

Professor Lee suggested that the Committee clarify its position on the use of nuclear weapons as well as the R2P.

Mr Bruce Mauleverer (UK) observed that the conclusion of the report spoke of the goal of the collective peace and security being "dependent upon strict adherence to the international law on the use of force". It also referred to "resort to force in dubious legal circumstances". He recommended that the report be expanded to discuss the language of UN Security Council Resolutions 678 (all necessary means), 687, and 1441 (serious consequences). He further raised concern that the Committee was not engaging in political territory and should at least make some comment on the distinction between all necessary means and all necessary measures. He added that Resolution 1441 should not be confined to a footnote (footnote 37).

Professor Lubell stated in response to suggestions for the removal of Stock Exchange attacks as an armed attack that its inclusion was important because, in the context of cyber operations, this was the likely question to be asked in the next few years.

He reiterated that the report sought to strike a balance on issues of the use of force and added that, apart from narrating the law, the Committee had to suggest practical solutions. He maintained, however, that the report should be careful not to open holes on the rules on the use of force.

The Chair, in closing, thanked the Rapporteur, members of the Committee, attendees and the reporters.

Reporters: Mothepa Shadung and Swikani Ncube

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

INTERNATIONAL HUMAN RIGHTS LAW

Members of the Committee

Professor Christina Cerna (USA): *Chair*
Professor Stefan Kadelbach (Germany): *Co-Rapporteur*
Dr Thilo Rensmann (Germany): *Co-Rapporteur*
Professor Koji Teraya (Japan) *Co-Rapporteur*

Mr Justice Muhammad Imman Ali (Bangladesh)
Professor Anne F Bayefsky (Canada)
Mr Vincent Berger (France)
Professor Eva Brems (Belgium)
Alternate: Professor Jan Wouters
Professor John Cerone (USA)
Director Jonas Christoffersen (Denmark)
Dr Ioana Cismas (USA) – Nominee of Chair
Dr Gerard Coffey (Ireland)
Alternate: Margaret Cordial BL
Professor Olivier de Frouville (France)
Professor Emmanuel Decaux (France)
Professor Marcilio Franca Filho (Brazil)
Professor Matthias Herdegen (Germany)
Professor Yuji Iwasawa (Japan)
Mr Westmin James (Caribbean)
Professor Mark Janis (USA)
Mr Sameer Jarrah (HQ)
Professor Liliana Jubilut (Brazil)
Professor Elzbieta Karska (Poland)
Dr Ursula Kriebaum (Austria)
Dr Jernej Letnar Cernic (Slovenia)
Dr Alexander Mezyaev (Russia)
Dr Christopher Michaelsen (Australia)
Professor Niels Petersen (Germany)
Professor Paulo Pinto de Albuquerque (Portugal)
Professor Riccardo Pisillo Mazzeschi (Italy)
Dr Eva R Rieter (Netherlands)
Professor Sir N S Rodley (UK)
Alternate: Professor Malcolm Evans
Dr Vera Rusinova (Russia)
Professor Elena Sciso (Italy)
Professor Sandesh Sivakumaran (UK)
Alternate: Professor Jeremy McBride
Dr Branislav Srdanovic (Denmark)
Professor Ruti Teitel (USA) – Nominee of Chair
Dr Johannes Gerrit Cornelis Van Aggelen (Brazil) – Nominee of Chair
Professor Gus Waschefort (South Africa)
Professor Dragica Wedam-Lukic (Slovenia)
Professor Kimio Yakushiji (Japan)
Dr Gentian Zyberi (Albania)

Final Report

INTERNATIONAL HUMAN RIGHTS LAW AND THE INTERNATIONAL COURT OF JUSTICE (ICJ): THE DOMESTIC IMPLEMENTATION OF JUDGMENTS/DECISIONS OF COURTS AND OTHER INTERNATIONAL BODIES THAT INVOLVE INTERNATIONAL HUMAN RIGHTS LAW

Part Two

THE DOMESTIC IMPLEMENTATION OF JUDGMENTS/DECISIONS OF COURTS AND OTHER INTERNATIONAL BODIES THAT INVOLVE INTERNATIONAL HUMAN RIGHTS LAW

finalized by Stefan Kadelbach

A. INTRODUCTION

1. For the mandate and genesis of this report, the Committee refers to Part One of this Final Report of the International Law Association as it was adopted during its Washington DC conference in March 2014,[1] dealing with the first part of the Committee's mandate, the relationship of the International Court of Justice and human rights.[2] For the purposes of Part Two, the ILA International Human Rights Law Committee (IHRL) sought to examine the legal framework of compliance with international judgments and decisions involving human rights around the world in order to study how the courts of a representative set of countries dealt with obligations resulting from decisions of judicial or quasi-judicial international human rights bodies, the impact of human rights jurisprudence, and the possible trends and parallels in their methods of implementation. As a consequence, the Committee sought to identify Guidelines regarding the nature of the obligations assumed by a state party to an international human rights treaty or *vis-à-vis* a judgment from a human rights body or an international body that involves human rights. The Guidelines are annexed to the Resolution adopted on 11 August 2016.

The Committee considered the following matters:

1. To define the obligations of a state upon becoming party to a treaty as regards compliance with judgments or decisions of judicial or quasi-judicial bodies in human rights cases;
2. To evaluate the practice of states, highlighting good practices;
3. To develop a concept and scope of 'good faith' compliance and 'good practices' with human rights treaties.

B. THE WORK OF THE COMMITTEE

2. The Chair sent Part 2 of the Final Report, which was prepared by Professor Stefan Kadelbach, Co-Rapporteur, to the Committee members on March 31, 2016, and requested comments. At the invitation of Judge Paulo Pinto de Albuquerque of the European Court, the Committee met on 12-13 May 2016 at the European Court of Human Rights in Strasbourg and finalized its draft Final Report, draft Guidelines and draft Resolution.

[1] See paras. 1 – 18 of the first part of the Report, as finalized by Christina Cerna.
[2] See paras. 19 – 87 of the first part of the Report, as finalized by Eva Rieter.

The following members participated in the session: Anne Bayefsky, Christina Cerna, Jonas Christoffersen, Yuji Iwasawa, Stefan Kadelbach, Niels Petersen, Paulo Pinto de Albuquerque, Thilo Rensmann, Eva Rieter, and Koji Teraya. Comments received from Mark Weston Janis, Jernej Letnar Cernic, Jeremy McBride, Nigel Rodley, Sandesh Sivakumaran, Hans van Aggelen, Dragica Wedam-Lukic and Gentian Zyberi were also taken into consideration in the preparation of the report.[3] The Committee discussed and finalized its draft Final Report, Part Two, at the 77th Conference in Johannesburg from 8 to 11 August 2016. The Committee members Christina Cerna, Ioana Cismas, Marcilio Franca Filho, Yuji Iwasawa, Stefan Kadelbach, Alexander Meziaev, Niels Petersen, Thilo Rensmann, Koji Teraya, Gus Waschefort and Gentian Zyberi participated in the meetings. The first part of the working session was devoted to discussing the report, the annexed guidelines and the resolution, and the second part to exploring possible future mandates of the ILA Human Rights Law Committee. In the public session of the Committee, the present report, the guidelines and the resolution were discussed and adopted. Finally, in the Conference's plenary session of 11 August 2016, the resolution and the guidelines annexed thereto were unanimously adopted.

C. THE OBLIGATIONS OF STATE PARTIES TO COMPLY WITH JUDGMENTS OR DECISIONS OF JUDICIAL OR QUASI-JUDICIAL INTERNATIONAL BODIES DEALING WITH HUMAN RIGHTS

1) The legal bases of the obligation to comply with human rights decisions

3. A state, in the exercise of its sovereignty, voluntarily consents to becoming a party to a human rights treaty. The legal bases of the states' obligation to comply with decisions of human rights bodies are the treaties which confer upon human rights bodies the jurisdiction to declare violations. Although most UN human rights treaty bodies were limited to state reporting on compliance with the treaty when they were created, today the core UN human rights treaties provide for a complaints mechanism and an individual petition procedure. For the purposes of this report, the term 'judicial bodies' refers to human rights courts: the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the African Court of Human and Peoples' Rights (AfCtHPR). The term 'quasi-judicial bodies' comprises the ten UN human rights treaty committees and the regional commissions of the Inter-American and African systems.

4. For the ten UN human rights treaty bodies, two general and eight subject-specific treaties form the bases of jurisdiction.[4] Individual complaint procedures exist under eight

[3] This part of the report is based, i.a., on contributions on protection systems and selected countries by individual Committee members which are indicated in the respective sections, as well as on comparative background papers provided by Christina Cerna, Matthias Herdegen and Elena Sciso.

[4] These bodies are the UN Human Rights Committee (HRC) under the International Covenant on Civil and Political Rights of 19 Dec 1966 (ICCPR), 999 UNTS 171, in force 23 March 1973; the committees monitoring the International Covenant on Economic, Social and Cultural Rights of 19 Dec 1966 (ICESCR), 993 UNTS 3, in force 9 March 1973; the Convention on the Elimination of all Forms of Racial Discrimination of 7 March 1966 (CERD), 660 UNTS 195, in force 15 June 1969; the Convention on the Elimination of Discrimination against Women of 18 Dec 1979 (CEDAW), 1249 UNTS 13, in force 9 Aug 1985; the two committees under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 Dec 1984 (CAT), 1465 UNTS 85, in force 31 Oct 1990 and the Optional Protocol thereto of 18 Dec 2002, 2375 UNTS 237, in force 22 June 2006, respectively, i.e. the Committee against Torture (CAT) and the Subcommittee

of these treaties, but require a special acceptance by the state parties.[5] In the regional systems, different models exist. With respect to Europe, although acceptance of the compulsory jurisdiction of the ECtHR was optional for many decades, today a state, upon becoming a member of the Council of Europe, must accept the compulsory jurisdiction of the Court and the right of individual petition.[6] The Inter-American Commission on Human Rights (IACHR) is unique in that it exercises jurisdiction under two human rights instruments: the American Convention of Human Rights (ACHR)[7] and the American Declaration on the Rights and Duties of Man (ADRDM).[8] The acceptance of filing individual applications before the Inter-American Commission under the ADRDM is automatic and does not require acceptance by the state upon becoming a member of the OAS. Acceptance of the IACtHR's jurisdiction, however, requires a state to become party to the ACHR and, in addition, to expressly accept the Court's jurisdiction under Article 62 ACHR.[9] In contrast to the European system, individuals do not have direct access to the IACtHR, but need to file their application with the IACHR which can take it to the Court if the respondent state does not comply with its recommendations. As regards the competence over inter-state complaints, only in two protection systems ratification of the underlying treaty includes the recognition of acceptance of the contentious jurisdiction for such proceedings,[10] whereas for the others specific acceptance is required.[11] In the African system, both complaint procedures before the African Commission are compulsory, but jurisdiction of the AfCtHPR depends on the ratification of an additional protocol to the African Charter, and its jurisdiction for individual petitions requires a declaration by the defendant state party.[12] Once a state is a party, the African bodies are competent to entertain complaints with respect to all human rights instruments to which the respondent

---

on Prevention of Torture (SPT); the committees under the Convention on the Rights of the Child of 20 Nov 1989 (CRC), 1577 UNTS 3, in force 5 April 1992; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 18 Dec 1990 (CMW), 2220 UNTS 3, in force 1 July 2003; the Convention on the Rights of Persons with Disabilities of 13 Dec 2006 (CRPD), 2515 UNTS 3, in force 3 May 2008; the International Convention for the Protection of All Persons from Enforced Disappearance of 20 Dec 2006 (CED), 2716 UNTS 3, in force 23 Dec 2010.

[5] Optional Protocol (OP) to ICCPR of 19 Dec 1966, 999 UNTS 302, in force 23 March 1976; OP to ICESCR of 11 Dec 2009, in force 5 May 2013; Article 14 CERD; OP CEDAW of 6 Oct 1999, 2131 UNTS 83, in force 22 Dec 2000; Article 22 CAT; Article 5 OP CRC of 19 Dec 2011, A/RES/66/138 of 19 Dec 2011, in force 14 April 2014; OP CRPD of 13 Dec 2006, UN Doc A/61/611, in force 3 May 2008; Article 31 CED; Article 77 CMW has not entered into force.

[6] Article 32 [European] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 Nov 1950 (ECHR), entered into force 3 Sept 1953, 213 UNTS 222; CETS No. 5.

[7] American Convention on Human Rights of 22 Nov 1969 (ACHR), 1144 UNTS 123; OASTS No. 36.

[8] American Declaration on the Rights and Duties of Man of April 1948: Resolution XXX, Final Act, Ninth International Conference of American States, Bogotá, Colombia, March 30 – May 2, 1948 (Pan American Union, 1948), p. 38; reprinted 43 AJIL Supp. 1949, 133.

[9] Jurisdiction of the IACtHR is today recognised by 23 states; Trinidad and Tobago denounced the ACHR in 1998, Venezuela in 2012.

[10] Article 33 ECHR; Article 11 CERD.

[11] This is the case with Article 41 ICCPR; Article 8 (2) OP CEDAW; Article 20 CAT; Article 33 CED; Article 13 OP CRC; Article 47 ACHR.

[12] Articles 47 and 55 African Charter of Human and Peoples' Rights of 27 June 1981 (AfChHPR), 1520 UNTS 217; OAU Doc CAB/LEG/67/3 rev. 5, in force 21 Oct 1986; Articles 5 and 34 (6)

state is a party. The Statute of the newly created Arab Court of Human Rights permits cases brought to be heard by the Court if the claimant's State and the respondent State are both parties to the statute; individuals do not have access to the Court.[13] The Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights do not provide for a complaint mechanism.[14]

5. As to a state's treaty obligations, the Vienna Convention on the Law of Treaties (VCLT) is an undisputed general point of reference.[15] Even though the VCLT entered into force only after the adoption of most of the human rights treaties and has not been ratified by all of their parties its essential contents are considered to form customary international law.[16] Accordingly, international treaties in force are 'binding upon the parties to it and must be performed by them in good faith' (*pacta sunt servanda*) (Article 26 VCLT) and 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' (Article 31 § 1 VCLT). By following an evolutive approach to the interpretation of the treaty provisions on their jurisdiction,[17] the competent human rights bodies have spelled out the obligation to comply with human rights conventions in an increasingly specific way.

6. According to Article 1 ACHR, states have 'to respect and ensure' the rights and freedoms of the ACHR to all persons subject to their jurisdiction.[18] Article 2 ACHR explicitly demands that states 'undertake to adopt [...] such legislative or other measures as may be necessary to give effect to those rights or freedoms' guaranteed under the Convention. In its jurisprudence on impunity, the Court interpreted these obligations to mean that the state has the duty to organize the governmental apparatus and all the structures through which public power is exercised to permit the exercise of rights and freedoms and that it 'must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.'[19] Ensuing duties are 'obligations of means, not of result', 'due diligence' obligations as the Court calls

---

Protocol to the AfChHPR of 9 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT III, in force 25 Jan 2004.

[13] Article 19 Statute of the Arab Court of Human Rights, adopted 7 Sept 2014, found in International Commission of Jurists, The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court, Geneva (International Commission of Jurists) 2015, p. 35; the Court has subject matter jurisdiction with respect to the Arab Charter on Human Rights of 23 May 2004, translated Int'l Hum Rts Rep. 12 (2005), 893, in force 15 March 2008.

[14] Terms of Reference for the Establishment of the ASEAN Intergovernmental Commission On Human Rights of 19-20 July 2009, reprinted 48 ILM 2009, 1162.

[15] Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT), 1155 UNTS 331, in force 27 Jan 1980; cf. Art. 75 ACHR.

[16] A. Aust, *Vienna Convention on the Law of Treaties*, in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, vol. X, Oxford (OUP) 2012, p. 709, §§ 14-18.

[17] As to the doctrine of human rights treaties as 'living instruments' ECtHR, *Tyrer v UK*, 25 April 1978, Ser. A 26, § 31; IACtHR, *Mapiripán Massacre v Colombia*, 15 Sept 2005, Ser. C 134, § 106.

[18] For the IACtHR jurisprudence see the contribution by Christina Cerna in S. Kadelbach, T. Rensmann and E. Rieter (eds.), *Human Rights before Non-Human-Rights Courts*, in preparation.

[19] IACtHR, *Velasquez Rodriguez v Honduras*, 21 July 1989, Ser. C 7, § 166.

them in the context of protecting a victim from violations by private parties.[20] As far as procedural restitution is at stake, these duties are addressed to the judiciaries of the respondent states.

7. The European Convention creates obligations for states parties towards all individuals within their jurisdiction, envisaging the practical implementation of the protected rights and freedoms on the domestic legal order of states parties. Recent case law has extended the ECtHR's jurisdiction extraterritorially, to countries outside the Council of Europe, in cases where the European state party to the Convention exercises authority and control over the purported victim or over the territory when the state party is an occupying power.[21] The ECtHR[22] could not avail itself of an express legal basis for positive obligations, but developed similar case-law under the jurisdiction clause of Article 1 ECHR, especially in the context of Articles 2 (right to life) and 3 (prohibition of torture and degrading treatment), at times taken together with the provision on the binding nature of judgments (Article 46) if measures to remedy a violation did not prove adequate.[23] Procedural obligations derive from Article 13 ECHR (right to an effective domestic remedy), which is violated if the state party obstructs efforts to remedy or investigate human rights complaints, be it before, during or after procedures before the ECtHR.[24] The Committee of Ministers of the Council of Europe (CoM) published a guide in respect of domestic remedies giving various examples of domestic case law of good practices in terms of implementation.[25]

8. With respect to the UN system, the stance taken by the HRC may be taken as paradigmatic. The jurisdictional clause of Article 2 ICCPR is decisive, according to which the state parties undertake 'to respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction' the rights recognised in the Covenant.[26] HRC General Comment 31 spells this out in further detail in holding all branches of government likewise accountable for both negative and positive obligations.[27] In conjunction with specific guarantees this means that states do not only have to refrain, for instance, from death threats (Article 9 ICCPR), but also 'to take appropriate measures to ensure' the

[20] IACtHR, *Miguel Castro – Castro Prison v Peru*, 25 Nov 2006, Ser. C 160, §§ 255 and 344; *González et al v Mexico*, 16 Nov 2009, Ser. C 205, §§ 243-286 ('Cotton Field').

[21] ECtHR, *Al-Skeini v UK*, Rep. 2011-XI; for the exterritorial application of UN human rights treaties in the jurisprudence of the competent bodies and the ICJ see the First Part of this Report, paras. 66-70.

[22] For the ECtHR jurisprudence see the contribution of HRLC member Paulo Pinto de Albuquerque in Kadelbach, Rensmann and Rieter (n. 18).

[23] Compare ECtHR, *Osman v UK*, Rep. 1998-VIII, § 115, and *Demirtaş v Turkey*, 28 Oct 2014.

[24] ECtHR, *Ramirez Sanchez v France*, Rep. 2006-IX, §§ 159, 166; *Burdov v Russia (No. 2)*, Rep. 2009-I, § 89.

[25] Committee of Ministers, Guide of good practice in respect of domestic remedies of 18 September 2013, Strasbourg (Council of Europe) 2013.

[26] T. Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in L. Henkin (ed.), The International Bill of Rights: The Covenant on Civil and Political Rights, New York (Colum Univ Press) 1981, pp. 72-91.

[27] HRC, General Comment No. 31, The Nature of the General Obligation Imposed on States Parties to the Covenant, CCPR/C/Rev.1/Add. 13, 26 May 2004.

right to security against private persons.[28] As in the Inter-American system, failure to prosecute perpetrators constitutes in itself a human rights violation.[29] It is a part of *bona fide* compliance with the Covenant that procedural safeguards ranging from domestic remedies to access to complaint procedures before the HRC, if accepted by the state party, are guaranteed effectively.[30]

9. To conclude, all treaty bodies dealt with here have confirmed the obligations of the states under the respective treaties, developed a notion from which negative and positive obligations are derived and established a nexus to procedural safeguards and consequences in that respect. We will now examine the measures to be taken by domestic courts.

2) Jurisprudence on the state party's obligation to comply with adverse human rights judgments and decisions

a) Human rights courts

10 Since there is neither a World Court of Human Rights nor an ICJ human rights chamber,[31] and since the AfCtHPR has not yet elaborated jurisprudence in this respect,[32] this section on court practice will focus on the ECtHR and the IACtHR.[33] Under the respective Conventions, states 'undertake to abide by the final judgment of the Court in any case to which they are parties' (Article 46 § 1 ECHR) or 'undertake to comply with the judgment of the Court in any case to which they are parties' (Article 68 ACHR). As in international law generally, such duties in the context of human rights protection mechanisms imply, as a rule, an 'obligation of result' of the respondent states, namely to put an end to the violation, to restore the situation that had existed before (*restitutio ad integrum*), to compensate for damages and to prevent repetitions of the conduct found to be in violation of the treaty.[34] In cases of international human rights crimes, there is an

[28] IACHR, *Maria da Penha v Brazil*, Rep. No. 54/1, 16 April 2001, § 44; HRC, *Delgado Páez v Colombia*, CCPR/C/39/D/195/1985, 23 Aug 1990, Annex § 5.6.

[29] HRC, *Jayawardena v Sri Lanka*, CCPR/C/75/D/916/2000, 22 July 2002, Annex §§ 7.3, 10.

[30] HRC, General Comment No. 31 (n. 27), § 15; General Comment No. 33, The Obligation of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/GC/33, 5 Nov 2008, § 11.

[31] Concept Paper on the High Commissioner's Proposal for a unified standing treaty body, HRI/MC/2006/2, 22 March 2006; Swiss Confederation, Federal Department of Foreign Affairs and Geneva Academy of International Humanitarian Law and Human Rights Law (eds.), Protecting Dignity: An Agenda for Human Rights, Geneva (United Nations) 2008; J. Kozema, M. Nowak and M. Scheinin, *A World Court of Human Rights – Consolidated Draft Statute and Commentary*, Vienna (Ludwig Boltzmann Institut für Menschenrechte) 2010.

[32] See generally F. Viljoen, *International Human Rights Law in Africa*, Oxford (OUP) 2nd ed 2012, pp. 410-468. To date, there have been two judgments by the AfCtHPR on the merits, App. 009/2011, *Tanganyika Law Society et al v Tanzania*, 14 June 2013, and App. 013/2011, *Beneficiaries of Late Norbert Zongo et al v Burkina Faso*, 28 March 2014.

[33] ICJ decisions with an impact on human rights, as they are dealt with in the first part of this report, will be integrated where pertinent in the country studies (below section D), but not systematically, given the small number of cases.

[34] Cf. Articles 30, 31 and 35 of the Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts, 56 UN GAOR Supp. No. 10, p. 43, Doc A/56/10 (2001), expressly referred to by the ECtHR, *VgT Verein gegen Tierfabriken v Switzerland (No. 2)*, Rep.

additional obligation to put in place a system that allows the investigation, prosecution and if warranted, the punishment of offenders.[35] Even though closer analysis of ECtHR and IACtHR practice reveals common features and shows tendencies of rapprochement, it has to be noted that both differ with respect to the substantial scope of their respective treaty bases, their powers in the follow-up mechanisms and the cultures of judicial dialogues with their domestic counterparts.[36]

11. In the European system, the execution of ECtHR judgments is subject to the supervision of the Committee of Ministers (CoM) (Article 46 ECHR).[37] The ECtHR, according to the original wording of the ECHR, has had no role in the execution phase. For approximately the first forty years since the ECtHR took up its function in 1959, the Court was content to let the CoM determine the appropriate redress for a finding of a violation of the ECHR. Its role ended with the judgment, and the mere finding of a violation was considered sufficient, also in terms of 'just satisfaction' (Article 41 ECHR). With the enlargement of the Council of Europe and the changing nature of the cases presented to the court, the ECtHR has developed a pattern to assist the CoM and the respondent state in identifying the remedies for the declared violation. The Committee of Ministers itself has sought such guidance from the Court since 2004.[38] Protocol No. 14 to the ECHR[39] has recently introduced the possibility for the CoM to seek interpretative assistance from the ECtHR in clarifying obligations arising from a judgment (now Article 46 § 3 ECHR). Moreover, the CoM has the option of instituting proceedings before the ECtHR to determine whether a state has complied with a judgment (Article 46 § 4 ECHR). In both cases, a majority of two-thirds of the CoM is required. This development corresponds to the increasingly more assertive role of the ECtHR with respect to the concepts of restitution and compliance with its judgments. So far, however, the Court has not yet acknowledged a complaint for non-execution of a judgment based on Article 46 ECHR alone.[40]

12. In the ECHR system, the choice of the appropriate means to implement a judgment still falls, as a matter of principle, to the respondent state.[41] However, the Court has

---

2009-IV, § 87. The underlying principle is the duty to make adequate reparation for every violation of an obligation under international law, cf. PCIJ, *Factory at Chorzów (Jurisdiction)*, 26 July 1927, Ser. A No. 9, p. 21 and *Factory at Chorzów (Merits)*, 13 Sept 1928, Ser. A No. 17, p. 29; ICJ, *Reparations for Injuries Suffered in the Service of the UN, Advisory Opinion*, ICJ Rep. 1949, p. 184.

[35] ECtHR, *Mocanu v Romania*, 17 Sept 2014, para. 321; for the ACHR, see n. 19.

[36] For a recent comparison see L. Burgorgue-Larsen, *The Added Value of the Inter-American Human Rights System*, in A. v. Bogdandy et al. (eds.), Transformative Constitutionalism in Latin America – The Emergence of a New Ius Commune, Oxford (OUP) 2016, forthcoming.

[37] For overviews see E. Lambert Abdelgawad, *The execution of judgments of the European Court of Human Rights*, Strasbourg (Council of Europe) 2nd ed. 2008; J.-F. Flauss, *L'Effectivité des arrêts de la Cour européenne des droits de l'homme: du politique au juridique ou vice-versa*, 77 RTDH 2009, 27-72, at 31-53.

[38] CoM Resolution DH Res. (2004) 3 of 12 May 2004; CoM Recommendation R (2004) 6 of 12 May 2004.

[39] Protocol 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 13 May 2004, ETS No. 194, entered into force 1 June 2010.

[40] Cf. ECtHR, *Olsson v Sweden (No. 2)*, 27 Nov 1992, Ser. A 250; in *Emre v Switzerland (No. 2)*, 11 Oct 2011, § 75, the Court for the first time combined the finding of a violation of a substantive right with one of Article 46 ECHR.

[41] ECtHR, *Marckx v Belgium*, 13 June 1979, Ser. A 31, § 58.

assumed an increasingly stricter stance in monitoring compliance with its decisions.[42] In this same vein, the ECtHR has limited the choice of means if the measures to be taken follow in sufficient clarity from the obligations of the Convention as specified by the Court.[43] Along this line, the ECtHR has turned to a practice of giving directions to the respondent states. Accordingly, execution may not only entail 'individual' measures as a consequence of the obligation to put an end to an ongoing unlawful situation and to provide restitution, but also 'general' measures aimed at eliminating the root causes and at preventing future violations.[44] As regards 'individual' measures, in some cases the ECtHR considers the appropriate remedy to be so self-evident that recourse to a lengthy discussion between the CoM and the respondent State would undermine the Court's 'principle of effectiveness.'[45] In *Assanidze v. Georgia*, the ECtHR reached the conclusion that the violation found (arbitrary detention) left no choice of remedy: the State had to release the applicant as soon as possible.[46] In a similar vein, possibilities of re-examination of administrative procedures must be considered.[47] Even though a conventional duty to this end is controversial,[48] the ECtHR, in order to restore the applicant to his prior position, has repeatedly appealed to respondent states to seek the possibility of re-opening judicial proceedings, where appropriate.[49] The CoM has endorsed this approach and encouraged states to ensure that adequate possibilities of the re-examination exist in those cases where the Court has declared a violation.[50] Remedies may also extend to 'general measures' like legislative acts.[51] This practice may be seen as a compensation for the lack of direct effect of ECtHR judgments[52] and fits in with a tendency of the Court to consider not only the state as a whole under the duty to comply with judgments, but all of its institutions, including the legislature.[53] The ensuing obligations may also entail a duty of domestic courts to ensure 'with diligence', having regard to legal certainty, the conventional standards.[54] Taken together with the process of monitoring compliance by the CoM, the indication and supervision of general measures amount to a concept of

---

[42] Starting from ECtHR, *Vermeire v Belgium*, 29 Nov 1991, Ser. A 214-C, § 28.

[43] ECtHR, *Papamichalopoulos et al v Greece*, 31 Oct 1995, Ser. A 330-B, § 34; *Scozzari and Giunta v Italy*, Rep. 2000-VIII, § 249.

[44] For the concept of restitution see D. Shelton, *Remedies in International Human Rights Law*, Oxford (OUP) 3rd ed 2015, pp. 298-314, see also A. Caligiuri and N. Napoletano, *The Application of the ECHR in Domestic Systems*, 20 Itl Yb Int'l L 2010, 125-159.

[45] ECtHR, *Scozzari and Giunta v Italy*, Rep. 2000-VIII, §§ 152-181.

[46] ECtHR, *Assanidze v Georgia*, Rep. 2004-II, § 181-184; *Ilaşcu et al. v Moldova and Russia*, Rep. 2004-VII, § 22; see also *Volkov v Ukraine*, Rep. 2013-I (reinstatement of a dismissed judge).

[47] ECtHR, *Da Silva and Hoogkamer v The Netherlands*, Rep. 2006-I.

[48] For this discussion see E. Klein, *Should the Binding Effect of the Judgments of the European Court of Human Rights be Extended?*, in P. Mahoney et al (eds.), The European Perspective – Studies in Memory of Rolv Ryssdal, Cologne (Heymanns) 2000, pp. 705-713.

[49] Cf. ECtHR, *Sejdovic v Italy*, Rep. 2006-II, § 127.

[50] CoM Recommendation R (2000) 2 of 19 Jan 2000.

[51] For a recent overview see N. Zimmermann, *Legislating for the Vulnerable? Special Duties under the ECHR*, 25 Swiss Rev Int'l & Eur L 2015, 539-562, at 543-553.

[52] D. Forst, *The Execution of Judgments of the European Court of Human Rights*, 7 Vienna J Int'l & Const L 2013, issue 3, p. 7.

[53] ECtHR, *Wille v Liechtenstein*, Rep. 1999-VII, § 46.

[54] ECtHR, *Fabris v France*, Rep. 2013-I, § 75.

'control of conventionality' for which these two institutions share responsibility.[55] An important role has also been assumed by the Parliamentary Assembly, which may draw the attention to judgments which have not been implemented, and, to a lesser extent, by the Commissioner for Human Rights.[56]

13. Since 2004, the ECtHR has established a new pattern of supervision to cope with its extensive backlog,[57] the 'pilot judgment' procedure designed to deal with repetitive cases deriving from 'systemic' problems.[58] The Court selects a representative case, suspends the processing of other cases dealing with the same issue, and specifies the 'general measure' that the state is supposed to take.[59] The basis of this obligation is the finding of a violation and its legal consequence that the state has to put an end to the situation that is in conflict with the Convention.[60] Appropriate means usually are either legislative measures[61] or the putting in place of essential infrastructure,[62] such as the construction or improvement of prisons.[63] Often, the Court contents itself in enumerating possible measures to be taken; it does so either in the *dispositif* or in the reasons of its judgments.[64]

14. With regard to the Inter-American compliance system, the lack of a provision in the ACHR providing for the execution of judgments by a political body has resulted in this supervision being conducted by the Court alone. The IACtHR asserts that monitoring state compliance with its judgments is an inherent attribute of its jurisdiction and regularly holds hearings and issues resolutions on compliance to this end.[65] Under its doctrine of 'control of conventionality', a state, under Article 2 ACHR, is required to give domestic effect to the provisions of the Convention and to determine whether its domestic laws

---

[55] Flauss (n. 37), pp. 37-38. The term 'control of conventionality' originated with the Inter-American system (*infra*).

[56] Forst (n. 52), pp. 22-24, 40-42, with references; see Parliamentary Assembly, Committee on the Honouring of Obligations and Commitments of the Member States of the Council of Europe (Monitoring Committee), The Monitoring Procedure of the Parliamentary Assembly, AS/Mon/Inf(2013)06rec3, 27 June 2013.

[57] The backlog has been reduced in the meantime; in 2012, there were still 151,600 cases pending before the Court; as of 31 March 2016, approximately 67,200 applications were referred to one of its formations.

[58] Beginning from ECtHR, *Broniowski v Poland*, Rep. 2004-V, § 83; see P. Leach et al., *Responding to Systemic Human Rights Violations*, Antwerp (Intersentia) 2010; as to 'quasi pilot judgments' (identification of systemic failure, but no suspension of cases and no indication of general measures) id., p. 24; for further analysis L.-A. Sicilianos, *The Involvement of the ECtHR in the Implementation of its Judgments*, 32 Neth Q Hum Rts 2014, 235-262.

[59] See, for instance, ECtHR, *Atanasiu et al. v Romania*, 21 Dec 2010, § 230.

[60] The pilot judgment procedure has been incorporated into the Rules of Procedure, which now provide that the ECtHR is to identify the remedial measures the State is required to take at the national level, Article 61 RoP ECtHR, as amended by the Court 21 Feb 2011, www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

[61] Like in ECtHR, *Greens and M.T. v UK*, Rep. 2010-VI (rights of prisoners to vote).

[62] Cf. ECtHR, *Driza v Albania*, Rep. 2007-V, § 123.

[63] As in ECtHR, *Ananyev et al.* v *Russia*, 10 Jan 2012.

[64] According to Article 61 § 4 RoP, the Court may set a time limit.

[65] Cf. as to its role in the execution process Article 65 ACHR, according to which the IACtHR "shall specify" cases to the General Assembly of the OAS "the cases in which a state has not complied with its judgments, making any pertinent recommendations".

comply with the provisions of the Convention as interpreted by the Court.[66] Compliance under Article 2 ACHR is interpreted by the IACtHR to mean that 'the state must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system.'[67] Despite the fact that Article 68 ACHR requires only that states comply with judgments in cases to which they are parties, under the control of conventionality doctrine the IACtHR has interpreted this to mean that all states parties are required to conform their national laws and jurisprudence to all the Court's judgments, including the reasoning. If a domestic law conflicts with the state's international obligations, the state is in violation of Article 2 ACHR and the Court may order the state to amend or repeal the law so as to comply with the treaty and provide for its execution. Absent implementing legislation, the IACtHR considers the ACHR self-executing and automatically incorporated into the domestic law of the states parties to the treaty; it determines that domestic laws that violate a right under the ACHR are without legal effect, such as amnesty laws that prevent the state from investigating, prosecuting and punishing human rights crimes.[68]

15. Individual and general measures ordered by the IACtHR result from an interpretation of the remedies clause (Article 63 ACHR) which, as opposed to the restriction on financial compensation found in Article 41 ECHR, explicitly spells out that 'consequences of the measure or situation that constituted the breach of [...] a right or freedom be remedied'.[69] The categories of such remedies ordered by the Court include restitution, rehabilitation, satisfaction, guarantees of non-repetition, the obligation to investigate prosecute and punish, compensation for material and moral damages and costs and expenses of bringing the case before the Inter-American system.[70] Restitution may mean the release of an individual illegally detained, the return of illegally seized property, protection for displaced victims to return to their homes, reinstatement of employment, the expunging of judicial, administrative, criminal or police records when a conviction has been reversed and the return of ancestral lands to indigenous groups.[71] In this vein, the IACtHR, in 1997, for the first time ordered the release of a civilian who had been convicted by a military court and then abused while in captivity.[72] In other cases the IACtHR annulled proceedings and ordered a retrial. For example, in the *Lori Berenson* case, the Court held that provisions of emergency laws adopted to deal with terrorism violated Article 2 ACHR, because they permitted the military to try civilians and demonstrated that the state had not taken the necessary domestic legal measures to give effect to the rights set forth in the ACHR.[73]

---

[66] See, for instance, *Almonacid Arellano v Chile*, 26 Sept 2006, Ser. C 154, § 124; summary also in IACtHR, Concurring Opinion of Judge *ad hoc* Ferrer Mac-Gregor Poisot, C*abrera García and Montiel Flores v. Mexico*, Ser. C 220, 26 Nov 2010.

[67] IACtHR, *La Última Tentación de Christo (Olmedo Bustos v Chile)*, 5 Feb 2001, Ser. C 73, § 87; *Trujillo Oroza v Bolivia*, 27 Feb 2002, Ser. C 92, § 96.

[68] IACtHR, *Barrios Altos v Peru*, 14 March 2001, Ser. C 75, op. § 4; *Almonacid Arellano v Chile*, 26 Sept 2006, Ser. C 154, § 119.

[69] For the different mandates of human rights bodies with respect to compensation see Shelton (n. 44), pp. 321-350.

[70] Shelton (n. 44), ch 10-14.

[71] For an overview see J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge (CUP) 2nd ed 2014, pp. 230-289.

[72] IACtHR, *Loayza-Tamayo v Peru*, 17 Sept 1997, Ser. C 33, § 87.

[73] IACtHR, *Berenson-Mejía v Peru*, 25 Nov 2004, Ser. C 119.

The state, after a change of regime and a number of ensuing judgments, annulled previous military court judgments and ordered retrials in civilian courts. In comparison, the IACtHR, for various reasons, responds to a considerable degree to systemic human rights violations, whereas the ECtHR in the vast majority of cases follows an individual justice pattern, so that general measures play a more important role for the former than it does for the latter.[74]

16. As for reparations, substantial moral damage, according to the ECtHR, result in higher compensation payments,[75] whereas they may entail in IACtHR jurisprudence a wide range of non-pecuniary remedies.[76] Such measures may be public acts or ceremonies in which the state acknowledges responsibility for the violations. Thus, the Court has demanded a public apology, publication and dissemination of the relevant parts of its judgment in the local newspapers, the creation of a memorial named after the victims, locating and identifying the victim's mortal remains and returning them to their families, and scholarships, literacy or vocational programs and housing for the living relatives of the victims, whom the Court also identifies as 'victims' due to their suffering as a result of the violation of the ACHR.[77] Similar in effect to the pilot procedure under the ECHR, if a pattern of human rights violations reveals a systemic problem likely to be repeated in the future and fundamental changes are not made, the IACtHR orders reparations that not only benefit the individual victims in the case but also bring about structural changes. Such remedies comprise capacity building by training public officials, legislative reform, reversal or execution of domestic court rulings and other non-legal measures such as improving prison conditions.

b) Quasi-judicial bodies

17. The UN treaty bodies have repeatedly used their powers to formulate in general observations how the respective conventions should be effectively implemented, as general comments by CEDAW, CRC, CAT, and CERD show.[78] In particular, the HRC, based on Article 40 § 4 ICCPR, which allows it to publish 'general comments as it may consider appropriate', specified compliance obligations by member states with regard to the treaty and its decisions. When it comes to complaint procedures, however, only five out of the ten treaty bodies could develop practice on a significant number of complaints so far: HRC, CERD, CEDAW, CAT and CRPD.[79] Among these institutions, HRC and CAT

[74] X. Soley, *The Transformative Dimension of Inter-American Jurisprudence*, in v. Bogdandy et al (n. 36).

[75] ECtHR, *Selmouni v France*, Rep. 1999-V, § 123.

[76] See the classification in 13 groups of remedies in the study by F. Basch et al, *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions*, 7 Sur 2010, n. 12, 9-35, at 12-14.

[77] Cf., i.a., IACtHR, *González et al v Mexico*, 16 Nov 2009, Ser. C 205, § 471 ('Cotton Fields').

[78] Cf. CEDAW, General Recommendation No. 6: Effective National Machinery and Publicity, 7th session 1988; CRC, General Comment No. 5, General Measures of Implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 Nov 2003; CERD, General Recommendation No. 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, 65th session 2005; CAT, General Comment No. 2, Implementation of Article 2 by States Parties, CAT/C/GC/2, 28 Jan 2008.

[79] The mechanism under CMW has not entered into force. CRC, CRPD, and CED have only recently started to operate and processed only a very small number of cases; SPT has a special jurisdiction for on-site inspections.

are probably the most pertinent in terms of numbers of cases and potential impact on domestic courts.[80] This section therefore concentrates on the implementation of findings of these bodies.

18. The Optional Protocol (OP) to the ICCPR, in Article 1, establishes the right to individual communications before the HRC for violations of civil and political rights as they are spelled out in the Covenant. The HRC is a 'quasi-judicial' body (see above, para. 3), which is, like the other UN treaty-based bodies, also competent to review the reports states have to submit regularly. The HRC uses the term 'decisions' for all types of final outcome of the procedure concerning an individual communication. If such a decision results in the finding on the merits, the treaty denotes it as 'views', which are to be forwarded to the state party in question and to the applicant (Article 5 § 4 OP). As of 1 September 2015, the HRC has adopted views in 1088 cases (with violations found in 922 cases); in addition, 645 cases were declared inadmissible, 368 discontinued or withdrawn, and 492 not yet concluded.[81]

19. Even though the HRC is not a human rights court, its views show some 'important characteristics of a judicial decision' such as their 'determinative character'.[82] Apart from the declaration of the alleged violations, the HRC has recommended remedies for a violation like the amendment of legislation, the release of unlawfully detained persons, or the payment of compensation.[83] Furthermore, in its follow-up procedure, it requests information from the state party about the measures taken to give effect to its views. To prevent irreparable harm, the HRC may decide on provisional measures.[84] The Committee on occasion has implied that its views are legally binding,[85] and appeared to be backed by the ICJ when it referred to HRC practice as 'jurisprudence',[86] even though the source of this legal obligation has never been explicitly defined or defended in any of the Committee's decisions on cases.[87] In General Comment Number 33 the HRC notes that 'the Optional Protocol [...] imposes obligations on states parties […] arising out of that procedure, in addition to their obligations under the Covenant' and stresses a duty of the states to cooperate with the Committee in good faith.[88] Instead of attributing explicitly binding force to its decisions, however, it has noted that its views 'represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument'.[89]

---

[80] CERD, CEDAW and CRPD address systemic problems of discrimination to be remedied predominantly by legislation and administrative practice. Violations are rarely found in complaint procedures, i.e. 15 by CERD, 15 by CEDAW and 5 by CRPD, numbers found http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx, 31 Oct 2015.

[81] HRC Report, UN GAOR 70, Supp. 40, Doc A/70/40, New York (UN) 2015, § 26.

[82] HRC, General Comment No. 33 (n. 30), § 11.

[83] For reference see S. Joseph et al., *The International Covenant on Civil and Political Rights*, Oxford (OUP) 2nd ed 2004, p. 24.

[84] Rule 92 of the Rules of Procedure of the HRC, UN Doc CCPR/C/3/Rev.10, 12 Jan 2012.

[85] Cf. HRC, *Roberts v Barbados*, CCPR/C/51/D/504/1992, 10 Aug 1994, Annex § 6.3.

[86] ICJ, *Ahmadou Sadio Diallo (Guinea v DRC)*, ICJ Rep. 2010, § 66; see further on the ICJ's confirmation of the authority of the HRC in interpreting the ICCPR Part I of this report, paras. 30-46.

[87] For further discussion M. Nowak, *CCPR Commentary*, Kehl am Rhein (Engel) 2nd ed 2005, Article 5 First OP, § 39.

[88] General Comment No. 33 (n. 30), §§ 3, 15 and 19.

[89] Id. § 13.

20. The HRC has not dealt with the domestic status of the Covenant. It follows a traditional international law pattern by leaving it to the member states as to how they ultimately live up to the standards set by the ICCPR. However, it has taken Article 2 ICCPR as a starting point to specify the obligations incumbent upon states to respect and to ensure the rights guaranteed by the treaty.[90] Accordingly, state parties are required to 'take the necessary steps to give effect to the Covenant rights in the domestic order'.[91] As to the judiciary, the ICCPR demands that every victim of a violation of a right in the Covenant must have access to an effective remedy, and this should include having his or her rights 'determined by competent judicial, administrative or legislative authorities [...] and to develop the possibilities of judicial remedy' (Article 2 § 3).[92] Thus, state parties are obliged to ensure that individuals and groups can invoke their rights under the ICCPR effectively.

21. However, it remains debatable how effective the mechanism of the Optional Protocol is for monitoring compliance with its own decisions. The HRC has assigned a committee member the task of 'follow-up' and occasionally of meeting with recalcitrant state representatives. But this procedure is opaque to the author of the communication who is not kept informed of the state's responses during these follow-up meetings, or even informed that such meetings have occurred. The lack of transparency in the follow-up procedure, and the lack of a sustained effort to keep the pressure on states who have failed to implement decisions – for example, by repeated, continuing meetings or open dialogue with state representatives dedicated specifically to follow-up of individual cases – diminishes the efficacy of, and respect for, the Committee's decisions.

22. Cooperation of the state party during procedures and in the follow-up is often unsatisfactory. In many cases, the HRC does not receive any response from the state party to communications or it witnesses rejection of its views after the ending of proceedings, which casts a deep shadow over the monitoring system of the HRC. When no response is at hand, the HRC considers the process as 'ongoing with a view to implementation'. However, it does not provide for any recourse if the state party does not participate or comply with the HRC's views. If a state party refuses to implement views under the Optional Protocol, the Committee publishes notice of the failure to implement the views. If the state violates interim or provisional measures, it directly violates the 'obligation to respect in good faith the procedure of individual communication established under the Optional Protocol.'[93]

23. The absence of any serious monitoring mechanism negatively affects the level of state compliance with the Committee's views. Part of the problem might be that the text of the Optional Protocol even lacks an express legal basis, so that the 'follow-up' mechanism was based on the doctrine of 'implied powers'. More importantly, the at times inconsistent and little transparent follow-up practice does not sufficiently persuade state parties to comply. Experience shows that states do not necessarily reject the rationale of the Committee's views, but they quite often assert that they do not have sufficient

[90] General Comment No. 31 (n. 27); for the self-executing character of the ICCPR see Y. Iwasawa, *Domestic Application of International Law*, 378 Recueil des Cours 2015, 9-261, at 36-41.
[91] Id. § 13.
[92] Id. §§ 15-19.
[93] Id. § 19.

domestic mechanisms of implementation. Thus, more persuasiveness in, and awareness of, decisions would contribute to the development of more consistent follow-up.

24. The CAT, which was set up in 1989, is responsible for the review of state reports, state complaints (which have not been raised so far), an inquiry procedure with respect to systematic violations, and, on an optional basis, individual complaints under Article 22 CAT. So far (15 Aug 2015), 272 out of 697 such complaints were decided on the merits, and 107 violations were found.[94] Findings on the merits are 'decisions' (Article 118 § 4 Rules of Procedure).[95] The CAT in those cases does not only state if a violation was found, but also refers to Article 118 § 5 RoP, according to which it may invite the respondent state to inform it about measures of relief, when it sets out specific measures to be taken such as interim relief, investigation, prosecution, and punishment of the responsible and compensation of the victims.[96] Like the HRC, the CAT has instituted a follow-up dialogue with the state parties.

25. However, the record of compliance with its decisions is disappointing. In complaint procedures, states too often fail to respond to communications. Only in 47 out of the 101 cases where violations were found, a satisfactory resolution has been achieved.[97] The review of state reports (Article 19 CAT) and the response by member states to the recommendations made by the CAT in the course of the reporting procedure have raised concerns as to the effectiveness of CAT and its protection mechanism. One of the issues raised most often is the lack of incorporation of the Convention into domestic law, be it that no statute of transformation is enacted, that the definition of torture has not been incorporated into domestic law, or that penal law and procedural law have not been duly amended.[98]

26. The IACHR (para. 4) was modelled on the now defunct European Commission, but unlike its European counterpart, was originally created by political resolution and not by treaty, in 1959. The Commission was 'recreated' with a 'legal basis' when the ACHR entered into force in 1978. All member states of the OAS recognise its competence to receive complaints under the ADRDM. In admissible cases, the IACHR may negotiate 'friendly settlements' between the parties; in serious and urgent cases, it may grant precautionary measures; it may issue decisions on the merits; and it may take a case to the IACtHR if the state fails to comply with the recommendations in its merits report. Although the ADRDM is not a legally binding instrument, the IACtHR has declared it 'a source of international obligations' for the member states of the OAS.[99]

27. The African Commission on Human and Peoples' Rights (AfCHPR), like its regional counterparts, is a quasi-judicial body established under Article 30 of the African Charter

[94] Status of communications dealt with by CAT under Article 22 Procedure as of 15 Aug 2015, available at www.ohcr.org/en/hrbodies/cat/pages/catindex.aspx.

[95] Rules of Procedure of the CAT, UN Doc CAT/C/3/Rev.6, 13 Aug 2013.

[96] Cf., for example, CAT Comm. 456/2011, *Hernández Colmenarez and Guerréro Sanchez v Venezuela*, 15 May 2015, § 8.

[97] CAT Report, UN GAOR 70, Supp. 44, Doc A/70/44, New York (UN) 2015, § 82.

[98] Cf. R. McQuigg, *How Effective is the United Nations Committee Against Torture?*, 22 EJIL 2011, 813-828.

[99] IACtHR, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,* Advisory Opinion, 14 July 1989, Ser. A 10, § 45.

(see para. 4) to interpret the African Charter and promote and protect individual human rights as well as the collective rights of peoples. Consonant with the communitarian nature of traditional African culture Article 29 of the African Charter also provides for duties incumbent upon peoples. The AfCHPR reports to the Assembly of Heads of State and Government of the African Union. States and individuals of 53 member states (except South Sudan) of the African Union may direct communications of alleged violations of the African Charter to the AfCHPR. With the creation of the African Court on Human and Peoples' Rights,[100] the Commission also submits cases to the Court. While the Commission's decisions are not legally binding on the AU member states, judgments handed down by the Court are binding upon parties to the case at hand. In addition to the African Charter, the Court has subject matter jurisdiction to interpret and apply any "relevant Human Rights instrument ratified by the States concerned". This broad subject-matter jurisdiction allows for the direct application of, amongst others, AU human rights treaties in addition to the African Charter, including the African Charter on the Rights and Welfare of the Child and the African Protocol on the Rights of Women in Africa.[101]

3) The obligation to comply with jurisprudence in matters of human rights when the State was not a party to the litigation

28. As far as human rights treaties address the effect of decisions of the competent bodies, the wording confines their binding force to the parties to the case decided (Articles 46 ECHR, 68 ACHR). The pilot judgment procedure in the European system is no exception to this rule. Even though it extends consequences of a judgment to like cases stemming from complaints with the same root cause, the legal effects are limited to the same respondent state. In other words, there is no formally binding effect of decisions by human rights courts on states not party to the procedures (*erga omnes*). This can similarly be said of final decisions by quasi-judicial bodies in complaint procedures.

29. The consequence is that there is no rule of international law that prevents states from failing to adhere to human rights decisions in cases in which they were not a party. One rationale for this is that otherwise new complaints in similar cases would be *res judicata* and hence inadmissible. Furthermore, human rights jurisprudence is not homogeneous, often fragmented and, due to the evolutive approach taken by some human rights bodies, subject to change. Finally, the exclusion of an *erga omnes* effect opens opportunities, provided that courts act in a cooperative spirit. A case in which a domestic supreme court decides not to follow the jurisprudence of an international human rights body with good reasons may initiate a judicial dialogue that ends up clarifying old, or even creating new, interpretations of the human rights treaty.[102]

---

[100] The Court was created under the Protocol to the Charter of 1998 (n. 12).

[101] African Charter on the Rights and Welfare of the Child of 11 July 1990, OAU Doc CAB/LEG/24.9/49 (1990), in force 29 Nov 1999; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 11 July 2003, in force 25 Nov 2005, reprinted in M.S. Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women*, 1 Afr Hum Rts L J 2001, 40-64, at 53.

[102] An example is the judgment of the Supreme Court of the United Kingdom, *R v Horncastle*, [2009] UKSC 14, § 11, which changed the ECtHR's evaluation of hearsay evidence in criminal proceedings; see ECtHR, *Al-Khawaja and Tahery v UK*, Rep. 2011-VI, §§ 146-147.

30. However, even though the primary function of judgments of human rights courts and decisions of quasi-judicial bodies is to grant legal protection to the applicants in a specific case, they have a leading role to play in providing orientation for similar future cases in other states.[103] Thus, according to the ECtHR, its judgments do not only serve as a remedy in individual cases, but also to establish a general standard of protection for all parties to the ECHR,[104] which it considers a 'constitutional instrument of European public order'.[105] The Court bases this claim to a general normativity of its jurisprudence on its mission under Article 19 ECHR, 'to ensure the observance of the engagements undertaken' by the states parties to the ECHR. Accordingly, member state courts have to take judgments, recommendations and observations by the competent bodies into account to the broadest extent possible.

31. The CoM *Guide to Good Practice* of 2013 notes that a party to the ECHR is 'obliged under Article 1 to secure the Convention rights to everyone within its jurisdiction, and under Article 46 to implement final judgments of the Court in cases to which it is party. Insofar as the Court is encouraged to be consistent in its interpretation of the Convention, it is advisable for all branches of the State, including national courts and tribunals, to have regard to the Court's settled interpretation of the Convention in cases against all High Contracting Parties. This can help prevent violations of the Convention. The effectiveness of a domestic remedy can also be significantly enhanced if it is able to respond to the Court's evolving interpretation of the Convention, in accordance with the living instrument doctrine, without waiting for this to be specifically reflected in the finding of a violation against the relevant High Contracting Party.'[106] It is also stated that a proper interpretation of the Convention by a national court or tribunal might not be possible without having regard to the jurisprudence of the ECtHR. In the same vein, the new Protocol (No. 16) to the ECHR provides for the highest courts of the ratifying parties the option to request an advisory opinion by the ECtHR on a pending case.[107] The general comments and observations by the competent UN treaty bodies may play a comparative role in judicial or quasi-judicial dialogue. If the national system permits, it is the role of counsel to draw the attention of domestic courts to the jurisprudence developed in the scope of a treaty to which the respective state is a party.

32. Thus, even though there is neither *stare decisis* nor formal *erga omnes* effect of decisions, domestic authorities must accord full consideration to the interpretation adopted by the respective competent international courts for the system to achieve coherence.[108] With respect to the European system, full consideration signifies that domestic courts and

---

[103] Cf. British Human Rights Act 1998 Sec 2 (1).

[104] Cf. ECtHR, *Ireland v UK*, 18 Jan 1978, Ser. A 25, § 154; *Karner v Austria*, Rep. 2003-IX, § 26; see also L.R. Glas, *The theory, potential and practice of procedural dialogue in the European Convention on Human Rights system*, Antwerp (Intersentia) 2016.

[105] ECtHR, *Loizidou v Cyprus* (preliminary objections), 23 March 1995, Ser. A 310, § 7; see also *Bosphorus v Ireland*, Rep. 2005-VI, § 154 ('peremptory character').

[106] Note 23, reference omitted.

[107] Protocol No. 16 to the ECHR, 2 Oct 2013, CETS No. 214.

[108] On the notion of *res interpretata* see J. Gerards, *Advisory opinions, preliminary rulings and the new Protocol No. 16 to the ECHR: A Comparative and Critical Appraisal*, 21 Maastr J Eur & Comp L 2014, 630-651, with references.

other state authorities take full cognizance of the interpretation by the ECtHR.[109] Also regarding the other protection systems, courts should give effect to the decisions taken by the competent international bodies and follow their interpretation, unless they provide convincing arguments for a different understanding.

D. CONTENTS OF 'GOOD FAITH' COMPLIANCE AND 'GOOD' OR 'BEST PRACTICE'

1) 'Good Faith'

33. The source of the obligation of the state parties to implement judgments is the respective human rights treaty itself. With respect to third states, their duty to duly consider decisions by human right bodies derives from the underlying treaty obligations and the duty to apply and interpret them in good faith (Articles 26 and 31 VCLT, see para. 5 above). The ECtHR derives from good faith,[110] the IACtHR from the object and purpose of human rights treaties[111] the obligation of the state parties to execute its decisions. HRC General Comment number 33 refers to good faith when stressing the duties of states to cooperate in complaint proceedings and to implement their decisions.[112] The CAT Rapporteur on follow-up noted that, even though the decisions of CAT may not be strictly mandatory, states parties had an obligation to comply with them in good faith.[113]

34. When the European Court and a UN human rights treaty body, like CAT, issue contradictory jurisprudence, the state generally appears to follow the European Court since it is a judicial body that issues legally binding judgments. Australian courts held that under its domestic Foreign State Immunity statute, they could not hear a civil suit against foreign state officials in the case of torture committed abroad,[114] thus ignoring decisions and general comments of the CAT that Article 14 should have extraterritorial application, and suggesting a claim of state immunity would be incompatible with the obligations assumed by state parties under the Convention.[115] This practice follows similar cases in the UK, Canada and New Zealand.[116] While the ECtHR, which in *Jones v. United Kingdom*

---

[109] For an example see Forst (n. 52), pp. 10-11 (adjustments to the French legal order after an ECtHR judgment in a Turkish case, cf. Conseil Constitutionnel, *Daniel W et al*., No. 2010-14/22, 30 July 2010, JO 2010, 14198).

[110] ECtHR, *VgT Verein gegen Tierfabriken v Switzerland (No. 2)*, Rep. 2009-IV, § 87; cf. also X.-B. Ruedin, *L'exécution des arrêts de la Cour européenne des droits de l'homme: procédure, obligations des Etats, pratique et réforme*, Brussels (Bruylant) 2009, p. 122.

[111] IACtHR, *Hilaire et al v Trinidad and Tobago*, 21 June 2002, Ser. C 94, § 83; *Indigenous Community Yakye Axa v Paraguay*, 17 June 2005, Ser. C 125, § 107.

[112] General Comment No. 33 (n. 30), §§ 15, 19; see also General Comment No. 31 (n. 27), § 3.

[113] CAT, 36th sess., summary record of the 717th mtg., CAT/C/SR.717, 1 June 2006, § 65.

[114] New South Wales SCt, *Zhang v Zemin*, 14 Nov 2008, 251 ALR 707; *affirmed* New South Wales Ct of Appeals, *Zhang v Zemin*, 5 Oct 2010, [2010] NSWCA 255.

[115] Concluding Observations, 7 July 2005, CAT/C/CR/34/CAN, §§ 4 (g) and 58 (f); for the question of exterritorial application see M. Nowak and E. McArthur, *The United Nations Convention Against Torture*, Oxford (OUP) 2nd ed 2008, Article 14, §§ 96-98.

[116] Superior Ct Ontario, *Bouzari v Iran*, 1 May 2002, 124 ILR 427; Ontario Ct of Appeals, *Bouzari v Iran*, 30 June 2004, 71 OR (3rd) 675; House of Lords, *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya as Saudiya et al.*, 14 June 2006, [2006] UKHL 26 (where CAT observations are dismissed as mere recommendations); High Ct New Zealand, *Fang v Jiang*, 21 Dec 2006, 141 ILR 702.

upheld the immunity of states and state officials from civil suits for torture in foreign courts,[117] appears to affirm the position taken by these domestic courts, it is a matter of concern when the interpretation by CAT, the responsible body under the Convention against Torture, is not even considered.[118]

35. As the ILA Human Rights Committee concluded earlier, decisions by human rights bodies constitute subsequent treaty practice in the sense of Article 31 § 3 (b) VCLT and have to be taken into account in the process of interpretation.[119] Thus, even as far as decisions may not be formally binding in themselves, the jurisprudence developed by these bodies constitutes *res interpretata* within the treaty system accepted by the state. For domestic courts, giving serious consideration to them is a matter of preventing a determination of the international responsibility of their states and thus of good faith implementation. With respect to the decision of quasi-judicial bodies, the minimum good faith obligation is to guard the object and purpose of the respective treaties, which means that the essential contents of the guarantees be respected, to protect the most vulnerable and to prevent irreparable harm to persons, which may mean that provisional measures are required until the matter is settled or decided.

2) 'Good Practices'

36. The fact that the judgments and decisions of human rights bodies generally refer to obligations of result, that the duty to prevent human rights violations implies that due diligence standards be observed, the lack of a strictly binding *erga omnes* effect of decisions, the disputed legally binding character of quasi-judicial human rights bodies and the rather vague good faith basis of obligations, all indicate that it is not always possible to spell out clear-cut obligations, which the decisions of the competent bodies would entail, particularly with respect to states not parties to the case. On the other hand, the more imminent threats to human rights affecting standards protecting the very existence of the human being and the more imminent the danger of irreparable harm, the less flexibility can there be in living up to treaty obligations as are specified by the interpretation of the competent bodies.

37. When standards were adopted in the past by expert groups or international organizations with a view to elaborating such an approach to a routine of compliance, they have

[117] ECtHR, *Jones v UK*, Rep. 2014-I.

[118] See the reaction by CAT in its Concluding Observations on the report by Canada, CAT/C/CAN/CO/6, 25 June 2012, § 15; General Comment No. 3, Implementation of Article 14 by states parties, CAT/C/GC/3, 13 Dec 2012, § 42.

[119] ILA, International Human Rights Law and Practice: Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, in: Report of the Seventy-First Conference in Berlin, London (ILA) 2004, p. 621, § 21; as to subsequent practice see the work initiated in 2008 of the ILC working group Treaties over Time – Subsequent agreement and subsequent practice in relation to interpretation of treaties, http://legal.un.org/ilc/guide/1_11.shtml.

been referred to as principles,[120] recommendations,[121] guidelines,[122] or guides to good practice.[123] The denomination does not necessarily imply a certain method of identification of such standards. However, the term 'principles' seems to suggest a certain level of normative abstraction, whereas 'good practice' identifies a certain conduct.[124] To identify an ideal type of such conduct, valid for all protection systems and all countries subscribing to them, necessarily results in an exercise of concentrating on universal minimum requirements for which the term 'good practice' recommends itself rather than to speak of 'best practice'. The method of identifying such practice may either be to seek model-type behaviour or, conversely, to point at shortcomings and possible means of improvement.

38. The approach taken here is to draw inspiration from various sources and to try to identify a basic set of 'good practices' relevant for domestic courts. Even though the concept of 'good practice' can be still vague, it can be rooted in international discourse. While it may be possible to connote the minimum obligations of states, there certainly exist practices which are preferable. Even if states are not strictly obliged to follow them, good practices reveal preferable options for realizing the object and purpose of human rights treaties and to fill *lacunae* in domestic law. Such practices may be identified both by deduction and inductively, i.e. on the one hand, by the interpretation of human rights treaties and relevant decisions with a focus on the best interest of the individual, and on the other hand, by study of various countries which may provide clues to preferable options. Whether they prove practicable may depend on factors like the overall constitutional set up of the state in question and of institutional as well as financial resources. In other words, the existence of various conceptions of good practices does not deny the usefulness of the concept as such.

---

[120] UN General Assembly: Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006; HRC: General Comment No. 31 (n. 27), § 1; UN experts: Report of the independent expert to update a Set of Principles to combat impunity, E/CN.4/2005/102, 18 Feb 2005 (so-called Orentlicher principles); group of domestic court judges: Bangalore Principles, Concluding statement of the Judicial Colloquium held in Bangalore, India, from 24-26 Feb 1988; groups of scholars: Limburg Principles on the Implementation of the ICESCR, 2-6 June 1986; Maastricht Principles on Exterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 29 Feb 2012; Draft Principles and Guidelines on the Role of Parliaments in the Protection and Realisation of the Rule of Law and Human Rights, in M. Hunt et al (eds), *Parliament and Human Rights*, Oxford (Hart) 2015, pp. 485-500.

[121] OHCHR, Judicial Colloquium on the Domestic Application of International Human Rights Norms, Outcome Document, Bangkok, 23-25 March 2009.

[122] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 22-26 Jan 1997 (experts); Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations CM(2011)13, adopted 4 April 2011, CM/Del/Dec(2011)1110; Guidelines against Intimidation or Reprisals ('San José Guidelines') HRI/MC/2015/6, 30 July 2015 (Chairs of the UN human rights treaty bodies).

[123] Guide to good practice in respect of domestic remedies (n. 25).

[124] As it was done by the CoE in the wake of the so-called Interlaken process, see CM (2012) 167, annex 4.3, CDDH report on measures taken by the member States to implement relevant parts of the Interlaken and Izmir Declarations, 17 Dec 2012.

39. With respect to the judiciary, in its *Guide to Good Practice* (2013) the Council of Europe's Committee of Ministers stressed the importance of dialogue between the ECtHR and national courts: 'This operates not only through meetings between judges, but especially through the exchange of ideas and principles as expressed in judgments. If national courts and tribunals can have regard to the Convention principles and the Court's jurisprudence, they can discuss these in their judgments, and the Court in turn can then both influence and be influenced by this analysis. This enriches and extends the effect of the Court's role of authoritatively interpreting the Convention.'[125]

E. COUNTRY BASED CASE STUDIES

40. The Committee is conscious of the fact that wide gaps may exist between laws and judgments on the one hand and the factual situation with respect to human rights on the other hand. There may be countries in which the judiciary holds human rights in high esteem whereas, at the same time, politics and public authorities systematically neglect or even violate them. On the other hand, courts in states with an overall acceptable civil rights record may set aside human rights treaties, convinced that their legal orders should serve as a paradigm for others. Good practice, however, starts with good law, and neglect of international treaty obligations is more likely to serve as a bad example than as model type conduct. Thus, in order to identify good practices, the Committee has undertaken to examine questions of compliance in a selection of specific contexts, of particular states, and in relation to particular human rights instruments and decision-making bodies, in particular domestic courts. The present study seeks to examine, *inter alia,* how states and most particularly, domestic courts, interpret their obligations under international decisions dealing with human rights.

41. In so doing, this Report starts from the assumption, as studies suggest, that ratification of human rights treaties leads to better rights protection.[126] Taking other studies into account which take a sceptical view at this observation[127] and bearing in mind that several constitutional and supreme courts consider their domestic constitutional framework as decisive in the last resort, this is a less obvious point of departure than one might assume. The assumption is nevertheless supported by the fact that international treaty law creates obligations which add to domestic protection schemes since, upon their ratification, it is no longer up to the state alone whether rights are publicly recognised as binding obligations and if violations are declared.[128] The local remedies rule, the principle of subsidiarity and the margin of appreciation that human rights bodies underscore that the primary obligation to respect and ensure human rights is with the states parties themselves. In assuring the best protection of the human rights of the individual, both constitutions and treaties have their roles to play, which advocates for leaving space to a productive judicial dialogue without raising claims of predominance of one over the other.

42. The following sections highlight various factors which are of importance with respect to the status human rights have in domestic legal orders in general and, as a consequence, for domestic courts in particular. Such factors are: the relationship among

[125] Guide to good practice in respect of domestic remedies (n. 25), p. 55.

[126] B.A. Simmons, *Mobilizing for Human Rights – International Law in Domestic Politics*, Cambridge (CUP) 2009, p. 351.

[127] O. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L J 2001, 1935-2042.

[128] Cf. E. Benvenisti and A. Harel, *Embracing the Tension between National and International Human Rights Law: The Case for Parity*, Global Trust Working Paper Series No. 02/2015, pp. 14-22.

national constitutions, international human rights treaties and domestic laws; the direct or indirect effect of human rights treaties in national law; the status of decisions of human rights courts and quasi-judicial bodies; how states and legal orders respond to the finding that a violation of human rights has taken place; and the extent to which domestic courts follow the practice of human rights bodies even if such practice concerns findings with respect to third states. If a state has not recognized the jurisdiction of such bodies to hear complaints, it is of interest how they respond to judgments of the ICJ with an impact on human rights, as they have been dealt with in Part One of the present report.

43. The present report examines the implementation and compliance with judgments in a selection of cases before the UN human rights treaty bodies, the ECtHR and the IACtHR in 20 countries.[129]

1) Argentina

44. Following a monist approach, the Argentine constitution, since a reform in 1994, distinguishes between two categories of treaties.[130] While treaties generally are subordinate to the constitution, but prevail over statute law, a set of key human rights instruments was incorporated into the constitution and shares its rank. Among them are, according to Article 75 § 22, ADRDM, UDHR, ACHR, ICCPR and its Optional Protocol, as well as the other major UN treaties except CMW and CED.

45. The Argentine Supreme Court accordingly interprets the obligation of the judiciary to harmonize the provisions of these treaties with those of the constitution.[131] The courts apply the treaties as they are interpreted by the competent courts, in particular under the ACHR, also in cases to which Argentina had not been a party. An example is the *Barrios Altos* case, in which the IACtHR held Peruvian amnesty laws to be incompatible with Peru's obligations under the Convention.[132] Based on this judgment, the Supreme Court declared Argentine amnesty laws to be 'constitutionally intolerable', despite the fact that the amnesty laws had been declared constitutional in an earlier 1987 Supreme Court decision.[133] Decisions of quasi-judicial bodies, by contrast, are not considered as binding, but provide interpretive guidance for judicial practice.[134]

---

[129] It is to be noted that regional courts, in particular the Court of Justice of the European Union (ECJ), have developed their own fundamental human rights jurisprudence drawing from human rights treaties which has an impact on domestic law. However, they are not included in this report since these regional organisations are not yet parties to human rights conventions. An exception is the EU's accession to CRPD, OJEU 2010 L 23/35. The project of the EU to ratify ECHR is suspended, due to ECJ Opinion 2/13, 18 Dec 2014, EU:C:2014:2475.

[130] J.A. Travieso, *Los derechos humanos en la Constitución de la República Argentina*, Buenos Aires (Ed. Univ de Buenos Aires) 2000; A. Gil Domínguez, *Constitución y derechos humanos*, Buenos Aires (Ediar) 2004.

[131] Corte Suprema de Justicia, *Chocobar v Caja Nacional*, 27 Dec 1996, Fallos:319:3241; *Cancela*, 29 Sept 1998, Fallos:321:2637; see O. Lo Prete, *The Protection of Religious Freedom by the National Constitution and by Human Rights Treaties in the Republic of Argentina*, 35 BYU L Rev 2009, 673-695, at 688-693.

[132] IACtHR, *Barrios Altos v Peru*, 14 March 2001, Ser. C 75.

[133] Corte Suprema de Justicia, *Simón et al.*, 14 June 2005, Fallos:328:2056; *Lilo et al*, 13 July 2007, Jur Arg 2007-III-573. A restatement of cases on human rights is found in Corte Suprema de Justicia de la Nación – Secretaria de Jurisprudencia, Delitos de lesa humanidad, Buenos Aires (CSJN) 2009.

[134] See, with respect to the IA Comm'n HR, Corte Suprema de Justicia, *Acosta et al*, 22 Dec 1998, Fallos:321:3555.

2) Australia

46. Australia has ratified most of the UN human rights instruments. It has also accepted the right of individual complaints under OP ICCPR and Article 22 CAT. However, these treaties only take direct effect on the domestic plane if transformed by 'enabling' legislation passed according to the external affairs power of Section 51 (xxix) of the constitution.[135] While such laws were enacted with respect to CEDAW and some of the obligations following from CERD, no such statute directly implements ICCPR, ICESCR, CAT, CRC and CRPD. As an implementation mechanism, the 2011 Human Rights (Parliamentary Scrutiny) Act was passed which requires bills to include a statement of compatibility with human rights standards and sets up a specialized Parliamentary committee with the task of review. The Human Rights Commission, which has existed since 2009 and was created under a different name before, is empowered to investigate and to conciliate complaints on various discrimination grounds and with respect to specific treaties among which ICCPR and CRC, but not the other UN human rights treaties are enumerated.

47. Human rights thus are in force, as far as they are adopted by legislation, on the rank of statute law.[136]Absent an act of transformation, human rights treaties serve as reference for the interpretation of Australian law before courts.[137] As the example referred to above has demonstrated, however, interpretations given to the conventions by treaty bodies are at times not considered as authoritative (see para. 34).[138]

3) Bangladesh

48. Bangladesh is a party to the basic UN human rights conventions, with the exception of CED, but has accepted jurisdiction for individual complaints only for CEDAW and CRPD. It belongs to the countries which have not yet submitted the initial report for review procedures according to the ICCPR to which it acceded in 2000. Like other commonwealth countries, Bangladesh adheres to a dualist approach. Therefore, its human rights obligations become effective on the municipal plane only if they are formally enacted as domestic law.

49. In this vein, the Supreme Court of Bangladesh referred in a case of 2008 to the ICCPR, but noted that 'our courts will not enforce the covenants and convention even if ratified by the State unless these are incorporated in municipal laws.'[139] In a 2013 decision, the same Court noted that while the state remained bound to honour a treaty it is party to, it was a different question whether the judiciary would follow and act in accordance with treaty stipulations in the absence of statutory command to that effect. Rather, it would take in aid ratio or observation made by the tribunals that were created

[135] High Court of Australia, *Commonwealth v Tasmania*, 1 July 1983, (1983) 158 CLR 1; *Kioa v West*, 18 Dec 1985, (1985) 550 CLR.

[136] In Federal Court of Australia, *Toben v Jones*, 27 June 2003, [2003] FCAFC 137, the Court was confronted with the argument that a statute went further than CERD required and was hence unconstitutional; only in rejecting this claim, it reviewed the statute law against CERD.

[137] High Court of Australia, *Mabo et al v Queensland* (No. 2), 3 June 1992, (1992) 175 CLR 1.

[138] For a comprehensive survey see B. Tronson, *Courts and their responses to human rights developments*, in: Australasian Institute of Judicial Administration (ed.), Australian Courts: Serving Democracy and its Publics, Melbourne (AIJA) 2013, pp. 245-264.

[139] Supreme Court of Bangladesh, Appellate Division, *Government of Bangladesh v. Sheikh Hasina et al.*, 5-6 Feb 2008, V ADC (2008) 541.

by the UN in the same way it consulted decisions of the superior courts of other states like the UK, India, or Pakistan and treat them as persuasive authorities where appropriate.[140]

4) Brazil

50. In 2004, Brazil reformed its legal system through a constitutional amendment by which a specific procedure for the incorporation of human rights treaties has been created (Article 5 § 3 of the Constitution).[141] The treaties that undergo this novel procedure, as did CRPD, now have constitutional status. However, there is still debate on the legal force of human rights treaties that were incorporated before the reform, which include ACHR and most core universal human rights instruments. According to a Supreme Court judgment which, i.a. under the influence of IACtHR case-law, departs from earlier jurisprudence, these treaties do not have legal, but 'supra-legal' status.[142] Even though this does not amount to constitutional rank, it appears that now statute law could be subject to review of compatibility with human rights law. However, in a case on an amnesty law, the Supreme Court refrained from making use of such an option,[143] so that conventionality control demanded by IACtHR was not applied.[144] Thus, there is not yet a clear doctrine as to the effect of supra-legality.

51. Therefore, even though the mobilizing effects of decisions and judgments under the Inter-American system are acknowledged,[145] with regard to the overall application of human rights by the executive, legislative and judiciary, a clear theory of how far human rights take precedence over any other political or national interest has yet to be created and followed. The issue has gained relevance in recent controversies between Brazil and the Inter-American system, especially with the latter questioning political decisions by the Brazilian government – as happened in the Belo Monte Dam case.[146]

5) Canada

52. Canada is not a party to the ACHR, but to most UN treaties including the complaint procedures under ICCPR and CAT. As a dualist system, Canadian law requires

---

[140] Cf. Supreme Court of Bangladesh, Appellate Division, *Abdul Quader Molla v. Government of Bangladesh*, 17 Sept 2013, Crl. A. No. 25, pp. 44-160, in a case concerning crimes against humanity.

[141] See M. Franca and L. Jubilut, *International Human Rights in Brazil and the dialogue with the Inter-American system*, in Kadelbach, Rensmann and Rieter (n. 18); A. Moreira Maués, *Supra-Legality of International Human Rights Treaties and Constitutional Interpretation*, 10 Sur 2013, No. 18.

[142] Supremo Tribunal Federal, Recurso Extraordinário no. 466.343, 3 Dec 2008.

[143] Supremo Tribunal Federal, Arguiçao de Descumbrimento de Preceito Fundamental no. 153, 28 April 2010; cf. L. Ayres França, *The IACtHR Gomes Lund et al judgment and the Brazilian Federal Supreme Court judgment on the constitutionality and conventionality of the 1979 amnesty law*, 7 Int-Am & Eur HR J 2014, 141-158.

[144] IACtHR, *Gomes Lund ('Guerrilha do Araguaia') v Brazil*, 24 Nov 2010, Ser. C 219, § 176.

[145] With respect to violence against women P. Spieler, *The Maria da Penha Case and the IACHR: Contributions to the Debate on Domestic Violence Against Women in Brazil*, 18 Indiana J Glob Leg Stud 2011, 121-143; with respect to the treatment of psychiatric patients C.M. Rosato and L. Cerquieira Correia, *Caso Damião Ximenes Lopes: Mudanças e desafios após a primeira condenação do Brasil pela Corte Interamericana de Direitos Humanos*, 8 Sur 2011, 93-113.

[146] IA Comm'n HR, *Indigenous Communities of the Xingu River Basin, Pará*, PM 382/10, 1 April 2011 (precautionary measures).

that human rights treaties be incorporated into domestic law.[147] There is a presumption that courts should strive to interpret domestic law in conformity with Canadian international legal obligations insofar as domestic law permits. In practice, both customary and conventional international legal obligations of Canada are used to assist in interpreting and applying domestic law.[148] This is particularly true in the case of the interpretation of Canada's constitutional human rights embodied in the Canadian Charter of Rights and Freedoms.

53. Thus, international human rights law may be used to interpret the content of the rights and freedoms guaranteed by the Charter, the interpretation of limits on those rights, and the balancing of competing rights. A majority opinion of the Supreme Court in 2011 states: 'Charter rights *must* be interpreted in light of Canadian values and Canada's international and human rights commitments.'[149] In some cases, courts have invoked interpretations of treaty obligations by international monitoring bodies.[150] Nevertheless, this willingness to seek interpretive guidance from international human rights law will not overcome a direct conflict between domestic and international law.[151] An example is the communication of *Waldman v. Canada* in which the HRC found a violation of Article 26 ICCPR because of discriminatory funding of religious schools by laws in Ontario.[152] Canada has refused to implement the decision, and claimed that divided jurisdiction as a federal state has made it impossible to do so by provincial recalcitrance. Even though the ICCPR does not permit claims that federalism can be invoked to reduce state obligations and the non-existence of federal remedies has been disputed, the Supreme Court of Canada has not reversed earlier decisions in this context to bring Canadian law into conformity with the HRC decision.[153] Canada's non-compliance, therefore, shows up on a regular basis in the 'unsatisfactory' column of the HRC's annual report.

6) China

54. The case of the People's Republic of China (PRC) is of particular interest since the country is, also by its representatives, depicted as an alternative model with a genuine, non-Western approach to human rights law.[154] Despite different understandings of the official Chinese position in the Western world, the PRC formally accepts the notion of universality of human rights.[155] It has ratified six out of the nine UN human rights treaties, ICCPR, CMW and CED being those not binding on the PRC. However, official statements stress that the emphasis in Chinese legal thought traditionally is on obligations towards others rather than on individual rights, and declare two caveats: that the principle

[147] Information on this section was provided by HRLC member Anne Bayefsky.
[148] Supreme Court of Canada, *Baker v Canada (Minister of Citizenship and Immigration)*, 4 Nov 1998, [1999] 2 SCR 817, §§ 69-87.
[149] Supreme Court of Canada, *Ontario (Attorney General) v Fraser*, 29 April 2011, [2011] 2 SCR 3, § 92, emphasis original.
[150] Supreme Court of Canada, *Canadian Foundation for Children v Canada (AG)*, 30 Jan 2004, [2004] 1 SCR 76, consulting interpretive practice of CRC.
[151] B. Oliphant, *Interpreting the Charter with International Law: Pitfalls & Principles*, Appeal 19 (2014), 105-129, at 119.
[152] HRC, *Waldman v Canada*, Comm. 694/1996, 5 Nov 1999.
[153] Like *Adler v Ontario*, 1 Nov 1996, [1996] 2 SCR 609.
[154] B. Ahl, *The Rise of China and International Human Rights Law*, 37 HRQ 2015, 637-661.
[155] J. Zhao, *China and the Uneasy Case for Universal Human Rights*, 37 HRQ 2015, 29-52.

of sovereignty prevailed over international human rights, so that they are not recognized as a sufficient reason for intervening into what is considered a domestic affair;[156] and that the right to subsistence and development were given greater weight under the present conditions.[157]

55. Since the Chinese constitution is silent on treaties, their domestic status is unclear and varies according to subject-matter. Human rights treaties have not been transformed into internal law so they do not form part of the sources of law to be applied by courts. Even though the 1982 constitution and later amendments subscribe to fundamental rights, they are not as inclusive as human rights treaties,[158] are subject to the limitation of collective interests (Article 51) and, as a rule, cannot be invoked before courts. Some of the areas covered by statute law take up matters which also fall into the purview of human rights. The General Principles of Civil Law (Article 142) and the Civil Procedure Code (Article 238) demand priority of international treaties in case of conflict with civil laws, which might be read as to open domestic law for human rights. However, with respect to human rights-related administrative law complaints, a general perception of judicial corruption and of a lack of independence is considered to be a constant source of distrust. Even in matters such as criminal law and criminal procedure where special laws protecting rights exist, courts reportedly take human rights treaty law or general comments by treaty bodies rarely into account.[159] On the other hand, there are indications that a reform of judicial review under the influence of international standards is the major reason for the decrease in the use of capital punishment in recent years.[160] It also seems that the exclusion of minors and pregnant women from the death penalty introduced by the criminal law reform of 1997 can be traced back to Concluding Observations by the CRC, deploring the lack of conformity of Chinese law with the Convention.[161]

7) Colombia

56. In Colombia, a country with a long history of violent internal conflict, human rights treaties have a special status, and their relationship with international humanitarian law (IHL) has been a salient issue.[162] It is in that context that Article 214 of the Constitution of 1991 is to be understood according to which human rights must not be suspended and IHL is to be respected under all circumstances. Article 93 provides that international

---

[156] J. Men, *Between Human Rights and Sovereignty – An Examination of EU-China Political Relations*, 17 ELJ 2011, 534-550.

[157] Information Office of the State Council of the People's Republic of China, White Paper on the Human Rights Action Plan for China (2012-2015), 11 June 2012, http://www.china.org.cn/government/whitepaper/node_7156850.htm.

[158] K. Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges*, 6 Chin J Int'l L 2007, 445-474.

[159] S. Guo, *Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects*, 8 Chin J Int'l L 2009, 161-179, at 165-167 and 176-178.

[160] R. Hood, *Abolition of the Death Penalty: China in World Perspective*, 1 City Univ Hong Kong L Rev 2009, 1-21.

[161] Cf. Article 149 Criminal Law in the version of 14 March 1997, http://www.asianlii.org/en/legis/cen/laws/clotproc361; Concluding Observations by the Children's Rights Committee, CRC/C/15/Add.56, 7 June 1996, § 22.

[162] C. von der Groeben, *The Conflict in Colombia and the Relationship between Humanitarian Law and Human Rights Law in Practice*, 16 J Confl & Sec L 2011, 141-164.

treaties, 'ratified by the Colombian Congress, that recognized human rights', prevail internally. To these treaties belong ACHR, all nine UN core treaties as well as the Geneva Conventions and their Additional Protocols, irrespective of the date of ratification. The rights set forth in the Colombian Constitution are to be interpreted in conformity with the international human rights treaties to which Colombia is a party.

57. This compound of treaties and constitutional rights is known as the 'bloc of constitutionality', following the French example with respect to the preamble of the 1946 Constitution. The Constitutional Court decides on constitutional complaints filed against municipal law, which can be reviewed against the standard of the *bloque de constitucionalidad* (cf. Article 241 of the Constitution).[163] In interpreting human rights treaties, the Constitutional Court defers to the jurisprudence of the IACtHR as the relevant 'hermeneutic criterion', also if such practice did not directly relate to Colombia.[164] Also the recommendations of the competent treaty bodies are to be taken into account.[165] In case of doubt, the interpretation of the laws most favourable to human rights is to be preferred.[166]

8) Denmark

58. Denmark is a party to the ECHR and to the UN treaties except CMW and CED, and it has accepted most individual complaint procedures such as those under ICCPR and CAT. Since Denmark has a dualistic legal system, treaties have to be transformed before being applicable before courts.[167] As the only one of these conventions, the ECHR was integrated into Danish law in 1992. Like in other Scandinavian countries, the main responsibility to comply with human rights treaties lies with the legislature, and institutions like the Parliamentary Ombudsman and independent human rights boards play an important role. This prerogative of Parliament also shows in the process of legislation when a review procedure has to be followed to ensure that a bill presented is not in conflict with Denmark's treaty obligations. During this process, judgments of human rights institutions like the ECtHR are considered, irrespective of whether or not Denmark was a party to the dispute in question.

59. Courts generally follow the ECHR and its interpretation by the ECtHR, but only in so far as it is required by Strasbourg practice and no other means are at disposal.[168] Treaties which are not incorporated do not serve as a standard to set aside statute law, but provide orientation as far as the laws leave room for interpretation.[169]

---

[163] See the Court's own summary in Corte Constitucional de Colombia, Sentencia C-067/2003, *Monroy Cabra*; cf. also M. Arango Olaya, *El Bloque de Constitucionalidad en la Jurisprudencia de la Corte Constitucional Colombiana*, Precedente 2004, 79-102.

[164] Id.; see also Corte Constitucional de Colombia, Sentencia C-010/00, *Martínez Caballero*; M.E. Góngora Mera, *Diálogos jurisprudenciales entre la Corte Interamericana de Derechos Humanos y la Corte Constiticional de Colombia*, in: A. v. Bogdandy et al. (eds.), La justicia constiticional y su internacionalizacion, Mexico (Instituto de Investigaciones Jurídicas) 2010, pp. 403-430.

[165] Corte Constitucional de Colombia, Sentencia C-200/00, *Tafur Galvis*.

[166] Corte Constitucional de Colombia, Sentencia C-038/04, *Montealegre Lynett*.

[167] For this section see the contribution of HRLC member J. Christoffersen, *International Human Rights in Denmark*, in: Kadelbach, Rensmann and Rieter (n. 18).

[168] Højesteret, dom UfR 1996.234 H.

[169] Højesteret, dom UfR 2006.770 H; dom UfR 2014.3667 H.

9) France

60. The Constitution of France, formally a monist state, provides that '[t]reaties or agreements duly ratified shall [...] prevail over Acts of Parliament' (Article 55).[170] This 'control of conventionality' falls into the responsibility of the *Cour de cassation* (CdC), the supreme court of the judiciary, and the *Conseil d'Etat* (CdE), the supreme administrative court.[171] The result of such control may be that national law is set aside or judgments of municipal courts are quashed. With respect to closed procedures, legislation was introduced in order to make the re-examination of criminal cases possible if the accused was convicted in violation of the ECHR, and jurisprudence of the CdE holds administrative authorities obliged to re-consider an administrative act which orders sanctions, even though there is no obligation to recall the act.[172]

61. Courts do not often refer to human rights treaties if the case can be decided on the basis of domestic law. The CdC ascribes to judgments of the ECtHR an *erga omnes* effect, which means that states would have to comply with them even if they were not a party to the dispute. A famous example is the interpretation of the right to a fair trial under French law by referring to ECtHR jurisprudence decided in Turkish cases.[173] The CdE is more reticent in that respect, but still applies the ECHR as it is interpreted by the ECtHR.[174] Most references to ECtHR case-law, however, are implicit when it is used for interpretive guidance. Since the 1990s, it is observed that the application of French law has been modified in many instances by adjusting it to ECHR practice. Decisions by non-judicial bodies like the HRC and the European Committee of Social Rights are not considered legally binding, but are used as reference material for interpretation.[175] The *Conseil Constitutionnel* on a recent occasion refused to follow a finding concerning France directly, which was special in that the HRC had arrived at a result which diverged from ECtHR in defining the scope of freedom of religion.[176]

10) Germany

62. Under the German Basic Law (Article 59 § 2), certain categories of international treaties, to which human rights conventions belong, must be formally adopted by an act of Parliament. This rule determines the domestic status of the treaty which applies as federal statute law. However, the Federal Constitutional Court (FCC) derives a general presumption from the constitution that the Basic Law is open towards international law so that the Constitution as well as all legislation enacted must be interpreted in the light of Germany's international obligations as far as methodologically feasible.[177] Amongst

---

[170] For this section see S. El Boudouhi and G. Dannenberg, *The Reception of International Decisions on Human Rights by French Courts*, in: Kadelbach, Rensmann and Rieter (n. 18).

[171] Not the Conseil Constitutionnel, see *Interruption volontaire de grossesse*, 74-54 DC, 15 Jan 1975.

[172] CdE, Ass., *Vernes*, no. 358564, 30 July 2014.

[173] CdC, Ass. Plén., no. 10-17.049, 15 April 2011.

[174] CdE, no. 377487, 6 May 2015.

[175] CdE, no. 239559, 3 Nov 2003 (HRC); CdE, no. 358992, 10 Feb 2014 (ESC).

[176] Conseil Constitutionnel, *John L. et autres*, 2914-453/454 QPC, 18 March 2015; cf. HRC, *Bikramjit Singh v France*, Comm. 1852/2008, Doc CCPR/C/106/D/1852/2008, 15 May 2013; ECtHR, *Dogru v France*, 4 Dec 2008.

[177] Bundesverfassungsgericht, BVerfGE 74, 358 at 370, 26 March 1987.

these obligations, the ECHR has a prominent place. In the shape of fundamental rights interpreted in conformity with its guarantees, human rights of the ECHR can be invoked in constitutional complaints procedures. To respond to ECtHR judgments is mostly up to Parliament; as far as the judiciary and the executive branch are concerned, statute law provides for the possibility to re-open procedures.[178] Because of the predominance of ECHR the UN treaties play a less prominent role, but have likewise to be taken into account as a means of interpretation.[179]

63. According to the FCC, German Courts must abide by ECtHR jurisprudence, even though not 'schematically', which means that in exceptional cases in which a complex balancing of colliding interests is at stake the Constitution may demand otherwise.[180] The Court mentions conflicts between the tabloid press and privacy and family law cases as examples. As a rule, however, judgments in which Germany was a party must be implemented and ECtHR practice is to be duly considered to avoid a violation of the fair trial guarantee. In a case on the ordering of preventive detention subsequent to criminal sentence, the FCC modified its own interpretation of the Constitution in order to harmonize domestic law with a ruling of the ECtHR.[181] Judgments in cases of third states are considered in the process of interpretation of the international treaties ratified by Germany. Even though the Court explicitly rejects any *erga omnes* effect,[182] the claim that ECtHR jurisprudence has not been properly considered may open a fair trial complaint.[183] The Federal Administrative Court expressly refers to the ECtHR as the 'authentic interpreter' of the Convention.[184] To harmonize interpretation with international law is a constitutional obligation and includes the jurisprudence of the ICJ, as the FCC has repeatedly held in cases in which notification of the right to consular assistance under Article 36 VCCR had not been granted.[185] Finally, practice of UN treaty bodies is occasionally, but not systematically cited in the reasoning of FCC judgments.[186] How far other courts live up to these standards is a different question.[187]

11) India

64. India adheres to most UN human rights treaties, with the exceptions of CAT, CED and CMW, but has not recognized any individual complaint procedures. The Indian Constitution of 1949 lists a range of human rights which show similarities to articles of

---

[178] § 359 Criminal Procedure Code; § 580 Civil Procedure Code, which by way of reference also applies to administrative procedures.

[179] Bundesverfassungsgericht (Chmb), 1 BvR 865/13, 10 Oct 2014 (CRPD).

[180] Bundesverfassungsgericht, BVerfGE 111, 307 at 329, 14 Oct 2004.

[181] Bundesverfassungsgericht, BVerfGE 128, 326 at 368-372, 391-403, 4 May 2011.

[182] Id. at 403.

[183] The claim must be raised expressly and in time, BVerfG (Chmb), 2 BvR 2169/13, 4 May 2015.

[184] Bundesverwaltungsgericht, BVerwGE 149, 117, at 129, 27 Feb 2014.

[185] In such cases judgments were reversed for violations of the right to a fair trial, Bundesverfassungsgericht (Chmb), NJW 2007, 499 and NJW 2011, 207.

[186] Cf. Bundesverfassungsgericht (Chmb), 2 BvR 148/11, 15 Dec 2011, § 33 (HRC).

[187] A disputed example is case-law by administrative courts on the prohibition of headscarves in classrooms, which takes a Swiss case as an argument for its compatibility with the German Constitution, cf. ECtHR, *Dahlab v Switzerland*, Rep. 2001-V, quoted without closer examination by Administrative High Court of Baden-Wuerttemberg, NJW 2001, 2899, at 2905.

the UDHR.[188] Social and economic rights are not included as self-executing rights, but binding as principles. Additionally, it holds the state responsible to 'foster respect for international law and treaty obligations' (Article 51) and confers on Parliament the power to make law for implementing treaties (Article 253). In order to fulfill its conventional duties, the Protection of Human Rights Act of 1993 was enacted. India thus chose an approach also taken by other common law countries not to implement treaties directly, but by specific legislation.

65. Additionally, the Supreme Court plays a proactive role in entrenching human rights law in the domestic system by interpreting progressively fundamental rights of the Constitution in the light of treaty rights.[189] In particular public interest litigation has taken the Court to refer to ICCR, CEDAW and ILO treaties to endorse the notion of societal change as a force underlying any interpretation.[190] In another case, it read the constitutional right to shelter in context with ICESCR to arrive at a right to adequate housing for the poor;[191] even the ECHR is quoted on various occasions.[192] Interestingly, such entrenchment even trumps reservations to treaties declared by India.[193]

12) Italy

66. According to the Italian Constitutional Court, the relationship between the internal legal order, on the one hand, and the ECHR and the effects of ECtHR judgments on the other are defined by Article 117 § 1 of the Italian Constitution, as amended in 2001. It provides that the legislative powers should be pursued 'in accordance with the [...] international obligations of the state'.[194] Treaties share the rank of the statute of transformation, but whether human rights treaty provisions are self-executing is still a controversial issue. However, the Court derives from Article 117 § 1 a concept of consistent interpretation. If such interpretation is not possible because of the wording of the provisions or because of structural gaps, the responsible courts will have to submit to the Constitutional Court the issue of the unconstitutionality of the domestic provision when contrasted with the conventional rule.[195] The underlying goal of the Constitutional Court is to ensure a balance between the need to guarantee respect for the international obligations of the state and of other constitutionally protected values and interests.

67. The Constitutional Court recognized the interpretative value of the provisions of the ECHR as clarified by the ECtHR with regard to constitutional principles and rules on the

---

[188] For an overview see H. Chandra, *International Human Rights Regime and India*, New Delhi (Abhijeet) 2014.

[189] Cf. P.P. Rao, *Universal Human Rights and Fundamental Rights in India*, 45 Indian J Int'l L 2005, 564-578.

[190] Supreme Court of India, *Anuj Garg v Hotel Ass'n of India*, (2008) 3 SCC 1, 6 Dec 2007.

[191] Supreme Court of India, *Gupta v State of Gujarat*, (1995) 2 SCC 182, 14 Dec 1994.

[192] Supreme Court of India, *P.T. Munichikkanna Reddy v Revamma*, (2007) 6 SCC 59, 24 April 2007, concerning property; further examples found in A. Vidyasagar and S. Tatiya, *The European Court of Human Rights and India*, 2 Asia-Pac J Hum Rts & L 2010, 31-51, at 41-48.

[193] Supreme Court of India, *Masilamani Mudaliar v Idol of Sri Swaminathaswami Thirukoil*, (1996) 8 SCC 525, 30 Jan 1996 (CEDAW).

[194] See the contribution by HRLC member Elena Sciso, *The Impact of the ECtHR on the domestic law according to the Italian Constitutional Court*, in Kadelbach, Rensmann and Rieter (n. 18).

[195] Corte costituzionale, Sentenze 348 and 349, 24 Oct 2007, GU 31 Oct 2007.

protection of fundamental rights. On the other hand, only if the guarantee at hand has become 'consolidated law' (*diritto consolidato*) by ECtHR jurisprudence, can it form the basis for a Convention-conform interpretation.[196] Even though the concept is not entirely clear, it apparently means that only Grand Chamber and pilot judgments and eventually chamber judgments constitute 'consolidated law', even though chamber judgments are only relevant if Italy was a party to the case.[197] Moreover, judicial interpretive and monitoring activity finds an insurmountable barrier in systemic deficiencies of the internal legal order, which undermines the full respect of the obligations arising out of the Convention. Nevertheless, the Constitutional Court has played an active role in integrating the ECHR as it is interpreted in ECtHR case-law into the Italian Constitutional order. Thus, it declared the unconstitutionality of Article 630 of the Code of Criminal Procedure in so far as the domestic provision did not provide for the reopening of a case when necessary, pursuant to Article 46 § 1 ECHR, to give effect to a judgment of the ECtHR.[198] The Italian Supreme Court also considers provisional measures by the ECtHR as binding; it was necessary for the judiciary to respect Article 3 ECHR rigorously and to avoid expulsion to a state where inhuman treatment was expected.[199]

13) Japan

68. In the Japanese Constitution of 1946, human rights form a central pillar of the political order.[200] For determining the domestic status of Japan's human rights obligations, which comprise all UN treaties with the exception of CMW, but no individual complaint procedure, Article 98 § 2 of the Constitution provides that '[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed'. The provision is read to incorporate international treaties upon ratification without further legislation. The prevailing doctrine places them on a rank between the Constitution and statute law. A Cabinet Legislation Bureau examines the compatibility of parliamentary bills in advance.

69. Japanese Courts have not been active in applying international human rights treaties since the human rights provisions of the Constitution are considered sufficient to satisfy international standards. In this vein, the Japanese Supreme Court does not treat human rights conventions as self-executing. However, the Court ruled that a provision in the civil code discriminating against children born out of wedlock was unconstitutional and void, following criticism brought forward in international fora.[201] The Court referred

[196] Corte costituzionale, Sentenza 49, 26 March 2015, GU 1 April 2015, § 7.

[197] For critique see S. Sonelli, *Convenzione europea dei diritti dell'uomo e giudici nazionali nella giurisprudenza 'trial and error' della Corte costituzionale*, 98 Riv Dir Int'le 2015, 1155-1170.

[198] Corte costituzionale, Sentenza 129, 16 April 2008, GU 7 May 2008; see also Sentenza 36, 19 Feb 2016, GU 24 Feb 2016, on the unconstitutionality of a procedural law because of excessive length of proceedings.

[199] Corte suprema di cassazione (sez. VI penale), Sentenza 20514, 28 April 2010, with reference to ECtHR, *Mamatkulov v Turkey*, 4 Feb 2005, and *Saadi* v *Italy*, 28 Feb 2008.

[200] For this section see the contribution of HRLC member K. Teraya, *Realizing International Human Rights Treaties in Japan: A Suggestive Experience*, in: Kadelbach, Rensmann and Rieter (n. 18); see also Y. Iwasawa, *International Law, Human Rights and Japanese Law: The Impact of International Law on Japanese Law*, Oxford (Clarendon Press) 1998.

[201] Supreme Court of Japan, Case on Statutory Share in Inheritance of Children Born out of Wedlock, 4 Sept 2013, Saikō Saibansho Minji Hanreishū [Minshū] 1320, Engl. trans. http://www.courts.go.jp/english/judgments/text/2013.09.04-2012.-Ku-.No.984.and.985-19544,html.

to ICCPR and CRC and the opinions and recommendations of their monitoring bodies as decisive elements of its reasoning. Some court decisions even refer to international treaties and decisions under treaties to which Japan is not a party like the ECHR.[202] As to the possibilities to invoke human rights before courts, instead of attributing immediate effect to human rights treaties, decisions rather tend to recognize an indirect impact in that they seek an interpretation which coordinates international and municipal law. Thus, in the *Nibutami Dam Case*, the ICCPR is used to fill provisions of the Constitution with contents regarding land use in conflict with minority rights.[203] In a range of cases, lower courts extended such an indirect effect also to civil law and thus influenced legal relations between private individuals.[204]

14) Mexico

70. Mexico has ratified the ACHR and all major UN conventions and accepted individual complaint procedures of six of these systems.[205] In 2011, the Constitution of 1917 was amended, and it incorporated in Title 1, Chapter 1 human rights provisions enshrined in treaties to which Mexico is a party. The reform also set out a constitutional duty of the state to prevent, investigate and punish human rights violations. The current domestic status of human rights law was defined by jurisprudence in the following years.[206]

71. In 2009, the IACtHR in the *Radilla Pacheco* case had declared Mexico in violation of its obligations under the ACHR for entrusting the investigation of a forced disappearance at the hands of the military in 1974, to the military justice system. Since 'forced disappearance' is a human rights crime and not a disciplinary offense, the IACtHR stated that it should be investigated by ordinary civilian jurisdiction.[207] In following year the IACtHR ruled again on human rights crimes involving civilians still in the hands of the military justice system and expressed its irritation at the failure of Mexico to comply with its judgment in *Radilla Pacheco*.[208] Consequently, under the amended Constitution of 2011, the Mexican Supreme Court issued an opinion announcing that Mexico would henceforth comply with judgments of the IACtHR, which it asserted constituted *res judicata* and could not be questioned.[209] Courts were under an obligation to exercise an *ex*

---

[202] Osaka Higher Court, *Kyoto Finger Print Case*, 28 Oct 1994, Hanrei Jihō No. 1513, p. 71.

[203] Sapporo District Court, *Nibutani Dam Case*, 27 March 1997, Hanrei Tokuhō No. 1598, p. 33.

[204] Hamamatsu Branch of Shizuoka District Court, *Hamamatsu Jewelry Shop Case*, 12 Oct 1999, Hanrei Jihō No.1718, p.92; Sapporo District Court, *Otaru Public Bath Case*, 11 Dec 2002, Hanrei Jihō No. 1806, p. 84; see also Kyoto District Court, *Zaitokukai Case*, 7 Oct 2013, http://www.courts.go.jp/search/jhsp0010.action;jsessionid=98B5EA5786F7778F43C4F71DDFDAD556) where the Court relied, i.a., on CERD in granting compensation in a hate speech case, upheld by Supreme Court of Japan, 10 Dec 2014.

[205] For Mexico's human rights history see A. Anaya Muñoz, *Actors and processes in the generation and change in the human rights policy of Mexico*, in: M. Serrano and V. Popovski (eds.), Human Rights Regimes in the Americas, Tokyo (UN Univ. Press) 2010, 189-206.

[206] See C.M. Cerna, *Status of Human Rights Treaties in Mexican Domestic Law*, 20 ASIL Issue 4, 23 Feb 2016, https://www.asil.org.

[207] IACtHR, *Radilla Pacheco v Mexico*, 23 Nov 2009, Ser. C 209.

[208] IACtHR, *Cabrera Garcia v Mexico*, 26 Nov 2010, Ser. C 220, § 193.

[209] Suprema Corte de Justicia de la Nación (SCJN), Expediente varios 912/2010, Diario Oficial 4 Oct 2011 (so-called Radilla Resolution). For further analysis see A. Gómez-Robledo Verduzco, *Corte Interamericana de derechos humanos: Caso Radilla Pacheco vs. México*, 11 An Mex Der Int'l

officio control of conventionality. In a later decision resolving a conflict of jurisprudence at the circuit court level, the Court reconsidered the status of human rights provisions in international treaties and decided that they had constitutional status, but were not superior to the Mexican Constitution.[210] Human rights and the rights set forth in the Constitution were interpreted as having co-equal status and should be considered as an 'amalgam of rights'. Consequently, these new rights are to be harmonized in accordance with the principle of the best interests of the human being. A special requirement was formulated with respect to interpretation: In ascertaining which solution served the '*pro persona* principle' best, jurisprudence and reasoning of IACtHR judgments were binding on domestic judges, irrespective of whether or not Mexico was a party to the dispute. For promoting and enforcing human rights by this jurisprudence the Mexican Supreme Court became one of the winners of the UN Human Rights Prize in 2013.

15) Netherlands

72. The moderately monist Dutch Constitution grants supremacy to treaty provisions and decisions or resolutions by international institutions that are binding on all persons (Article 94 of the Constitution of 1953, as amended 1983).[211] Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with such provisions of treaties or resolutions. According to Article 93, '[p]rovisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.' As a consequence, all courts can review acts of parliament against self-executing treaty provisions,[212] to which all ECHR guarantees belong. This is remarkable because the courts cannot review the constitutionality of acts of parliament (Article 120).[213] The domestic courts interpret ECHR provisions not just in light of ECtHR judgments against the Netherlands, but also in light of judgments against other States (*res interpretata*), and they hold Dutch State organs responsible accordingly. At times courts try to interpret them in as limited a manner as possible, but generally speaking they faithfully apply the case law. Moreover the legislative and executive branches have often been proactive in adapting practices and legislation following international case law relevant to the Dutch situation,[214] also if this case law did not involve the Netherlands.

73. An example of a case where the Supreme Court clearly relied on human rights law is its *Nuhanović/Mustafić* judgment**.**[215] In the specific circumstances of these cases it found the Dutch state responsible for the conduct of Dutchbat in Srebrenica. It invoked the *Al-Skeini* case of the ECtHR[216] to dismiss the argument that the state did not have jurisdiction as referred to in Articles 1 ECHR and 1 § 2 ICCPR.[217] It also found there was no basis in customary international law, the ECHR, the ICCPR and Dutch law for the exercise

2011, 561-591; C. Pintado, *Burying the Right to Justice in Backyard Battlefields*, 27 Am U Int'l L Rev 2012, 955-992.

[210] SCJN, Contradicción de tesis 73/2014, 25 April 2014.

[211] Information for this section was provided by HRLC member Eva Rieter.

[212] Hoge Raad, *NS v Vervoersbonden*, LJN AC9402, 30 May 1986, NJ 1986, 688.

[213] There is an ongoing debate on the advisability of removing this provision.

[214] E.g. on the reopening of criminal cases in favour of the person convicted.

[215] Hoge Raad, *Nuhanović/Mustafic*, 12/03324, 6 Sept 2013, NJB 2013, 1974.

[216] ECtHR, *Al-Skeini v UK*, Rep. 2011-XI.

[217] See also Part One of this report, para. 70 discussing extraterritorial application.

of the type of far-reaching restraint in the judicial review of what happened, as advocated by the government. The Supreme Court also invoked the Draft ILC Articles on the Responsibility of International Organisations and the Commentaries thereto.[218] Among others, it recognised the possibility of dual attribution of responsibility, explaining this by reference to the independent and non-exclusive responsibility discussed by the ILC.

16) Russia

74. Russia is a party to seven of the nine principal UN treaties and accepted complaint procedures under ICCPR, CERD, CEDAW and CAT, but the most important obligations result from the ECHR. The Convention forms part of the national legal system. Having been ratified by the Russian Federation (RF) internally in the form of a federal law, the ECHR takes 'priority of application' over 'federal constitutional', statute law and other legal acts (cf. Articles 32 and 15 § 4 Constitution of 1992).[219] Even though, under Article 17 § 1, 'human and civil rights and freedoms shall be recognized and guaranteed according to the universally recognized principles and norms of international law and this Constitution', the Constitution is interpreted as prevailing over the norms of international treaties to which the RF is a party. Self-executing norms of the ECHR should apply directly within the domestic legal system.

75. The question of the relationship between the decisions of the highest judicial bodies on the one hand, and judgments of the ECtHR on the other, is a recurring issue. The role of 'apple of discord' in this context was played by the case of *Konstantin Markin*.[220] In this case, the Constitutional Court of the Federation (CCRF) decided in 2009 that the norms contested by the applicant concerning parental leave did not affect the human rights listed in the Constitution. In 2010, the ECtHR found a violation of Article 14 in conjunction with Article 8 of the ECHR.[221] The key to the relationship between decisions of the ECtHR and the CCRF can be found in the parallel application of the Constitution and 'international principles and norms' (Article 15 § 4 in conjunction with Article 17 of the Constitution). Accordingly, fundamental rights can be violated as a result of a violation of the international treaty or the Constitution, or both.[222] By the Federal Law 'On Ratification of the ECHR' Russia has acknowledged the competence of the ECtHR to interpret the treaty. Originally, this was thought to refer only to Strasbourg jurisprudence concerning Russia. Nevertheless, the Supreme Court and the CCRF have concluded that not only cases to which Russia was a party but all Strasbourg case-law should be taken into consideration.[223] A new posture began to take shape when several Russian Duma

[218] Draft Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, Vol. II, Part Two.

[219] Information on this section was provided by HRLC member Vera Rusinova; cf. also A. Nußberger, *The Reception Process in Russia and Ukraine*, in H. Keller and A. Stone Sweet (eds.), A Europe of Rights: The Impact of the ECHR on National Legal Systems, Oxford (OUP) 2008, 603-674; contributions in L. Mälksoo (ed.), *Russia and European Human-Rights Law*, Leiden (Brill) 2014.

[220] Constitutional Court of the Russian Federation (CCRF), Case No 187-O-O *on the application of K. Markin*, 15 Jan 2009.

[221] ECtHR, *Markin v Russia*, 7 Oct 2010, confirmed by GC, 22 March 2012.

[222] CCRF, Case No. 4-P on applications of *A.A. Doroshok, A.E. Kot, and E.Y. Fedotova*, 26 Feb 2010, § 3.3

[223] Even though subject to some caveats, see CCRF, Resolution No. 2-P/2007 on request of the *Cabinet of Ministers of the Republic Tatarstan, applications of PLC 'Nizhnekamskneftekhim', PLC 'Khabarovskenergo' and several citizens*, 5 Feb 2007.

members challenged the constitutionality of the Ratification Law, because they believed Russia was obliged unconditionally to implement ECtHR decisions if they contradict the Russian Constitution. In a ruling of July 2015, the CCRF expanded former rulings on the supremacy of the Constitutional Court over foreign courts and international treaties, affirming the primacy of the Russian Constitution. In the case of conflict, the Court held that 'in such a situation, by virtue of the Basic Law, Russia will be forced to abstain from the literal implementation of the decision of the Strasbourg Court' and invoked court practice in various countries like Germany, Italy, and the UK to support its position. The CCRF suggested that the federal legislature introduce a legal procedure which would enable it to interpret ECtHR judgments on request of the President or the government of the Federation.[224] In her reaction to this ruling, the president of the Parliamentary Assembly of the Council of Europe noted that the RF is already one of the countries with the highest number of non-implemented ECtHR judgments; it has not yet fully implemented nearly 1500 judgments. The mechanism envisaged by the CCRF should not lead to a selective implementation, as this would undermine the authority and efficiency of the human rights protection system as a whole.[225]

17) Slovenia

76. Pursuant to Article 8 of the Constitution of Slovenia, laws and regulations must comply with generally accepted principles of international law and with treaties to which Slovenia is a party.[226] The same article states that ratified and published treaties shall be applied directly. This means in effect that Slovenia recognises the primacy of international law over internal law, but international law ranks below the Constitution. Through ratification and publication, treaties become an integral part of the domestic legal system, and only if their provisions cannot be directly applied in determining the rights and obligations of individuals, it is necessary to adopt appropriate rules for their implementation. If their provisions are self-executing, they are to be used directly regardless of whether their content is reproduced in internal regulations or not.

77. The fundamental rights spelled out in the Constitution broadly correspond to the guarantees of the ECHR. Thus, the Slovenian Constitutional Court frequently refers to ECtHR jurisprudence in interpreting them, also if such judgments were not addressed to Slovenia as a party to a complaint, and follows ECtHR case law quite closely. Article 15 § 5 of the Constitution determines that no human right or fundamental freedom may be restricted on the ground that the Constitution does not recognise that right. If divergences between the two systems occur, they often come up in private law cases in which

[224] CCRF, Resolution No. 21-P/2015 on request of *State Duma deputies*, 14 July 2015, translation by M. Smirnova found at http://transnational-constitution.blogspot.de/2015/08/russian-constitutional-court-decision.html. The Russian President signed a corresponding law on 15 December 2015, summary found at http://en.kremlin.ru/acts/news/50935, 15 Dec 2015. A connection between this ruling and the judgment by the ECtHR, *Yukos Shareholders v Russia*, 31 July 2014, in which applicants were awarded 1.87 billion € compensation under Article 41 ECHR has been noted.

[225] Council of Europe, Parliamentary Assembly, PACE President concerned by decision on 'selective implementation' of Strasbourg rulings in Russia, press release of 16 July 2015.

[226] For this section see D. Wedam Lukić, *The Impact of the Jurisprudence of the European Court of Human Rights on the Decision-making of the Constitutional Court of Slovenia*, in Kadelbach, Rensmann and Rieter (n. 18).

competing protected interests are weighed against each other differently. The casuistic and at times unpredictable character of ECtHR practice is considered to be another reason. Slovenian criminal procedure law, unlike other procedural codes of the country, declares an ECtHR judgment as a possible basis for reopening a case.

18) South Africa

78. The Republic of South Africa (RSA) has a written constitution with an extensive Bill of Rights in Chapter Two. In addition to providing for the domestication of international law and a general preference for an interpretation in harmony with municipal law, the Constitution of 1996 also provides, in Section 39 (1) (b), 'when interpreting the Bill of Rights, a court, tribunal or forum must consider international law'. In one of the Constitutional Court's earliest decisions, in which the death penalty was deemed unconstitutional, it was held that 'public international law would include non-binding as well as binding law'.[227] In this vein, 'decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights […] and the European Court of Human Rights […] may provide guidance as to the correct interpretation of particular provisions of Chapter Three'.[228] The Constitutional Court uses the ECHR and ECtHR case-law accordingly.[229] Generally, the Court's approach towards human rights law is regarded as exemplary, even though observers note that its reference to human rights bodies is more erratic than systematic.[230] An interesting element of the Constitution is Section 39 (1) (c) which provides that courts 'may consider foreign law' and thus empowers them to take into account how constitutional courts in other states deal with human rights and their application in internal law.

79. Section 39 (1) (b) of the Constitution has initiated an international human rights mainstreaming within South African law, and human rights litigation feature prominently in South African legal practice. In the spirit of the Constitution, other post-1994 legislation also promotes the harmonization of South African law and international human rights law. For instance, Section 6 (1) (a-e) of the Refugee Act 130 of 1998 provides that the act must be interpreted and applied with due regard to a number of specifically listed international human rights law instruments, and the last provision provides for any other relevant convention or international agreement to which South Africa is a party.[231]

---

[227] For overviews see J. Dugard et al., *International Law – A South African Perspective*, Cape Town (Juta) 3rd ed 2005, pp. 336-340; M. Olivier, *South Africa and international human rights agreements*, 28 Tydskrif vir die Suid-Afrikaanse reg 2003, 293-310 and 490-511.

[228] Constitutional Court of the Republic of South Africa (CC RSA), *S v Makwanyane and Mchunu*, Case CCT/3/94, [1995] ZACC 3, 6 June 1995, § 35. The decision refers to the Interim Constitution of 1993 and its Chapter 3, but the rationale equally applies to Section 39 (1) (b) and Chapter 2 of the 1996 Constitution.

[229] CC RSA, *Carmichele v Minister of Safety and Security*, Case CCT/48/00, [2001] ZACC 22, §§ 45-49 (ECtHR and interpretation of common law); *S v Mthembu*, Case 379/07, [2008] ZASCA 51, §§ 30-36 (ECHR and evidence obtained through torture in court).

[230] Cf. E. de Wet, *The 'friendly but cautious' reception of international law in the jurisprudence of the South African Constitutional Court*, 28 Fordh Int'l L Rev 2005, 1529-1565.

[231] See also Labour Relations Act 66 of 1995.

19) United Kingdom

80. Treaties, including those on human rights, have no direct legal effect in the United Kingdom, but the courts apply a presumption when interpreting legislation that Parliament does not intend to breach treaty obligations.[232] To determine the scope of the obligation concerned, they will have regard to rulings of relevant international courts and bodies. Pursuant to the Human Rights Act 1998, which indirectly incorporates the ECHR, common law as well as existing and future legislation must, as far as possible, be read and given effect in a way which is compatible with rights and freedoms under the ECHR and the courts must take into account ECtHR case law. Nonetheless, legislation, which despite such interpretative efforts is found to be incompatible with those rights and freedoms must still be given effect and only a declaration of incompatibility can be made. It is then a matter for Parliament to decide whether to amend the legislation concerned, but a declaration of incompatibility, of course, will be an incentive to apply to the ECtHR to obtain a judgment that the UK has breached its obligations under the ECHR.

81. In recent years, criticism has been voiced in the judiciary as well as on the political plane that the ECtHR had unduly constrained member states' margin of appreciation.[233] The new Supreme Court distanced itself from the deference hitherto practiced by the House of Lords and held that, under certain, albeit rare circumstances, it were 'open to the domestic court to decline to follow the Strasbourg decision'.[234] In particular, cases concerning the deporting of suspects of terrorism[235] and on voting rights of prisoners[236] triggered British initiatives which resulted in the so-called Brighton Declaration with proposals to amend the Convention and appeals to the Court with a view to strengthening domestic courts in their relationship to the ECtHR.[237]

20) United States of America

82. The US is not a party to the ACHR, but individuals may file petitions before the IACtHR pursuant to the ADRDM. This is the only international human rights body to which complaints against the US may be brought. From the UN treaties, the US has ratified ICCPR, CAT, CERD, and the first CRC Optional Protocols, albeit with many caveats. According to court practice, international treaties, if executed by Congress or treated as self-executing by courts, are superior to the law of the states, but in relation to federal law, a last in time rule applies. Consequently, a treaty provision that becomes effective as law of the US supersedes as domestic law any inconsistent pre-existing provision of a

---

[232] For an overview see S. Besson, *The Reception Process in Ireland and the United Kingdom*, in Keller and Stone Sweet (n. 219), pp. 31-106, at 35-43.

[233] Cf. the controversy between L. Hoffmann, *The Universality of Human Rights*, 125 LQR 2009, 416-432 and E. Bates, *British Sovereignty and the ECtHR*, 128 LQR 2012, 382-411.

[234] Supreme Court of the United Kingdom, *R v Horncastle*, [2009] UKSC 14, § 11.

[235] ECtHR, *Othman (Abu Qatada) v UK*, Rep. 2012-I.

[236] ECtHR, *Hirst v UK (No 2)*, Rep. 2005-IX; the latter's rationale was overruled in *R (Chester) v Secretary of State for Justice*, [2013] UKSC 63.

[237] High Level Conference on the Future of the European Court of Human Rights, Declaration of 19 and 20 April 2012, http://www.coe.int/en/2ß120419-brighton-declaration; see the contribution of the late HRLC member P. van Krieken, *Brighton Revisited – The Impact of the Brighton 2012 Meeting on the Strasbourg Human Rights Court*, paper presented at the ILA HRLC Conference on 12-16 June 2012, on file with the Committee.

law or treaty of the US. Subsequent federal law, where possible, will be construed so as not to conflict with international law or an international treaty to which the US is a party. If a federal law, subsequent in time, cannot be reconciled with international law or an international treaty to which the US is party, it supersedes the earlier provisions.

83. According to a reservation to CAT and declarations made to the CCPR and CERD, the US considers the substantial provisions of these human rights treaties as 'not self-executing', which means that they are not directly applicable and can only be enforced domestically through implementing legislation.[238] Thus, references to these treaties in jurisprudence are only indirect.[239] The fact that no such incorporation has taken place is one of the reasons why the Alien Tort Statute of 1789, which provides that US federal courts have jurisdiction over an alien's violations of a few especially definite rules of customary international law, has gained some attention in human rights litigation.[240] In the *Medellín* case, concerning the obligatory force of ICJ orders and judgments with respect to treaty obligations arising from the Vienna Convention on Consular Relations, the US Supreme Court affirmed that the US had an obligation under international law not to sentence and execute a foreign national in criminal proceedings without granting the opportunity to seek consular protection.[241] However, the decisions by the ICJ against the US, the Court noted, derived from Article 94 § 1 of the UN Charter, were not self-executing so that they did not take domestic effect unless Congress implemented them. Since no such legislation was enacted, the ruling made state compliance with international court judgments a voluntary exercise.[242] With regard to a possible indirect impact decisions and opinions of international bodies may have on interpretation, the Supreme Court has expressed that they deserved 'respectful consideration'.[243]

F. CONCLUSIONS

84. Cursory as it is, the foregoing overview has affirmed the assumption that the human rights record of a state as a whole does not always coincide with openness of its courts with respect to human rights treaties. This goes in both directions. However, whether the human rights record of a state is satisfactory or not, recent trends by some courts to openly justify non-compliance generally or in certain cases (Germany, Italy, Russia, UK) is a principal concern. This comes at a time in which many protection systems are

---

[238] Cf. R.B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U Cinn L Rev 1985, 367-416; L. Henkin, *International Human Rights Standards in National Law: The Jurisprudence of the United States*, in: B. Conforti and F. Francioni (eds.), Enforcing International Human Rights in Domestic Courts, The Hague (Kluwer) 1997, 189-205.

[239] US SCt, *Roper v Simmons*, 543 U.S. 551, 576 (2005) (use of CRC and ICCPR for assessing capital punishment against juveniles); *Hamdan v Rumsfeld*, 548 U.S. 557, 663 (2006) (ICCPR as a means to establish Geneva Conventions fair trial standards).

[240] US SCt, *Sosa v Alvarez Machain*, 542 U.S. 692 (2004); cf. D. Caron and B.R. Roth, *Scope of Alien Tort Statute*, 98 AJIL 2004, 798-804; see also *Kiobel v Royal Dutch Petroleum Co.*, 569 U.S. 1 (2013).

[241] US SCt, *Medellín v Texas*, 552 U.S. 491 (2008).

[242] For a more international law friendly approach see SCt Massachusetts, *Commonwealth v Gautreaux*, 458 Mass 741 (2010); *Gutierrez v Nevada*, No. 53506 Nev SCt, 19 Sept 2012.

[243] US SCt, *Breard v Greene*, 523 U.S. 371 (1998); see also US SCt, Lawrence v Texas, 539 U.S. 558, 573 (jurisprudence of the ECtHR); *Sosa v Alvarez Machain*, 542 U.S. 692, 738 n 30 (2004) (referring to the UN Working Group on Arbitrary Detention).

being challenged as regards their workability.[244] Such domestic non-compliance by courts takes different shapes.[245] They range from the non-execution of judgments in individual cases for lack of resources (as some of the ECtHR pilot procedure categories indicate) to intentional non-implementation (Russia, US), from systemic non-compliance (China), 'reservations' by courts (Germany, Italy, UK), to political resistance to certain aspects (UK). In that climate, it is essential to recall that domestic courts share responsibility with international bodies for the protection of human rights.[246] To live up to this demand, criteria can be drawn from the preceding sections which relate to the courts' obligations, methods and capacities as well as to the institutional environment in which they operate. These criteria are (1) the characteristics of the system of human rights protection to which their states adhere, (2) the mode of engagement with international law in general, (3) the interpretation of the role of domestic courts in relationship to political institutions, (4) their willingness to adhere to international practice, (5) the framework of jurisdiction, (6) the existence of mechanisms to avoid conflict with human rights treaties, and (7) the availability of training, information and exchange.

85. Firstly, it is obvious that it makes an important difference to which protection system a country belongs. In the regional court systems, their courts and the binding effect of their judgments had a strong influence on the status of the respective conventions in domestic law. In the Americas the jurisprudence of IACtHR has revolutionised the status of human rights in domestic law, most notably by the requirement of 'control of conventionality'. The ECHR has attained a special status in many European legal orders, and has changed internal law in many respects (France, Germany). On the other hand, due to the less strictly conceived binding effect of its decisions, more limited practice in terms of numbers of cases, and the heterogeneity of its members, the UN treaty bodies have by far not achieved a comparable impact. Whether acceptance of individual complaint procedures makes a difference, may depend on the internal constitutional structure. But it is well arguable that recognition of such proceedings provides an incentive to bring human rights violations before a court.

86. Secondly, an important feature certainly is the mode of 'engagement' of a domestic legal order with international law in general.[247] At first sight, it looks like monist systems are more favourable to human rights treaties than dualist constitutions, as the examples from the Netherlands and from Latin America illustrate. However, courts in some systems like the US have developed modes to avoid integration of international law. On

[244] N. Pillay, *Strengthening the United Nations human rights treaty bodies system*, Geneva (UN OHCHR) 2012.

[245] See the categories discerned by Flauss (n. 37), 39-47.

[246] For the concept of shared responsibility see ECtHR President J.-P. Costa, *Memorandum to the States with a View to Preparing the Interlaken Conference*, 3 July 2009, p. 4, http://www.echr.coe.int/Documents/Speech_20090703_Costa_Interlaken_ENG.pdf; see also J. Jahn, *Ruling (In)directly through Individual Measures*, 74 Heidelb J Int'l L 2014, 1-40, at 13-39; J.H. Gerards, *The European Court of Human Rights and the national courts: giving shape to the notion of 'shared responsibility'*, in J.H. Gerards and J.W.A. Fleuren (eds.), Implementation of the ECHR and of the judgments of the ECtHR in national case law, Antwerp (Intersentia) 2014, pp. 13-94.

[247] See ILA Study Group 'Principles on the Engagement of Domestic Courts with International Law', Preliminary Report by A. Tzanakopoulos, found at www.ila-hq.org (15 Feb 2016); see also D. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, Oxford (OUP) 2011.

the other hand, courts in dualist legal orders may compensate for the seemingly strict separation between the national and the international level with methods of consistent interpretation which aim to bring domestic law in harmony with human rights (Australia, Canada, Germany, India). Thus, to capture the stance taken by courts, the monism/dualism dichotomy is certainly too simplistic. It is therefore advisable to look at the attitude a legal system takes vis-à-vis human rights treaties in particular. Many constitutions attribute to human rights a special status which is not necessarily the status international law or treaties have in general (Latin American countries), others dispose of bills of rights which coincide in contents with human rights treaties (India, South Africa).[248] Decisive is whether or not individual guarantees are deemed self-executing, what rank they have in relation to other sources of law, and whether there are effective legal remedies to invoke them in court proceedings. By contrast, there are many states which do not incorporate or transform human rights treaties at all.

87. A third feature is the attitude taken by courts generally with respect to international law. Certainly, this attitude depends on the position of the judiciary in the overall balance of powers within a state, and in federations it may be further influenced by the relationship between the federal and state levels. However, courts often have considerable powers to influence their role and status, and in a comparative perspective, they make different use of it. The ILA Study Group on Domestic Interpretation distinguishes between avoidance and alignment. Avoidance postures accordingly include concepts of open contestation like constitutional caveats (Germany), ranking constructions in the domestic hierarchy of norms as they are observed in many countries, and doctrines of non-justiciability like, in particular, concepts of self-execution (Japan, US). Techniques of alignment are consistent interpretation (Canada, Germany, Italy).[249] Antagonistic strategies may be present in the jurisprudence of the same court, and at times techniques of alignment are used to camouflage avoidance and *vice versa*. It has been analysed in legal writings how the attitude of courts to international law is mostly dominated by domestic matters like the institutional context, pursuit of a local political agenda, and culturally idiosyncratic modes of reception.[250] From a human rights perspective, however, one easily identifies strategies of alignment with good court practice.

88. A closely related issue is, fourthly, the use of international material by domestic courts. As state organs, they share the obligation to implement judgments in proceedings to which they are a party; given the exhaustion of remedies rule, however, clarity about the content of these obligations is often available only after the supreme judicial body has taken a decision. Therefore, to avoid future violations, it is crucial how decisions are taken into account which relate to other cases. Practice varies between courts which follow closely the interpretation given by the competent bodies (Netherlands, Slovenia), courts which take such judgments as means of orientation (as they do in most states), and courts which ignore, or deny any effect from, international decisions (Bangladesh, US).

---

[248] 'Consubstantial norms', in the terminology of the ILA Study Group, see id. para. 29.

[249] Id. paras. 19-24, 38; cf. also P.-H. Verdier and M. Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AJIL 2015, 514-533, at 522-527.

[250] See S. E. Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 American Anthropologist 2006, 38-51; H.P. Aust, A. Rodiles and P. Staubach, *Unity or Uniformity? Domestic Courts and Treaty Interpretation*, 27 Leiden J Int'l L 2014, 75-112.

UN bodies generally have a comparatively modest impact on domestic court practice.[251] As a rule, courts are expected to adhere to treaty obligations incurred by their states and seek orientation in the practice of authoritative interpreters, and they often do so, even in cases in which their states did not participate (Mexico). Should domestic courts consider findings of international bodies unconvincing, it constitutes good practice to engage, where possible, *bona fide* in a judicial dialogue, also with other domestic courts dealing with related questions.[252] The Constitution of South Africa explicitly obliges courts to consider international jurisprudence and the case-law developed, and accordingly can be considered an ideal for good practice.

89. Fifth, to enable courts to fulfil their obligations, they must have jurisdiction to hear human rights cases,[253] be it explicitly in constitutional complaints (*amparo*) or incidentally in other types of procedures. Such procedures can be based on legislation or jurisprudence alike, and they do not necessarily have to be in the hands of the judiciary alone, as parliamentary and independent institutions illustrate (Denmark).[254] As to courts, effective remedies presuppose a certain infrastructure, independence of the judiciary from politics and economic interests, and sufficient resources.[255] To avoid irreparable harm and to ensure effective protection, the option to obtain provisional relief as well as procedural ways to implement judgments and decisions by means of enforcement or reopening of proceedings must exist. Conversely, if violations result from ongoing court proceedings, mechanisms must be devised to close a file and to provide for certainty. Ideally, procedural law or court practice formulates standards against which domestic law can be reviewed. The development of a bloc of constitutionality composed of constitutional and human rights (Colombia, France, Mexico) is a notable example in that respect.

90. Sixth, means exist which are suitable to avoid conflicts before courts between international human rights law and national law. Such a path is the *ex ante* examination before ratification of international treaties by constitutional courts (France). Studies suggest that non-compliance is often infrastructure-related, which means that the state must have the capacity to react to an adverse judgment and to promote change or repeal legislation (France, Germany, Japan, UK).[256] Such a review of bills presented before enacting legislation is advisable (Australia). Also parliamentary committees can be entrusted with the task of surveillance as to how municipal law conforms to treaty obligations and the practice of treaty bodies and give advice as to measures to be taken (Denmark).

91. Finally, failure to consider international practice may be due to a lack of information and, possibly, also to accessibility in terms of language. Whereas awareness of ECtHR and IACtHR judgments is nowadays quite high within the respective systems,

[251] Cf. also C. McCrudden, *Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW*, 109 AJIL 2015, 534-550, at 535.

[252] For increasing practice in this respect see McCrudden, 544-546 (n. 251), with references.

[253] See the Council of Europe Guide to Good Practice, above para. 7.

[254] Cf. Principles Relating to the Status of National Institutions (The Paris Principles), UN GA Res 48/134, 20 Dec 1993.

[255] For a correlation between evidence-production costs and specific human rights see Y. Lupu, *Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements*, 67 IO 2013, 469-503.

[256] D. Anagnostou and A. Mungiu-Pippidi, *Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter*, 25 EJIL 2014, 205-227.

the practice of UN human rights bodies is less well known. This may be different in countries where the UN treaties are the principal source of human rights obligations, as it is the case in Japan. Generally speaking, however, it would contribute to good practice by governments to develop a pattern of dissemination of relevant decisions for responsible institutions like courts, judicial councils, bar associations and to provide translation, if necessary. Likewise, meetings of members of judiciaries of different countries on a regular basis have proved useful. Thus, courts may be provided with additional information as to whether a change of jurisprudence ought to be considered.

INTERNATIONAL HUMAN RIGHTS LAW COMMITTEE

WORKING SESSION

Tuesday, 9 August 2016, 9.00am

Chair: Professor Willem van Genugten (Netherlands)

The Chair welcomed attendees and introduced the members of the panel, namely Professor Christina Cerna (US), Professor Koji Teraya (Japan), Professor Stefan Kadelbach (Germany) and Dr Thilo Rensmann (Germany).

The Chair commenced the session with an overview and breakdown of the draft report produced by the Committee and thanked them for their hard work and effort. The Chair explained that the draft report focused on international human rights law, the International Court of Justice, and the domestic implementation of judgments/decisions of courts and other international bodies that involved international human rights law.

The report also examined the legal framework of compliance with international judgments and decisions involving human rights around the world in order to understand how the courts of a representative set of countries dealt with obligations resulting from decisions of judicial or quasi-judicial international human rights bodies, the impact of human rights jurisprudence, and the possible trends and parallels in the methods of implementation.

In his discussion, the Chair made reference to part one of the final report, which was adopted in March 2014, dealing with the impact of international human rights on the International Court of Justice. The current draft report was the second stage of the Committee's research and the working document was drafted by Professor Stefan Kadelbach. Pursuant thereto, the Committee sought to identify guidelines regarding the nature of the obligations assumed by a State Party to an international treaty that involved human rights. The draft guidelines were included as an annex to the draft report.

The Chair explained that, in sum, the Committee focused on three key issues:

1. defining the obligations of a State upon becoming party to a treaty as regards compliance with judgments or decisions of judicial or quasi-judicial bodies in cases involving human rights;
2. evaluating the practice of States, highlighting good practices; and
3. developing the concept and scope of "good faith", compliance and "good practices" with regard to treaties involving human rights.

The Chair explained that Section D of the report focused on country based case studies. The case studies focussed on key issues in national courts including the implementation of and compliance with judgments and the status of human rights in the various countries. The committee looked at twenty countries: Argentina, Australia, Bangladesh, Brazil, Canada, China, Colombia, Denmark, France, Germany, India, Italy, Japan, Mexico, Netherlands, Russian Federation, Slovenia, South Africa, United Kingdom and the United States of America.

The Chair thereafter made a few general observations based on the various country based case studies.

The first observation was that domestic courts with a good record of observing human rights were not always in countries with good human rights records. Good practice itself started with good laws within the states concerned. The protection system to which a country belonged also made a significant difference. In the regional court systems, their courts and the binding effect of their judgments had a strong influence on the status of the respective conventions in domestic law.

The second observation was that an important feature was the mode of "engagement" of a domestic legal order with international law in general. It was too simplistic to say that monist systems were more favourable to human rights treaties than dualist systems. It was advisable to look at the attitude that a legal system took vis-à-vis human rights treaties in particular. It was important to consider whether or not individual guarantees were deemed self-executing, what rank they had in relation to other sources of law, and whether there were effective legal remedies to invoke them in court proceedings.

The third observation was that the role and status of the courts responsible for administering human rights must be taken into account. Important aspects to bear in mind included the independence of the national courts and the attitude of the courts towards the observance of human rights. He further highlighted the difference between the principle of avoidance and that of alignment. Both principles could be employed by the same court. In addition, the attitude taken by courts generally with respect to international law was of utmost importance. This was largely influenced by a variety of factors including the institutional context, pursuit of a local political agenda, and culturally idiosyncratic modes of reception.

The fourth observation was that, in relation to the use of international material by domestic courts, whilst certain states had taken active steps in incorporating international law into their judgments, some States had not done so. He gave South Africa as an example of good practice in this respect. As a rule, courts were expected to adhere to treaty obligations and should domestic courts consider the findings of international bodies unconvincing, it was good practice for the courts to engage where possible in a judicial dialogue with other domestic courts dealing with related questions.

The fifth observation was that to enable courts to fulfil their obligations, they must have jurisdiction to hear human rights cases. In order for courts to operate optimally, there needed to be sufficient resources, the requisite infrastructure, and the judiciary must be independent from political and economic interests. In addition, parliamentary bodies could play an effective role in furthering international law. Greater emphasis could and perhaps should be placed on how to further engage national parliaments in this.

The sixth observation was that the failure to consider international practice might be due to a lack of information and the inability to access the judgments of international courts due to language barriers. It would therefore be good practice of governments to disseminate the relevant decisions to courts, judicial councils and bar associations, with the relevant translations where necessary.

The Chair then highlighted that, from these observations, the Committee was able to produce guidelines and recommendations for good practice.

Professor Cerna made a few general remarks regarding the draft resolution produced by the Committee, and indicated that this would be discussed at a later stage in much greater detail.

The Chair then discussed the conclusion reached by the Committee in its work. He indicated that, through its research, the Committee had established that the human rights record of a State did not always coincide with the openness of its courts with respect to human rights treaties. What was of primary concern was that courts in certain cases (Germany, Italy, Russian Federation, UK) had openly justified noncompliance with human rights treaties. Such non-compliance took different forms ranging from the non-execution of judgments in individual cases due to lack of resources, intentional non-implementation (Russian Federation, US), systemic non-compliance (China), "reservations" by courts (Germany, Italy, UK) and political resistance to certain aspects (UK).

The Chair then proceeded to invite attendees to pose questions to the panelists.

Dr Gentian Zyberi (Albania) indicated that the independence of the judiciary was particularly important in relation to enforcement. Other key issues such as corruption and the manner in which the courts were viewed by society were also important. In relation to the use of international materials, the major issue was that there was not enough engagement with international sources, and whatever engagement that might occur ordinarily did so at the highest national courts. The engagement of domestic courts in international law was particularly difficult in politically charged cases. This was due to the fact that it was difficult for the courts to make rulings that were acceptable to both the domestic and the international audience.

Professor Kadelbach indicated that he agreed with these comments. Although the courts should also benefit from good practice, a great deal of importance must also be placed on the standing of the courts within society and the public perception of the courts.

Professor Cerna then circulated the draft resolution to attendees.

The Chair indicated that the draft resolution included the draft guidelines proposed by the Committee. He explained that the preparation of the guidelines evidenced the completion of the second part of the Committee's work (the first part was finalised in 2014 and presented at the working session in Washington).

One attendee commented that a major issue was reprisal taken against individuals who brought complaints to international bodies. He encouraged the Committee to consider mechanisms of encouraging cooperation.

Professor Kadelbach indicated that guideline 6 contained within the draft resolution in fact made provision for such cooperation.

Professor David Bilchitz (South Africa) indicated that point four of the draft resolution seems to suggest that international human rights law was not a priority and was not of prime importance. He enquired whether this was something that should be considered.

Professor Kadelbach indicated that, although not expressly included in the report and draft resolution, this was definitely considered by the Committee, although there was no general hierarchy in respect of international law.

Dr Ioana Cismas (US) reiterated that guideline two addressed the concern about the primacy of international human rights law adequately.

Professor Cerna added that part of the objective of the report was to illustrate the importance of international human rights law. There had been great progress in this regard in Latin America, for example. However, international human rights law still needed to be given greater importance in a number of other countries.

Mrs Oonagh Fitzgerald (Canada) inquired whether the report distinguished between the rights contained in the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). It would also be interesting for the Committee to consider the more positive obligations envisaged in the ICESCR. This was especially so given the adoption by the UN General Assembly of the Sustainable Development Goals (SDGs) and the adoption of the Paris Agreement on Climate Change. There were also emerging principles in ensuring that the various SDGs were implemented.

The Chair then indicated that the next items on the agenda included the discussion of ideas for inclusion in the new mandate to be decided in November, the issue of membership, the role of the rapporteur, and the formation of a new committee.

A number of issues were raised as potential topics of interest.

Professor Cerna mentioned that the Committee had considered and discussed a number of possible topics. For example, one topic was the question of long arm jurisdiction in human rights. This topic presented interesting questions: How far back in time could we go when considering and dealing with the violation of human rights? Was it appropriate to go as far back as slavery and if so what would be appropriate reparations? Who are the "victims"? Another topic involved the inter-relationship between UN bodies and regional bodies – what were the divergences/convergences?

Professor Cerna then introduced the topic that had received the greatest support from the Committee at its intersessional meeting held in Strasbourg, France and during its working meeting in Johannesburg and that the Committee wished to present as its next topic should the Committee be reconstituted under its current structure. This was "International Human Rights Law and States of Emergency." This was deemed to be a timely subject given that both Turkey and France had both recently declared states of emergency. The ILA has studied this subject in the past, in the 1990s, but changed circumstances provide new issues and ways of dealing with these questions that merit studying this important issue again. It was suggested and agreed that the term "states of emergency" should be expanded and interpreted also to include natural disasters (e.g. caused by climate change and other phenomena), epidemics (e.g. the Zika virus).

Dr Zyberi noted that human rights in states of emergencies in an age of global threats should be something to consider. It was suggested that this should not be limited to terrorism but should possibly also include situations such as famine. It was important to establish what determines a state of emergency. Whatever topic was chosen, it was important to combine the theory and practice of human rights. It might be helpful to have a list if topics on a long-term agenda which could be used by the Committee in the future.

The Chair indicated that the Committee should also consider looking at the use of non-judicial means to address human rights concerns. This method could be equally effective.

One attendee explained that there was a problem with public order and criminality in urban areas. Some said that human rights law should be used, whilst others said that international humanitarian law should be applied. This should also be considered. Citizen security was also an interesting topic and its importance was growing.

Dr Hilly Moodrick-Even Khen (Israel) suggested that now might be the time to consider evaluating the hierarchy in human rights norms. She queried whether there were new *jus cogens* norms, such as gender equality. She also suggested that the Committee consider looking into the relationship between international human rights law and international humanitarian law. She queried whether these was a hierarchy. She also queried whether international law norms should be used in the interpretation of international human rights law.

Professor Cerna pointed out that the hierarchy issue had been considered in the report, including the hierarchy between constitutions and international covenants.

Mrs Fitzgerald (Canada) suggested that, in relation to states of emergencies, man-made emergencies should also be considered, such as climate change. Part of the research could also look at ways to prevent the harm occurring but also the positive enforcement of rights.

Professor Aaron Fellmeth (US) highlighted that the Committee might want to consider incorporating someone with expertise in international humanitarian law when considering states of emergencies as the latter might often include involvement by rebels and other organised groups.

Professor Christof Heyns (South Africa) added that the Committee could also consider whether states of emergencies could be broadened to include responses to emergencies. It might also be interesting to look at the relationship between the United Nations and regional organisations as well as the concept of universality.

The Chair concluded the session by thanking attendees for their participation.

Reporters: Ms Tafadzwa Chiposi

COMMITTEE ON THE RULE OF LAW AND
INTERNATIONAL INVESTMENT LAW

WORKING SESSION

Tuesday, 9 August 2016, 9.00am

Chair: Photini Pazartzis (Greece)

The Chair noted that the Committee was a year old and was still in its infancy. Thus, the Committee welcomed all input and feedback from attendees. She introduced the panel, comprised of the Chair of the Committee and Co-Rapporteurs, then gave the floor to the Chair of the Committee.

Professor August Reinisch (Austria) informed attendees that the Committee was first established by the ILA Executive Committee in its meeting in May 2015. However, the Committee had not commenced much of its work, and was thus keen to receive feedback from members and non-members of the Committee.

Professor Reinisch then proceeded to give a brief background on the Committee. At the 2008 conference in Rio de Janeiro, the Committee on the International Law on Foreign Investment concluded its work. Its aim had been to codify investment law. That Committee recorded its findings in the *Oxford Handbook on International Investment Law*, which was published by Oxford University Press.

The question as to whether investment law could become the subject of a new Committee post 2008 was posed at the end of the conference. It was decided at the Rio de Janeiro conference to set up a Study Group on the Role of Soft Law Instruments in International Law. The specific task of this Study Group was to provide an overview of emerging jurisprudence in the field; in particular to determine if a soft law instrument could assist governments and tribunals in agreements and negotiations. However, when the work of this Study Group commenced, its members realised that it was too early to attempt to codify the law. Reasons for this included, among other things, that tribunals disagreed on a number of elements in investment law such as the reach of most-favourednation clauses, the effect of umbrella clauses or the scope of protection under fair and equitable treatment. Another contentious issue was that many core fields of investment law were not yet ripe for consensus.

The Study Group then turned its focus to the value of soft law instruments, looking at how they had worked in other fields of international law and whether there were any areas that were ripe for codification. Like its predecessor, the outcome of the Study Group was a published book, this time with Edward Elgar. It was then proposed at the end of the Study Group that the current Committee be formed.

Professor Reinisch stated that the time was now ripe to focus on investment law and the rule of law. He underlined that the basic mandate of this Committee was to study the implications of the rule of law on investment law with focus on procedural and substantive matters.

- Examples of the substantive issues were whether investment standards could lead to a spillover into constitutional law or if there would be a negative effect on domestic

law and also whether investment law influenced the rule of law in domestic systems. Other substantive issues included the debate on investor obligations and whether investor agreements were the proper instruments to regulate this as well as the effect of investment law on the host State and the financing of investment arbitration.
- Examples of procedural aspects included an analysis of procedural fairness, transparency, and moving towards a quasi-court and appeal system for investment law. Another issue to assess was whether the rule of law could be used as a tool to criticise investment law or whether investment law could be used to push through the rule of law.

Professor Reinisch emphasised that, in the event of an overlap with the work of other Committees on substantive issues, the two Committees must work together. He then recommended that, after this open session, Committee members stay behind and have their first official meeting.

Ordinarily, a report and sometimes draft recommendations followed the work of a Committee. Although this Committee would like to follow this procedure, it might be difficult to come up with draft recommendations. However, similar to its predecessor, the Committee would want to follow up with a publication consisting of contributions on the identified topics.

Professor Andrea Bjorklund (American) enumerated the six over-arching topics/categories that the Committee would be addressing and gave some context on each:

1. The notion of rule of law in domestic and international law.
2. The implications of a greater emphasis on the rule of law for host States – this topic would focus on how the development of rule of law principles in international investment law could have a spillover effect on the law of the host state.
3. The rule of law component of investment standards (eg, how protection standards had developed and how they contributed to the rule of law).
4. Threats to the rule of law posed by investment guarantee – this would involve an assessment of how much a focus on international investment law could harm the rule of law.
5. Rule of law demands in investment arbitrations – this would assess how the arbitral process should work in order to encourage the rule of law as well as decision making within the rule of law.
6. Contributions of investment law arbitrations to the rule of law generally – this would involve a look at the contributions that investment law had made towards other areas of international law such as transparency, as well as how and where clarification and legal certainty developed in international law.

Professor Bjorklund reminded attendees that the above categories were subject to amendment and invited contributions on what to discuss under these categories. She then proposed to open the discussion on the first category by stating that there was currently a lot of discourse on the topic and warned that the Committee should be specific and careful about what was meant by the rule of law.

The Chair opened the floor to interventions on the first category (ie, the notion of rule of law in domestic and international law).

Professor Mary Footer (UK) questioned to what extent, if at all, the rule of law was based on the socalled Washington Consensus. Had the US viewed fair and equitable treatment as a rule of law standard in bilateral investment treaties (BITs)? Following on from this, did the rule of law resonate at all with other views such as those from China (and the so-called Beijing Consensus), Japan and South East Asia? She also pointed out that there was no single understanding of what the term meant.

Professor Catherine Kessedjian (France) advised the Committee to be aware of the language and legal cultural differences around the world, for example the differences between the rule of law and the French é*tat de droit*. The Committee must also have a strong introductory chapter outlining what they were going to do. She noted that the previous report had no definition of soft law. She also advised the Committee to be mindful of concepts that seemed to be universal.

Dr Marcin Menkes (Poland) suggested that the Committee frame the topic as the legitimacy of investment law and that they should identify a formal and substantive approach to the topic. It could do a comparative exercise between the different branches of law, for instance the extent to which substantive principles of rule of law between international investment law and human rights law were similar.

Professor Susan Karamanian encouraged the Committee to consider the political theorists working in this area in trying to determine the definition of the rule of law. She acknowledged that it would be a huge challenge to ascertain the meaning of the rule of law; nevertheless, the Committee should be sensitive to comments raised in this working session especially regarding those of a western view.

Ms Luz Helena Hanauer stated that the Committee would have more direction if it defined who the recipient (beneficiary) of this definition would be. Was it intended for judges or for policy makers? She also queried the purpose of establishing such a definition or a concept.

Professor Stephan Schill (Germany) agreed that the Committee ought to work on defining the notion and concept of the rule of law. Because of its diversity, an ILA Committee would be in a good position to conduct this exercise and compare different domestic legal orders to try to develop a universal – or at least broadly accepted – concept that could be used in international investment law. The Committee needed to work comparatively with other international and constitutional regimes and to spend time on the concept of rule of law. The Committee should refer to legal literature. In this regard, for example, there had recently been writings in the field of law and economics trying to explain the rule of law. This material could be useful to the Committee in ascertaining the meaning of the rule of law.

The Chair asked the panel to respond to the first round of interventions.

Professor Andreas Ziegler (Switzerland) responded by warning that it was not realistic to expect that, at the end of this exercise, the Committee would produce a pure theory acceptable to everyone. He had recently written a chapter on good faith in international investment law and encountered the same challenges there as with this first topic. He had started by comparing how the term "rule of law" was used in different legal systems. The comparison could be taken to a global level; however, some countries would be underrepresented, which would make it difficult to find sources.

He warned that the rule of law could become a very political question. Some had argued that, despite the ongoing debate, there was consensus on the core meaning of the rule of law in different fields.

The Committee was aware of the challenge and was counting on members and non-members to engage with it. They were aware that the name of the Committee was an ambitious one (the rule of law and international investment law), but it should try nonetheless.

Professor Reinisch acknowledged that there was a difficulty to overcome when it came to the different notions of the rule of law. He was skeptical about the ability to seriously engage on a broad comparative issue. There seemed to be some consensus in the UN where, in the Secretary General reports, there appeared to be a working definition of the rule of law. It could be beneficial to use these working definitions as an additional yardstick. The reports might be criticized, but at the same time could be somewhere to find consensus. The rule of law was not merely procedural in nature but was a broad notion that had to do with governance and supremacy of the law. It would thus be prudent for the Committee to take a topdown approach and to build on what was already out there.

Professor Footer said that a lot would depend on the eventual membership of the Committee. She then suggested that the Committee come up with a number of assumptions about the rule of law and set out to challenge them. This could be done through a mapping exercise. Instead of comparing the definition of the rule of law in different jurisdictions, the Committee could challenge the various assumptions. She also suggested that the Committee query whether the rule of law was an economic governancebased concept and whether it meant something different in the UN context, especially with the UN being concerned primarily with international peace and security.

Dr Marc Bungenberg (Germany) asked whether it would be possible that, by next month, the Committee have a clearer picture on this first topic before embarking on the others, and whether this would have an impact on the Committee's workload.

Dr Menkes said that it would be advisable to compare the perspectives of different countries because they had different legal traditions. Instead of covering ninety-eight jurisdictional perspectives, the Committee could cover ten branches of law, making it easier to cover a broad scope.

Professor Kessedjian expressed her concern over Professor Reinisch's response to the issues raised by attendees. The name of the Committee must be taken very seriously. The ILA had not formed yet another Committee on investment. She did not think it necessary to have yet another book on investment law. She emphasised that this Committee was about the rule of law, which was the centre of its mandate. Thus, the Committee must conduct the tedious exercise of determining what the rule of law was today in the twenty-first century for international and investment law purposes. The Committee would not be saved from the very tedious exercise of comparative law. The rule of law was the specificity of this Committee and this should be made clear in the Committee's report.

Professor Reinisch responded to Professor Kessedjian's concerns by stating that he did not recall responding to interventions from the floor with the attitude that this was just another investment law committee and that the rule of law was unimportant. Quite the contrary, the rule of law was central to the Committee's work. In response to Professor

Mary Footer's question regarding the UN, Professor Reinisch quoted from a 2004 report of the UN Secretary General entitled *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, which defined the rule of law as being "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards". Although the report was about peace and security, the definition could be useful for the purposes of the Committee's work.

Professor Reinisch agreed that the Committee was about the rule of law, which is why the rule of law was the first topic that the Committee would address. He conceded that it was indeed a challenging topic. Once the Committee had consensus on what it understood the rule of law to be, it could determine whether it was reflected in investment law.

Professor Bjorklund stated that, in order to take advantage of the brain power in the room, she did not want to adopt Dr Bungenberg's suggestion *in toto* because she would like to discuss the other topics while everyone was still present.

In response to Professor Menkes' suggestion to make a comparison of the rule of law on an international rather than domestic level, she said that she did not think that it was either a domestic or international law study but both. The international law comparison might be easier because it was smaller, but the Committee must try and engage in both.

Professor Ziegler added that the topic was very interesting and could continue being discussed for some time; however the other topics also needed attention.

The Chair gave the floor to Professor Bjorklund to start the discussion on the second category (ie, the implications of a greater emphasis on the rule of law for host States).

Professor Bjorklund stated that, as previously mentioned, the Committee's initial ideas surrounding the second topic were if and how investment law should affect the law of the host State and what the challenges were in getting feedback from international law to domestic law.

Professor Kessedjian said that there was one aspect of Andrea Bjorklund's initial remark regarding whether a State would have an obligation or rather incentive to follow the decision of an arbitral tribunal that she found particularly interesting. She enquired what the legitimacy of a tribunal was and the personnel who composed it, and whether this would be a question that the Committee would address in its work.

Professor Bjorklund asked Professor Kessedjian whether she did not think a State had an obligation to honour an award.

Professor Kessedjian disagreed with Professor Bjorklund, stating that it was one thing to enforce an award and another to apply the award in regulatory rules.

Professor Bjorklund argued that, logically speaking, if the reason behind an award was not legitimate, neither was the award itself, and the State had no obligation to follow it.

Professor Kessedjian argued, in response, that being given an award did not mean that a State would change its policies to be in line with that award.

Professor Bjorklund agreed that a State did not have to change its policy based on a decision of the tribunal, but it must at least consider it. The tribunal could not force a State to comply; however, if a State did not, the entire exercise became pointless.

Professor Kessedjian responded that she would not be that drastic.

Professor Karamanian posited that a State which refused to comply with an award did so at its own peril because it might face more cases in the future. She suggested that the Committee look at other areas such as human rights. She also questioned how national systems were responding to awards. She pointed out that topics two and four would both assess national systems. Looking at other systems of law would be useful in giving the Committee insight.

Professor Schill suggested that the Committee look at the interaction of obligations of international law and foreign investment and the extent to which those obligations were transformed and complied with at the domestic level. There might be clashes on an international and national law level when it came to the definition of the rule of law. This clash could be seen in the *Tadić* case and in domestic cases.

Professor Engela Schlemmer (South Africa) agreed with Professor Schill that the definition of the rule of law would differ between countries and constitutions, and gave the example of South Africa, which no longer used the arbitration route because many of the arbitrated issues involved policy considerations that were not matters meant for arbitration.

Professor Bjorklund agreed with Professor Schlemmer, and said that being an American (and "semi-Canadian"), one faced difficult questions when dealing with strong federal States because it was difficult for the national government to force the constituent states to comply with international law obligations.

Mr Juan Pablo stated that, in Mexico, international investment awards were actually taken into account when designing regulations in the Mexican federal government.

The Committee should look at what States understood by the rule of law domestically and what the Committee understood by rule of law in terms of investment law. He then suggested that the Committee analyse the recent developments in Latin America where certain States were imposing a constitutional appeal against international arbitrations. They did so on the premise that, while these constitutional appeals might breach their international law obligations, they would retain the rule of law domestically.

Professor Ziegler reminded attendees that the purpose of the meeting was not only to get ideas about what the Committee should do, but also on what they should leave out.

Ms Hanauer asked the panel about the main impacts that had occurred in the past and if they had any bearing on the spillover effect. She then reiterated that the Committee needs to adequately define for whom they were trying to define the concept of the rule of law and for what reasons.

Dr Menkes voiced his concern at whether causation can be distinguished from correlation while analysing the influence of international investment law on regulatory/legislative change. He observed that if we were struggling as economists to prove causation

between international investment law and economic growth, then how would we be able to differentiate between arbitral and domestic rulings.

Professor Junji Nakagawa (Japan) stated that, in the context of the second topic, the rule of law was being assessed from an international law perspective. The conflict between the different levels of the rule of law was an issue and the Committee must consider these different levels.

Professor Bjorklund noted with interest that EU domestic law was under threat from international investment law as well as the concern that EU law could not be influenced or altered in any way by international law, making it a completely separate regime. This had also been seen for a number of years in the US.

The Chair asked Professor Bjorklund to move on to the third category (ie, the rule of law component of investment standards).

Professor Bjorklund said that the Committee had envisioned a "roll call" of the main investment law standards such as fair and equitable treatment, expropriation, the transfer provisions, and the in accordance with host state law provisions. Each warranted discussion about their contributions to the rule of law.

Professor Schill agreed that the third topic did look straight forward, but submitted that most of the investment law standards in light of the rule of law were not that simple to apply. For example, the concept of legitimate expectations changed policy considerations because it limited the legislator. Evaluation of these standards would depend on what the rule of law was, and applying this to various international standards would be easier once this had been ascertained.

Professor Ziegler agreed that the answers to all of these topics would depend on what the rule of law was. Trying to come up with a definition of the rule of law was a challenge faced by all Committee members.

Dr Menkes asked whether the Committee could include the substantive rights of States such as the right to self-preservation and the measures taken during states of emergency.

The Chair asked Professor Bjorklund to introduce the fourth category (ie, threats to the rule of law posed by investment guarantees).

Professor Bjorklund said that this category was covered substantially during the course of the discussion on the second category, but invited further comments from the floor all the same. The Committee could look at the failure of investment law agreements and decisions to accommodate non-economic interests as well as the lack of obligations placed on investors.

Professor Footer suggested that the Committee also take into account security interests, that is, human security which differed from human rights. This concerned securing the well-being of individuals (ie, local communities and land). Human security could be much broader than human rights. For example, it could possibly include national security interests.

Dr Menkes suggested that, given the legitimacy crisis, it would be worthwhile to include labour law concerns as opposed to investor rights. He also suggested that the Committee

investigate how regulatory power was considered tantamount to the rule of law. This could be included in a separate point on the freedom of regulation and the rule of law; one could enhance or undermine the other.

The Chair asked Professor Bjorklund to introduce the fifth category (ie, rule of law demands in investment arbitrations).

Professor Bjorklund said that the Committee had a provisional list of areas to consider, namely institutional guarantees of a fair trial or due process in general. She acknowledged that the Committee would have to consider what due process meant in light of the rule of law. The Committee would also have to consider the independence and impartiality of arbitrators, the equality of the parties, procedural fairness, transparency, the right to be heard, consistency and sufficiency of decision making, control mechanisms, and the desirability of an appellate stage.

Mr Fenghua Li commented that some scholars argued that international investment arbitration was a form of global governance. If this argument was true, it might have the potential to affect the rule of law in the regime of international investment law, which begged the question as to whether investment arbitration was a form of governance.

The Chair gave the floor to Professor Bjorklund to address the sixth and final category (ie, contributions of investment law arbitrations to the rule of law generally)

Professor Bjorklund introduced the final category as one that could be quite controversial. Under this topic, the Committee would assess the effect of transparency on investment law, as well as the general interaction between investment law and areas of public international law. One of the underlying factors was that investment law was so active and States usually paid the awards issued against them. Therefore, the Committee would also be looking at the deficiencies within the contributions of investment law to the rule of law. She also stated that this topic would be a conclusory section building on the other parts of the study.

Professor Karamanian remarked that there had been a conversation about treaty interpretations the previous day and suggested that the Committee look at the *Vienna Convention on the Law of Treaties*, particularly Art 31, in relation to investment law.

The Chair agreed with Professor Karamanian and remarked that this last topic was as important as the first.

Mr Richard Allen (UK) said that the final topic seemed to be another way of asking whether there was now a customary international law of international investment.

Professor Ziegler agreed with Mr Allen's comment, and noted that the first topic was theoretical and value laden and the conclusion was challenging. Not all the conclusions would be agreed upon by everyone in the Committee, although a dual approach could be useful and had even become an ILA tradition. The most interesting outcome would be to highlight what the differences were.

The Chair handed the floor to Professor Reinisch to provide some concluding remarks.

Professor Reinisch thanked attendees for their participation and for giving the Committee members a lot of food for thought on what would be a very challenging exercise.

The Chair thanked attendees for their participation. She noted that the Committee had a heavy workload ahead of it. This session had proven that the rule of law was a central topic of the Committee. In her personal opinion, the Committee could start with a working definition but only at the end would it have a picture of what the rule of law and its implications for investment law.

Reporter: Tinotenda Kakora

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

INTERNATIONAL PROTECTION OF CONSUMERS

Members of the Committee

Professor Claudia Lima Marques (Brazil): *Chair*
Professor Dan Wei (HQ/): *Rapporteur*

Professor Christoph Benicke (Germany)
Professor Thierry Bourgoignie (Canada)
Professor Der-Chin Horng (China (Taiwan))
Dr Fernando Lauria (Argentina)
Dr Ulla Liukkunen (Finland)
Dr Fadi A Makki (HQ)
Professor Ariane Morin (Switzerland)
Professor James Nehf (USA)
Professor Yuko Nishitani (Japan)
Dr Luke Nottage (Australia)
Professor Gail Pearson (Australia)
Dr Rui Pereira Dias (Portugal)
Professor Iain D C Ramsay (UK)
Professor Francois-Xavier Train (France)
Professor Hector Valverde Santana (Brazil)
Professor Patrick H G Vrancken (South Africa)
Dr Ying Yu (UK)

FINAL REPORT (2012-2016)

I – Introduction: The ILA Committee on International Protection of Consumers: Mandate and its activities; II – Mappings of global, regional and national efforts on the international protection of consumers – 1. Global Level, 2 Regional Level, 3.National Level. III – Committee's work in the last two years: Engagement in international Organizations dealing with consumer protection: – 1.Revision of UN Guidelines on Consumer Protection; 2.The UN Intergovernmental Group of Experts (IGE) on Consumer Protection Law and Policy ; 3.Collaboration with Consumers International at the Revision of the UN Guidelines and UNCTAD Manual on Consumer Protection; 4.Protection of International Tourists at the Hague Conference on Private International Law; 5.Meetings among Committee's members; 6. Preparation of a final report: Guidelines Draft on Best Practices on international protection of consumers – Applicable law; Conclusion: Johannesburg Recommendations and Guidelines on the Best Practices on International Protection of Consumers

I – Introduction: The ILA Committee on International Protection of Consumers: Mandate and its activities

The Mandate of the ILA Committee on International Protection of Consumers was established in 2008, since then the Committee has acted to fulfil this mandate. The internal Amsterdam Statement in 2010 and the Sofia Statement (ILA's Resolution 4/2012) are examples of the most important accomplishments of the Committee.

Following the discussions at the Biennial Conference in Rio de Janeiro,[1] the Committee on International Protection of Consumers was officially approved as an ILA Committee

[1] See the Rio de Janeiro findings the first Discussion Paper at www.ila-hq.or/en/committees/index.cfm/cid/1030

in November 2008, as a response to a proposal by the Brazilian Branch. The Committee's mandate is to: "*undertake studies on the international protection of consumers, with particular regard to e-commerce, tourism and consumer accidents. To this end, the Committee will compare various national legislations on consumer protection and the standards they offer for the protection of non-national and non-resident consumers on their territories, and will consider the possible extraterritorial reach of consumer legislation. The Committee's primary aim is to look at how national legislation on the conflict of laws and jurisdiction, as well as international treaties, model laws and regional legislation on consumer issues) deal with the issue of consumer protection in a transboundary context. It will compare national and regional solutions to the issue by bringing together specialists to provide insight into national and regional experiences on consumer protection in a transboundary context, to assist in currently existing efforts in international law-making*." [2]

The current Committee's mandate includes a study of the role of public and private international law to protect consumers, the review of Guidelines, Model laws and Treaties, as well as national legislations concerning protection and consumer redress, especially in the context of conflict of laws and jurisdiction. Since its creation the Committee has addressed three issues: (1) the impact of the financial crisis on consumers and its international dimension; (2) the issue of consumer redress in cross-border transactions and the role of international law to protect consumers; (3) International Organizations dealing with consumer protection. It took 4 years for the Committee to address the first two issues, which have been completed with the Sofia Declaration on the development of international principles on consumer protection. The third one is especially addressed in this report.

II – Mappings of global, regional and national efforts: the present status

1. Global level

1.1 UN Efforts and the Revision of the UN Guidelines for Consumer Protection

In the absence of a universal instrument that contains specifically rules vis-à-vis international consumer protection, the Guidelines on Consumer Protection (UNGCP, adopted in 1985, revised in 1999 and 2015) is the most important reference. The UNGCP provide policy advice for member states and leave them enough flexibility when transposing principles into national laws. More than one hundred countries now have laws based on the Guidelines. When celebrating its 30th anniversary,[3] the revision of Guidelines was approved by the UN General Assembly on 22 December 2015. The revision brought important suggestions to address the new issues of consumer society, such as consumption at a distance by electronic means and mobile, the privacy, the protection of hyper-vulnerable consumer,[4] the financial and credit services, the tourism and mass transport,

[2] See Discussion Report available at www.ila-hq.or/en/committees/index.cfm/cid/1030 .

[3] See the original version, A/RES/39/248, 16 April 1985 and its importance in Brazil, in the work of SHAFIQ, Marcelo Gomes. A construção do direito do consumidor. São Paulo: Atlas, 2009.

[4] The expression are used is "vulnerable and disadvantage consumers" (III, .5), the expression hyper-vulnerable is used by Antonio Herman Benjamin, initially in lectures and, later, in the decision: "the ethical-political category, and also legal, of vulnerable subjects includes a subgroup of subjects hyper-vulnerable, [...] When you protect the hyper-vulnerable, strictly speaking ends benefited is truly the society itself, as expected respect for the collective social inclusion pact imperative,

the densification of the power of administrative protection agencies of consumers, and international consumption. It is believed some points of the revisions could serve as inspiration for national legislators,[5] especially regarding the international protection of consumers. The very recent revision of UNGCP in 2015[6] aimed to achieve an effective protection for consumers at the national, regional and international levels, while maintaining the balance between a high level of consumer protection and the competitiveness of businesses.[7] Now, the Preamble of UNGCP sets out expressively the Millennium Development Goals and the areas covered by UNGCP are much broader by adding new themes such as state-provided services, privacy, e-commerce,[8] financial services,[9] energy,[10] public utilities,[11] travel and tourism[12] and so forth. Moreover, in implementing one of the objectives of the Guidelines which is to further international cooperation in the field of consumer protection, the revision of the Guidelines in 2015 encourage national enforcement agencies to coordinate and cooperate in cross-border cases, to utilize existing international networks, to enter into bilateral and multilateral arrangement and to improve international judicial and interagency cooperation. Finally, the Guidelines also guarantee

---

which is expensive, not for his patrimonial facet, but precisely by embracing the intangible and humanist dimension of the principles of human dignity and solidarity. Ensure judicial inclusion (that is, recognize the legitimacy to Act) of these people hyper-vulnerable, including of the intermediaries who is up to represent them, not to leave any rough justice for lack of rights spokesman offended." (STJ, REsp 931,513/RS, p/Judgment Minister Herman Benjamin, first section, tried in 11/25/2009, Laurence 9/27/2010). See MARQUES, Claudia Lima. Some observations about a person in Market and the protection of vulnerables in Private Law can been seen in GRUNDMAN, Stefan, MENDES, Gilmar, MARQUES, Claudia Lima, BALDUS, Christian and MALHEIROS, Manuel. Direito Privado, Constituição e Fronteiras. 2. Ed., São Paulo: RT, 2014, p. 287-331.

[5] The Department of Trade and Industry (DTI) of the Philippines has announced it will update the consumer protection law (Consumer Act of the Philippines) with the new issues raised by the updated Guidelines, see Philippines/United Nations: DTI welcomes revised UN guidelines for consumer protection, in Thai News Service , December 30, 2015 (available at: http://academic.lexisnexis.nl/, 03.01.2015).

[6] UNCTAD, (2015), Draft Resolution on Consumer Protection for Consideration by the General Assembly, Paragraphs 82-90, available at http://unctad.org/Sections/ditc_ccpb/docs/UNGCP_DraftResolution2015_en.pdf.

[7] UNCTAD, (2015), *Report on Modalities for the Revision of the United Nations Guidelines for Consumer Protection*, available at http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx.

[8] UNCTAD, (2015), Draft Resolution on Consumer Protection for Consideration by the General Assembly, Paragraphs 63-65, available at http://unctad.org/Sections/ditc_ccpb/docs/UNGCP_DraftResolution2015_en.pdf.

[9] UNCTAD, (2015), Draft Resolution on Consumer Protection for Consideration by the General Assembly, Paragraphs 66-68, available at http://unctad.org/Sections/ditc_ccpb/docs/UNGCP_DraftResolution2015_en.pdf.

[10] UNCTAD, (2015), Draft Resolution on Consumer Protection for Consideration by the General Assembly, Paragraph 76, available at http://unctad.org/Sections/ditc_ccpb/docs/UNGCP_DraftResolution2015_en.pdf.

[11] UNCTAD, (2015), Draft Resolution on Consumer Protection for Consideration by the General Assembly, Paragraph 77, available at http://unctad.org/Sections/ditc_ccpb/docs/UNGCP_DraftResolution2015_en.pdf.

[12] UNCTAD, (2015), Draft Resolution on Consumer Protection for Consideration by the General Assembly, Paragraph 78, available at http://unctad.org/Sections/ditc_ccpb/docs/UNGCP_DraftResolution2015_en.pdf.

the establishment of international institutional machinery (an Intergovernmental Group of Experts on Consumer Protection Law and Policy) to provide capacity building and technical assistance to developing countries and economies in transition in formulating and enforcing consumer protection laws and policies, among other mandates.[13] In sum, compared with the previous version in 1999, the new UN Guidelines revised in 2015 has improved in building capacity through forming an expert group with participation of consumer authorities, in building international cooperation with more interactions at the governmental level and in building an environment favorable for digital economy and many services.

The United Nations Guidelines on Consumer protection constitute a policy framework urging national governments to promote consumer protection initially in eight areas: *basic needs*, *safety*, *information*, *choice*, *representation*, *redress*, *consumer education* and *healthy environment*. The Guidelines are particularly designed for governments of developing countries and newly independent countries in structuring and strengthening consumer protection policies and legislation (ref.). The Guidelines were adopted "*recognizing that consumers often face imbalances in economic terms, education levels, and bargaining power, and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the importance of promoting just, equitable, and sustainable economic and social development*." The document is the most important international legal reference establishing minimum standards in the field of consumer protection including the need to "*facilitate the production and distribution patterns responsive to the needs and desires of consumers*", "*assist countries in curbing abusive business practices by enterprises at the national and international levels which adversely affect consumers*", "*facilitate the development of independent consumer groups"*, "*further international co-operation*" and "to *encourage the development of market conditions which provide consumers with greater choice at lower prices*".[14] Nevertheless, it is important to note that during the past 30 years of UNGCP, there was no official group of experts nor a specific Committee regarding consumer protection matters in the ambit of the United Nations. Therefore, the creation of the Intergovernmental Group of Experts on Consumer Protection Law and Policy should be welcomed as one of the most important results of the Revision of the UNGCP in 2015.

The Intergovernmental Group of Experts on Consumer Protection Law and Policy shall operate within the framework of an existing commission of the Trade and Development Board of the United Nations Conference on Trade and Development. The intergovernmental group will have the mandate such as to provide forums and modalities for multilateral consultations, discussions and exchanges of views between Member States; undertake studies and research periodically on consumer protection; conduct voluntary peer reviews of national consumer protection policies of Member States, as implemented by consumer protection authorities; collect and disseminate information; provide capacity-building and technical assistance to developing countries and economies in transition in formulating and enforcing consumer protection laws and policies; consider relevant

[13] UNCTAD, (2015), Draft Resolution on Consumer Protection for Consideration by the General Assembly, Paragraph 96, available at http://unctad.org/Sections/ditc_ccpb/docs/UNGCP_DraftResolution2015_en.pdf.

[14] See http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx .

studies, documentation and reports from relevant organizations of the United Nations system and other international organizations and networks; make appropriate reports and recommendations on the consumer protection policies of Member States, including the application and implementation of these guidelines; and conduct a periodic review of the guidelines, when mandated by the United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.[15] The UNGCP aim that each "*Member States should develop, strengthen or maintain a strong consumer protection policy, taking into account the guidelines set out below and relevant international agreements. In so doing, each Member State must set its own priorities for the protection of consumers in accordance with the economic, social and environmental circumstances of the country and the needs of its population, and bearing in mind the costs and benefits of proposed measures."*[16]

Some United Nations' agencies are also engaged in consumer protection at international level. The Agriculture and Consumer Protection Department of the Food and Agriculture Organizations (FAO) has established "Food Chain Crisis Management" (FCC) and "Emergency Prevention System for Food Safety" (EMPRES Food Safety) that assist FAO members in early warning, emergency prevention and rapid response.[17]

Codex Alimentarius Commission (CAC), jointly created by FAO and the World Health Organization (WHO) as the world's most relevant food standard body covering 99% of the earth's population, has established more than two hundred food standards and more than one hundred guidelines and codes for food production and processing. The Food Code, or Codex Alimentarius,[18] is now global reference for both food industries and consumers. Top priority has been given to the protection and interest of consumers. It serves as an important basis for national food legislation and has far-reaching implications for resolving trade disputes among the WTO members.

The World Health Organization has launched numerous programs and initiatives related to consumer protection.[19] For instance, in 2003, the WHO Framework Convention on Tobacco Control, as the first international treaty negotiated under the supports of the WHO, was adopted and eight implementation guidelines covering nine articles of the Convention have been approved.[20] Since 2004, the International Food Safety Authorities Network (INFOSAN) has facilitated information and data sharing regarding food safety issues.

The International Organization for Standardization (ISO) through Committee on Consumer Policy (COPOLCO) develops standards together with active participation of consumer organizations, a network called Priorities from a Consumer's Point of View.[21]

---

[15] Text sent by Hector Valverde Santana and Ana Candida Cipriano.

[16] http://unctad.org/meetings/en/SessionalDocuments/ares70d186_en.pdf.

[17] More information can be found at http://www.fao.org/food/food-safety-quality/empres-food-safety/en/.

[18] World Health Organization and Food and Agriculture Organization of the United Nations, (2006), *Understanding the Codex Alimentarius,* 3rd edition, Rome, p. 25.

[19] More information can be found at http://www.who.int/entity/en/.

[20] FCTC, (2015), *The WHO Framework Convention on Tobacco Control: an Overview,* http://www.who.int/fctc/WHO_FCTC_summary_January2015_EN.pdf?ua=1.

[21] http://www.iso.org/sites/ConsumersStandards/4_interests.html.

According to the project overview dated in January 2016, COPOLCO has advanced in total twenty-nine key areas for consumers.[22] In recent years, much progress has been achieved in the areas of customer satisfaction (the right to be informed and the right to redress of consumer), product safety (recall procedure, food safety, consumer safety guidance, child-resistant packaging and cross-border trade),[23] more vulnerable consumer (children, older people and persons with disabilities, etc.)[24], services (energy and finances),[25] and so forth.

The World Intellectual Property Organization (WIPO) adopted the WIPO Development Agenda in 2007, which contains 45 recommendations and aims to care for especially the rights of intellectual property users in developing countries, through a demand-driven approach.[26]

The International Telecommunication Union (ITU) adopted in 2014 GSR14 Best Practice Guidelines on Consumer Protection in a Digital World, which highlights the need to redefine legitimate consumer rights and to establish effective mechanisms for cooperation with relevant bodies at the national, regional and international level, service providers and consumer authorities.[27] The Guidelines encourages effective systems to safeguard consumer privacy and data, consumer right to information, multiple channels for redress as well as the particularly vulnerable consumers.

The UN World Tourism Organization created a working group on the protection of tourists/consumer and travel organizers in 2010.[28] The mentioned working group proposed in 2013 a Draft Convention on the Protection of Tourist and Tourism Service Providers,[29] which has a special focus on the force majeure and the emergencies such as disasters and bankruptcies of travel agencies. The UNWTO proposal purports to standardize national laws and to protect mainly *ex post* tourism services providers. In the absences of indicated responsible authorities, the effectiveness of tourists/consumers protection remains to be improved.

---

[22] ISO/COPOLCO, (2016), COPOLCO WG2, N 099, available at http://www.iso.org/iso/key_areas_programme_copolco.pdf.

[23] For example, ISO 10001, Customer Satisfaction – Guidelines for Codes for Organizations, ISO 10002, Customer Satisfaction – Guidelines for Complaints Handling, ISO 10003, Customer Satisfaction – Guidelines for Dispute Resolution External to Organizations, ISO 10008, Customer Satisfaction – Guidelines for Business to Consumer Electronic Transactions, ISO 10377, Consumer Product Safety – Guidelines for Suppliers, ISO10393, Consumer Product Recall – Guidelines, ISO 14452, Network Services Billing – Requirements, ISO/TSA 20245:2014, Cross-border trade of second-hand goods, ISO 22000:2005, Food Safety Management Systems – Requirements for Any Organization in the Food Chain, etc.

[24] For example, ISO/IEC Guide 71:2014, Guide for Addressing Accessibility in Standards.

[25] For example, ISO/IEC Guide 76:2008, Development of Services Standards – Recommendations for Addressing Consumer Issues, ISO/TC 224, Services activities relating to Drinking Water Supply Systems and Wastewater Systems – Quality Criteria of the Services and Performance Indicators.

[26] http://www.wipo.int/ip-development/en/agenda/recommendations.html.

[27] http://www.itu.int/en/ITU-D/Conferences/GSR/Documents/GSR14_BPG_final_en.pdf.

[28] UNWTO, (2011), *Activities towards a legal instrument on tourist/consumer protection general debate,* CE/90/7 and UNWTO, (2012), *Report of the Secretary-General, Part I (e) Protection of tourist/consumer and travel organizers,* CE/94/3(I)(e).

[29] UNWTO, (2013), *Draft Convention on the Protection of Tourists and Tourism Service Providers*, WCTE/12/5.

1.2 Other international organizations

Other international organizations have also raised awareness of consumer rights and promoted consumer empowerment. In the area of financial services, after the world financial crisis, the Organization for Economic Cooperation and Development (OECD) assisted G20 countries and other economies in adopting G20 High-level Principles on Financial Consumer Protection in 2011.[30] The Financial Stability Board (FSB) delivered Consumer Finance Protection with particular focus on credit in 2011.[31] The World Bank issued Good Practices for Financial Consumer Protection in 2012.[32] In the area of electronic commerce, OECD approved in 1999 the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce,[33] which were revised and re-issued in 2016. On 24 March 2016, the OECD Council revised this instrument and the Recommendation of the Council on Consumer Protection in E-commerce ("the revised Recommendation") "now addresses new and emerging trends and challenges faced by consumers in today's dynamic e-commerce marketplace".[34] The 2016 Recommendation reflexes the challenges arising in mobile and online payments, the purchase of intangible digital content products, and participative e-commerce.[35]

The United Nations Commission on International Trade Law (UNCITRAL)'s Working Group III has drafted preliminary procedural rules for online dispute resolution (ODR) cross-border electronic commerce transactions (including business-to-consumer transactions)[36] and an outcome document regarding the elements and principles.[37] In 2013, International Financial Consumer Protection Organization (FinCoNet) was created with a purpose of institutionalizing cooperation among financial supervisory authorities.[38] The FinCoNet issued a Report on Responsible Lending – a Review of Supervisory Tools for Consumer Lending Practices, which summarized the responses to financial crisis from twenty jurisdictions worldwide and reported that a great majority of jurisdictions were in the process of developing or implementing measures of responsible lending.[39]

In the area of tourism services, as early as 1970, the International Institute for the Unification of Private Law (UNIDROIT) adopted an International Convention on Travel Contracts (CCV), aiming at safeguarding the rights and interests of the traveler.[40] However, little progress has been achieved in terms of ratifications by member states

[30] http://www.oecd.org/daf/fin/financial-markets/48892010.pdf.

[31] http://www.fsb.org/wp-content/uploads/r_111026a.pdf.

[32] The document can be found at http://www.worldbank.org.

[33] http://www.oecd.org/sti/consumers/34023811.pdf.

[34] http://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf .

[35] See OECD (2016), *Consumer Protection in E-commerce: OECD Recommendation,* OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264255258-en.

[36] UNCITRAL, (2015), *Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules*, A/CN.9/WG.III/WP.133.

[37] UNCITRAL, (2016), *Draft outcome document reflecting elements and principles of an ODR process*, A/CN.9/WG.III/WP.140.

[38] http://www.finconet.org.

[39] FinCoNet, (2014), *FinCoNet report on responsible lending: Review of supervisory tools for suitable consumer lending practices*, p. 118, full text available at http://www.finconet.org/FinCoNet-Responsible-Lending-2014.pdf.

[40] http://www.unidroit.org/instruments/transport/ccv.

of the UNIDROIT. The Hague Conference on Private International Law (HCCH) decided to include a proposal submitted by the Brazilian government "Draft Convention on Cooperation and Access to Justice Concerning International Tourists" into its working agenda.[41] More details will be addressed in following section 1.3.

The International Consumer Protection and Enforcement Network (ICPEN) has gathered together fifty-five countries as member organizations and three countries as partner organizations since 1992, to cooperate in information sharing and enforcements for cross-border commercial activities affecting consumers. Instead of handling individual consumer complaints, ICPEN promotes collective actions to be taken by consumer agencies of its participants in order to facilitate cross-border remedies and effective international consumer protection. A few initiatives of this kind are international internet sweeps, filing complaints in up to eight languages related to cross-border transactions such as online shopping, ecommerce services, travelling, phone services, financial services, etc. through alternative dispute resolution (ADR) with supervision of national consumer authorities[42] and the education campaigns such as the fraud prevention project.

The International Consumer Product Safety Caucus (ICPSC) is international organization with a view to sharing information and enhancing cooperation among consumer product safety regulatory and market surveillance authorities. ICPSC develops knowledge base project and individual topics such as international cooperation, products recalls, recall effectiveness and product safety initiatives.[43]

The International Consumer Product Health and Safety Organizations (ICPHSO), as another international forum, is composed by governmental agencies, consumers, business, legal firms, trade associations and all stakeholders, to study non-food consumer product safety issues.[44]

Consumers International (CI) is the worldwide federation of consumer groups (non-governmental organizations – NGO) with members over 240 member organizations in 120 countries and represents the global voice defending the consumer rights in other important international organizations. CI is specifically recognized as speaking for consumers in the UN and in the OECD where it occupies a seat on the Committee on Consumer Policy alongside business and labour unions. Apart from participation in international negotiations, such as the revisions of the UN Guidelines and the OECD e-commerce guidelines, the contributions and achievements of CI include empowerment of consumers and participation in the development of national consumer protection legislation and policy, acting through and advising its member associations.[45]

---

[41] Hague Conference on Private International Law, (2015), Conclusions & Recommendations Adopted by the Council, Council on General Affairs and Policy of the Conference, 24-26 March 2015.

[42] More information on this project "Econsumer.gov" can be found at http://www.icpen.org.

[43] See membership information at http://www.icpsc.org.

[44] http://www.icphso.org/about-icphso.

[45] See for example, Consumers International, (2010), *Consumer International, 50 Years of the Global Consumer Movement*, available at http://www.consumersinternational.org/media/33263/ci50ebook-english.pdf.

1.3. Progress achieved by the Hague Conference on Private international Law
On the 26th of March 2015, the Council of the Hague Conference on Private International Law has decided to include the subject of international protection of tourists as consumers on the working agenda and has asked the Permanent Bureau to conduct a desirability and feasibility study taking into account *inter alia* the compatibility of the work conducted in other fora. For the first time, in more than 100 years, the international protection of tourists has become a subject of Hague Conference Agenda. Even though the subject herein has benefited from the preliminary studies of ASADIP (American Association of Private International Law, Asunción, Paraguay), the Sofia Statement on the Development of International Principles on Consumer Protection of ILA (Res. 4/2012 of the International Law Association, London) and the Draft Convention prepared by Brazilian Government[46], it is necessary to have a new international instrument on the subject protection of tourist. Meanwhile, it is timely that the new instrument will be analyzed, because the UN World Tourism Organization (Madrid) is working on a Resolution on the form of a Convention to protect tourists and providers only in case of force major (catastrophes, mass accidents and bankruptcy). The two instruments will be fully compatible, because the UNWTO 5th Draft merely presents uniform substantive rules and some standards practices to be used in case of emergencies, nationally and internationally. It is important to note that the preamble of this 5th Draft states "*the insufficiency and lack of consistency of existing rules at the global level governing the rights and obligations of tourists and of tourism service providers, particularly in a context of increasing diversification of destinations and generating countries.*" And it recognizes "*the need to establish uniform provisions relating to the protection of tourists and tourism service providers in order to enhance transparency and increase legal certainty for tourists and tourism service providers*."

The same can be true for rules on private international law and international judicial and administrative cooperation. In the revised UN Guidelines on Consumer Protection, the protection of tourists as consumers has been included as a new subject: " 78. *Tourism. Member States should ensure that their consumer protection policies are adequate to address the marketing and the provision of goods and services related to tourism, including, but not limited to, travel, traveler accommodation and timeshares. Member States should, in particular, address the cross-border challenges raised by such activity, including enforcement cooperation and information sharing with other Member States, and should also cooperate with the relevant stakeholders in the tourism-travel sector."* We hope to have new international legal instruments in this area. From the perspective of international protection of consumer/tourist, the HCCH proposal advances a great step compared with the UNWTO proposal because the draft convention aims to protect *ex ante* tourists as consumers in any market niche with direct consumption relations through international cooperation among administrative authorities and judicial cooperation including small claims courts.[47]

---

[46] SEE MARQUES, Claudia Lima. "The Brazilian Draft Convention on Co-operation in respect of tourists and visitors abroad" at the Hague Conference and the UN World Tourism Organization's Draft Convention, in José Antonio Moreno Rodriguez, Claudia Lima Marques (Org), Los servicios en el Derecho Internacional Privado, Porto Alegre : Ed. RJR, 2014. p. 829ff.

[47] Hague Conference on Private International Law, (2015), *Proposal by the Government of Brazil on a Draft Convention on Cooperation and Access to Justice for International Tourists*, Prel.Doc. No. 2, at Annex III, prepared by Claudia Lima Marques and Nadia de Araújo.

2. Regional level

2.1 European Union

Consumer protection policy involves in regional integration processes. Different regional blocs set up different priorities. The European Union (EU) has become a global reference in breaking down trade barriers without prejudice to the high level of protection for the consumers. The European Consumer Agenda adopted by the European Commission purports to maximize consumer participation and trust in the single market. The European treaties and the Charter of Fundamental Rights of the European Union[48] establish the general principles of promoting balanced and sustainable development while ensuring free movement of persons, services, goods and capital. A number of directives at EU level[49] effectively facilitated legislative harmonization among EU member states. In the area of enforcement, EU regulation No. 2006/2004 lays down a structure for enforcement cooperation among national authorities of the EU member-states. Where consumers' collective interests in the internal market are at stake, a court or an administrative entity can grant injunctions, in accordance with the Injunctions Directive 2009/22/EC. Regarding the disputes, the EU consumers may benefit from the European Consumer Centers (ECC-Net)[50] as well as alternative dispute resolution[51] and online dispute resolution.[52]

A new **Package Travel Directive** (2015/2302/EU) was adopted on 25 November 2015, bringing up-to-date developments in the travelling market. The new Directive entered into force on 31 December, 20 days after its publication. The Member States have to adopt laws to transpose it by 1 January 2018 and it will become binding from 1 July 2018. The new Directive broadens the concept of 'package', namely, applicable to 3 different sorts of travel combinations: "*pre-arranged packages* – ready-made holidays from a tour operator made up of at least 2 elements: transport, accommodation or other services, e.g. car rental; *customised packages* – selection of components by the traveler and bought from a single business online or offline; *linked travel arrangements* – if the consumer, after having booked one travel service on one website, is invited to book another service through a targeted link or similar, the new rules offer some protection– provided that the second booking is made within 24 hours."[53] It is also to mention that the new Directive (EU) 2015/2302 on package travel and linked travel arrangements has an "Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended

---

[48] Charter of Fundamental Rights of the European Union, 2010/C 83/02.

[49] For instance, the Directive on Consumer Rights, the Directive on certain aspects of the sable of consumer goods and associated guarantees, the Directive on unfair terms in consumer contracts, the new package travel directive, the Directive on the protection of consumers in respect of certain aspects of timeshare, the Unfair Commercial Practices Directive, the Price Indication Directive, the Directive on Misleading and Comparative Advertising and so forth.

[50] In 2014 alone, the ECC-Net dealt with more than 37000 complaints. See European Commission, (2015), *The European Consumer Centres Network: 10 Years serving Europe's consumers, Anniversary Report 2005-2015*, available at http://ec.europa.eu/consumers.

[51] Directive 2013/11/EU on ADR for consumer disputes.

[52] EU Regulation No. 524/2013 and Commission Implementing Regulation (EU) 2015/1051.

[53] See http://ec.europa.eu/consumers/consumer_rights/travel/package/index_en.htm .

by Regulation (EC) No 889/2002 of the European Parliament and of the Council", published on June 10th 2016".

The **Common European Sales Law** (COM(2011) 635 final) presented by the European Commission aiming "to make cross-border trade simpler for consumers" has not achieved success. In 2014, BEUC, the European Consumer Organization, which represents 41 national consumer associations across Europe and Ecommerce Europe, and more than 4,000 companies that sell products and services online to consumers throughout Europe, called for a joint letter to reject the proposed instrument and to vote against the report on the Common European Sales Law. They argued that *"the Common European Sales Law proposal will only generate confusion, increase legal complexity and uncertainty and transaction costs. It would undermine existing rules on private international law and as well as consumer protection standards in a number of countries and thus damage the confidence of both consumers and companies when engaging in ecommerce transactions."* On 16 December 2014 the EU Commission presented its Work Programme for 2015 to the European Parliament with the existing proposal for a Common European Sales Law (CESL) being listed as item 60 in the Annex of withdrawn proposals. The reason given for the withdrawal is "Modified proposal in order to fully unleash the potential of e-commerce in the Digital Single Market".[54]

On 9 December 2015 the European Commission published two proposals concerning digital content under the European Commission's Impact Assessment. The framework for this action is "**A Digital Single Market Strategy for Europe**", which should give "better access for consumers and businesses to online good and services" and simplify rules for consumers making online digital purchases.[55]

According to the proposal for a **Directive on contracts for the supply of digital content**, *"Only 18% of consumers who used the Internet for private purposes in 2014 purchased online from another EU country while 55% did so domestically. Consumers are not confident when buying online across borders and believe that they are better protected when buying online in their own country, under their familiar domestic law. One of the major reasons is their uncertainty about their key contractual rights. Differing national regimes also constitute an obstacle to efficient enforcement of consumer rights. As a result, consumers miss opportunities and face a narrower range of goods at less competitive prices. Moreover, since consumers are not confident to shop online cross-border, they are unable to take advantage of existing price divergences between Member States and thus miss important potential opportunities. It is necessary to act fast in relation to the online sales of goods."*[56] BEUC welcomed the European Commission's proposal, "*which is a step forward in ensuring that consumers are protected when purchasing or accessing digital products*". In the relation to the Commission's proposal BEUC supports:" *1. The inclusion of in-kind payments into the scope of the directive. 2. The adoption of specific remedies in case the digital content is not in conformity with the contract, in particular the right to recover the data submitted to the service provider such as videos, photos, consumer reviews and other user-generated content. 3. The reversal of the burden of proof on the trader, which is the party best placed to assess the causes of the problem with the digital*

[54] See http://www.epln.law.ed.ac.uk/2015/01/07/proposal-for-a-common-european-sales-law-withdrawn/ .
[55] See COM(2015) 635 final.
[56] See http://ec.europa.eu/justice/contract/files/digital_contracts/dsm_online_en.pdf .

content."[57] The Directive aims to achieve a full harmonization.[58] The proposed Directive "lays down certain requirements concerning distance sales contracts concluded between the seller and the consumer, in particular rules on conformity of goods, remedies in case of non-conformity and the modalities for the exercise of these remedies." (Article 1).

The second proposal is **a Directive on certain aspects concerning contracts for the online and other distance sales of goods**, COM (2015) 635 final, aiming a full harmonization (Article 3). This Directive has a very large range of new rules, as a set of certain sales, for example, rules on conformity, remedies and modalities of these remedies (Article 1), conformity criteria (Article 4 and 5), incorrect installation (Article 6), legal defects (Article 7), transparency (Article 15) and remedies (Article 9). Other provisions include a consumer's choice about the replacement of goods at seller's own expenses (Article 10 and 11), rules on price reduction (Article 12) and the right to terminate the contract (Article 13). Article 18 imposes the mandatory nature of consumer contract law's rules, but there is an important exception provided by Article 4, 3. According the Article 4, 3: "*Any agreement excluding, derogating from or varying the effects of Articles 5 and 6 to the detriment of the consumer is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods and the consumer has expressly accepted this specific condition when concluding the contract*."

These two EU proposals were "built on a number of amendments made by the European Parliament in the first reading concerning the proposal for a Regulation on a Common European Sales Law, in particular the restriction of the scope to online and other distance sales of goods and the extension of the scope to certain digital content which is provided against another counter-performance than money."[59]

It is worth mentioning that until September 2016 an evaluation of the EU consumer protection rules will be made. In the context of the "Fitness Check" of EU consumer and marketing law directives, the Commission seeks views on whether these rules are still up to date and fit for purpose. The following six directives are subject to this Fitness Check: Unfair Contract Terms Directive 93/13/ECC; Consumer Sales and Guarantees Directive 1999/44/EC; Unfair Commercial Practices Directive 2005/29/EC; Price Indication Directive 98/6/EC; Misleading and Comparative Advertising Directive 2006/114/EC; Injunctions Directive 2009/22/EC. In addition, this consultation covers also the Consumer Rights Directive 2011/83/EU, which is subject to a separate evaluation.[60] A good example is the "Blue Guide" on the implementation of EU product rules 2016, with a proposal to change the cross-border accreditation and to enhance cooperation between accreditation bodies. [61]

2.2 Americas and OEA: International Consumer Protection from a regional perspective

Consumer protection has gained in recent years new impulses in the Americas, according to the trends in multinational forums dedicated to the subject, more specifically referred to the defense and guarantee of rights.

---

[57] See http://www.beuc.eu/consumer-rights-and-enforcement/common-european-sales-law.

[58] See 2015/0288 (COD).

[59] COM (2015) 635 final. Information sent by Professor Thierry Bourgoignie.

[60] Information send by Prof. Dr. Christoph Benicke. See consultation in: https://ec.europa.eu/eusurvey/runner/ConsumerLawFitnessCheck.

[61] Notice 5.4.2016 C(2016) 1958 final. Information sent by Professor Thierry Bougoignie.

Within the American scope, the initiatives were originated by the Inter-American Juridical Committee of the OAS, an area in which the issue has been on its agenda since year 2000, and has been strengthened last year after the proceedings held in an academic and political meeting in Rio de Janeiro, in August. As a corollary of that meeting, innovative ideas were presented in order to draft legislative proposals as a Guide for national rules on international consumer matters in countries where require them. The upcoming idea was to draft a text, which contained a wide range of systems and positions on duty among the countries of the Americas. In that context, a broad spectrum of representatives of American sub-regions and legal systems was formed, due to the help of the Academy, the involved countries would be able to move ahead with any proposal or referential model that can be overturned in the national regulations.

To date, a selected group of representatives of the three Americas, accompanied by the Juridical Committee and expert's advices in the field, on behalf of the ASADIP (American Association of Private International Law), is working on a comprehensive and plural project. The project is estimated to be discussed and presented at the next meeting of the Inter-American Committee in October in Rio.

Similarly, some sub-regional integration schemes (MERCOSUR/Pacific Alliance) have also expressed their desirability of relevant systems of international protection of consumers within their territorial spaces. Coincidentally in line with these trends, Argentina, a member of MERCOSUR, where consumer protection has gained constitutional status, has also taken steps to introduce national regulation of private international law for the protection of consumers in order to defend their rights as a vulnerable population. Indeed, in Title IV of the new Civil and Commercial Code, which regulates matters of private international law, two specific international rules for consumer protection have been incorporated for the first time.[62]

2.3 Mercosur

The Southern Common Market (Mercosur) has made some progresses in consolidating a Mercosur system of consumer defense,[63] which is structured based on a common information system, a regional action of capacity building, a norm applicable for international consumer contracts.[64] The Mercosur legislations sets an aim of harmonizing basic concepts (such as consumer and provider) regarding consumer protection adopted by members. It is the technical committee 7 with the participation of national consumer protection agencies in the discussion of policies and actions, in order to improve and develop the protection and defense of consumers within the Mercosur.[65]

The Inter-institutional Agreement between Bodies of Consumer Protection of Mercosur member states on Behalf of Visitor Consumer – this agreement was approved on June 3, 2004, in Buenos Aires, Argentina.[66] Pursuant to Article 3, consumer

[62] Information sent by Prof. Juan Cerdera, Argentina.

[63] JÚNIOR, Antônio Pereira Gaio, (2014), *O Consumidor e sua Proteção na União Europeia e Mercosul: Pesquisa Conjuntural como Contribuição à Política Desenvolvimentista de Proteção Consumerista nos Blocos*, Juruá Editora.

[64] See Estatuto da Cidadania do Mercosul Plano de Ação, Mercosul/CMC/DEC. Nº 64/10.

[65] More projects can be found in National Secretariat of Consumer of the Ministry of Justice of Brazil, (2015), *Manual de Defesa do Consumidor Mercosur e Peru*, 1st Edition, pp. 23-26.

[66] MERCOSUR/LV GMC/DI nº 12/2004. Disponível em: http://www.mercosur.int/msweb/SM/DefCons/es/Acu_Def_Cons_Vis_ES.pdf.

tourists in the region will be advised and informed of their rights. Fast and efficient administrative mechanisms will be in force to settle disputes stemming from the consumer's stay in a foreign country, taking into account of the rules of the host country. At the meeting on August 16 and 17, 2012, the member states of Mercosur decided to start the phase of implementation of the agreement. The pilot project received the support from the Superintendence of Consumer Protection (PROCON's) of Rio de Janeiro and Sao Paulo. On January 10, 2013, the PROCONs together with Brazilian Consumer National Bureau (SENACON) officially lunched the Form[67] for Complaints of Visitor Consumer in conjunction with Uruguay and Venezuela. Once lodged a claim, authorities of both countries shall remain in contact for information exchange and cooperation in pursuit of a mutually satisfactory agreement. In the subsequent meetings of the CT 7, from 2013 onwards, other tourism destinations were adhered to the pilot project, namely, the Autonomous City of Buenos Aires, San Carlos de Bariloche, Curitiba, Porto Alegre, Natal and Fortaleza.[68] In 2014, Brazil received many foreign tourists in the occasion of the World Cup, creating therefore a pilot project based on the Agreement, which was used by consumer protection authorities in all 12 host cities, under Senacon-MJ coordination, which helped certainly to reduce the number of problems related with foreign tourists during the 2014 World Cup.[69]

The Draft Agreement on Applicable Law Relating to International Consumer Contracts and the Draft Agreement on Recall of Products and Services – Mercosur has been discussing this subject since 2010, when the Brazilian delegation presented a draft resolution to Mercosur Common Group on law applicable to international consumer contracts during the regular meeting of the CT 7 in Rio de Janeiro. Being analyzed, revised and extended in the following meetings of the CT 7, the draft had four different versions.[70] Approved as Decision Project No. 15/2012, the latest version contains the Mercosur Agreement on the Applicable Law to International Consumer Contracts.[71] With respect to the applicable law, Article 4, that governs the contracts concluded by the consumer, the latter being in the state of domicile, employs alternative connection elements, such as the consumer's domicile, place of conclusion or execution of the contract and headquarters of the supplier of goods or services, allowing the parties to choose the applicable law, if it is the most favorable for the consumer. In the absence of a valid election or lacking the exercise of this right, the rule provides for the application of the law of the consumer's domicile. Since 2015 the project has been paralyzed due to divergences

[67] The form which should be submitted by the consumer tourist can be found at: http://www.procon.sp.gov.br/noticia.asp?id=3365; http://www.indepabis.gob.ve/MERCOSUR; http://www.consumidor.gub.uy/informacion/index.php?SectionCode=MENU&IndexId=433, ambos acessados em 7/2/2014.

[68] We thanks Professors Alberto Amaral Jr. and Luciane Klein Viera for the text sent to the Committee.

[69] Information sent by Prof. Hector Valverde Santana (Brazil).

[70] Comentários às quatro diferentes versões do Projeto referido podem ser encontrados em: VIEIRA, Luciane Klein. "El Proyecto de Acuerdo del MERCOSUR sobre Derecho Aplicable en Materia de Contratos Internacionales de Consumo". In: *Revista de Direito do Consumidor.* Nº 99. Mai./Jun. 2015. pp. 159-179.

[71] See Ata nº 3 da LXXXIX Reunião Ordinária do GMC. Anexo III. Cuiabá, 18/10/2012. Disponível em: http://www.MERCOSUR.int/innovaportal/file/4945/1/gmc_2012_ata03_pt.pdf, acesso em 19/1/2016.

presented by the Venezuela delegation. In 2015, the CT 7 began a debate on a Draft to an Agreement on Recall of Products and Services.[72]

2.4 NAFTA

Compared with the EU and the Mercosur, the North American Free Trade Agreement (NAFTA) holds a more mercantilist position, since there is no common consumer policy nor primary objective to harmonize consumer protection laws.[73] NAFTA gives each member state the freedom to impose restrictions due to public policy purposes.

2.5 ASEAN

In ASEAN[74], in terms of enactment of consumer law, now of general consumer laws in nine out of ten ASEAN states (not yet Cambodia), but e.g. those of Brunei and Singapore aren't as comprehensive as the seven others.[75] Moreover, a cross-border consumer redress mechanism to handle consumer complaints has been created within the ASEAN, though the ASEAN Committee on Consumer Protection (ACCP).[76] In accordance with the ASEAN Strategic Action Plan for Consumer Protection 2016-2025 (ASAPCP), measures will be adopted aiming to achieve a Common ASEAN Consumer Protection Framework, a higher level of consumer empowerment, a higher consumer confidence and cross-border commercial transactions, more consumer-related matters in ASEAN policies and more consumer protection measures in products and services sectors.[77]

2.6 APEC

In Asia-Pacific Economic Cooperation (APEC), the blueprint in 1998 declared to develop and implement consumer protection.[78] The Electronic Commerce Steering Group (ECSG) is in charge of the cross-border privacy rules (CBPR) system from which consumer may benefit.[79] It should be noted that APEC only operates in non-binding commitments and consensus among its member states and therefore the ongoing projects are only of advisory nature.

---

[72] See Ata nº 01/2015 da LXXVII Reunião Ordinária do CT nº 7, Anexo VI. Brasília, 21 e 22/5/2015. Available in: http://www.mercosur.int/innovaportal/v/383/2/innova.front/busqueda_avanzada.

[73] NEHF, James P., (2008), *Principles of Consumer Protection in the North American Free Trade Agreement*, available at http://dx.doi.org/10.2139/ssrn.1208822.

[74] See two volumes of Case Studies and Policy Digests that Professor Luke Nottage and co-consultants for the ASEAN Secretariat produced over 2014-5, including presentations at two inaugural ASEAN Consumer Protection conferences (Hanoi Dec 2014, Bangkok Dec 2015): http://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/consumer-protection/key-documents/. More useful information on consumer and contract law reform in Asia can be found at: http://blogs.usyd.edu.au/japaneselaw/2016/05/symposium_consumer_contract.html.

[75] Information sent by Professor Luke Nottage.

[76] http://www.aseanconsumer.org/accp.

[77] http://aseanconsumer.org/accp/index.php?r=portal/article&id=53.

[78] http://www.apec.org/Meeting-Papers/Leaders-Declarations/1998/1998_aelm/apec_blueprint_for.aspx.

[79] BARRAD, Catherine Valerio and RAUL, Alan Charles, (2014), "APEC Overview", in *The Privacy, Data Protection and Cybersecurity Law Review*, edited by RAUL, Alan Charles, Law Business Research, pp.19-30.

2.7 Africa

In Africa, the Southern African Development Community (SADC) adopted a draft declaration on regional cooperation in competition and consumer policies[80] and the Communications Regulators' Association of Southern Africa (CRASA) formulated Information and Communications Technology Consumer Rights and Protection Regulatory Guidelines[81] for its member states.

2.8 Mega-regional trade agreements

In the mega-regional trade agreements negotiations, one can find two different approaches. In the recently concluded Trans-Pacific Partnership Agreement (TPP), the achievement on consumer protection is modest since TPP members "agree to adopt and maintain consumer protection laws related to fraudulent and deceptive commercial activities online and to ensure that privacy and other consumer protections can be enforced in TPP markets."[82] It is to note that the TPP has a Chapter (Ch.14) on e-commerce.[83] Article 14.10 includes a general recognition by the States of the benefits of consumers being able to access and use online services and applications of their choice, and to connect the devices of their choice to the Internet ("Open Internet" principle).[84] This Chapter addresses several other issues that interest -directly or indirectly- consumer protection, like methods of electronic authentication and the validity of e-signatures; maintenance of laws on online privacy and the regulation of "unsolicited commercial electronic messages" (spam) and one especial rule on online consumer protection, as follow: *"Article 14.7: Online Consumer Protection – 1. The Parties recognise the importance of adopting and maintaining transparent and effective measures to protect consumers from fraudulent and deceptive commercial activities as referred to in Article 16.6.2 (Consumer Protection) when they engage in electronic commerce. 2. Each Party shall adopt or maintain consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities. 3. The Parties recognise the importance of cooperation between their respective national consumer protection agencies or other relevant bodies on activities related to cross-border electronic commerce in order to enhance consumer welfare. To this end, the Parties affirm that the cooperation sought under Article 16.6.5 and Article 16.6.6 (Consumer Protection) includes cooperation with respect to online commercial activities.*" In Chapter 16 about Competition the TPP has a second rule on the importance of consumer protection to this Free Trade Area: *"Article 16.6: Consumer Protection- 1. The Parties recognise the importance of consumer protection policy and enforcement to creating efficient and competitive markets and enhancing consumer welfare in the free trade area. 2. For the purposes of this Article, fraudulent and deceptive commercial*

---

[80] http://www.sadc.int/files/4813/5292/8377/SADC_Declaration_on_Competition_and_Consumer_Policies.pdf.

[81] http://www.crasa.org/common_up/crasa-setup/10-03-2015_SADC%20ICT%20CONSUMER%20RIGHTS%20AND%20PROTECTION%20%20REGULATORY%20GUIDELINES%20%202011.pdf.

[82] The Summary of the TPP can be found at the website of Office of the United States Trade Representative at http://ustr.gov.

[83] https://www.mfat.govt.nz/assets/_securedfiles/Trans-Pacific-Partnership/Text/14.-Electronic-Commerce-Chapter.pdf .

[84] See https://www.globalpolicywatch.com/2015/11/the-tpps-electronic-commerce-chapter/ .

activities refers to those fraudulent and deceptive commercial practices that cause actual harm to consumers, or that pose an imminent threat of such harm if not prevented, for example: (a) a practice of making misrepresentations of material fact, including implied factual misrepresentations, that cause significant detriment to the economic interests of misled consumers; (b) a practice of failing to deliver products or provide services to consumers after the consumers are charged; or (c) a practice of charging or debiting consumers' financial, telephone or other accounts without authorisation. 3. Each Party shall adopt or maintain consumer protection laws or other laws or regulations that proscribe fraudulent and deceptive commercial activities. 4. The Parties recognise that fraudulent and deceptive commercial activities increasingly transcend national borders and that cooperation and coordination between the Parties is desirable to effectively address these activities. 5. Accordingly, the Parties shall promote, as appropriate, cooperation and coordination on matters of mutual interest related to fraudulent and deceptive commercial activities, including in the enforcement of their consumer protection laws. 6. The Parties shall endeavour to cooperate and coordinate on the matters set out in this Article through the relevant national public bodies or officials responsible for consumer protection policy, laws or enforcement, as determined by each Party and compatible with their respective laws, regulations and important interests and within their reasonably available resources."[85] These new rules have attracted the attention of the Committee and should be analyzed further in the future.

While in the ongoing Transatlantic Trade and Investment Partnership (TTIP) negotiations, the approach seems more ambitious because the TTIP's goal is to harmonize consumer protection standards, according to the announcement of political leaders. The Similarity can be found in the ***Comprehensive Economic and Trade Agreement (CETA)*** concluded between Europe and Canada.[86] As the negotiations continue, more time will be needed to verify if the potential closer economic partnership may imply deregulation of consumer protection in the EU or instead intensify harmonization between the EU and the US.

3. National level

3.1 China

In 2013, China amended its 20-year-old Consumer Law. Along with the administrative enforcement, the courts also play an extremely important role in the defense of consumer rights. It should be noted in this regard that, by June 2015, there was a total of 199,000 lawsuits in the country, 179 000 of which completed the trial, verifying a remarkable increase in the winning rate on the part of the consumer[87]. The Supreme Court issued respectively on the 23rd of December 2013 and the 16th of June 2015, a "judicial interpretation on the provisions relating to some problems in law enforcement in the prosecution of cases involving food or medicine" and 10 paradigmatic cases on the protection of consumer rights[88]. On July 1, 2015, the Commission for the Protection of Consumers of Shanghai brought a collective action under the new Consumer Law.

---

[85] https://www.readthetpp.com/ch16.html

[86] Information sent by Iain Ramsay.

[87] http://www.npc.gov.cn/npc/xinwen/2015-11/03/content_1949930.htm.

[88] http://www.court.gov.cn/zixun-xiangqing-14729.html. They are the cases: 1) Yin Chang Yi against the subsidiary of Wuhan Hanfu Supermarket Co., Ltd. in Hanyang, on a contract of sale; 2) Liu Xin

On November 23, 2015, the State Council of China promulgated the Guideline on the Role of Leadership in New forms of Consumption in the Acceleration of Development, according to which the punitive damages system will be improved and intensified, in order to impose high amounts in damages to increase the costs on violations by business operators.

Considering that product safety and market surveillance as a key priority worldwide, China has adopted several important legislation on food and product safety in the past several years and joined in Trilateral Cooperation EU/USA/China Summits.[89]

It is also to note that since April 2011 China has a special choice-of-law rule for consumer contracts. Article 42 of the "*Law of Application of Law for Foreign-related Civil Relations of People's Republic of China"* provides that "c*onsumer contract shall be governed by the law of the country of the consumers' habitual residence. The law of the country where the products/commodities and services be supplied should govern the contract, provided that it was chosen by the consumer or there is no related business activities of supplier/ professional in the country of the consumer's habitual residence."* Article 42 indicates three rules, namely: (a) In general, the Habitual residences' law of consumer governs the consumer contracts; (b) The law of the country where the commodities and services be supplied by the supplier should be applied, if it was chosen by consumer; (c) The law of the country where the commodities and services be supplied by the supplier should be applied, under the circumstance that the supplier didn't deal related operation in the country of the consumer's habitual residence.[90]

It is to note that the consumer can choose the law of performance (*lex loci executiones*) or the law of the habitual residence of the consumer will apply. There are other translations that put the emphasis on the alternative connecting factors: "consumer contracts shall be governed by the law of the place in which the consumer is habitually resident; if consumer chooses to apply the law where goods and services are provided, or if the business party does not engage in any soliciting activities in the place in which the consumer is habitually resident, the law of the place where goods and services are provided shall apply."[91]

---

against Shanxi Lixin Pharmacy, on a contract of sale; 3) Wang Xin against Xiaomi Technology Co., Ltd., on a contract of sale online; 4) Li Xiaodong against Jiuxian Platform Electronic Commerce Limited Company, on a contract of sale online; 5) Yang Bo against affiliate Bayan Nur He Zhongyuan Delivery Limited in Urad Front Banner, on a contract of sale online during the Chinese New Year; 6) Fan Jianwu against Guangdong cultural relics sales headquarters, on a contract of sale; 7) Yu Aoyong against the seller of Hua Liping products in a liability action; 8) Wang Yi against Luyou Products for Babies, Limited, on a contract for the provision of services; 9) Wu Jun against the Company for Trade and Investment of Suning Commerce of Zhejiang, Limited, on a contract of sale; and 10) Wang Yi against Tianjin Zhongjin Plenty Fame Automobile Service Co., Ltd., surrounding a purchase and sale agreement. It must be noted that to date the Supreme Court failed to publish any guiding case on the application of the new Consumer Law since its enactment.

[89] Information sent by Professor Thierry Bourgoignie.

[90] YING, Yu. Chinese Approaches to Reform Consumer Protection law: Substantive Law and Conflict Law, in *Revista de Direito do Consumidor*, vol. 103, 2016, p. 149.

[91] Zhengxin Huo, Highlights of China's New Private International Law Act: From the Perspective of Comparative Law, in *Revue Juridique Thémis*, (2011) 45 R.J.T. 637 – 684.

3.2 Japan

Japan is currently making the first comprehensive reform of the contract law provisions of its Civil Code of 1898, which is also influencing a revision of the Consumer Contracts Act of 2000. Representative actions for damages claims have been incorporated in the new act.

In the area of electronic commerce, the Ministry of Economy, Trade and Industry of Japan issued an Interpretative Guidelines on Electronic Commerce and Information Property Trading, with a view to explain how the relevant laws and regulations including the Civil Code are applied and interpreted with respect to various types of legal problems in the field of electronic commerce. In Part IV of such Guidelines, issues concerning cross-border transactions have been raised and adjudicative jurisdiction and applicable law have also been elucidated.

The Act on Special Provisions of Civil Court Procedures for Collective Recovery of Property Damage of Consumers was submitted to the Congress on April 19, 2013 and promulgated as the Act No. 96 of 2013 on Dec. 11. This Act is supposed to come into force from October 1, 2016. It is mainly for consumer group litigation led by consumer organizations for monetary compensation based on consumer contracts.[92]

Japan's Private International Law rules are codified in the Act on the General Rules of Application of Laws. The Revision of this Act in 2006 brings an especial rule on international consumer contracts. The Article 11 is adapted to the European Union Model but puts all focus on the consumer's manifestation about the mandatory rules.[93]

---

[92] Information sent by Wenjia Sun.

[93] *Information sent by Yuko Nishitani.* The original text is: "Special Rules for Consumer Contracts – Article 11 (1) Even if the law governing the formation and effect of a contract (except for a labor contract) that is concluded between a consumer (the term "consumer" as used in this article means an individual who becomes a contractual party neither in nor for the purpose of business) and a business operator (the term "business operator" as used in this article means a juridical person or other association or foundation, or an individual who becomes a contractual party in or for the purpose of business), which is referred to in the following provisions of this article as a "consumer contract", is, according to a choice or change of governing law pursuant to Article 7 or Article 9 respectively, a law other than the law of the place where the consumer habitually resides, the specific mandatory rules in the law of the consumer's habitual residence shall also apply to matters subject to such mandatory rules with regard to the formation and effect of the consumer contract, provided that the consumer expresses his/her will to the business operator to the effect that such mandatory rules should apply. (2) If the parties have not chosen a law to govern the formation and effect of their consumer contract pursuant to Article 7, the formation and effect of such consumer contract shall be, notwithstanding Article 8, subject to the law of the consumer's habitual residence. (3) Even if a law other than the law of the consumer's habitual residence has been chosen to govern the formation of a consumer contract pursuant to Article 7, the specific mandatory rules in the law of his/her habitual residence shall exclusively apply to matters subject to such mandatory rules with regard to the formalities of the consumer contract, notwithstanding paragraphs 1, 2 and 4 of the preceding article, provided that the consumer expresses his/her will to the business operator to the effect that such mandatory rules should apply. (4) If the law of the consumer's habitual residence has been chosen to govern the formation of a consumer contract pursuant to Article 7, and if the consumer expresses his/her will to the business operator to the effect that the law of his/her habitual residence should exclusively apply to the formalities of the consumer contract, the formalities of the consumer contract shall be governed by the law of the consumer's habitual residence, notwithstanding paragraphs 2 and 4 of the preceding article. (5) If the parties have not chosen a law to govern the formation of their consumer

3.3 India

The Indian Parliament is debating the Consumer Protection Bill 2015 to reform of the Consumer Protections Act of 1986, with a focus on inclusion of e-commerce transactions, mediation process, product liability, advertisement, safe food and new consumer protection agencies for regulation and redress.

3.4 Australia

The Australian Consumer Law has been set for review in 2016 and some possible areas embrace the penalty regime in delivering deterrence, the application of the ACL to the sharing economy, the adoption of trusted international product safety standards and so forth. It applies already to software.

Quality in Consumer Goods and Credit – Australia did not adopt the approach to quality until 2010 when it adopted the terminology 'acceptable quality' in the *Australian Consumer Law*.[94] The Australian provision in Commonwealth law is no longer a term of the contract but a statutory guarantee to consumers. The ACL consumer guarantees include 'express warranties' including assertions. The developments in the notion of merchantable quality of goods and the substitution of acceptable or satisfactory involve a collapsing of the private requirements of one buyer into a standard for all reasonable consumer buyers. It assumes an interchangeability of buyer and an interchangeability of what is desired or required of the goods. It assumes that what is suitable for one buyer will be suitable for other buyers. Today, we should note that there is no applicable merchantable or acceptable quality standard for credit or other financial services in Australia. There is an implied contractual term that such services should be fit for a communicated purpose or a communicated desired result. [95] This standard is different from the traditional goods standard. The services must be fit for the purpose or 'of such a nature and quality that they might reasonably be expected to achieve that result'. [96] This is a shift from a standard unique to the acquirer which edges towards a more general standard. [97]

---

contract pursuant to Article 7, the formalities of the consumer contract shall be governed by the law of the consumer's habitual residence, notwithstanding paragraphs 1, 2 and 4 of the preceding article. (6) The preceding paragraphs 1 through 5 are not applicable in any of the following cases: (i) the business operator's establishment which relates to the consumer contract is located in a jurisdiction other than the jurisdiction of the consumer's habitual residence, and the consumer goes to the jurisdiction of the business operator's establishment and concludes a consumer contract in that jurisdiction; except where the consumer has been solicited by the business operator to conclude the consumer contract in that jurisdiction. (ii) the business operator's establishment which relates to the consumer contract is located in a jurisdiction other than the jurisdiction of the consumer's habitual residence, and the consumer goes to the jurisdiction of the business operator's establishment and receives or is to receive complete performance by the business operator in that jurisdiction; except where the consumer has been solicited by the business operator to receive complete performance to be performed by the business operator in that jurisdiction. (iii) at the time the consumer contract is concluded, the business operator is unaware of the location of the consumer's habitual residence and has reasonable ground for such unawareness. (iv) at the time the consumer contract is concluded, the business operator has misidentified the counterparty as not being a consumer and has reasonable ground for such misidentification." (Source: http://www.pilaj.jp/text/tsusokuho_e.html).

[94] *Competition and Consumer Act 2001* (Cth) Schedule 2 (*Australian Consumer Law)* s 54(2).

[95] *Australian Securities and Investments Commission Act 2001* (Cth) s 12 ED(2).

[96] *Australian Securities and Investments Commission Act 2001* (Cth) s 12 ED(2).

[97] Information sent by Prof. Gail Pearson.

3.5 UK

The new Consumer Rights Act of 2015 – After accusations of being extremely and unnecessary complex,[98] the UK Consumer Law has been reshaped very recently, by the Consumer Rights Act 2015. The legal benchmark inaugurates a new contour of consumer law, by setting out a framework that consolidates in one place key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts. Additionally, the Act creates easier paths for consumers and small and medium sized enterprises ("SMEs") to challenge anti-competitive behaviour through the Competition Appeal Tribunal ("CAT"). Another important element is the consolidation of enforcers' powers as listed in Schedule 5 to investigate potential breaches of consumer law; the same session establishes that certain enforcers (Trading Standards) can operate across local authority boundaries. In the pursuit of keeping up with technology and new forms of consumer relations, products and services, the Act also gives the civil courts and public enforcers greater flexibility to take the most appropriate action for consumers when dealing with breaches or potential breaches of consumer law.[99]

3.6 France

Changes on the Consumer Code: The French Consumer Code (*Code de la Consommation*) was established by Law No. 93.949, of July 26th, 1993, and has so far been a real consolidation of consumer protection regulations (including consumer protection, procedure and administrative rules as well as economic criminal law and over-indebtedness rules). It contains a legislative section (articles L, updated by *Ordonnance* No. 2016-301 of March 14th, 2016, which shall come into force in July 2016) and a regulatory section (in force by Decree No. 97.293 of March 27th, 1997, articles R) and references to Law No. 95.125, of February 8th, 1995, about the organization of civil, criminal and administrative procedure jurisdictions. At this time, the French chose to maintain intact their Civil Code of 1804 – now updated- and their *Code de Commerce*. They consolidated all rules of consumer protection on a crosscutting Consumer Code, hitherto little systematic, but stabilized all the internal laws and special Directives of consumer protection. On March 2016 an Administrative Law modernized the 1993 Consumer Code (Ordonnance n°2016-301, de 14.03.2016). In July 2016, the reform of the legislative section of *Code la Consommation*, will be started, aiming to introduce a definition of consumer (derived from the Directive 2011/83/EU on consumer rights),[100] a definition of professional or supplier of goods and services and "non-professional" (which can be treated as consumer)[101] as well as substantial changes of the subjects order.

---

[98] The Law Commission No.332/The Scottish Law Commission No.226, March 2012; Davidson Report, HM Treasury, 2006; Consolidation and simplification of UK consumer law, BIS, 2010.

[99] Information sent by Prof. Iain Ramsay. The Committee thanks PhD student Maria Luiza Jobim for collecting the information.

[100] See PAISANT, Gilles. Vers une définition générale du consommateur dans le Code de la Consommation ?, in La Semaine Juridique nr. 22, 27 mai 2013, p. 1031-1033.

[101] See the original Text: « Article liminaire (Créé par Ordonnance n°2016-301 du 14 mars 2016) Pour l'application du présent code, on entend par : – consommateur : toute personne physique qui agit à des fins qui n'entrent pas dans le cadre de son activité commerciale, industrielle, artisanale, libérale ou agricole ; – non-professionnel : toute personne morale qui agit à des fins qui n'entrent pas dans le cadre de son activité commerciale, industrielle, artisanale, libérale ou agricole ;- professionnel : toute personne physique ou morale, publique ou privée, qui agit à des fins entrant dans le cadre de

Changes on the Civil Code: On October 1, 2016 will come into force the France´s Order No. 2016-131 of February 10, 2016 reforming the contract law, the general rules and the proof of obligations. This is a very important reform for the French Private Law, because the letter of its Obligation Law has remained practically intact since the approval of the Napoleonic Code in 1804. This order seeks mainly to codify the case law created during the past century and to make the French Law more competitive within the European law market. This norm does not focus on Consumer Law, but rather only indirectly modifies the French Consumer Code of 1993. However, the reform incorporates, although briefly, the rules about unfair contractual terms and standard form contracts, which are applicable to consumers and professionals. The order also establishes for the first time in the Civil Code the duty of pre-contractual information and it sets up new regulations about the exclusion of liability for defective products and electronic commerce. [102]

3.7 Brazil

The new Brazilian Civil Procedure Code came into force in March 2016 (Law 13.105, 16.03.2015) and brought a new Chapter on international cooperation (Articles 26 to 41). Article 22 of the new Civil Procedure Code assures jurisdiction for the Brazilian Courts "raising from consumer relations, when the consumer has domicile or residence in Brazil" (nr. III, Art. 22). Article 23 establishes the exclusive jurisdiction mentioning only immobile goods situated in Brazil. Article 101, I of the Brazilian Consumer Code (Lei 8.090/1990) remains in force and guarantees the privilege of *forum actoris* to consumers.

The Reform of the Consumer Code is being debated at the Brazilian Parliament and Bill 3415, 2015 with half sanction by the Senate brings changes to update the Consumer Code in national and international distance sales and e-commerce. The Bill 3415, 2015 updates article 101, by adding a sole paragraph introducing the possibility for the parties to choose the most favorable law to the consumer (most favorable law test). There is also a new Article 9B in the Introductory Law (LINDB) with a conflict rule on other consumer contracts, using the traditional *lex loci celebrations*, but allowing the choice of the Brazilian Law, if most favorable to consumer.

3.8 Argentina

The new Argentinian Civil and Commercial Code came into force in 2015. This body of rules replaces the Civil Code of 1871 and the Commercial Code of 1862. The new code unifies not only the civil and commercial law, but it also incorporates some rules about consumer contracts. These are not regulated as another special type of contract, but rather as a fragmentation of the general contract theory. Thus, the code sets up first the contracts in general, then the consumer contracts and finally the different types of contracts. Solely principles and general rules about consumer law have been incorporated into the code. The Civil and Commercial Code settles, amongst others, a definition of consumer contract and consumer relationship, general norms about the interpretation of consumer contracts, abusive practices, duty of information, publicity and electronic commerce. These incorporations meant a partial reform of the special legislation about consumers: the Law No. 24.240 on Consumer and User Protection, which came into force in 1993

son activité commerciale, industrielle, artisanale, libérale ou agricole, y compris lorsqu'elle agit au nom ou pour le compte d'un autre professionnel. »

[102] Information sent by Manuel Gonzalo Casas, University of Heidelberg, Germany.

and was substantially modified in 2008 by the law No. 26.361. For example, by defining the consumer relationship the new code excludes from the Argentina´s Consumer Law the so-called "exposed consumer".

Moreover, the new code incorporates, separately from the consumer contracts, the regulation of standard form contracts. These were neither included in the Civil Code nor in the Consumer Law. It establishes, for example, the principle of interpretation *contra proferentem*, that is, against the party that drafted the standard terms. By this, the new law closes the discussion whether the consumer law should be applied to relations between small and medium-sized enterprises and big companies.

Finally, the law No. 27.250, which modifies the article 4 of the Consumer Law and the article 1100 of the Civil and Commercial Law about duty of information on consumer contracts, took effect on June 22, 2016. The innovation of this norm is that it establishes that suppliers can replace the communication on physical means by using another medium of communication just if the consumer accepts it expressly.[103]

It is to note that the new Argentinean Civil and Commercial Code regulates also on Article 2655 "the law applicable to international consumer contracts"[104] and on Article 2654[105] "the jurisdiction on international consumer contracts". [106]

3.9 Panamá, Dominican Republic and Paraguay

On 8 May 2014, Panamá approved a new Code on Private International Law (Código de Derecho Internacional Privado, Ley nº 7),[107] with four Articles about cross border

[103] Information sent by Manuel Gonzalo Casas, university of Heidelberg, Germany.

[104] The original text is: "ARTÍCULO 2655.- Derecho aplicable. Los contratos de consumo se rigen por el derecho del Estado del domicilio del consumidor en los siguientes casos: a. si la conclusión del contrato fue precedida de una oferta o de una publicidad o actividad realizada en el Estado del domicilio del consumidor y éste ha cumplido en él los actos necesarios para la conclusión del contrato; b. si el proveedor ha recibido el pedido en el Estado del domicilio del consumidor; c. si el consumidor fue inducido por su proveedor a desplazarse a un Estado extranjero a los fines de efectuar en él su pedido; d. si los contratos de viaje, por un precio global, comprenden prestaciones combinadas de transporte y alojamiento. En su defecto, los contratos de consumo se rigen por el derecho del país del lugar de cumplimiento. En caso de no poder determinarse el lugar de cumplimiento, el contrato se rige por el derecho del lugar de celebración."

[105] The original text is: "Contratos de consumo – ARTÍCULO 2654.- Jurisdicción. Las demandas que versen sobre relaciones de consumo pueden interponerse, a elección del consumidor, ante los jueces del lugar de celebración del contrato, del cumplimiento de la prestación del servicio, de la entrega de bienes, del cumplimiento de la obligación e garantía, del domicilio del demandado o del lugar donde el consumidor realiza actos necesarios para la celebración del contrato. También son competentes los jueces del Estado donde el demandado tiene sucursal, agencia o cualquier forma de representación comercial, cuando éstas hayan intervenido en la celebración del contrato o cuando el demandado las haya mencionado a los efectos del cumplimiento de una garantía contractual. La acción entablada contra el consumidor por la otra parte contratante sólo puede interponerse ante los jueces del Estado del domicilio del consumidor. En esta materia no se admite el acuerdo de elección de foro."

[106] Information sent by Prof. Dr. Ricardo Lorenzetti, Supreme Judge from Argentina.

[107] Ley publicada en: *Gaceta Oficial del Panamá,* nº 27.530, el 8/5/2014. El Código refiere, en su art. 184, que entrará en vigencia en los 6 meses siguientes a su publicación, es decir, el 8/11/2014.

consumer contracts, in a compreensive way to adopt strong protection policy on the subject.[108]

For the first time in the Americas, the consumer protection is mentioned as public policy principle in Private international Law. Article 8[109] of the new Panama Code impose as the maximum principle the protection of the consumer interest ("*el interés superior del consumidor*").

Art. 89 defines international contracts made with a weaker party ("*se entiende por contratos desiguales o de adhesión los contratos en los que la parte más débil no tiene facultad para negociar las cláusulas esenciales de dichos contratos. Se entenderá como cláusulas esenciales o de adhesión las cláusulas que fijan el precio, las condiciones de ejecución del contrato y las cláusulas de solución de conflictos. La imposición de una de esas cláusulas se entenderá como el medio de comprobación de un contrato desigua*l"). Art. 90 expressly includes consumer contracts as such. And Article 95 regulates the jurisdiction and the law applicable to international consumer contratcts ("*los contratos del consumidor se rigen por la ley del lugar donde concluyó la transacción. A elección del consumidor, este podrá recurrir a la jurisdicción de su domicilio,[110] a la del lugar de conclusión del contrato o a la que le sea más favorable, en función del principio del interés superior del consumidor. Se entiende por la ley más favorable la ley de la reparación y protección más apropiada al interés del consumidor*."). It is a very interesting and innovative model, inspired by the Brazilian Proposal at the CIDIP VII.[111]

---

[108] The Chair thanks the ASADIP for the Information followed and specially Prof. Dr. Luciane Klein Vieira.

[109] See the original text: "Art. 8º. Los principios fundamentales de la comunidad internacional son parte de las reglas de aplicación del juez, como el interés superior del niño y el interés superior del consumidor, que priman sobre cualquier otro aspecto; la igualdad, equidad, buena fe y lealtad negocial, la seguridad jurídica sobre los actos, la básica territorialidad de la ley, la personalidad de las normas sobre el Estado, la capacidad y derecho de familia, la proporcionalidad, los derechos adquiridos sin fraude al derecho naturalmente competente, la protección a la parte más débil, las obligaciones internacionales *erga omnes* y los derechos derivados del *ius cogens* y la responsabilidad ambiental y aquellos principios universales de justicia aplicables."

[110] Aquí, es interesante observar que si el consumidor propone la demanda ante los tribunales de su domicilio, punto de conexión que debería ser empleado por todos los ordenamientos jurídicos mercosureños, a fin de facilitar el acceso a la jurisdicción a la parte débil, el juez buscará en las normas de conflicto del foro cuál es el derecho a ser aplicable, que puede ser un derecho nacional o extranjero.

[111] See the **Article 4. Contractual protection in distance contracting** 1. (**Limited and valid choice of law applicable to passive consumers)** International contracts and transactions concluded by the consumer in the State of his or her domicile, especially in the case of distance contracting, shall be governed by the law chosen by the parties; the parties may choose the law of the consumer's domicile or the law of the place of conclusion, the place of performance, or the law of the main office of the provider of goods or services; such law shall be applicable to the extent it is more favorable to the consumer. 2. **(Determination of the law most favorable to the passive consumer)** To that end, the most favorable option for the consumer shall be regarded as the following, in the order indicated: a. The law of the consumer's domicile; b. The law of the common residence of the consumer and one of the branches of the provider of goods or services; c. The law of the place of conclusion or the law of the place of performance, if it coincides with the law of the domicile, the principal place of business or main office of the provider of goods or services, which acted in the contract in a capacity other than that of mere distributor. 3. (**Place of conclusion in distance contracting**) In

On 15th October 2014, the so called "Ley de Derecho Internacional Privado de la República Dominicana" was approved the Law 544, which came into force on 20th December 2014.[112] The new Law on Private International Law of the Dominican Republic brinsg two articles related to international protection of consumers. Article 16, number 4, ensures the jurisdiction when the consumer has domicile at the Dominican Republic and the "stream of commerce" of the provider of goods and services was directed to this country. Article 16, number 1, brings a subsidiary connection to the place of performance, excluding the choice of a forum in international consumer contracts (Articles 18 and 19 together).

Article 16, inspired by the European Model, regulates the law applicable to international consumer contracts as follows: "los contratos celebrados por consumidores se rigen por la ley del país donde habitualmente se realiza la actividad, en defecto de elección por las partes se aplicará la ley de la residencia habitual del consumidor. Párrafo. En los contratos celebrados por consumidores establecidos en este artículo, la elección por las partes de la ley aplicable no podrá aminorar los estándares de protección del consumidor previstos en la ley de su residencia habitual, en aquellos casos en que el cocontratante tenga un establecimiento comercial en dicho país o de cualquier forma haya dirigido su actividad comercial hacia dicho país."

On 21th January 2015 in Paraguay came into force a new Law on the applicable law on international contracts (*Ley 5393 sobre el derecho applicable a los contratos internacionales*), which is only for commercial contracts, excluding consumer contracts.[113]

3.10 USA

Two consumer law initiatives in the US should be mentioned: the Consumer Financial Protection Bureau's proposed rule prohibiting class action waivers in financial services contracts, and the draft Restatement of Consumer Contracts.[114] In Johannesburg the Committee is willing to make a brief discussion of both initiatives.

Case Law has defined High-speed internet service as a utility -The 2-to-1 decision by a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit prevents cable and phone companies from blocking websites or creating fast and

---

the case of international distance contracting, the place of conclusion shall be considered to be that of the domicile notified by the consumer at the moment of contracting, except in the case of fraud. 4. (**Domicile notified at the moment of conclusion of the contract**) In the case of international distance consumer contracting, the consumer's domicile shall be regarded as the address or domicile communicated by the consumer to the professional or provider of goods or services at the moment of conclusion of the contract between the parties, except in the case of fraud. 5. (**Subsidiary rule for passive consumers)** If there is no valid choice of law by the parties, international contracts and transactions concluded when the consumer is in the State of his or her domicile shall be governed by the law in force therein. 6. (**Online choice of the law**) In the case of distance online and interactive choice by the consumer, the options of State laws to be selected must be clearly and prominently communicated in the prior information given to the consumer."

[112] Ley publicada en: *Gaceta Oficial de la República Dominicana,* el 18/12/2014. Entró en vigencia el 20/12/2014, conforme art. 1º del Código Civil.

[113] We thank ASADIP for this information. For Paraguay, see MORENO RODRIGUEZ, José Antonio. El derecho no estatal en la nueva ley paraguaya de contratos internacionales, p. 55.,

[114] Information sent by Prof. James Nefh.

slow lanes for delivering content on the internet. With a ruling in June 2016 high-speed internet service should be equally accessible to all Americans, a federal appeals court has come down forcefully in favor of competition and consumer protection. The decision affirmed the government's view that broadband is as essential as the phone and power and should be available to all Americans, rather than a luxury that does not need close government supervision. The decision came in a case about rules applying to a doctrine known as net neutrality, which prohibit broadband companies from blocking or slowing the delivery of internet content to consumers.[115]

III – Committee's work in the last two years: International Organizations dealing with international consumer protection

Desiring to contribute for debates on the creation of acceptable and equitable framework principles to international consumer protection worldwide, the Committee has worked very hard in the last two years. The Committee recommended to international organizations, especially the UNCTAD, the Hague Conference on Private International Law, to national consumer protection authorities, to non-governmental organizations such as the CI (Consumers International), to the IACL (International Association of Consumer Law), to the ASADIP (Asociación Americana de Derecho Internacional Privado), to the IFFTA (The International Forum of Travel and Tourism Advicates), to the academia and to consumer groups the "Sofia Statement on the Development of International Principles on Consumer Protection" (ILA Resolution nr. 4/2012). This report is about the success achieved by the Chair and all Committee Members on this endeavor.

1. Revision of UN Guidelines on Consumer Protection

The Committee on International Protection of Consumers of the ILA has been accepted by the United Nations Conference on Trade and Development (UNCTAD) to act in the role of an observer in the current efforts in updating the UN Guidelines on Consumer Protection (1985 and 1999). A few suggestions submitted by the Committee on International Protection of Consumers have been well reflected in the UN Guidelines. The Committee of International Protection of Consumers of International Law Association has recognized the emergence of the international dimension in consumer protection and the role of international (private and public) law in helping to develop more equitable standards of consumer protection worldwide. Aiming to develop fair, equitable and non-discriminatory standards and models for all consumers in the world, the Committee has proposed five guiding principles which had been adopted by the ILA as Resolution No. 4/2012 the Sofia Declaration. The suggestions submitted to the UNCTAD were made based on this 'Sofia Statement on the Development of International Principles on Consumer Protection' (approved as an International Law Association's Resolution – Res. No. 4/2012).

The Chair of the Committee, Professor Claudia Lima Marques (Federal University of Rio Grande do Sul, Brazil) sent substantive and editorial suggestions to the UNCTAD by writing on February 16, 2015. The Rapporteur of the Committee, Professor Dan Wei attended the Informal Expert Meeting of the UNCTAD on Revision of UN Guidelines for Consumer Protection and participated in the technical discussions as the representative

[115] Information sent by Prof. James Nefh. see https://www.cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/%24file/15-1063-1619173.pdf.

of the Committee on March 27 in Geneva. Professor Lima Marques and Professor Wei submitted afterwards the second position with 3 final suggestions to the plenary of the UNCTAD, which has been very well received. ILA was invited by the UNCTAD to continue making contributions for this project in the near future.

All committee members are very honored by the positive impact of the suggestions for the most important universal legal instrument in the area of consumer protection. The Committee members also express gratitude to the indispensable support of the ILA Headquarters, the Executive Council and Professor Marcel Brus.

The UN Guidelines for Consumer Protection sets a goal to promote international cooperation among Member States and encourages sharing experiences and best practices in consumer protection. The ILA Committee on International Protection of Consumer' focus is to help the efforts of the Intergovernmental Group of Experts (IGE) on Consumer Protection Law and Policy/UNCTAD.

2. The UN Intergovernmental Group of Experts (IGE) on Consumer Protection Law and Policy

The Intergovernmental Group of Experts (IGE) on Consumer Protection Law and Policy is a standing body established under the United Nations Guidelines for Consumer Protection (UNGCP) "*to monitor the application and implementation of the guidelines, provide a forum for consultations, produce research and studies, provide technical assistance, undertake voluntary peer reviews, and periodically update the guidelines*."[116]

On 17 to 18 October 2016, in Geneva, Switzerland, in the First Session of the IGE on consumer protection will be studied the future of this intergovernmental Expert Group IGE and the following topics: "1. Launch of the revised United Nations Guidelines for Consumer Protection; 2. Engaging stakeholders for the achievement of the Sustainable Development Goals: leaving no consumer behind; 3. Challenges and perspectives for the emerging collaborative economy; 4. Capacity building in consumer protection: trends and challenges. " In this First Session, the IGE on Consumer Protection is expected to decide on its method of work and work program for the period 2016-2020. In particular, in guideline 97(c) of the United Nations Guidelines for Consumer Protection, the General Assembly decided that UNCTAD should conduct voluntary peer reviews of national consumer protection policies of Member States, as implemented by consumer protection authorities. An interactive discussion will also be devoted to this pioneer peer learning activity."

In order to facilitate the deliberations and the informal exchange of experiences and best practices on the topics to be discussed, member States and observers are requested to submit contributions in writing to the UNCTAD secretariat by Friday, 16 September 2016, to allow participants to prepare themselves for the consultations.

The International Law Association through our Committee was invited to send written contributions to be discussed at the Johannesburg Conference and to participate in the meeting as observer. This invitation is a great honor and recognition. At the Johannesburg Conference, the Committee will ask the authorization to act again as observer in this first

[116] See http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=1060 .

meeting. If the ILA Headquarters and the Executive Council allows our participation, with the support and guidance of Prof. Marcel Brus, the Chair and General Rapporteur will be present to initiate a cooperative joint work with this new important UN Forum on the protection of consumers. The goal of the Chair and all Members of the Committee is to support the UN efforts in this "Intergovernmental Group of Experts on Consumer Protection Law and Policy" to enhance cross border protection of consumers worldwide.

3. Protection of international Tourists at the Hague Conference on Private International Law

In the annual Council of the Hague Conference on Private International Law in 2015, the Committee on International Protection of Consumers of the ILA was accepted by the Permanent Bureau to participate as an observer. The Chair Professor Claudia Lima Marques and the Rapporteur Professor Dan Wei attended the meeting on March 24-26, 2015 in the Hague, Netherlands. The Committee strongly supported the initiative to include tourism project into the working agenda of the Hague Conference on Private International Law and to carry out a feasibility study by the Permanent Bureau and the creation of an experts' group.

4. Meetings among Committee's members

In these years, the Committee Members decided to make small meetings, taking the opportunity of participation in key congresses and events and to hold only one main teleconference before the Johannesburg Conference. The Chair and the Rapporteur have had several meetings with the Members to prepare for the book and this report, as follows.

4.1 Collaboration with Consumers International at the Revision of the UN Guidelines and of the UNCTAD Manual on Consumer Protection

Consumers International (CI) is the only independent global non-governmental organization on consumer protection, giving worldwide "voice for consumers". With over 240 member organizations in 120 countries, it is the most important and much-acknowledged international NGO for the international consumer movement, helping, protecting and empowering consumers worldwide.[117] During the process of the Revision of the UN Guidelines and together with the IACL (International Association of Consumer Protection) the Committee has worked together with the CI to enhance the mentions of cross-border consumer protection in the UN Guidelines. The Committee feels honored to be able to collaborate on this important endeavor and wants to acknowledge the important contributions made by the CI Representatives, Antonino Serra, Amanda Long and Robin Simpson during the Revision of the UNGCP.

At the end of this effort, the Chair and several members of the Committee, like Prof. Dr. Thierry Bourgoignie, Prof. Dr. Yu Ying and Prof. Dr. Iain Ramsay were invited to send comments on the updating of the UNCTAD's Consumer Protection Manual by Mr. Robin Simpson who worked independently with the UNCTAD secretariat after the revised Guidelines were adopted in December 2015. During the process of Revision of the UNGCP and at the CI's World Congress in Brasília, the mentioned Committee Members held small informal meetings with the Chair and General-Raporteur and also Skype conferences.

[117] See www.consumersinternational.org <http://www.consumersinternational.org>

4.2 International Association of Consumer Law

The Committee has work closely with the IACL. During the Biannual Conference of the International Association of Consumer Law (IACL), the most important experts of consumer protection have discussed the international dimension of consumer law (Amsterdam, 29 June to 1 July 2015, see the Program). The Chair and the other five Committee Members Hector Valverde Santana (Brazil), Iain Ramsay and Toni Williams (UK), Thierry Bourgoignie (Canada), James Nefh (USA) and Gail Pearson (Australia, also President of IACL) made two informal meetings to prepare for a future book of the Committee and to contribute for this Report. The IACL congregates the leading scholars in consumer protection and in this Amsterdam Congress, the main international issues discussed were: self-regulation in tourism and air travel, e-commerce, cross-border unfair commercial practices, international product safety, data protection, private enforcement of consumer law and international collective actions and arbitration.

4.3 Brasilcon, DLJV and Academia

The Committee Members have also made small meetings during several Congresses, in Brazil and in Germany, namely, during the 2016 Congress of Brasilcon (Claudia Lima Marques, Dan Wei, Hector Valverde Santana, Thierry Bourgoignie, Christoph Benicke, Gail Pearson, Iain Ramsay and Toni Williams), the 2015 Deutsch Lusitanische Juristenvereinigung-DLJV, in Porto Alegre, Brazil (Rui Dias, Dan Wei, Christoph Benicke, Claudia Lima Marques, Hector Valverde) and in academic Congresses, at the Federal University of Rio Grande do Sul, in Porto Alegre, Brazil (Yuko Nishitani, Hector Valverde Santana, Juan Cerdera), at ASADIP Congresses in 2015 Porto Alegre and in 2016 Panamá City (Claudia Lima Marques, Cristoph Benicke, James Nefh), ASADIP PUC-Rio (Claudia Lima Marques, David Stewart, Dante Negro-OEA and José Moreno Rodríguez-ASADIP). Some of these meetings were organized by other International Associations that wish to continue working together with our Committee.

4.4 Work with ASADIP

As mentioned before, the Committee Members worked together with the American Association on Private International Law (ASADIP) during the 2014 and 2015 Annual Congresses of ASADIP and also the preparatory meetings for the Hague Council. Within the range of ASADIP's activities and considering the constant development of tourism services and the increasing number of visitors and tourists in the world, 108 experts from more than 14 countries have manifested officially their support for the creation of a legal instrument with an objective to protect tourists and visitors internationally. The so-called "Declaration of *Rio de Janeiro*" well reflects the accomplishment of studies, which is now under the scope of the Hague Conference on Private International Law. The draft convention on the cooperation and protection of consumers as tourists recognizes all vulnerabilities of tourists as foreigners, e.g.: the less time they spend in destinations, the circumstances of being away from their home country and culture, possible difficulty in foreign languages, the need for information, the need to find proper venue to complain and the need to get access to justice, use of alternative dispute resolution and small claim courts, the need to benefit from an easy administrative and legal aid without discrimination. It is interesting to note that in 2014 ASADIP organized a meeting with participations by experts, diplomats and practitioners to help the Member States to include the subject of tourist protection in the working agenda of the Hague Conference

on Private International Law. In 2015, ASADIP's annual meeting was held in Panama City and ASADIP continued to focus on the international protection of consumers. The ASADIP has invited the Committee to present relevant results at the coming meeting and to consider the need to create a study group on the protection of tourists as consumers.

4.5 Future work with the International Forum of Travel and Tourism Advocates (IFTTA)

Preparing our collaboration with the Hague Conference on Private International Law the Chair make contact with the International Forum of Travel and Tourism Advocates (IFTTA). The IFTTA is a world organization of lawyers, academicians, legal advisors, government officials and tourism experts solely dedicated to the legal aspects of tourism and travel. IFTTA was conceived in 1983 and has always tried to spread the expertise of its members by organizing annual conferences and workshops worldwide and distributing a periodical IFTTA Law Review. As travel is mostly international, it seems appropriate to widen the legal horizon beyond the purely domestic. IFTTA's main focus is to exchange experiences, learn from each other and promote international travel and tourism through the creation of an appropriate legal framework. IFTTA has held 26 World Conferences and many regional ones. At present, membership comprises lawyers from 42 countries across the globe. Sections and chapters have also been formed in Europe, North America, Argentina, Israel, Brazil and the Asia-Pacific region. The Committee appreciates the key focus of IFTTA and is willing to contribute for further developments of any international instrument.

The IFTTA invited the Committee to present its work at the Buenos Aires Conference in 2015. In the lively debates at IFTTA conferences, the consensus reached was that issues in travel and tourism law are more or less the same all over the world, yet legal approaches differ in the light of cultural and historical backgrounds. Based on this first exchange of ideas, IFTTA sent a letter to enhance the cooperation to the Hague Conference on Private International Law supporting the position to protect tourists as consumers worldwide. Being respectively the observer at the UN World Tourism Organization, in Madrid and the observer on the Revision of the UN Guidelines on Consumer Protection at UNCTAD, IFTTA and ILA plan to exchange information and share knowledge to contribute jointly for new international instruments on Co-operation in Respect of Protection of Tourists and Consumers in the world.

5. Preparation of a final report: Guidelines Draft on best practices on international protection of consumers: Applicable law

After the Committee's work at the negotiations on the Revision the UN Guidelines for consumer protection, all the involved members were convinced that there is need to be aware of the different Models that already exist, since more and more countries have established conflict rules for this issue (see Panamá, Dominican Republic, Argentina, Brazil, CARICON, China etc.). The work of the Committee aims to put in evidence these Models and to support this new trend of consumer protection, by means of presenting a draft resolution with some Guidelines on jurisdiction for international consumer transactions, recommendations on the best practices. The Draft resolution has been endorsed by all Committee's members.

The Committee will also publish a book entitled "The Future of International Protection of Consumers". The structure will be organized as follows: Part. 1 Models of consumer protection through Private International Law; Part. 2 Sofia Declaration and Revision of UN Guidelines; and Part. 3 National developments of consumer protection law and policy.

The Committee will continue to pay close attention to the coming results at the UNCITRAL and continue to work on the protection of international tourist protection, following with great interest the results at the Hague Conference on Private International Law. Both of issues haven't been addressed in the Draft Resolution.

DRAFT RESOLUTION

COMMITTEE ON THE INTERNATIONAL PROTECTION OF CONSUMERS

The 77th Conference of the International Law Association held in Johannesburg, South Africa, 7 to 12 August 2016:

HAVING CONSIDERED the Report on the Role of international Law on contemporary consumer protection, the contents of the book prepared by the Committee and the survey of the consumer protection laws and regulations in the global financial crisis;

THANKS the Chair, the Rapporteur and the members of the Committee for the valuable work done;

RECOGNIZING the emergence of the international dimension in consumer protection through the globalization and the role of international law in helping to develop more equitable standards of consumer protection and the need to take consumer into account in international trade regulation;

ACKNOWLEDGING that individuals are usually the weaker parties on consumer contracts in general, and specifically in cross-border contracts in respect to the applicable law and jurisdiction in the national, regional and global markets;

CONCERNED about the growing consumers' loss of confidence in the global market and inexistence of universal models to protect consumers in cross-border contracts;

AWARE that the *ILA Resolution No. 4/2012 – Sofia Statement on the Development of International Principles on Consumer Protection* was utilized by the UNCTAD during the Revision of the UN Guidelines for Consumer Protection in 2015, representing a chance to enhance consumer protection, in its international and national dimensions;

DESIRING to contribute with the debate on the creation of acceptable and equitable framework principles to international consumer protection worldwide;

ADOPTS the Recommendations and Guidelines annexed to this Resolution;

COMMENDS the Recommendations to international organizations, countries and consumer groups that are working in national, regional or international initiatives to face the global financial crises and to assure international co-operation in consumer issues, and to their advisors, with a view to focusing the attention of all concerned on the need to develop fair and equitable standards and models for all consumers in the world, without discrimination;

INVITES the Committee to continue and complete its work on the new developments on the international protection of consumers and to focus on the protection of tourists.

JOHANNESBURG RECOMMENDATIONS AND GUIDELINES ON THE BEST PRACTICES ON INTERNATIONAL PROTECTION OF CONSUMERS

RECOMMENDATIONS

1. CONSIDERING that consumers as natural persons acting outside of their profession or trade are not experts and do not have the same knowledge and information of the businessmen, so their unequal bargaining power makes the application of the common rules on commercial transaction transactions (which often includes *lex mercatoria)* unfair to them. Therefore, **we recommend acknowledgement of the protection of consumers as weaker parties as a principle in national and international transactions,** and we stress the differences between consumer contracts and other business contracts and the need for special rules to protect consumers not only nationally but also in international contracts and in case of dispute resolution.

2. NOTING that several international law initiatives have been undertaken by different international bodies, such as the United Nations Commission on International Trade Law (UNCITRAL), the Organization of American States (through CIDIP VII-Part II), the European Union, Mercosul and CARICOM, which are also working to harmonize laws relating to cross-border consumer transactions through conventions, model laws, and legislative guides. Also that the 2015 Revision of the UN Guidelines for Consumer Protection has acknowledged the international dimension of the consumer protection, urging the States to consider the cross-border consumer transactions and the protection of tourists. The UNCITRAL's efforts to regulate jurisdiction for online consumer contracts and the efforts of the Hague Conference of Private International Law about the possibility and necessity to regulate the international tourism should be welcome. Therefore, **we recommend the adoption of special rules on applicable law and jurisdiction for cross-border consumer protection.**

3. AWARE that the foreign tourists demand special protection related to their consumer rights, especially if they are in the visited destination, far from their habitual residence, culture environment and language; ACKNOWLEDGING the efforts made at the UN World Tourism Organization to enhance the protection of tourists in case of emergency situations and the efforts of the Hague Conference of International Law on the field, **we also recommend the continuations of the actual international efforts to assure more international co-operation and pro-active initiatives on consumer protection worldwide, especially in the field of international tourism.**

4. CONSIDERING that in the last years there has been an important moment to update national and regional laws, regulating international consumer contracts (specially at the EU, Mercosur, OEA, Japan, China, Korea, Brazil, Argentina, Panamá, Dominican Republic) and after studying the models of consumer protection through Private International Law in the world, **we recommend the States to use one or more of these best practices on international protection of consumers, therefore we selected and organized the following Guidelines to helping the development of fair and equitable legal standards for all consumers in the world, without discriminations;**

DRAFT

GUIDELINES ON THE BEST PRACTICES ON LAW APPLICABLE TO INTERNATIONAL PROTECTION OF CONSUMERS

Considering the 2012 ILA's Sofia Statement on the Development of International Principles on Consumer Protection acknowledging *that "It is desirable to develop standards and to apply rules of private international law that entitle consumers to take advantage of the most favourable consumer protection",* the best practices on especial rules on applicable law to international consumer contracts, selected by the Committee on International Protection of Consumers, are the follow:

1. Models of Framed Autonomy in Consumer Contracts

The Committee identifies three different models of what can be called "framed autonomy in international consumer contracts" or "limited Party Autonomy in Private International Law", models that permit the choice of law in international consumer contracts, but limiting this choice by three different protective approaches:

a. *Substantive-comparative approach:* by using mandatory rules (European Model)
b. *Substantive-comparative approach with the creation of an especial connecting factor to consumer protection*: by allowing the choice only of "the most favorable law" to the consumer (Brazilian Model)
c. *Procedural and alternative approach*: by allowing the choice of law if made only by the consumer and limiting the laws to choose with traditional connecting factors.

A. Limiting the Choose Law by comparing with Mandatory Rules:

European Union Model – As Recital 25 explain **c**onsumers should be protected by rules of the country of their habitual residence that by the EC Regulation 593/2008 cannot be derogated from by agreement, "provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country". The same protection should be guaranteed if "the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities". Article 5 of the 1980 Rom Convention had already this model, now consolidate at Article 6 of the European Regulation n. 593/2008 on the law applicable to contractual obligations, called Rome I.

The European Model is followed by the Laws of Québec, Canada, and with some adaptations- by the Dominican Republic and the new Civil and Commercial Code of Argentina. The Japanese Law has some European and some *sui generis* elements, because requires the manifestation of the consumer.

Committee's Suggested Model Rule:

"Article 1. Consumer Contracts

1. An international consumer contract shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
b) by any means, directs such activities to that country or to several countries including that country, and in both cases, the contract falls within the scope of such activities.[118]

2 If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be governed by the law choose by the parties, however, such a choice may not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of his habitual residence.[119]

3. In absence of choice, by the law of the country where the goods or services were supplied.[120]"

B. Party Autonomy only to choose the most favorable law to consumers:

Brazilian Model – The Brazilian Government has used this model at the CIDIP VII proposal (Inter-American Convention on the Law Applicable to International Consumer Contracts and Transactions),[121] suggested by Prof. Dr. Claudia Lima Marques, from the Federal University of Rio Grande do Sul, in Porto Alegre, at her OAS Summer Course in 2000,[122] and also at the MERCOSUR CT 7 Proposal. The Brazilian Bill 3514, 2015 to update the Consumer Code also use this model (Art. 101 sole paragraph) opting for a new connecting factor to consumer contracts, ´the more favorable law to consumer´.

The Brazilian Model is followed in part by the new Panama Private International Law. The Panama Law allowed the choice only by the consumer, but does accept the most favorable to the consumer connecting factor, defined in a substantive presumption ("Se entiende por la ley más favorable la ley de la reparación y protección más apropiada al interés del consumidor"), although the mix of jurisdiction and applicable law in a sole rule may bring some difficulties.

---

[118] Adaptation of the European Model.

[119] Adaptation of the European Model.

[120] Adaptation of the Argentinean Law.

[121] See OEA/Ser.G, CP/CAJP-2652/08 add. 4, 10 November 2008 and Explanation to the Simplified Version of the final Brazilian Proposal "Buenos Aires Proposal", Joint proposal of the Governments of Brazil, Argentina, and Paraguay, in OEA/Ser.G, CP/CAJP-2837/10, 21 April 2010.

[122] The original academic proposal had distinguished between active and passive consumers, as followed: "*Article 2. Protection contractuelle générale* – 1.Les contrats et les transactions avec les consommateurs, spécialement ceux conclus à distance par moyens électroniques, par opération de télécommunication ou par téléphone, lorsque le consommateur se trouve dans son pays de domicile, sont régis par la loi de ce pays ou par la loi plus favorable au consommateur, choisie par les parties, tant qu'elle est la loi du lieu de la conclusion du contrat, ou celle du lieu de l'exécution du contrat, ou celle de la prestation caractéristique, ou celle du domicile ou du siège du fournisseur des produits ou des services. 2.La loi choisie par les parties, parmi celles du lieu de la conclusion du contrat, du lieu de l'exécution de celui-ci et du lieu du domicile du consommateur, est appliquée aux contrats conclus par le consommateur lorsqu'il se trouve en dehors du pays de son domicile . See MARQUES Cláudia Lima, A proteção do consumidor: aspectos de direito privado regional e geral, in *XXVII Curso de Derecho Internacional-OEA/CIJ*, Ed. Secretaría General- Subsecretaria de Asuntos Jurídicos, Washington, 2001, p. 657-780.

Committee's Suggested Model Rule:

"Article 1. Consumer Contracts

1. An international consumer contract shall be governed by the law of the habitual residence or domicile of the consumer or by the law choose by the parties, provide that this law is more favorable to the consumer.
2. The parties may choose between the law of the habitual resident or domicile of the consumer; the place of the conclusion of the contract, the place of performance or the law of the main office of the professional or provider of goods or services.
3. The more favorable law to the consumer is presumably the law that assures the remedies or the redress more protective for the consumer interest in this dispute.[123]
4. In all contracts and especially in the case of distance online or interactive choice by the consumer, the options of laws to be selected must be clearly informed to the consumers, but the choice does not prevent their right to claim the application of ´the most favorable law for the consumer` in case of future litigation.[124]"

C. Limited **connecting factors and choice of law only by the consumer:**

Chinese Model: The special choice-of-law rules for consumer contracts are provided in Article 42 which states that "consumer contracts shall be governed by the law of the place in which the consumer is habitually resident; if consumer chooses to apply the law where goods and services are provided, or if the business party does not engage in any soliciting activities in the place in which the consumer is habitually resident, the law of the place where goods and services are provided shall apply."[125]

The Chinese Model can be compare to the Japanese model, insofar the Japanese Law also use the will of the consumer to apply the mandatory rules ("Art. 11. 1…a law other than the law of the place where the consumer habitually resides, the specific mandatory rules in the law of the consumer's habitual residence shall also apply to matters subject to such mandatory rules with regard to the formation and effect of the consumer contract, provided that the consumer expresses his/her will to the business operator to the effect that such mandatory rules should apply").

Committee's Suggested Model Rule:

"Article 1. Consumer Contracts

1. International consumer contract shall be governed by the law of the habitual residence of the consumer.
2. The law of performance, considered the law where the goods or services be supplied, shall be govern the international consumer contract if the consumer expressly choose this law or if there is no related business activities of supplier/professional in the country of the consumer's habitual residence.

---

[123] Adaptation of the Panama Law: "Se entiende por la ley más favorable la ley de la reparación y protección más apropiada al interés del consumidor."

[124] Adaptation of the Brazilian Proposal at the OAS for a CIDIP VII in applicable law on international consumer contracts.

[125] Zhengxin Huo, Highlights of China's New Private International Law Act: From the Perspective of Comparative Law, in Revue juridique Thémis, (2011) 45 R.J.T. 637 – 684.

2. Final Suggestion of the Committee of a mixed Model Rule:

Article 1. Consumer Contracts

1. An international consumer contract shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
   a. pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
   b. by any means, directs such activities to that country or to several countries including that country, and in both cases, the contract falls within the scope of such activities.[126]
2. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be governed by the law choose by the parties[127] and in absence of choice, by the law of the country where the goods or services were supplied.[128]
3. The parties may choose the law applicable, provide that this law is more favorable to the consumer.[129]
4. The parties may choose between the law of the habitual residence of the consumer, the place of conclusion or the place of performance of the contract,[130] and in this case, the more favorable to the consumer is the law that assures the protective remedies or redress more adequate to the interest of the consumer in the dispute.[131]

[126] Adaptation of the European Model.
[127] Adaptation of the European Model.
[128] Adaptation of the Chinese Model, followed also by Argentina.
[129] Adaptation of the Brazilian Model.
[130] Adaptation of Chinese Law and Brazilian Model.
[131] Adaptation of the Panama Law.

COMMITTEE ON THE INTERNATIONAL PROTECTION OF CONSUMERS

WORKING SESSION

Tuesday, 9 August 2016, 2.00pm

Chair: Professor Rainer Hofmann (Germany)

The Chair welcomed attendees and observed that the Committee must be the most lusophonic of the ILA, with members from Portugal and Macao SAR.

Professor Cláudia Lima Marques (Brazil) expressed her great honour in serving as the Chair of the Committee, and congratulated its members for their work on the book entitled *The Future of International Protection of Consumer* (published by the Federal University of Rio Grande do Sul).

Professor Dan Wei (HQ) presented the work of the Committee since the last biennial conference in 2014. The Committee had decided to launch a second book (as noted by Professor Lima Marques). The book brought together contributions from most of the members of the Committee, with additional contributions from Indian colleagues and Brazilian experts in the field of consumer protection. The book was divided into three parts: the first part focussed on the revision of the *UN Guidelines for Consumer Protection* (UNGCP); the second part focussed on national developments in consumer protection law and policy; the third part contained some of the products of the Committee's work, including the Sofia Statement (adopted at the 2012 biennial conference) and existing models of consumer protection through private international law with suggestions.

Over the past two years, members of the Committee had been actively keeping in touch. As a result, the current draft report reflected contributions from all members. The work over this period had been very intensive, and the Committee had worked closely with international organisations (including United Nations Conference on Trade and Development (UNCTAD) and the Hague Conference on Private International Law (HCCH)) and nongovernmental organisations (including Consumers International (CI), the International Association of Consumer Law (IACL) and the American Association of Private International Law (ASADIP)).

With regards to the UNGCP, Professor Wei recalled that the current version had been twice revised (in 1999 and 2005). The Committee was invited to participate in a further revision of the UNGCP as observer. The Committee submitted some suggestions, most of which had been reflected in the 2015 revision.

The revised UNGCP set the goal of further international cooperation among Member States in the field of consumer protection. The Committee was particularly pleased that the UN General Assembly decided to establish an intergovernmental group of experts on consumer protection law and policy. This was a positive step, because one of the main objectives of the group was to assist with the implementation of the UNGCP, and to provide a forum for consultation, technical assistance, voluntary peer review, and the periodic updating of the UNGCP. The first meeting of the group would take place in Geneva in October 2016. In order to facilitate discussion and deliberation, as well as the informal exchange of best practice, Member States and observers had been required to submit written contributions prior to the meeting. The ILA had been invited to submit a

contribution. The Committee hoped to be able to participate in the meetings, and counted on the support of the Executive Council in this regard.

With regards to the HCCH, Professor Wei was pleased to report that an important initiative related to consumer protection in the area of tourist protection had been well received by the governing council. Work towards a draft convention had been included on the work programme of the organisation at the proposal of Brazil. Professor Wei attended the annual meeting of the Council on General Affairs and Policy in 2015 as an observer for the ILA, where she manifested support for the proposal, and emphasised the importance of acknowledging the tourist as the weaker party and the need for special protections.

With regards to nongovernmental organisations, Professor Wei described recent interactions between the Committee and CI, IACL, and ASADIP (as detailed in the Committee's report). Moving forward, the Committee would continue these interactions, as well as develop a closer association with the International Forum of Travel and Tourism Advocated (IFTTA), which was a perfect partner for the Committee.

Ana Cândida Muniz delivered a presentation entitled "The UN Guidelines for Consumer Protection: review and next steps".

When consumer rights began to be internationally considered, following an address of the US President John Kennedy to Congress in 1961, no one would have predicted that the theme would become one of international concern.

The advent of the UNGCP, first adopted in 1985, was a clear recognition of the importance of the basic rights that President Kennedy had outlined; the right to safety, the right to be informed, the right to choose, and the right to be heard. The UNGCP were a direct effect historical events that followed President Kennedy's address, including the first UNCTAD in 1964, the collapse of the Soviet Union, the independence of many countries and the fall of dictatorships in others, and an increase in UN membership.

These independent countries and new UN members required a special strategy for their development. Hence, the attention to the theme of consumption and therefore consumer protection became inevitable.

Today, about 20 years on, the UN General Assembly had recently approved the second review of the UNGCP. But what did this review mean? What was expected from UN members, and what could consumer expect from the adoption of the revised UNGCP?

The Advent of the UNGCP adopted in 1985

In 1970, the UN Economic and Social Council requested the Secretary General to survey institutions and legislation in the various UN members. Upon consideration of the report of the survey, ECOSOC agreed that general "guidance" was necessary setting specific objectives, considering the needs of developing countries in particular.

It was only in the early 1980s that ECOSOC formally requested the Secretary General to continue consultations and a first draft of the guidelines was presented. In April 1985, the General Assembly adopted the UNGCP by consensus (Resolution 39/248). The UNGCP provided an international framework for the development and evaluation of consumer policy.

There was no doubt that the Guidelines became an international reference regarding minimum consumer protection standards. Legislation in many UN was largely based on and inspired by the UNGCP.

The UNGCP constituted a policy framework and urged governments to promote consumer protection, at first, in eight areas, namely basic needs, information, safety, choice, representation, redress, consumer education, and healthy environment. The UNGCP were designed in particular for governments of developing and newly independent countries to use in structuring and strengthening consumer protection policies and legislation. They were adopted "recognizing that consumers often face[d] imbalances in economic terms, education levels, and bargaining power, and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the importance of promoting just, equitable, and sustainable economic and social development". Accordingly, the UNGCP was used as an example of official recognition of consumer protection as a tool for social justice and economic development.

Early reports on the implementation of the UNGCP recognised their importance and relevance for social development, especially in developing countries. Even in developed countries, where there were already considerably strong consumer laws, the UNGCP constituted a reference, even to achieve objectives and goals. As for the objectives of the UNGCP, States at the time considered that, among the interests and needs of consumers – "particularly those in developing countries" – those deserving attention related to imbalance in economic terms and education, access to non-hazardous products, and just, equitable and sustainable economic and social development. Therefore, the original UNGCP had the aim not only of identifying the main consumer rights, but also of assisting States to achieve adequate and proper protection in this very specific area.

The UNGCP settled a new standard for the responsibility of government to develop proper policies on consumer protections, and in doing so, to set priorities according to the State's economic status and needs. It was recommended that governments provide or maintain adequate infrastructure to develop, implement and monitor consumer protection policies, paying special attention to certain sectors of the population such as those in rural areas.

Thus, it became crucial for States to create proper organisations or agencies to implement, follow and enforce the basic consumer protection standards established in the UNGCP in the following areas:

- physical safety;
- promotion and protection of consumers' economic interests;
- standards for the safety and quality of consumer goods and services;
- distribution facilities for essential consumer goods and services;
- measures enabling consumers to obtain redress;
- education and information programmes;
- measures relating to specific areas (food, water, pharmaceuticals including pesticides and chemicals); and
- international cooperation.

The review of UN Guidelines in 1999

The 1999 review of the UNGCP was mainly focused on environmental matters. At the 1972 Conference on Human Environment, the International Organization of Consumers Unions set the basis for environmental discussions in the ambit of consumer matters. It was recognised that environmental matters were basically "ordinary people's matters", and that the wellbeing and survival of all individuals was the main concern. Considering that the environment was being damaged, mainly due to all sorts of consumption (eg, energy, water, food, electronics), the need to call people's attention to this matter became inevitable. In order not only to consider the theme of environmental matters in its new revision, but also to successfully call attention to the need for sustainable consumption, the revised UNGCP called for new consumer protection and awareness policies, as well as international cooperation.

The 1999 revisions to the UNGCP did not suppress or change any of the objectives set in the 1985 version, but highlighted some of these objectives and established new objectives according to the need to consider environmental limitations and global warming. New objectives included education on environmental, social and economic impacts of consumer choice, consumer redress, and the promotion of sustainable consumption patterns.

The UN considered that unsustainable patterns of production and consumption within industrialised countries were the major cause of the continued deterioration of the global environment. It was therefore crucial for such countries to take the lead in achieving sustainable consumption patterns. As for developing countries, their needs and economic status were to be taken into consideration together with the goals of eradicating poverty, development and healthcare. The revised UNGCP also acknowledged the role of enterprises in guaranteeing consumer protection, stating that they should obey the relevant laws and regulations of the countries in which they do business, complying with international appropriate standards.

The participation of universities and public and private enterprises was also officially considered in the process of developing consumer protection policies. In this regard, the participation of the civil society was important, as highlighted by CI, which participated not only in creating the UNGCP in the first place, but also in expanding them, including in the area of sustainable consumption.

The first meeting of the Ad Hoc Expert Group on Consumer Protection

For 30 years, there was no official group mandated to consider consumer protection matters under the auspices of the UN. For over 18 years, the Intergovernmental Group of Experts (IGE) on Competition Law and Policy within UNCTAD organised ad hoc meetings on consumer protection. While both themes were related, given the existence of an official international document on consumer protection, the lack of an official dedicated forum for discussing consumer matters under the auspices of the UN was for some time the object of much criticism. The Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which convened in Geneva in November 2010, invited UNCTAD to convene two ad hoc expert group meetings on on the interface between competition policy and consumer welfare, separate from the Competition Law and Policy IGE:

- The first ad hoc expert group meeting took place in July 2012 and had as its first aim to prepare an implementation report on the UNGCP. Given the time that had elapsed since their original elaboration and first review, it was necessary for the group to consider the need for a new review. Initial investigations were coordinated by UNCTAD with the participation of several States, which contributed information on whether the UNGCP were still valid and useful. The result of this process was that the UNGCP remained not only valid and useful, but that other themes should be studied with a view to possible inclusion in a second revision, including: ecommerce, financial services, data protection, tourism, energy and cross-border trade.
- The second ad hoc expert group meeting took place in July 2013. States used the opportunity to discuss not only the need for a revision of the UNGCP, but also the need for establishing an official and dedicated IGE on consumer protection. In order to promote further investigation and studies, four working groups were created: one on ecommerce (chaired by France), one on financial services (chaired by Malaysia), one on other issues (chaired by Brazil and Germany), and one on the implementation of the UNGCP (chaired by Gabon). Other issues highlighted by the Brazilian and German experts were tourism, privacy, and data protection. This process counted on the participation of the ILA and CI, which contributed to drawing attention to issues such as public services, energy, e-commerce, financial services, updates related to water, pharmaceutical products, and food, and the need for a new IGE.

Review process of UN Guidelines 2012-2015

The first ad hoc expert group meeting recommended that UNCTAD "undertake discussions regarding the possibility of updating the [UNGCP], under the auspices of the Intergovernmental Group of Experts on Competition Law and Policy". It also recommended that UNCTAD "undertake to collaborate on the content of potential revisions".

An implementation report was prepared by the UNCTAD secretariat and considered by the second ad hoc export group meeting. The report identified a number of areas for the improvement of the UNGCP to ensure that they addressed new and contemporary issues that were at the forefront of consumer protection policy.

In 2015, an informal expert meeting was held in Geneva, attended by more than 60 participants from over 40 Member States, intergovernmental and non-governmental organisations. Although it was an informal meeting, it was perhaps one of the most important moments in the discussions relating to the UNGCP review. At this point, most States had confirmed their support on the new version of the UNGCP and strongly affirmed the need for establishing an IGE on consumer protection. UNCTAD representatives explained the budgetary implications of establishing an IGE, noting that the earliest budgetary opportunity would be 2017-2018. However, States, especially developing States, considered that the social and political impact of officially establishing the IGE was too important, even without the proper budget.

A draft resolution on consumer protection and the revised UNGCP was submitted to and adopted by the Seventh United Nations Conference to Review All Aspects of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. Thanks to the close work and support of States, particularly by their respective consumer protection agencies, the aim of creating an IGE on

consumer protection was achieved: the UN General Assembly decided to establish such a group at its 81st plenary meeting on 22 December 2015. The revised UNGCP was also adopted. The new revision covered the additional topics of e-commerce, financial services, public utilities, tourism, and data protection and privacy.

The IGE on consumer protection law and policy would operate within the framework of an existing commission of UNCTAD's Trade and Development Board. It would be mandated to:

- provide forums and modalities for multilateral consultations, discussions and exchanges of views between Member States;
- undertake studies and research periodically on consumer protection;
- conduct voluntary peer reviews of national consumer protection policies of Member States, as implemented by consumer protection authorities;
- collect and disseminate information;
- provide capacity-building and technical assistance to developing countries and economies in transition in formulating and enforcing consumer protection laws and policies;
- consider relevant studies, documentation and reports from relevant organisations of the UN system and other international organisations and networks;
- make appropriate reports and recommendations on the consumer protection policies of Member States, including the application and implementation of the UNGCP;
- conduct a periodic review of the UNGCP, when mandated by the United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

The need for internalisation of the UNGCP by the UN Member States

In the year that marked the 30th anniversary of the original adoption of the UNGCP, Member States had made a special effort to establish an IGE on consumer protection within the UN. In previous versions of the UNGCP, States where urged to take appropriate measures to implement the UNGCP. Whether regionally or nationally, governments were demanded to take the necessary measures to respect the standards established in the UNGCP as well as to take actions in order to achieve such standards.

The question remained as to how the "new" UNGCP topics would be implemented? How would States develop consumer protection policies to align with the UNGCP? Would the IGE on consumer protection take part in such implementation? Brazil was one of the States to take the lead in this area since it already had developed a specific policy for consumer protection matters; however, the both political and economic crisis in Brazil seemed to have hampered these developments.

It was undeniable that the UNGCP constituted an international reference for standards of consumer protection and policies. But they certainly went beyond that, being an international recognition of consumers' vulnerabilities and a necessary tool for development and even human rights.

The two updates to the UNGCP might be considered a little too "shy" for some critics and experts, but they certainly reflected the times and new technologies. The theme of sustainable consumption was as important in 1999 as it was in 2015. As the UN

Secretary-General observed at the signing of the Paris Agreement in April 2016, "[t]he era of consumption without consequences is over". The connection between consumer protection, development and environment was therefore inevitable. It was time to take action on these topics. Following the latest revision of the UNGCP, it was urgent for governments to create, deliver and develop policies regarding consumer protection in accordance with the international standards established by the UNGCP.

The constant evolution of the means of communication and related technologies was providing new products and services, and shrinking barriers and distances. The inclusion of topics such as data protection and privacy, e-commerce, financial services, and tourism was an example of this process. At the same time, it is necessary to recognise that constant change in our societies demanded future reviews of the UNGCP. Governments, civil society and other stakeholders must therefore consider such change; after all, the rights recognised in the UNGCP recalled that consumer protection had an impact on development, access to information, access to justice and, ultimately, people's lives. It was here that civil society, academics and actors such as ILA could make a contribution in order to guarantee consumer protection and the implementation of the UNGCP.

Dr Luciane Klein Vieira delivered a presentation entitled "Latin American paradigm on international protection of consumers", in which she outlined major developments in the region in the area of private international law as it related to consumer protection. Specifically:

- In Argentina, a new civil and commercial code had entered into force on 1 August 2015, which contained special rules for applicable law in consumer matters.
- In Brazil, while there were no special rules for applicable law in consumer matters, projects were afoot to fill gap (including reforms to the Consumer Protection Code to limit party autonomy and to favour the most favourable law). Moreover, Art 22(2) of the new Code of Civil Procedure conferred jurisdiction on the Brazilian courts in consumer matter when the consumer is domiciled or resident in Brazil, although it was not clear whether Congress intended for this to be an exclusive jurisdiction.
- In Paraguay, significant reforms were implemented by Law No 5393 on the Law Applicable to International Contracts, which was promulgated in January 2015. However, consumer contracts were expressly excluded from the scope of the new regime.
- In Panama, a new Code of Private International Law was introduced in 2014, which contained special rules for jurisdiction and applicable law in consumer matters.
- In the Dominican Republic, Law 544 on Private International Law was introduced in 2014, which also contained special rules for jurisdiction and applicable law in consumer matters (Arts 16 and 63, respectively).

Dr Klein Vieira also outlined two major regional projects instigated by Brazil:

- In 2010, under the auspices of the Organisation of American States, Brazil submitted a proposal for a draft "InterAmerican Convention on Applicable Law to Some International Consumer Contracts and Transactions" to the Seventh InterAmerican Specialised Conference on Private International Law (CIDIPVII). The proposal – referred to as the "Buenos Aires Proposal" – was supported by Argentina and Paraguay. If adopted, the Convention would constitute a significant breakthrough in the region.

- In 2010, under the auspices of Mercosur, Brazil presented a draft resolution on the law applicable to international consumer contracts. The resolution was revised and formulated as Draft Decision 15 of 2012. That proposal used the CIDIPVII proposal as a basis. Article 4 established a number of connecting factors for determining the law applicable to contracts concluded by passive consumers, with the consumer having the right to choose the applicable law where it was the most favourable law to the consumer. Regrettably, this project had stalled since the entry of Venezuela to Mercosur.

Dr Klein Vieira noted that there was an absence of conventional sources for rules on consumer protection. This aggravated conditions for consumers. It was a source of mistrust and reduced legal certainty. The efforts by Argentina, Brazil, Paraguay, Panama and the Dominican Republic to reform their domestic laws were laudable. However, it was necessary to go beyond this; it was essential that a convention be adopted at a regional level, following the Brazil OAS and Mercosur proposals, to ensure adequate protection.

The Chair noted that, from a European Union perspective, it was good to hear about regional developments elsewhere. From the EU experience, it was definitely worthwhile pursuing legally binding solutions.

Ms Maria Goretti Sanches Lima delivered a presentation on the efforts of the World Tourism Organisation (UNWTO) and the HCCH to protect tourists. Ms Lima introduced herself as the Executive Vice President of IFTTA, and provided attendees with an overview of the organisation and mandate of IFTTA, and its arrangements with UNWTO, through which it had become involved in UNWTO's work developing a draft convention on the protection of tourists and the rights and obligations of tourism service providers.

The UNWTO commenced work on the draft convention following an accident in Finland. The central idea was to make provision for the protection of tourists in extraordinary circumstances. As the term "extraordinary circumstances" had an established legal meaning in the EU, the focus was on "emergency situations". A working group had been established to develop the convention, and all member States and other organisations such as IFTTA were participating in the process. The draft convention also covered other issues such as accommodation and package holidays.

There were many rules and terms in the draft convention that were being elaborated. One of the main issues was the title of the convention. This was because it dealt with two types of participants: tourists and tourism service providers. Tourism service providers had hitherto not been a focus of the UNWTO. In the latest meeting of the working group, the UNWTO had started reflecting more deeply on this issue, and decided to remove reference to "protecting" service providers, replacing it with reference to their "rights and obligations", which brought with it certain legal consequences. Another sensitive issue was that the draft convention did not develop provisions regarding service providers; rather, the provisions of the draft convention focussed on tourists. A lot of further work remained to be done.

At the HCCH, a new legislative project was dealing with the protection of, and access to justice for, tourists. Based on information available, the idea is impressive yet easy to implement. However, the eventual convention needed to have broad acceptance among

States. Yet the advantage of the HCCH project was that it was not implementing new rules; rather it was marking a way for adapting something that already existed.

Ms Lima expressed that view that both conventions were entirely suitable and each project should be able to proceed. They were different in substance and in other respects, and therefore could coexist and be implemented together.

Professor Hector Valverde Santana (Brazil) delivered a presentation entitled "globalisation and product liability". He thanked Professor Lima Marques for inviting him to present. He started by noting that technological developments had significantly changed systems of production and consumption. There was an increasing risk of product defects being distributed in markets. Defects in products and services were related to a lack of security, such as life, physical integrity and consumer property. The need to protect these interests was the main reason for the organised consumer protection movement. However, increasing industrialisation and mass consumer production, together with an increased exposure to danger, were the main factor that leading to a debate on the need to regulate provider liability for defective products and services. Reform in developed and developing countries sought to strike a balance between consumer protection and the promotion of economic activity. Consensus was reached in some aspects of regulation, such as in the allocation of repair of damages, strict liability, and full compensation.

Professor Valverde noted that, along with the globalisation of manufacture and consumption, came the dispersion of traditional production centres in developing countries and the consequent migration of multinational companies to those countries. This was highly motivated by production costs in the form of cheaper labour and the lack of protective legislation. Added to this was tax incentives, proximity to market, and easy access to raw materials.

Professor Valverde observed that cross-border product liability disputes were intensified by globalisation. These disputes were regulated and resolved by national law. As a result of globalisation, unsafe products and services were being consumed far from the production site, with varying standards and quality control. International debate on defective products and services was therefore necessary. Objective standards for consumer protection in all countries was necessary through appropriate conventions. It was a fundamental right to not be exposed to unsafe products and services. At the same time, individuals States were taking action, including by facilitating access to justice in their courts, and recognising consumer vulnerability through the application of the most favourable law.

Professor Valverde recommended that States promote activities aimed at developing proper regulation of provider liability for defective products and services. What was needed that action to prevent damage in the first place by improving safety certification systems, reporting mechanisms (including of consumer accidents) and administrative bodies specialised in safety and product recall. It was also important to strengthen rules on class actions.

Professor Valverde concluded by suggesting that new challenges for civil liability in this area must be addressed by existing legal regulations, as well as through protective measures. It was also important to recognise the use of the civil fine as an enforcement

measure that resulted in an appropriate sanction. These suggestions were merely illustrative and not exhaustive.

Professor Wei noted that the Committee would focus on the protection of tourists in the coming two years. Given the importance of the area, the Committee could consider undertaking further study into product liability.

Professor Lima Marques introduced the draft recommendations and guidelines proposed by the Committee. She explained that there were three different models for consumer protection before the Committee:

1. The EU model, which began in the 1980s with the adoption of the Rome Convention (now the Rome Regulations) – these instruments provided protection of the country of the consumer's habitual residence, which was assured by the application of mandatory rules.
2. The substantivecomparative approach with the creation of a special connecting factor to consumer protection, which allowed only for the choice of the most favorable law to the consumer (Brazilian model)
3. The procedural and alternative approach, which allowed for party autonomy but only if the choice of law was made by the consumer, and traditional connecting factors existed with the chosen law (Chinese model)

The recommendations and guidelines proposed by the Committee did not put forward a rule based on any of these models, but rather put forward a fourth model that was a mix of all three. The Committee's model was similar to the EU model insofar as it maintained habitual residence as the main connecting factor, provided that the supplier or professional directed their activities to that place. If this was not the case, the Committee's model provided for a limited ability for the parties to choose the applicable law, provided that it did not deny the law of the habitual residence where that was the law more favourable to the consumer. In the absence of such a choice, the law of the place where the goods or services were agreed to be supplied was to be applied. The Committee's model contained a definition of "law more favourable". During consideration of the draft by the Steering Committee, Lord Mance had suggested using the words "more protective of" rather than "more adequate to" the consumer's interests.

Mr Dipak Bhattacharyya (India) explained difficulties experienced by Indian courts in assuming jurisdiction in consumer matters over multinational enterprises. Jurisdiction would only be established by service of summons abroad. Foreign companies did not take cognizance of summons unless served on an Indian office. The main emphasis should therefore be on the enforcement of judgments of the chosen court. If these judgments were not enforced in a timely manner, the philosophy of consumer protection would fail.

Professor Lim Marques agreed that jurisdiction was a very important subject, and the results of her research in this area was published in the book. She noted work by ASADIP on developing principles of jurisdiction, but these excluded consumer matters. She also noted that the enforcement of foreign judgments was being considered at the HCCH (as part of the "Judgments Project"). Argentina was trying to have judgments in consumer matters within scope, but this was being opposed by the United State and other countries.

These two projects were just the beginning. The Committee was following them. For now, it was focussing on one area of private international law, ie applicable law.

The Chair noted that the recognition and enforcement of foreign judgments was a sensitive subject in many countries. In the EU, even with its common philosophy of consumer protection, there was much debate leading to the recasting of the Brussels I Regulation.

The Chair then queried whether the Committee was happy for only a single model for applicable law to be presented in the draft recommendations and guidelines.

Professor Wei explained that the original intention of the Committee was to present the existing models together with the Committee's own model. It believed that there was no universal consensus on the issue of applicable law, and therefore its role was to provide existing models in a practical manner for national legislatures to consider. After discussions with the Steering Committee, it was decided to present a single model that combined existing models. Professor Wei expressed a preference for presenting all model (ie, existing models and the Committee's own model).

The Chair responded that, in his experience, it was not the best solution to present multiple models. It was unusual for an ILA resolution to do that.

Professor Lima Marques agreed that there were strong arguments for presenting a single rule, and proposed a vote.

Professor Wei added that she was happy if only one model were presented. But her preference was for all models to be presented as different alternatives. This would allow the resolution to get more traction, particularly among developing countries.

The Chair called a vote. Five attendees expressed their support for presenting a single model (ie, the Committee's own model); no one expressed their opposition. The Chair also noted that the draft guidelines would be revised to include the change suggested by Lord Mance mentioned earlier by Professor Lima Marques.

The Chair thanked attendees for their participation and closed the session.

Reporter: Alexander Kunzelmann (Australia)

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

THE ROLE OF SUSTAINABLE NATURAL RESOURCES MANAGEMENT INTERNATIONAL LAW

Members of the Committee

Professor Nicolaas J Schrijver (Netherlands): *Chair*
Dr Marie-Claire Cordonier-Segger (Canada): *Rapporteur*

Professor Freya Baetens (Belgium)
Professor Yongmin Bian (HQ)
Dr Marc Bungenberg (Germany)
Professor Jorge Cabrera Medaglia (HQ)
Professor Susana Camargo Vieira (Brazil)
Alt: Fabiano de Andrade Correa
Professor Paolo Farah (Italy)
Alt: Dr Ilaria Espa
Dr Ximena Fuentes Torrijo (Chile)
Dr Tarcisio Gazzini (Switzerland)
Alt: Mr Maximilian Oehl
Dr Markus Gehring (Germany)
Professor Ellen Hey (Netherlands)
Alt: Dr Otto Spijkers
Professor Stephan Hobe (Germany)
Alt: Professor Isabel Feichtner
Dr Kamal Hossain (Bangladesh)
Alt: Dr Sharif Bhuiyan
Dr Barbara Janusz-Pawletta (Poland)
Mr Erick Kassongo Kalonji (HQ)
Professor Louis Kotze (South Africa)
Alt: Professor Werner Scholtz
Mr Guy Jules Kounga (HQ)
Dr Konstantia Koutouki (Canada)
Alt: Mr Frederic Perron-Welch
Ms Amanda Kron (Sweden)
Professor Charles Marvin (USA)
Erjon Muharremaj (Albania)
Professor Ved Nanda (USA)
Professor Maki Nishiumi (Japan)
Professor Damilola S Olawuyi (Nigerian)
Professor Cymie Payne (USA)
Dr Pamela Towela Sambo (HQ)
Mrs Nadia Sanchez Castillo-Winckels (Chile)
Dr Arie Trouwborst (Netherlands)
Dustin Kuan-Hsiung Wang (China (Taiwan))
Alt: Professor Yea-jen Tseng
Professor Friedl Weiss (Austria)

FIRST REPORT OF THE COMMITTEE 2016

I. Introduction

The ILA Committee on the **Role of International Law in Sustainable Natural Resource Management for Development** (hereinafter 'the Committee') was established by the ILA Executive Council in November 2012 in response to a proposal by the Netherlands Branch in September 2012. This Committee builds upon a distinguished history of ILA inquiry into international law related to sustainable development. In 1978, the ILA established the Committee on Legal Aspects of a New International Economic Order, whose work culminated in the substantive Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order (1986) and a series of book publications in the 1980s and early 1990s. At the 1992 Cairo Conference of the ILA, the Committee on Legal Aspects of Sustainable Development

was established, and its work resulted in the 2002 New Delhi Declaration on Principles of International Law in the Field of Sustainable Development (New Delhi Declaration). The New Delhi Declaration was also published as an UN document and served as an input at the World Summit on Sustainable Development (WSSD) in Johannesburg, 2002. A follow-up Committee on International Law on Sustainable Development was equally productive, with a number of book publications and the adoption of the 2012 Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law relating to Sustainable Development (Sofia Guiding Statements). In Sofia, pressing questions on sustainable natural resource management for development were emphasized, and it was agreed that a new Committee would examine these issues.

This new Committee analyses the principle of sustainable use of natural resources, as a crucial element of the evolving international law of sustainable development, in view of its firm status in treaty law and its frequent application in decisions of international courts and tribunals. It considers how international law can support a sustainable use and stewardship of natural resources, while also contributing to an adequate living standard and the realization of human rights for all. For sustainable development, effective governance of resources is crucial, including water, forests, biodiversity, landscapes, minerals, and energy (particularly from renewable sources), as is the relationship between armed conflict and natural resource management. In this regard, there is recognition of the need to analyse and build better global understanding of the role and legal status of principles and rules of international law for the sustainable use of natural resources, as well as their implementation in the practice of States and international organizations, and their reflection in the decisions international courts and tribunals.

The field of international law on sustainable development is rapidly evolving.[1] Global concern and attention towards sustainable resources management concerns has risen significantly. Global policy agendas are moving to reflect the interest, with the outcomes of the 2012 UN Conference on Sustainable Development (Rio+20) resulting in the world's agreement, at New York in September 2015, on Agenda 2030 and the global Sustainable Development Goals (SDGs), which cover for high profile resources such as water, energy, landscapes and biodiversity towards 2030. Treaty negotiations continue to touch upon sustainable management of different natural resources. Of highest note in the recent period is the adoption at Paris in December 2015 of the new *Paris Agreement*

[1] *See generally*, N Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Hague Academy of International Law, 2008); D Freestone & V Lowe, *Sustainable Development in International Law* (Oxford University Press, 1999); MC Cordonier Segger & A Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford University Press, 2004); N Schrijver & F Weiss, eds, *International Law and Sustainable Development* (Martinus Nijhoff, 2004); MC Cordonier Segger & CG Weeramantry ,eds, *Sustainable Justice* (Martinus Nijhoff, 2004); D French, *International Law and Policy of Sustainable Developmen*t (Manchester University Press, 2005); D French, ed, *Global Justice and Sustainable Development* (Brill, 2010); M Gehring & MC Cordonier Segger, eds, *Sustainable Development in World Trade Law* (Kluwer Law International, 2005); MC Cordonier Segger, M Gehring & A Newcombe, eds, *Sustainable Development in World Investment Law* (Kluwer Law International, 2010); S Jodoin & MC Cordonier Segger, eds, *Sustainable Development, International Criminal Justice & Treaty Implementation* (Cambridge University Press, 2015); and MC Cordonier Segger w CG Weeramantry, eds, *Sustainable Development in International Courts and Tribunals* (Routledge, 2017 forthcoming), among other publications.

under the United Nations Framework Convention on Climate Change[2] (Paris Agreement) at the 21st Conference of the Parties (COP). Tribunals are increasingly being seized of natural resources concerns, with notable recent decisions such as the *Japan – Whaling case*, *Nicaragua – San Juan River case*, and the *Peru – Maritime Boundary case* in the International Court of Justice (ICJ), the *Coastal State Opinion* and the *Seabed Chamber Opinion* in the International Tribunal on the Law of the Sea (ITLOS), the *South China Sea Arbitration* in the Permanent Court of Arbitration and Justice, and *China – Rare Earth* and *US – Tuna/Dolphin III* in the World Trade Organisation's dispute settlement mechanism.

The focus of the Committee's work is responsive to the evolving needs of the global sustainable development agenda, supported by a consideration of how key principles on sustainable development have been reflected in the growing body of global, regional and bilateral treaties which touch upon the sustainable management of key natural resources, and also the increasing instances of countries seeking international dispute resolution through different tribunals, courts and arbitral procedures. In particular, the Mandate of this Committee has three principal axes that form the Work Programme:

(i) The study and analysis of the contents, legal status and application of the principles and rules of international law related to the sustainable management of natural resources at the national and international levels, as well as an assessment of the practice of States, and international organizations in this field;
(ii) An examination of the relationship between the evolving international law in the field of sustainable development (see the New Delhi Declaration and the Sofia Guiding Statements) and the principle of the sustainable use of natural resources, including analysis of:
    a. the status of the obligation of countries to use natural resources in a manner that is sustainable, including issues such as the obligation to undertake impact assessments of plans and projects that might affect sustainable development, transboundary resources management, the sharing of resources in the world interest and taking into account the interests and needs of future generations;
    b. innovative economic instruments to support sustainable use of natural resources and their status and implementation in international and national law, including measures within Regional Trade Agreements and multilateral economic treaties;
    c. the relationship between natural resource management and the enjoyment of human and peoples' rights;
    d. decisions of international courts and tribunals on matters related to natural resource management.
(iii) The study of national and international approaches to the regulation of natural resources in developing countries and the impact of such approaches on the sustainable use of natural resources and on the evolution of international law in this field.

[2] *Paris Agreement under the United Nations Framework Convention on Climate Change*, 12 December 2015 (in force 4 November 2016), UN Doc FCCC/CP/2015/10/Add.1, Decision 1/CP.21, Annex. ("Paris Agreement")

Regarding the first tranche of work on *International Law and its Practice for Sustainable Resources Management*, in the recent period a working group was formed to engage Committee Members in discussions during an international law experts seminar event in Leiden, The Netherlands, on 12-14 November, 2015, which was kindly hosted by Prof Nico Schrijver, the Faculty of Law at Leiden University and the Netherlands Branch of the ILA. Scoping notes were prepared by the Committee's working group on freshwater resources, and on marine resources. Several brief papers were also prepared by legal specialists, guided by Committee Members, on the contributions of international law and governance to the achievement of key global SDGs related to natural resources, including energy, biological resources, freshwater and fisheries and ocean resources.

Following this brief introduction, Section II of the present Report provides a summary of the Committee's scoping work to date, compiled in line with the newly agreed global SDGs that shape the international sustainable development policy agenda from 2016-2030. This scoping supports analysis of the contents, legal status and application of the rules of international law related to the sustainable management of certain natural resources in these sectoral areas, assessing the practice of States and international organizations (including treaty bodies). Then, in Section III, the Report comments on a new development, the adoption and entry into force of the Paris Agreement, highlighting how this innovative instrument addresses the New Delhi Declaration principle on the sustainable use of natural resources in accordance with the Committee's mandate, and showing how it also reflects other New Delhi Declaration principles. The final Section IV further outlines the future research agenda of the Committee.

II. The Rules and Practices of International Law in their Contributions to the Global Sustainable Development Goals Related to Natural Resources

Building on growing global consensus elaborated through the 1992 United Nations Conference on the Environment and Development (UNCED or Rio Summit), the 1997 UN General Assembly (UNGA) Special Session on Sustainable Development, and the 2002 World Summit on Sustainable Development (WSSD), among other meetings, the Rio+20 outcome document *The Future We Want*[3] called upon countries to agree to a series of time-bound global objectives and targets building on the 2000 Millennium Development Goals (MDGs), and called on all countries and stakeholders, including through international treaty bodies and organizations, to assist in developing the post-2015 development agenda. In September 2015, the post 2015 agenda was formally adopted in the UNGA Resolution *Transforming our World: The 2030 Agenda for Sustainable Development* (Agenda 2030).[4] Therein, UN member States agreed on 17 SDGs and 169 related time-bound targets and specific means of implementation. These SDGs and their targets guide the UN, member States, other international organizations and stakeholders across all regions of the world towards more sustainable development worldwide.

As expert law and governance reviews prepared by Committee Members in collaboration with the Centre for International Sustainable Development Law (CISDL) and the United

[3] *Report of the United Nations Conference on Sustainable Development*, Rio de Janeiro, Brazil, 20-22 June 2012, UN Doc. A/CONF.216/16. ("The Future We Want")

[4] *Transforming our world: The 2030 Agenda for Sustainable Development*, 25 September 2015, UN Doc A/RES/70/1 ("Agenda 2030").

Box 1: SDG 6 Water and Sanitation – Ensure Availability and Sustainable Management of Water and Sanitation for all

6.1 By 2030, achieve universal and equitable access to safe and affordable drinking water for all.

6.2 By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations,

6.3 By 2030, improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally,

6.4 By 2030, substantially increase water-use efficiency across all sectors and ensure sustainable withdrawals and supply of freshwater to address water scarcity and substantially reduce the number of people suffering from water scarcity,

6.5 By 2030, implement integrated water resources management at all levels, including through transboundary cooperation as appropriate.

6.6 By 2020, protect and restore water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes.

6.a By 2030, expand international cooperation and capacity-building support to developing countries in water- and sanitation-related activities and programs, including water harvesting, desalination, water efficiency, wastewater treatment, recycling and reuse technologies.

6.b Support and strengthen the participation of local communities in improving water and sanitation management.

Nations Environment Programme (UNEP) have demonstrated, these SDGs and their targets can be linked to the object and purpose of many important international treaties in the field of sustainable development.[5] In Part II of the Committee's initial Report, the outcomes of several analytical scoping reviews are provided, in which the authors examine the contributions of international law and governance to the achievement of specific SDGs related to natural resources, in particular with regards to sustainable energy, freshwater, biological resources, and marine resources.

1. Rules and Practices of International Law for the Sustainable Management of Fresh Water Resources towards SDG 6 on Ensuring Water and Sanitation for All

Based on the Scoping Note by Dr Otto Spijkers, The Netherlands, Dr Yongmin Bian, China & Prof Maki Nishiumi, Japan; with contributions from a further Legal Brief by Freedom-Kai Phillips, Canada, Dr Cameron A. Miles, Australia, Dr Ashfaq Khalfan, Kenya, and Dr Maria Leichner Reynal, Uruguay, for expert review.

[5] See MC Cordonier Segger & E Mrema, eds, *The Contribution of International Law, Policy and Governance to the Sustainable Development Goals* Issue Briefs (CISDL & UNEP, 2016). Part II of this Report shares thoughts with, and features, the conclusions of Committee Members and colleagues in these studies.

Box 2: Selected International Treaties and Instruments related to SDG 6 on Sustainable Management of Water Resources

- 1911: Institut de Droit international, International regulation of the use of international watercourses apart from the exercise of the right of navigation
- 1921: League of Nations, Convention and Statute on the Regime of Navigable Waterways of International Concern
- 1956: International Law Association, Statement of principles on the Uses of the Waters of International Rivers
- 1958: International Law Association, Agreed Principles of International Law and Agreed Recommendations on the Uses of the Waters of International Rivers
- 1959: United Nations General Assembly resolution, Preliminary studies on the legal problems relating to the utilization and use of international rivers
- 1961: Institut de Droit international, Utilization of Non-maritime International Waters (Except for Navigation)
- 1963: UN Secretariat report, Report on the legal problems relating to the non-navigational uses of international watercourses, followed by supplementary reports
- 1966: International Law Association, Articles on the Uses of the Waters of International Rivers (Helsinki Rules)
- 1970: UN General Assembly resolution, Progressive development and codification of the rules of international law relating to international watercourses
- 1971-1994: UN International Law Commission, work on the Law of Non-Navigational Uses of International Watercourses (Resolution on Confined Transboundary Groundwater, annexed to ILC's Watercourses Convention)
- 1979: Institut de Droit international, The Pollution of Rivers and Lakes and International Law
- 1986: International Law Association, Rules on International Groundwaters
- 1997: Convention on the Law of the Non-Navigational Uses of International Watercourses
- 2004: International Law Association, Rules on Water Resources and Dissenting Opinion (Berlin Rules)
- 2008: International Law Commission, Draft articles on the Law of Transboundary Aquifers,
- 2014: Entry into force of the Convention on the Law of the Non-Navigational Uses of International Watercourses

Source: Compiled by Dr Otto Spijkers, The Netherlands, Dr Yongmin Bian, China & Prof Maki Nishiumi, Japan

1.1 Sustainable Management of Fresh Water Resources

SDG 6 on Water and Sanitation commits to "ensure availability and sustainable management of water and sanitation for all", emphasizing global agreement on the need to ensure access to water and sanitation, and to care for the water resources necessary for sustainable development upon which all countries depend.

International human rights law provides for access to water and access to sanitation. International water law regulates the use of freshwater resources, such as rivers, lakes, wetlands, aquifers, and glaciers. Like other natural resources, freshwater resources can be depleted, destroyed and polluted. International rivers provide different benefits to different riparian states. For example, for many agricultural states, rivers are essential for food security. Irrigation and fisheries are important for some riparian states, especially midstream and downstream states. The most urgent problems relating to the sustainable

utilisation of freshwater resources include water pollution, depletion of non-rechargeable underground water and fossil water, and the diversion of freshwater resources in a way that negatively affects underlying ecosystems.

This section focuses on the substantive targets of SDG 6 that are recognized in the *International Covenant on Economic, Social and Cultural Rights*[6] (ICESCR), the UN *Convention on the Law of the Non-navigational Uses of International Watercourses*[7] (New York Convention), the United Nations Economic Commission for Europe (UNECE) *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*[8] (Helsinki Convention), and the *Convention on Wetlands of International Importance especially as Waterfowl Habitat*[9] (Ramsar Convention), and discusses international law, policy and governance mechanisms which could help to achieve SDG 6 in a coordinated way. The section ends with legal obstacles that the international community and States may face in their efforts on water and sanitation that are deserving of further research.

1.2 Contribution of International Law, Policy and Governance to SDG 6 on Water and Sanitation

The Committee on Economic, Social and Cultural Rights (CESCR), the independent body of experts elected by States to interpret the ICESCR, determined that the right to water, target 6.1, is derived from the right to an adequate standard of living found in Article 11(1) of the ICESCR.[10] The right to water is also protected under other international treaties, including the UN *Convention on the Rights of the Child*[11] (CRC) and the UN *Convention on the Elimination of All Forms of Discrimination against Women*.[12] In the UNGA and the Human Rights Council (HRC), States have affirmed by consensus that "the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living, and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity."[13] As the CESCR also notes, the right to water entitles everyone to sufficient, safe,

---

[6] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 (in force 3 January 1976), 993 UNTS 3. ("ICESCR")

[7] *UN Convention on the Law of the Non-Navigational Uses of International Watercourses*, 21 May 1997 (in force 17 August 2014), 36 ILM 700. ("New York Convention")

[8] *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 17 March 1992 (in force 6 October 1996), 1936 UNTS 269. ("Helsinki Convention")

[9] *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, 2 February 1971 (in force 21 Dec 1975), 996 UNTS 245. ("Ramsar Convention")

[10] Committee on Economic Social and Cultural Rights, *General Comment No. 15: The right to water*, UN Doc. E/C.12/2002/11, Para. 3 ("General Comment No. 15").

[11] *Convention on the Rights of the Child*, 20 November 1989 (in force 2 September 1990), 1577 UNTS 3, Arts. 24(2), 27. ("CRC")

[12] *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979 (in force 3 September 1981), 1249 UNTS 13, Art. 14(2). ("CEDAW")

[13] For example, *Human rights and access to safe drinking water and sanitation*, UN Doc. A/HRC/RES/15/9 (2010), Para. 3; *The human right to safe drinking water and sanitation*, UN Doc. A/RES/68/157 (2013), Para. 2; *The human rights to safe drinking water and sanitation*, UN Doc. A/RES/70/169 (2015). Note: the UNGA and HRC referred to them as a single right until UNGA Res 70/169, which recognized two rights – a right to safe drinking water and a right to sanitation.

acceptable, physically accessible and affordable water for personal and domestic uses,[14] as endorsed by the UNGA and the Human Rights Council (HRC).[15] CESCR General Comment No. 15 on the right to water, adopted in November 2002, sets criteria for the full enjoyment of the right to water addressing: availability, quality, and accessibility, including non-discriminatory physical and economic access to water and information on water issues.[16] General Comment No. 15 also states that, "the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water,"[17] of relevance to target 6.6. Additionally, it states that: "individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties."[18] Similar obligations apply to the right to sanitation.[19]

The right to safe drinking water and sanitation, target 6.2, is also a derivative right to an adequate standard of living, and a pre-requisite to the realization of the rights to adequate housing and health. These in turn are pre-requisites to the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development, including access to sanitation, as guaranteed by the CRC. As the CESCR indicated, States must ensure that everyone, without discrimination, has physical and affordable access to sanitation, "in all spheres of life, which is safe, hygienic, secure, socially and culturally acceptable, provides privacy and ensures dignity,"[20] as endorsed by the UNGA and the HRC.[21] The UN Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation endorsed and expanded upon the criteria articulated by UNCESCR in 2009.[22] These international human rights standards require States to take active steps to ensure that everyone can enjoy the right to water and sanitation, achieving targets 6.1 and 6.2, as soon as possible. State parties must adopt the necessary measures directed towards the full realization of the right to water and sanitation, including by taking positive measures to assist individuals and communities to enjoy the right.[23] States are under an obligation to move as expeditiously and effectively as possible towards securing the right to water.

---

[14] General Comment No. 15, *supra* n10, Para. 2.

[15] *The human rights to safe drinking water and sanitation* (2015), *supra* n13, Para. 2; *The human right to safe drinking water and sanitation*, UN Doc. UN/HRC/RES/27/7 (2014), Preamble at Para. 21.

[16] General Comment No. 15, *supra* n10, Para. 12.

[17] *Ibid,* Para. 48.

[18] *Ibid.*

[19] *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*, 1 July 2009, UN Doc. A/HRC/12/24*,* Para. 66. ("Report of the independent expert on safe drinking water and sanitation")

[20] Committee on Economic Social and Cultural Rights, *Statement on the Right to Sanitation*, UN Doc. E/C.12/2010/1, Para. 8.

[21] The human rights to safe drinking water and sanitation (2015), *supra* n15, Para. 2; The human right to safe drinking water and sanitation (2014), *supra* n15, Preamble at Para. 21.

[22] Report of the independent expert on safe drinking water and sanitation, *supra* n19, Paras. 72-73, 75.

[23] General Comment No. 15, *supra* n10, Para. 25.

Target 6.3 focuses on water quality through pollution reduction and has its roots in Chapter 21.3 of *Agenda 21*,[24] Articles 25 and 40 of the *Johannesburg Declaration on Sustainable Development*,[25] the 2012 UNEP Manila Declaration,[26] and *The Future We Want*. The principal instruments relating to the release and transportation of hazardous chemicals – the Basel, Rotterdam and Stockholm Conventions – are relevant to target 6.3's focus on minimizing release of "hazardous chemicals" in connection with the right to clean water.[27] In implementing these Conventions, State Parties to the Conventions have enhanced synergies, cooperation and coordination in their decision-making through the adoption of a synergies" framework grounded in an Ad Hoc Joint Working Group. This framework was adopted through decisions of each respective Convention,[28] and has structured decision-making around organizational, thematic, managerial and administrative issues. Further integration has occurred through a simultaneous extraordinary meeting of the COP in 2010, which provided a set of joint activities including a synchronized budget and auditing,[29] the move in 2011 to begin harmonization of the Secretariats,[30] the 2013 omnibus decision coordinating all COP meetings,[31] and the 2015 decisions enhancing measures for cooperation and coordination which further expands institutional integration on strategic, technical and financial matters.[32]

Many international treaties are directly relevant to targets 6.4, 6.5, 6.6 and 6.a at global, regional and bi-lateral levels, a selection of which are in Box 2 below. Three international treaties with intersecting scopes related to environmental protection of waters are highlighted here. First, the Ramsar Convention aims to conserve and sustainably use natural resources through emphasis on the wise use of wetlands.[33] Second, New York Convention aims to harmonize terms and principles relating to watercourse agreements,

---

[24] *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, Brazil, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. I-II).

[25] *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, 26 August–4 September 2002, UN Doc. A/CONF.199/20.

[26] *Manila Declaration on Furthering the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities* (2012), UN Doc. UNEP/GCSS. XII/INF/10.

[27] *Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 22 March 1989 (in force 5 May 1992), 1673 UNTS 126 ("Basel Convention"); *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 10 September 1998 (in force 24 February 2004), 2244 UNTS 337 ("Rotterdam Convention"); *Convention on Persistent Organic Pollutants*, 22 May 2001 (in force 17 May 2004), 2256 UNTS 119 ("Stockholm Convention").

[28] Basel Convention COP Decision BC-IX/10, Rotterdam Convention COP Decision RC-4/11, and Stockholm Convention, COP Decision SC-4/34.

[29] Decisions BC.Ex-1/1, RC.Ex-1/1 and SC.Ex-1/1.

[30] Decisions BC-10/29, RC-5/12 and SC-5/27; Proposal from the Executive Secretary of the Basel, Rotterdam and Stockholm Conventions for the organization of the secretariats of the three conventions, 21 December 2011, online: http://www.brsmeas.org.

[31] Decisions BC.Ex-2/1, RC.Ex-2/1 and SC.Ex-2/1.

[32] Decisions BC-12/17, RC-7/9, SC-7/27(international cooperation); BC-12/18, RC-7/8, SC-7/22 (integrated financing); BC-12/20, RC-7/10 and SC 7/28 (enhanced cooperation); BC-12/20, RC-7/11, SC-7/29 (clearing-house mechanism); BC-12/22, RC-7/12, SC-7/30 (science); BC-12/22, SC-7/31, RC-7/13 (coordination of COPs).

[33] Ramsar Convention, *supra* n9, Art. 6.

facilitate cooperation and consultation relating to the protection and management of international watercourses, and support constructive reconciliation of disputes.[34] As such, its adoption furthers the harmonization of international legal standards with respect to integrated trans-national management of international waterways and watersheds. Third, the Helsinki Convention aims to protect transboundary watercourses and international lakes through cooperation to strengthen measures to prevent pollution of the marine environment, and to address, minimize, and mitigate any adverse effects from the failure to do so.[35]

Given the transboundary operative scope of the Helsinki Convention,[36] and the New York Convention,[37] cooperative arrangements under these treaties can facilitate the implementation of target 6.5, which calls for integrated water resources management at all levels, including through transboundary cooperation. For instance, regional cooperation efforts under the Helsinki and New York Conventions to prevent adverse health and socio-economic impacts from environmental damage to transboundary rivers might be recognized as good practices for target 6.5, or might further capacity building, international cooperation and other support under target 6.a. With respect to wetlands, Parties to the Ramsar Convention recognize that wetlands – whether naturally occurring or manmade, permanent or temporary,[38] including adjacent islands and marine water deeper than six meters at low tide[39] – constitute vital ecosystems that provide broad socio-cultural, environmental and economic benefits. Implementing the Ramsar Convention's inclusive definition of wetlands as one contiguous whole can advance States' achievement of targets 6.3, 6.4, 6.5 and 6.6.[40]

Key principles on the cooperative and equitable use and management of international watercourses are found in the New York and Helsinki Conventions, including sustainable use, environmental protection, and a duty to cooperate on equitable governance of the watercourse.[41] Additionally, the Helsinki Convention provides for the precautionary principle, the polluter-pays principle, and the principle that water resources should be managed for both present and future generations.[42] Parties to the Ramsar Convention aim to facilitate cooperation on the wise use of wetlands and water resources based on an ecosystem approach,[43] with wise use defined as "the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the

---

[34] New York Convention*, supra* n7, Preamble at vi, Arts. 3(2), 6(2), 33.
[35] Helsinki Convention, *supra* n8, Preamble at iii.
[36] *Ibid*, Art. 1.
[37] New York Convention, *supra* n7, Art. 2.
[38] Ramsar Convention, *supra* n9, Art. 1(1).
[39] *Ibid*, Art. 2(1).
[40] *The Ramsar Convention Manual: a guide to the Convention on Wetlands (Ramsar, Iran, 1971)*, 6th ed. (Ramsar Convention Secretariat, 2013) at 7. ("Ramsar Manual")
[41] New York Convention, *supra* n7, Arts. 5, 7, 8-9, 20; Helsinki Convention, *supra* n8, Arts. 2(1)–(6), 5, 6, 9-10, 12.
[42] Helsinki Convention, *supra* n8, Art. 2(5); LB de Chazournes, "Freshwater and International Law: The Interplay between Universal, Regional and Basin Perspectives", side publication to World Water Assessment Programme, *The United Nations World Water Development Report 3: Water in a Changing World* (UNESCO, 2009).
[43] Ramsar Convention, *supra* n9, Art. 3(1); Ramsar Manual, *supra* n40, 46–7.

context of sustainable development."[44] The active institutional framework arising from the cooperative and precautionary mechanisms provided therein empowers Parties to achieve core aspects of SDG 6 including pollution reduction under target 6.3, support to sustainability across the water-use chain under target 6.4, policy harmonization and collaboration under target 6.5, establishment of protective measures under target 6.6, and mobilization of international support for capacity building and water-usage programs under target 6a.

The three Conventions facilitate the development and strengthening of local, regional, and national measures to protect transboundary waters, providing a normative framework to guide regional and sub-regional agreements on key watercourses, and actively engage achievement of SDG 6. Parties to the Helsinki Convention aim to develop measures to implement a variety of mechanisms to prevent/control pollutants, notably precautionary measures and application of environmental impact assessments (EIAs) to minimize pollution.[45] As such, the Helsinki Convention includes provisions to address the quality, quantity and integrated management of water basins, in support of target 6.3.[46] Under the New York Convention, Parties are encouraged to harmonize watercourse agreements to the terms of the Convention.[47] Parties to the Ramsar Convention are required to implement National Wetland Policies based on common guidelines.[48] Measures under the three Conventions that allow for the harmonization of water-related policies, in particular concerning water quality, the use of the precautionary approach, and the use of EIAs, constitute important channels for the adoption of the mutually supportive programs, policies and procedures necessary to effectively achieve SDG 6.

Environmental protection is a key feature across the Conventions. In the New York Convention, riparian States are required to protect the ecosystem of relevant watercourses, prevent the introduction of pollution and alien species, and to mitigate any significant adverse impacts where there is reasonably belief that these may occur.[49] The principal aim of the Helsinki Convention is the prevention, control and reduction of transboundary impacts from pollution. This is achieved through use of EIAs, joint measures, cooperative monitoring and public participation in policy making directly in line with target 6.5 on transboundary water management, and peripherally target 6.3 on pollution prevention through information of water-quality.[50]

---

[44] Ramsar COP 9 Resolution IX.1, Annex A.

[45] Helsinki Convention, *supra* n8, Art. 3(1)(a)–(l).

[46] *Ibid*, Art. 3(3); Food and Agriculture Organization (FAO), *Forests and Water: International Momentum for Action* (FAO, 2013).

[47] New York Convention, *supra* n7, Art. 3.

[48] Ramsar COP 4 Recommendation 4.10; Ramsar COP 7 Resolution VII.7. Further: Ramsar Manual, *supra* n40, 47–8.

[49] New York Convention, *supra* n7, Arts. 11-16, 20, 21(2), 22-27. Watercourses and related instillations, facilities and works are also provided protection during times of armed conflict, with Parties empowered to use indirect means of communication, consultation and negotiation where serious obstacles to contact exist, see Arts. 29-30.

[50] Helsinki Convention, *supra* n8, Arts. 3, 15-16; See also UNECE *Convention on Environmental Impact Assessment in Transboundary Context*, 25 February 1991 (in force 10 September 1997), 1989 UNTS 309, and its *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context*, 21 May 2003 (in force 11 July 2010), 2685 UNTS 140.

Box 3: Selected Bilateral and Regional Treaties on Sustainable Water Management

Africa

- 2000: Agreement between Botswana, Lesotho, Namibia and South Africa on the establishment of the Orange-Senqu River Commission
- 2000: Protocol on Shared Watercourses in the Southern African Development Community (SADC)
- 2002: Water Charter River Senegal
- 2003: Protocol for Sustainable Development of Lake Victoria Basin
- 2008: Water Charter Niger River Basin
- 2010: Cooperative Framework Agreement Nile River Basin
- 2011: Lake Chad Water Charter

Latin America

- 1969: Treaty of the River Plata Basin
- 1973: Treaty between Brazil and Paraguay concerning the Hydroelectric Utilization of the Water Resources of the Paraná River
- 1975: Statute of the River Uruguay
- 1978: Treaty for Amazonian Cooperation (Amazon River)
- 1995: Agreement constituting the Tri-National Commission of the Pilcomayo River Basin
- 2010: Guaraní Aquifer Agreement

Asia

- 1960: Indus Water Treaty (India and Pakistan)
- 1988: Sino–Mongolia Treaty on Common Boundaries
- 1994: Sino–Mongolia Agreement on Protection and Utilisation of Border Waters
- 1995: Memorandum of Understanding on Environmental Principles Governing the Tumen River Economic Development Area and Northeast Asia
- 1996: Sino-Russian Agreement on Khanka/Xingkai Lake International Natural Reserve
- 1996: Ganges Water Sharing Treaty (India and Bangladesh)
- 2001: Sino–Kazakhstan Cooperation Agreement on the Utilisation and Protection of Transboundary Rivers
- 2001: Treaty of Good Neighbourliness and Friendly Cooperation
- 2006: Agreement on Management System of China–Russia Border
- 2006: Agreement on the Management System of the China–Kazakhstan Border
- 2008: Agreement on Reasonable Utilisation and Protection of Transboundary Waters between China and Russia
- 2009: Sino–Vietnam Land Border Management System Agreement
- 2011: Sino–Kazakhstan Agreement on the Protection of Water Quality of Transboundary Rivers
- 2011: Sino–Kazakhstan Water Quality Agreement

Europe

- 1994: Convention on cooperation for the protection and sustainable use of the river Danube
- 1999: Convention on the Protection of the Rhine
- 2002: Meuse Convention

Source: Compiled by Dr Otto Spijkers, The Netherlands, Dr Yongmin Bian, China & Prof Maki Nishiumi, Japan

Under the Ramsar Convention, Parties designate suitable wetlands for inclusion on the List of Wetlands of International Importance, which requires establishing a domestic monitoring framework and sharing ecological information with the Ramsar Secretariat on changes to their ecological character, with notations indicated on the Montreux Record among other procedural mechanisms.[51] Policy-making decisions relating to water-use efficiency, integrated water management and protection of water-related ecosystems can be significantly enhanced through the monitoring framework established under Ramsar, which provides valuable insight to changes in ecological character of water sources informing policy in support of targets 6.4-6.6. Each Convention's notification efforts support integrated water management under target 6.5, and implicitly foster greater dialogue and cooperation in support of SDG 6 more broadly speaking.

Given the importance of the management of shared water resources to future sustainable development and the potential for conflict over shared waterways, the importance of dispute resolution mechanisms cannot be underestimated. Dispute settlement provisions provide clear procedures for consideration of contentious measures relating to the implementation of SDG 6. Procedures are provided in the New York and Helsinki Conventions. Disputes that arise relating to an international watercourse under the New York Convention are to be resolved through use of negotiation, mediation, conciliation by a third party or joint watercourse institution, or submission of the dispute to the ICJ.[52] The Helsinki Convention provides for similar measures, including consideration by the ICJ, or arbitration based on procedures attached in its Annex IV.[53] While the Ramsar Convention does not provide for explicit dispute settlement procedures, the Secretariat of the Convention has – in certain contexts – been identified as a modality for consultation and implementation of measures relating to the waters in question by the ICJ.[54] Additionally, European Parties may access dispute resolution measures established under the Helsinki Convention.

A number of regional water agreements also contain key principles of cooperative and equitable use and management of international watercourses and a selection are listed in Box 3. In Africa, the 2000 *Revised Protocol on Shared Watercourses in the Southern African Development Community* provides for the conservation and enhancement of the environment to promote sustainable development[55] including the protection and preservation of ecosystems,[56] and the *Water Charters* of the Senegal and Niger rivers and the Lake Chad Water Basin also contain provisions on sustainable development[57] and

---

[51] Ramsar Convention, *supra* n9, Arts. 2, 3(2).

[52] New York Convention, *supra* n7, Art. 33.

[53] Helsinki Convention, *supra* n8, Art. 22.

[54] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Provisional Measures, 2011 ICJ Reports 6 at 27; *in passim*, Indication of New Provisional Measures, 2013 ICJ Reports 354 at 370. Further: C Miles & MC Cordonier Segger, *Ramsar Convention Secretariat Mandate—Nicaragua Border Area Dispute before the International Court of Justice* (CISDL, 2014).

[55] *Revised Protocol on Shared Watercourses in the South African Development Community*, 7 August 2000 (in force 22 September 2003), Art. 3(4)

[56] *Ibid*, Art. 4(2)

[57] *Charte des Eaux du Fleuve Sénégal*, 28 May 2002, Preamble, Art. 4; *La Charte de l'eau du Bassin du Niger*, 30 April 2008, Art. 2; *La Charte de l'eau du Lac Tchad*, 30 April 2012, Art. 7 (a).

ecosystem protection.[58] Water agreements in Latin America also contain these principles. For example, the 1975 *Statute of the River Uruguay* includes two chapters on environmental protection and pollution prevention and control,[59] and the 2010 *Guaraní Aquifer Agreement* contains provisions for the conservation and protection of the Guaraní Aquifer System so as to ensure "multiple, reasonable, sustainable, and equitable use of its water resources."[60]

In Asia, the 1995 *Mekong River Agreement*[61] provides for reasonable and equitable utilization, protection of the environment and prevention of environmental harm;[62] and both the 2001 *China-Kazakhstan Cooperation Agreement*,[63] and 2008 *China-Russia Agreement*[64] include provisions on cooperation and equitable and reasonable utilization, and the prevention of environmental harm.[65] Lastly, the principles of equitable use, environmental protection, and sustainability are also found in European water agreements including the Danube Convention, which provides for the prevention, control and reduction of transboundary impact, the sustainable and equitable use of water resources, and the conservation of ecological resources,[66] and the Rhine Convention, which has as primary objective the sustainable development of the Rhine ecosystem in particular through the prevention and control of pollution, the protection of biological diversity, and the consideration of ecological requirements when implementing technical measures related to water development projects.[67] The European Union (EU) *Water Framework Directive* is also worth mentioning as it provides for environmental protection including the review of the environmental impact of human activity, the prevention and control of pollution, and public participation.[68]

1.3 Legal Obstacles Facing the Implementation of SDG 6 on Water

As observed by Dr Otto Spijkers, The Netherlands, Dr Yongmin Bian, China and Prof Maki Nishiumi, Japan in their ILA Committee Scoping Note, the most important international or national legal obstacles and innovations for the implementation of these treaties

---

[58] *La Charte de l'eau du Bassin du Niger*, *ibid*, Arts. 1(32), 6-9; *La Charte de l'eau du Lac Tchad*, *ibid,* Art. 4(d), Ch. 3.

[59] *Statute of the River Uruguay*, 26 February 1975 (in force 18 September 1976), 1295 UNTS 340, Chapters IX, X.

[60] *Guaraní Aquifer Agreement*, 2 August 2010 (not in force), Art. 4.

[61] *Agreement On The Cooperation For The Sustainable Development Of The Mekong River Basin*, 5 April 1995 (in force 5 April 1995).

[62] *Ibid*, Arts. 3, 5, 7.

[63] *Government of the People's Republic of China and the Government of the Republic of Kazakhstan Cooperation Agreement on the Utilisation and Protection of Transboundary Rivers*, 2001 (in force 10 September 2002). ("China-Kazakhstan Agreement")

[64] *Agreement Between the Government of the People's Republic of China and the Government of the Russian Federation Concerning Reasonable Use and Protection of Transboundary Waters, 2008*. ("China-Russia Agreement")

[65] China-Kazakhstan Agreement, *supra* n63*,* Arts. 2-3; *Ibid*, Preamble, Art. 2

[66] *Convention on Cooperation for Protection and Sustainable Use of the Danube River*, 29 June 1994 (in force 22 October 1998), Arts. 5-6

[67] *Convention on the Protection of the Rhine,* 12 April 1999 (in force 1 January 2003), Art. 3(1)

[68] *Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy,* OJ L 327, Arts. 1, 4, 5, 14, 16-17.

and customary principles for sustainable management of freshwater resources are as follows. First, there is a lack of multilateral agreements adopted for international rivers. Few riparian states have ratified the New York Convention, especially in Asia, meaning that there is no global compulsory dispute settlement mechanism to set and apply universally applicable standards. Second, many gaps remain in the existing agreements regulating use of specific watercourses. Many transboundary watercourses are not yet regulated by a specific treaty. Their use is not managed by a common institution, such as a commission, meaning that there is a noticeable lack of effective dispute settlement mechanisms. Third, the vagueness of international customary standards continues to be a challenge. Customary international rules are rarely applied in domestic courts and provide very limited guidance to States, especially relating to information sharing and the duty to notify. It is not clear whether upstream States have an obligation under international law to share with downstream States the hydrological information of international rivers in their territory. Fourth, there is a lack of international cooperation in relation to EIAs. Practices for EIAs are adopted by the riparian states according to their own domestic laws, if any. Usually, downstream States do not have an opportunity to participate in the EIA process done by upstream States.[69] State practice shows great variety and inconsistencies. For example, it is not clear how to judge whether negative impacts are 'significant' or 'substantial'. Fifth, there is a need to strengthen the ecosystem approach, and a need to strengthen the legal recognition of the rights of the riparian populations, the human right to clean water in particular.

There are several other legal, policy and governance challenges to the implementation of SDG 6, as noted by Freedom-Kai Phillips *et al* in their contribution to the Committee's deliberations. These include human-induced pressures on water quality and quantity, impacts from climate change on water availability, increased demand for water-based energy both within and beyond the watershed, and degrading biodiversity and ecosystem integrity. Increased institutional capacities and cooperation are needed to foster comprehensive and compatible solutions. Water is a cross-cutting resource often traversing or impacting multiple jurisdictions, national or regional and various local rights holders, requiring a cohesive administrative approach both nationally and internationally.[70] The rights to water and sanitation were relatively recently recognized, and some countries have adopted them as legally binding in national law.[71] The right to sanitation is recognised in fewer countries than the right to water.[72] Most countries adopt elements of these

[69] See, e.g., N Sánchez Castillo & Y Bian, "China's Obligation to Conduct Transboundary Environmental Impact Assessment (TEIA) in Utilizing Its Shared Water Resources" (2014) 55 Natural Resources Journal 105.

[70] *Nature for Water: Protecting Water-Related Ecosystems for Sustainable Development* (UNECE, 2005).

[71] The right to water is recognised in national law by countries including Algeria, Angola, Belarus, Bolivia, Central African Republic, Democratic Republic of the Congo, Costa Rica, Ecuador, France, Guinea, Kenya, Honduras, Indonesia, Madagascar, Maldives, Mauritania, Mozambique, Namibia, Nicaragua, Paraguay, Russia, South Africa, Tajikistan, Uganda, Ukraine, Uruguay and Venezuela. Note that this list is not comprehensive and does not include sub-national legislation recognising the right to water (e.g. California, Quebec, Wallonia, Flanders, Brussels and Mexico's Federal District). Some national judiciaries recognise the rights to water and sanitation on the basis of the direct incorporation of the ICESCR in national law (e.g. Argentina) or as rights implicitly contained in the right to life (e.g. India).

[72] These include Algeria, Bolivia, Kenya, Maldives, South Africa and Uruguay.

rights in national laws and policies on water and sanitation.[73] There are a range of other policy obstacles of particular relevance to targets 6.1 and 6.2, including: (i) exclusion of particular groups in planning decision-making, (ii) lack of culturally sensitive and pro-poor policies for the allocation of water resources between the different sectors of water use, and also within the different sectors (agriculture, education, health, water resources), (iii) insufficient allocation of resources for water and sanitation, and (iv) urbanisation that is dramatically increasing the populations of urban informal settlements that are frequently not politically accepted. Levels of drought are being exacerbated by alterations in weather patterns due to climate change and by desertification due to poor farming practices. Decentralisation policies in many countries are transferring responsibilities for water and sanitation from the national to the regional, local or municipal level. While residents may gain access to decision-making processes, the necessary capacity and finances are not always transferred to the new authorities, making it difficult to manage services adequately, and to extend them to the unserved and under-served.

Lack of information, particularly at the local level, exacerbates the administrative governance challenges related to SDG 6. All three Conventions provide mechanisms for information sharing and collaboration or supported its implementation. Both the Helsinki and New York Conventions provide for cooperative measures including sharing of ecological data, development of mutually applicable measures, and creation of joint mechanisms. The Ramsar Convention requires timely exchange of data relating to the ecological character of a wetland, with an Advisory Mission able to be deployed to supplement and support domestic response capacity. Ensuring effective and consistent domestic and regional monitoring in the face of limited capacity and changes in personnel and political climates, continues to prove challenging for the elimination of water pollution in line with target 6.3, among other targets. Inadequate financing and ineffective institutional collaboration are key challenges to ecosystem protection and restoration. The lack of adequate resources in individual jurisdictions is a prime inhibitor of successful implementation of SDG 6, exacerbated by the lack of access to knowledge and operational experience. By leveraging the collaborative forums provided by the Conventions, the costs of policy development can be reduced making domestic implementation more cost-effective.

The Ramsar Convention plays a key role in targets 6.5 and 6.6, among other conventions. While all three Conventions cover water and groundwater, only the Ramsar Convention has exclusive jurisdiction over wetlands, and complementary jurisdiction over transboundary water and groundwater resources. As the Ramsar Convention has the broadest membership and the longest institutional history in relation to the other two Conventions, it has great potential to capitalize on its collaborative nature as a means to preserve and restore aquatic ecosystems in partnership with the others.

1.4 Future International Law Research on Sustainable Management of Water Resources

Conservation and sustainable use of global water resources and implementation of adequate sanitation provides a wide range of benefits to ecosystem health and the welfare of current and future generations. Individually and collectively, the New York Convention,

[73] The most authoritative assessment of laws is found in: *The human right to safe drinking water and sanitation in law and policy - a sourcebook* (WASH United, Freshwater Action Network, WaterLex, 2012).

the Helsinki Convention and the Ramsar Convention play an integral role in achieving SDG 6, also SDG 15, and to a certain extent, SDG 14 and targets 3.9, 11.5, 12.4, and 17.9. As each Convention possesses an overlapping mandate to conserve and sustainably use water resources based on an ecosystem approach, the collaborative, substantive and procedural aspects each Convention provides are valuable tools, particularly for developing nations, that can and must be leveraged in a mutually supportive manner to enhance the complementarity of the respective instruments.

SDG 6 provides a unique opportunity for the recognition, development and integration of mutually supportive legal and institutional measures in line with the aforementioned Conventions, particularly the *Convention on Biological Diversity*[74] (CBD) under SDG 15. Complementary strategic planning under the Strategic Plan 2011-2020 and Aichi Biodiversity Targets is a prospective avenue for enhanced synergies, clarity and coordination. Increased communication and collaboration at the executive level of applicable Secretariats would also benefit the implementation of SDG 6. The Basel, Helsinki, Rotterdam, and Stockholm Conventions have each adopted valuable approaches to meeting the challenges of effectively managing international water resources and reversing their degradation.

The effective realization of SDG 6 also requires greater policy coherence across all governance mechanisms at all levels, and across applicable industry sectors. The development of national, regional, local and sector-based water and sanitation strategies allows for domestic policy harmonization and enhancement of interfaces with related strategic planning modalities such as National Biodiversity Strategies and Action Plans (NBSAPs). Further emphasis must be placed on increased complementarity across the relevant international treaties, and at the national level, through implementation and enforcement of environmental legal norms as applied by the domestic judiciary. Greater collaboration among the international legal research community, including law schools, international organizations, and the judiciary, is required to meet the need for increased legal and policy cohesion in the domestic application of international sustainable development law and those related to SDG 6 in particular.

In particular, as noted by Dr Otto Spijkers, The Netherlands, Dr Yongmin Bian, China and Prof Maki Nishiumi, Japan in their ILA Committee Scoping Note, there are several important future trends or research priorities in this field which can be recommended based on recent developments. In 2014, the Helsinki Convention became global and the New York Convention entered into force, and in 2015 the SDGs were adopted. These three developments can complement each other in several ways.[75] For instance, States are encouraged to embrace a "sustainable" interpretation of water law's fundamental principles. The SDGs, with their emphasis on ecosystems, could encourage the further development of the ecosystems approach in international water law. Public participation in the sustainable management of water is also encouraged. Future international law research priorities cover several further key concerns. For instance, civil liability and compensation of various actors, such as States, corporations, and individuals, for damage

[74] *Convention on Biological Diversity*, 5 June 1992 (in force 29 December 1993), 1760 UNTS 79. ("CBD")

[75] See also O Spijkers, "The Sustainable Development Goals as Catalyst for the Sustainable Management of Water Resources" (2015) 24 *Journal of Water Law* 115.

caused to transboundary waters. Further, the link between biodiversity and international water law through the development of the ecosystem approach bears investigation. In addition, the links between human rights and international water law, especially in the case of involuntary resettlement, are important to explore.

2. Contributions of International Law to SDG 7 on Sustainable Energy for All

Based on a Legal Brief with Dr Markus Gehring, Germany, Mr Stuart Bruce, UK and Sean Stephenson, Canada, with further review by Dr Ilaria Espa, Italy & Dr Paolo Davide Farah, Italy.

2.1 Sustainable Management of Renewable Energy Resources

As former UN Secretary-General Ban Ki-moon noted: "Energy is the golden thread that connects economic growth, increased social equity, and an environment that allows the world to thrive".[76] Energy was crucial to progressive realisation of the MDGs, despite not being included in their text. The SDGs redresses this omission, formally acknowledging the important role of energy in society, and for the attainment of all SDGs as an integrated, indivisible set of global priorities.[77] SDG 7 aspires to "ensure access to affordable, reliable, sustainable, and modern energy for all", especially for the 1.3 billion people without electricity and 2.7 billion people who use wood and biomass to cook and heat their homes. This section highlights selected features of the existing international legal order that are relevant to the implementation of SDG 7. It surveys relevant international, regional and bilateral treaties and non-binding instruments, identifies certain legal, policy and governance challenges that States may encounter when implementing SDG 7, and then considers innovations to assist with overcoming those obstacles, before drawing tentative conclusions regarding law, governance and policy opportunities for ensuring access to affordable, reliable, sustainable, and modern energy for all.

2.2 Contributions of International Law and Governance to SDG 7 on Sustainable Energy for All

International law and policy can play a role in facilitating and accelerating changes in global energy production and consumption and steer State and non-State actors towards increased use of low-carbon energy sources. However, at present, international law relating to sustainable energy is underdeveloped and may have a limited role in achieving SDG 7. Despite extensive political agreement on the need to further increase access to modern, affordable, sustainable energy services, binding international law instruments tend to indirectly, rather than directly, relate to sustainable energy and SDG 7. Implementation of SDG 7 can draw upon the normative guidance found in a wide range of international as well as bilateral and regional policy instruments.

To date, international treaties have largely avoided creating binding sustainable energy generation and consumption obligations. Rather, the relevant instruments have sought to facilitate decentralised sustainable energy policy choices and investment through innovative mechanisms and support measures. International treaties have been designed to balance incentives and disincentives and to motivate and influence behavioural change

[76] UN, *Sustainable Energy for All: A Framework for Action. Secretary-General's High-Level Group on Sustainable Energy for All* (2012), 4.
[77] Agenda 2030, *supra* n4, Para. 18.

Box 4: SDG 7 on Sustainable Energy – Ensure Access to Affordable, Reliable, Sustainable, and Modern Energy for All

7.1 By 2030, ensure universal access to affordable, reliable, and modern energy services;
7.2 By 2030, increase substantially the share of renewable energy in the global energy mix; and
7.3 By 2030, double the global rate of improvement in energy efficiency.
7.a By 2030, enhance international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency and advanced and cleaner fossil-fuel technology, and promote investment in energy infrastructure and clean energy technology; and
7.b By 2030, expand infrastructure and upgrade technology for supplying modern and sustainable energy services for all in developing countries, in particular least developed countries, small island developing States, and land-locked developing countries, in accordance with their respective programmes of support.

among States and their domestic actors. Global treaties of particular relevance to sustainable energy access and development include the *Statute of the International Renewable Energy Agency* (IRENA), the *United Nations Framework Convention on Climate Change*[78] (UNFCCC), its *Kyoto Protocol*[79] and Paris Agreement, the *United Nations Convention on the Law of the Sea*[80] (UNCLOS), and increasingly, the World Trade Organization (WTO) agreements, and human rights treaties. Regional treaties also play a role, and are described in the subsequent section.[81]

Directly relevant to SDG 7 is the IRENA Statute, which articulates the only generally accepted definition of renewable energy in international law as all forms of energy produced from renewable sources in a sustainable manner, including bioenergy, geothermal energy, hydropower, ocean energy, solar energy, and wind energy.[82] The IRENA Statute also provides strong, detailed support for its implementation, especially for target 7.2, and supports targets 7.2, 7.a and 7.b through the mandate and objectives of the international organisation that it created, which include knowledge transfer, capacity building and promotion of international cooperation. Most relevantly, in performing its activities, IRENA is tasked to become a centre of excellence which can facilitate efficient development and transfer of knowledge and technology.[83]

---

[78] *United Nations Framework Convention on Climate Change*, 9 May 1992 (in force 21 March 1994), 31 ILM 849. ("UNFCCC")
[79] *Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997 (in force 16 February 2005), 2303 UNTS 162. ("Kyoto Protocol")
[80] *United Nations Convention on the Law of the Sea*, 10 December 1982 (in force 16 November 1994), 1833 UNTS 3. ("UNCLOS")
[81] For deeper analysis see S Bruce, "International Law and Renewable Energy: Facilitating Sustainable Energy for All?" (2013) 14(1) Melbourne Journal of International Law 3; and S Bruce "Climate Change Mitigation through Energy Efficiency Laws: from International Obligations to Domestic Regulation' (2013) 31(3) Journal of Energy & Natural Resources 327.
[82] *Statute of the International Renewable Energy Agency*, IRENA/FC/Statute, 26 January 2009 (in force 8 July 2010), Art. 3. The Statute defines renewable energy by its source, but it does not define the "sustainable manner" in which renewable energy must be produced.
[83] *Ibid*, Art. 4.

Within the climate change regime, while renewable energy is not expressly mentioned in the UNFCCC as a relevant measure, and energy efficiency is noted only in the preamble in the context of a potential measure to counteract growing energy consumption,[84] the Kyoto Protocol provides its Parties with discretion to implement and elaborate policies and measures across sectors, with explicit reference to renewable energy sources and energy efficiency, in accordance with their national circumstances.[85] The relevance of the UNFCCC and Kyoto Protocol to advancing SDG 7 is twofold. First, they establish global objectives, an international framework and rules related to emissions reductions and market mechanisms that can incentivise investments in renewable energy and energy efficiency projects. Second, they establish obligations for States to cooperate, share and transfer low-carbon energy technologies and knowledge, as well as financial assistance.[86]

While the climate regime imposes no obligation on Parties to generate or provide access to sustainable energy, in practice it has catalysed significant investment into sustainable energy projects and contributed to knowledge transfer, particularly through Clean Development Mechanism projects. In this manner, the climate regime's evolution through decisions of the COPs and other bodies, focusing on mitigation, adaptation, finance, technology transfer and capacity building, and most recently the Paris Agreement, will directly and indirectly affect the implementation of SDG 7. Although low-carbon technologies are not an explicit, textual focus of the pre- or post-2020 climate regime, increased generation and use of sustainable energies and "making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development" will be vital to attaining the climate regime's new long-term objective of "holding the increase in the global average temperature to well below 2°C degrees above pre-industrial levels"[87] and in contributing to the regime's overall effectiveness. Additionally, the preamble of the decision text accompanying the Paris Agreement explicitly acknowledges "the need to promote universal access to sustainable energy in developing countries, in particular in Africa, through the enhanced deployment of renewable energy",[88] lending unanimous support to SDG 7 and targets 7.1 and 7.2.

International trade instruments, particularly the covered agreements of the WTO, are of increasing relevance to SDG 7.[89] In principle, the WTO's foundational pillars and disciplines, in particular the principles of most favoured nation and national treatment,[90] treat the energy sector and energy goods and services like all others. In 2001, through the Doha Ministerial Declaration, WTO members noted that trade disciplines and environmental protection can be "mutually supportive" and agreed to negotiate the reduction and/or

---

[84] UNFCCC, *supra* n78, Preamble at Para. 22, Art. 2.

[85] Kyoto Protocol, *supra* n79, Arts. 2(1)(a), 10(b)(i).

[86] UNFCCC, *supra* n78, Arts. 4(1)(c), 4(1)(g), 4(1)(i), 4(3)-(5), 6(b), 11(1); Kyoto Protocol, *supra* n79, Arts. 10(c)-(e) and 11(2).

[87] Paris Agreement, *supra* n2, Art. 2 (a) and (c).

[88] UNFCCC COP Decision 1/CP.21, *Adoption of the Paris Agreement*, Preamble at Para. 14. ("Paris Agreement Adoption Decision")

[89] See e.g. M Gehring & MC Cordonier Segger, *Sustainable Development in World Trade Law* (Kluwer Law International, 2005).

[90] The principles of most favorable nation found in Art. 1(1) of GATT and Art. 2 of GATS, as well as national treatment found in Art. 3(4) of GATT incorporate factors such as "like circumstances", and if the measure places a foreign investment at a "disproportionate disadvantage"

the elimination of tariff and non-tariff barriers on environmental goods and services.[91] In 2007, Asia-Pacific Economic Cooperation (APEC) leaders committed to "wide-ranging and ambitious actions" to contribute to greenhouse gas (GHG) reductions[92] and, in 2012, concretized certain of its ambitions by endorsing an agreement on environmental goods, consisting of 54 products for which tariffs would be reduced by 5% by the end of 2015.[93] This has been mostly successfully implemented. Since 2014, the EU and 16 other States have been negotiating to remove tariff and non-tariff barriers to trade in environmental goods and services that contribute to environmental protection and climate change mitigation (in addition to providing economic benefits).[94] Renewable energy and energy efficiency products are among the environmental categories under consideration.

The global regimes relating to oceans and human rights are of note as well. The global regime relating to oceans, UNCLOS, has particular significance to renewable energy production and targets 7.2, 7.a and 7.b, establishing coastal State jurisdiction for the construction and operation of offshore wind turbines or marine renewable energy generation within that costal State's exclusive economic zone (EEZ) or on its continental shelf.[95] The clean energy aspects of SDG 7 in particular benefit from the clarity of territorial sovereignty and functional dispute settlement provided under UNCLOS. Obligations to cooperate globally and regionally and to provide technical assistance to developing States may further assist attainment of SDG 7.

The connection between human rights and energy is underdeveloped in the SDGs, since international human rights law does not yet recognise a human right to energy. This predicament is particularly relevant for the advancement of target 7.1. Agenda 2030 generally notes that the SDGs are grounded in both the *Universal Declaration on Human Rights* and international human rights treaties, and are informed by the *Declaration on the Right to Development*, but it does not indicate how human rights interact with issues related to energy.[96] Additionally, CEDAW expressly requires Parties, in the context of rural development, to ensure that women have the right to adequate housing including electricity.[97] Despite the absence of binding international obligations, the connection between human rights and climate change is increasingly explored,[98] which necessarily implicates issues regarding access to and use of energy.

---

[91] World Trade Organization, "Doha WTO Ministerial 2001: Ministerial Declaration", WT/MIN(01)/Dec/1, Paras. 6, 31(iii).

[92] Sydney APEC Leaders' Declaration on Climate Change, Energy Security and Clean Development, online: http://www.apec.org.

[93] 2012 APEC Leaders' Declaration, Annex C – APEC List of Environmental Goods, online: http://www.apec.org.

[94] European Commission, DG-Trade, "Environmental Goods Agreement (EGA): Liberalizing trade in environmental goods and services", online: http://trade.ec.europa.eu/.

[95] UNCLOS, *supra* n80, Art. 56(1)(a); See also Arts. 60, 80.

[96] Agenda 2030, *supra* n4, Para. 10.

[97] CEDAW, *supra* n12, Art. 14(2)(h).

[98] *Human rights and climate change*, UN Doc. A/HRC/7/23 (2008); *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, UN Doc. A/HRC/10/61 (2009); *Human rights and climate change*, UN Doc. A/HRC/RES/10/4 (2009); *Human rights and climate change*, UN Doc. A/HRC/RES/18/22 (2011); *Human rights and climate change*, UN Doc. A/HRC/RES/26/27 (2014); *Human rights and climate change*, UN Doc. A/HRC/RES/29/15 (2015); See also S Humphreys, ed, *Human Rights and*

Regional treaties that touch on energy have grown in prominence recently, many of which contain innovative mechanisms that could be used to advance SDG 7. The *Energy Charter Treaty*[99] (ECT) and its *Protocol on Energy Efficiency and Related Environmental Aspects*[100] (Energy Efficiency Protocol), European Union law, international investment agreements, and increasingly, regional trade agreements and regional human rights treaties (and case law) are of particular relevance. The 1994 ECT contains a broad range of obligations in support of SDG 7, including free trade in energy materials and products, freedom of energy transit through pipelines and grids, investment protections and dispute resolution measures. The promotion of renewable energy and cleaner fuels is also noted as a priority.[101] The primary objectives of the Energy Efficiency Protocol are to promote energy efficiency policies consistent with sustainable development, foster cooperation on energy efficiency, and encourage economic energy use that encourages environmental benefits. Parties are required to establish energy efficiency policies, legal and regulatory frameworks to promote the efficient functioning of market mechanisms, including market-oriented price formation and a fuller reflection of environmental costs and benefits, the reduction of barriers to energy efficiency, mechanisms for financing energy efficiency initiatives, education and awareness, dissemination and transfer of technologies, and transparency of legal and regulatory frameworks. [102] Practically, the Energy Efficiency Protocol has been effective at facilitating cooperation and knowledge exchange, through Working Group dialogues with States in transition that are developing energy legislation, analytical studies and voluntary country reviews. In this regard, lessons can be learned to advance targets 7.a and 7.b. The EU's innovative directives on renewable energy and energy efficacy create legal frameworks to promote sustainable energy measures domestically, institute rules to remove barriers in energy markets and establish time-bound targets to be achieved by member States through national plans contributing to the attainment of SDG 7.[103] By 2020, energy efficiency must improve by 20% and 20% of final energy consumption must be generated from renewable energy sources. The EU proposes to increase both the share of its renewable energy and improvement in energy efficiency by 27% by 2030.[104]

International trade and investment agreements facilitate SDG 7 through encouraging investments generally – not specifically in relation to SDG 7 targets, or even within the energy sector – to promote and protect all cross-border investments, including investments

Climate Change (CUP, 2010); S **Jodoin** & Y Saito, eds, "Human Rights and the Environment: Key Challenges & Best Practices", CISDL report submitted to the Office of the High Commissioner for Human Rights (June 2011).

[99] *Energy Charter Treaty*, 17 December 1994 (in force 16 April 1998), 2080 UNTS 95. ("ECT")

[100] *Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects*, 17 December 1994 (in force 16 April 1998), 2081 UNTS 3. ("ECT Protocol") For analysis see "Climate Change Mitigation through Energy Efficiency Laws: from International Obligations to Domestic Regulation", *supra* n83, 329-330 and "International Law and Renewable Energy: Facilitating Sustainable Energy for All?", *supra* n81, 39-42.

[101] ECT, *supra* n99, Art. 19(1)(d).

[102] ECT Protocol, *supra* n100, Arts. 1, 3(2), 5.

[103] *Directive 2009/28 on the promotion of the use of energy from renewable sources*, OJ L 140/16, 5 June 2009; *Directive 2012/27/EU on energy efficiency*, OJ L 315, 25 October 2012.

[104] European Commission, "2030 framework for climate and energy policies" (23 October 2014), online: http://ec.europa.eu.

made in the renewable energy and energy efficiency sectors. States agree to a range of positive and negative obligations in international investment agreements, some of which are similar to those in WTO law, which act as incentives for in-bound investments, promote stable business environments and may encourage investors with knowledge and capacity in sustainable energy to bring their experience into new jurisdictions. Additionally, certain RTAs (for example the EU-Caribbean Forum) encourage innovations to advance an economic response to climate change and sustainable development through the promotion of cleaner, more sustainable energy technologies.[105] The trade agreement signed between Chile and Colombia establishes several cooperation schemes for the production of sustainable energy, technology transfer and energy efficiency.[106] Similar cooperation schemes are included in the CAFTA-DR[107] and in the *Cotonou Agreement*.[108] The above-mentioned regional trade agreements provide States with an opportunity to progress on SDG 7 in the context of greater economic and trade openness, supported by capacity building, technical assistance, scientific and educational exchanges, dialogue and other measures.

As for the gradual advancement of target 7.1, regional approaches may support an implied human right to energy grounded in regional treaties, including the *African Charter on Human and Peoples' Rights* and the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* under the principle of "best attainable physical and mental health". [109] Regional jurisprudence and inquiries have recognized the practical connection between energy matters and certain human rights, particularly in connection with the rights to housing and to a clean environment.[110] Legal action has also been brought against States through regional American human rights bodies in the context of global warming, climate change and melting ice caps.[111]

---

[105] *Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part*, 15 October 2008, OJ L 289 (not in force), Art. 138.

[106] *Free trade agreement between Chile and Colombia*, 27 November 2006 (entered in force 8 May 2009), Art. 19(5).

[107] *Central America-Dominican Republic-United States Free Trade Agreement*, 5 August 2004 (in force 1 January 2009), Art. 17(9).

[108] *Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part*, 23 June 2000 (in force 1 April 2003), OJ L 317, Art. 32(1)(iii).

[109] *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 17 November 1998 (in force 16 November 1999), 69 OAS TS, Arts. 10-11; African Charter on Human and Peoples' Rights, 27 June 1981 (in force 21 October 1986), 1520 UNTS 217, Art. 16.

[110] *Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v Nigeria)*, Case No. ACHPR/COMM/A044/1; *Minors Oposa v Secretary of the Department of Environment and Natural Resources* (Philippines), (1994) 33 ILM 173; *Government of the Republic of South Africa and Others v Grootboom and Others*, (2000) 11 BCLR 1169.

[111] Arctic Athabaskan Council, "Petition to the Inter-American Commission on Human Rights seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting caused by Emissions of Black Carbon by Canada" (23 April 2013); "Petition to the Inter-American Commission on Human-Rights Seeking Relief from Violations Resulting from Global Warming by Acts and Omissions of the United States" (7 December 2005).

Additionally, human rights obligations were considered in the recent landmark decision of *Urgenda Foundation v The Netherlands*, which held that The Netherlands was required to take further action to reduce its GHG emissions,[112] noting that regardless of the scale of emissions a State must exercise due care towards third parties.[113] As public interest litigation grows, jurisprudence may increasingly serve to interpret laws in the context of rights linked to climate change and energy and to influence the operationalisation of target 7.1.

2.3 Legal Obstacles Facing the Implementation of SDG 7 on Sustainable Energy for All

A spectrum of challenges at the international, regional and national levels may impact domestic implementation of SDG 7. First, many of the terms used in SDG 7 are undefined both in its text and in international law generally. Terms like "modern energy" and "modern energy services" in SDG 7 and target 7.1 respectively are commonly used by international organizations including the International Energy Agency (IEA), the World Bank and the Sustainable Energy for All (SE4ALL) initiative, but there is no universally agreed definition. The SE4ALL initiative launched by Secretary-General Ban Ki-moon, detailing channels for public-private collaboration on sustainable energy access,[114] gives meaning to "modern energy" by demarcating the type of energies that are excluded from its scope, including wood, coal, charcoal and animal waste. The IEA defines modern energy services as "household access to electricity and clean cooking facilities"[115] such as fuels and stoves that do not cause indoor air pollution. The World Energy Outlook confirms that there is no single definition of "energy access", but common elements across definitions exist. Both the IEA and the World Bank use a threshold of "500kwh per year per urban household – and just half this rate for rural households" to define access to modern energy.[116] This is not to mention the inherent uncertainty in "energy efficiency improvement" in target 7.3. Definitional uncertainty within non-binding international instruments has minimal impact on the legal obligations of States, particularly when compliance is not being assessed, but this poses difficulties when attempting global scientific accounting towards achieving this goal.

Second, domestic measures to support renewable energy sources have been subject to inquiry with recent trade disputes claiming injurious conduct concerning the application of renewable energy support policies and measures, including the lawfulness of mandatory targets, domestic content requirements and whether feed-in-tariffs amount to unlawful subsidies in breach of the *Agreement on Subsidies and Countervailing Measures*.[117]

---

[112] *Urgenda Foundation v The State of the Netherlands*, C/09/456689/ HA ZA 13-1396 (24 June 2015), Para. 4.79.

[113] See generally, *inter alia*, publications of Stephen M Gardiner, Dale Jamieson, Tim Hayward and Henry Shue; D Shelton, "Equitable utlilization of the atmosphere: a rights based approach to climate change?" in S Humphreys (ed.), *Human Rights and Climate Change* (CUP, 2010).

[114] See generally, "Sustainable Energy for All", online: http://www.se4all.org.

[115] International Energy Agency, "Energy Poverty", online: http://www.iea.org.

[116] Todd Moss, "SDG Seven: Update the 'Modern' in Universal Modern Energy Access" (Center for Global Development, 2 April 2015); World Bank, "Access to electricity" (2015) http://data.worldbank.org/indicator/EG.ELC.ACCS.ZS.

[117] See e.g. *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (Japan and EU complainants), regarding domestic content requirements in a feed-in tariff programme. Other cases have been filed but have not progressed: see e.g. *China – Measures concerning Wind Power Equipment* (US complainant); *European Union and a Member State* [Spain] – *Certain Measures*

Similar issues have been challenged in recent investor-state arbitrations against Canada,[118] Spain,[119] Italy[120] and the Czech Republic,[121] where investors have alleged that repeal of clean energy programs, mal-administration of clean energy programs and/or imposition of performance requirements have resulted in indirect expropriation, unfairness or the devaluing of their investments and breaching fair and equitable treatment which includes legitimate expectations. Importantly, these investment disputes do not challenge the competence of States to create laws and regulations regarding renewable energies, but rather the differential treatment of programs and policies, which allegedly breach obligations related to international investment agreements. Careful planning and implementation of sustainable energy programs in a non-discriminatory, fair manner, in accordance with the rule of law and legitimate expectations of investors in a given context, can advance SDG 7 while ensuring compliance with international economic law obligations.

Third, implementation of SDG 7 necessitates a practical operationalization of the principle of common but differentiated responsibilities as reflected, among other sources, in Article 3 of the UNFCCC. This tension has affected climate negotiations, and the ailing WTO Doha round. As SDG 7 requires action from both developed and developing countries, it is commonly understood that achievement of the various targets and indicators will necessitate some degree of so-called "burden sharing"; that is, a "fair" allocation of responsibilities among all States taking into consideration their individual historic responsibilities. The SDGs reaffirm the principle of common but differentiated responsibilities.[122] Given the rapid cost and efficiency improvements in clean technologies, the burden in adopting, or facilitating adoption of, greater levels of clean energy

---

Concerning the Importation of Biodiesels (Argentina complainant); *EU and certain Member States* [Italy and Greece] – *Certain Measures Affecting the Renewable Energy Generation Sector* (China complainant).

[118] *Mesa Power Group LLC v Canada*, PCA Case No. 2012-17; *Windstream Energy LLC v Canada*, PCA Case No. 2013-22.

[119] *The PV Investors v Spain,* UNCITRAL*; CSP Equity Investment S.à.r.l. v Spain,* SCC*; Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v Kingdom of Spain*, ICSID Case No. ARB/13/31*; Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v Spain,* ICSID Case No. ARB/13/36*; Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain,* ICSID Case No. ARB/14/1*; NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11*; InfraRed Environmental Infrastructure GP ltd. et al v Spain,* ICSID Case No. ABR/14/12*; RENERGY S.à.r.l. v Spain*, ICSID Case No. ABR/14/18*; RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Spain,* ICSID Case No. ABR/14/34*; Stadtwerke München GmbH, RWE Innogy GmbH et al. v Spain*, ICSID Case No. ABR/15/1*; STEAG GmbH v Spain*, ICSID Case No. ABR/15/4*; 9REN Holding S.a.r.l v Spain,* ICSID Case No. ARB/15/15*; BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v Kingdom of Spain*, ICSID Case No. ARB/15/16*; Cube Infrastructure Fund SICAV and others v Spain,* ICSID Case No. ARB/15/20; *Matthias Kruck and others v Spain,* ICSID Case No. ARB/15/23*; KS Invest GmbH and TLS Invest GmbH v Kingdom of Spain,* ICSID Case No. ARB/15/25*; JGC Corporation v Kingdom of Spain,* ICSID Case No. ARB/15/27.

[120] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic,* ICSID Case No. ARB/14/3.

[121] *Antaris Solar GmbH and Dr. Michael Göde v The Czech Republic*, UNCITRAL; *Voltaic Network GmbH v Czech Republic*, UNCITRAL; *ICW Europe Investments Limited v Czech Republic*, UNCITRAL.

[122] Agenda 2030, *supra* n4, Para. 12.

may bring considerable economic, environmental and energy security advantages. In this regard, the progress on this principle made through the Paris Agreement may be looked to as an example.

Lastly, despite significant progress relating to energy, many developing States in particular have either no or suboptimal sustainable energy polices, laws and regulations, for want of financial resources, domestic institutional cooperation, capacity and/or technical capability. Opportunities exist to improve these issues, as well as the effectiveness of new and existing laws and regulations, by addressing cognate issues in an integrated fashion, including the links between transport and energy efficiency or fiscal incentives and renewable energy project finance, and by ensuring that energy legislation complements climate change legislation. Such measures could reduce continuing demands on finite government resources and provide greater certainty and predictability to private enterprise, thereby encouraging international and regional trade and investment and support a holistic regulatory approach that maximises SDG 7 implementation efforts. The drafting of model laws and regulations could assist in maximizing sustainable energy development opportunities and increasing uptake of sustainable energy,[123] and provide clarity to undefined terms in support of targets 7.1-7.3.

2.4 Future International Law Research on Sustainable Management of Renewable Energy Resources

Overall, the current state of international law related to sustainable energy and energy access is underdeveloped, but it has considerable potential to advance SDG 7. International law, and particularly international policy, can be used to facilitate and accelerate change in global energy production and consumption and steer State and non-State actors towards increased use of low-carbon energy sources. It would do so by facilitating and optimising domestic, regional and international commitments among States and non-State actors and providing a forum for dialogue and normative development. In recent years, some 164 States have adopted renewable energy targets or support policies, including feed-in-tariffs and renewable portfolio standards.[124] Sustainable energy measures are often used in the context of Nationally Appropriate Mitigation Actions (NAMAs) – emissions reduction actions within domestic climate strategies – or vertically integrated NAMAs, so-called V-NAMAs, whereby sub-national actors with relevant competences are involved in planning and implementation of those strategies. Greater cognisance and incorporation of sustainable energy measures into national plans of action and development plans can support progressive implementation of SDG 7.

The objectives of SDG 7 may be advanced through a range of measures and approaches including, on the one hand, continued and increasing interpretation of energy-related issues in the context of existing international law frameworks and, on the other hand, the development of new measures, such as: global product performance and sectoral standards; international energy generation, access, use and education benchmarks; globally agreed principles for sustainable energy technology sharing, transfer and licensing; international mechanisms to mobilize private and public sustainable energy finance; and

---

[123] *Ibid*, Para. 45.

[124] JL Sawin et al, "Renewables 2015: Global Status Report: Key findings" (Renewable Energy Policy Network for the 21st Century, 2015) at 7.

comprehensive and meaningful global, regional and national monitoring, reporting and verification procedures that measure and track progressive implementation of SDG 7.

Over time, international regulation of sustainable energy may emerge. For the moment, the absence of specific and integrated legal frameworks that support sustainable energy development may provide an impediment to concerted action. As the economic self-interest of States increasingly aligns with the objectives and desired outcomes of SDG 7 and the other SDGs, the incentives to improve both international and domestic sustainable energy laws and regulations will strengthen. Just as international law related to SDG 7 is piecemeal, so too are the means of implementation found in SDG 17. Additional research, collaboration and capacity building regarding international law, policy and governance related to sustainable energy would further contribute to this burgeoning field and contribute to the advancement of SDG 7.

3. Rules and Practices of International Law for the Sustainable Management of High Seas Marine Resources towards SDG 14 on Sustainable Management of Fisheries and Ocean Resources

Based on a Scoping Note by Cymie R. Payne, USA; with contributions from a further Legal Brief by Prof Konstantia Koutouki, Canada, and Mr Freedom-Kai Phillips, Canada, for expert review.

3.1 Value, Threats, Status of Marine Natural Resources on the High Seas and Generally

SDG 14 aims to "conserve and sustainably use the oceans, seas and marine resources for sustainable development." This part of the Committee's examination focuses on just the natural resources of the ocean's high seas area, that is, areas beyond national jurisdiction (ABNJ), which constitute more than half of the world ocean and the world's largest ecosystem. International law governing natural resources in areas within national jurisdiction—ocean waters landward of 200 nm (or 12 nm for states that have not claimed an EEZ) and the seafloor landward of continental shelf boundaries, where they have been claimed—is extensive, and only partially overlaps this topic.[125] High seas marine resources include fisheries, one of the most ancient subjects of international law, and marine genetic resources, one of the most novel. These and other vital ocean natural resources and ecosystem services exist within areas of national control and areas beyond national jurisdiction, with important transboundary effects and commons considerations.

[125] The work of the ILA "International Law and Sea Level Rise" Committee on fixed versus ambulatory baselines is relevant to this topic. That Committee noted, at its April 2015 meetings, the linkages with this Committee's work, particularly with regard to coastal adaptation to climate change. That Committee is also considering human rights and forced migration in relation to sea level rise, subjects that have bearing on sustainability, governance and rights of human populations in relation to marine resources. In this regard, that Committee considered that the "law on self-determination had a great potential in the context of endangered statehood and access to natural resources". That Committee also discussed whether "income generated from the Exclusive Economic Zone of a submerged State could eventually be put in a Trust Fund for the benefit of the affected population". Alternatively, that portion of the ocean might become high seas. *See*, DD Caron, "Climate Change, Sea Level Rise and the Coming Uncertainty" in S-Y Hong and JM Van Dyke, eds, *Oceanic Boundaries: A Proposal to Avoid Conflict in Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhof, 2009), 1-17.

The extent and status of ocean ecosystem services was evaluated by the First Global Integrated Marine Assessment (World Ocean Assessment).[126] Half of the oxygen humans breathe is produced by the ocean; it is an essential element in climate dynamics, including the ocean's absorption of heat and about 26 percent of the anthropogenic carbon dioxide in the atmosphere; it cycles inorganic plant nutrients and is part of the hydrological cycle. Its biodiversity, greater than terrestrial biodiversity, includes living marine resources with and without commercial value. Primary production in areas of upwelling has no market value, but it is the basis of the oceanic food web. Marine resources with commercial value include seafood, hydrocarbons and seabed minerals. Marine food resources are the primary source of essential protein and micronutrients for about 3 billion people. Marine genetic resources, such as the thermophiles that live in the deep ocean, are potentially highly valuable for industrial, pharmaceutical, cosmetic and other applications. Ships use the ocean to transport food, energy, consumer goods and people—especially tourists. Ocean-based energy sources include wind and tide. Submarine cables on the ocean floor carry 90 percent of information and financial transactions. Cultural and religious ecosystem services associated with high seas living resources have social value, particularly for island and other ocean-going peoples; they are given economic value by tourism.

Harm to the living marine environment of the high seas is largely caused by economic uses of marine natural resources, by impacts of ships, and by pollution. Threats include over-harvesting directed at particular species, land- and ocean-based pollution. Current research reports a high risk that we are experiencing defaunation of the oceans.[127] As a result of a weak legal regime and poor enforcement, up to one third of the fish catch is taken illegally,[128] and non-target species are killed. In some cases, legal concepts intended to contribute to sustainable management have not had the desired result: for example, the concept of "maximum sustainable yield", used in international agreements, is criticized for being "based on the inherent trade-off between increasing harvests and decreasing the ability of a smaller resulting population to compensate for the removals."[129] Acidification from excessive global atmospheric carbon dioxide levels, a much broader problem, is also a threat. Future impacts might be caused by bio-prospecting, deep seabed mining and marine geoengineering. The social pillar of sustainable development concerns equitable access to living marine resources, benefit sharing for deep seabed minerals and marine genetic resources.[130] The notoriously poor labour conditions at sea are not discussed further in this section.[131] The marine natural resources of the high seas are relatively unknown. Governance measures are therefore undertaken under conditions of uncertainty and ignorance. Measures to support the collection and sharing of scientific information are a necessary element of the international law regime for high seas living resources. International law is called to address the crucial balance between the economic,

[126] UN, *First Global Integrated Marine Assessment* (World Ocean Assessment I), 2016, Summary, 1-4, online: http://www.un.org/Depts/los/woa.

[127] DJ McCauley, ML Pinsky, SR Palumbi, JA Estes, FH Joyce, RR Warner, *Marine defaunation: Animal loss in the global ocean* (2015) 347(6219) Science 247.

[128] DJ Agnew, J Pearce, G Pramod, T Peatman, R Watson, JR Beddington and TJ Pitcher, *Estimating the Worldwide Extent of Illegal Fishing* (2009) 4(2) *PLoS ONE*.

[129] World Ocean Assessment, *supra* n126, 16.

[130] *Ibid*, Section 4.2.

[131] International Labor Organization, *Caught at Sea: Forced Labour and Trafficking in Fisheries* (ILO, 2013).

environmental and social pillars of sustainable development for the natural resources of the high seas. Ensuring that resource extraction—living and non-living—is conducted in a manner that does not cause harm and that leaves enough for the future is necessary. So too is management of all kinds of ocean pollution, including noise pollution.

More broadly, as noted by Prof Konstantia Koutouki et al, SDG 14 aims to conserve and sustainably use all oceans, seas and marine resources for sustainable development. Including the high seas, three-quarters of the planet's surface consists of oceans, seas and marine areas. They are a vital provider of food for humans and wildlife, and crucial to regional, national and local economies, as well as an important regulator of our climate and an important source of cultural and spiritual inspiration for many peoples and communities. SDG 14 is key for the environmental dimension of sustainable development, however, the international legal instruments, governance arrangements and policy collaborations on sustainable development in relation to conservation and sustainable use of resources are still evolving, and with regard to key aspects of SDG 14, important gaps can be found.

3.2 The International Legal Terrain on the High Seas and SDG 14 for Sustainable Management of Ocean Resources

UNCLOS is the framework convention that structures the law of the sea, codifying customary international law and developing international law. It establishes maritime zones, principles, and rights and duties of coastal, port, flag and land-locked states. It also created the ITLOS, a forum for dispute settlement and authoritative interpretation of UNCLOS. Detailed means to achieve sustainability are left to implementing agreements and other legal measures. Obligations that promote more sustainable management of the high seas marine environment, established by UNCLOS and the opinions of ITLOS and the ICJ, include: conservation;[132] precaution, applied according to the State's capabilities;[133] due diligence;[134] EIAs;[135] and best environmental practices.[136]

The customary principle of freedom of the seas embedded in UNCLOS states that "the high seas are open to all States" for navigation, overflight, laying of cables, construction of artificial installations, fishing, and scientific research, subject to other provisions of UNCLOS and of international law.[137] Freedom of the seas is in tension with other rights and duties to the extent that it is used to unilaterally assert a right of free access to take and use the marine environment. The principle has evolved from its earlier form, as recognized by the ICJ in its statement that "resulting from the intensification of fishing …

[132] UNCLOS, *supra* n80, Arts. 117-120.

[133] ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion* (2011), Paras. 122, 125-135, 151-163 ("Advisory Opinion on Responsibilities and Obligations with respect to the Area"); ITLOS, *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)* Order (27 August 1999) 1999 ITLOS Reports 274, Para. 77.

[134] Advisory Opinion on Responsibilities and Obligations with respect to the Area, *ibid*, Paras. 110-120, 131.

[135] *Ibid*, Paras. 122, 141-150; UNCLOS, *supra* n80, Art. 206.

[136] *Ibid*, Paras. 122, 136-137. Ecosystem-based management may now be considered a best practice, as reflected in the CBD and the UN Fish Stocks Agreement, *infra* n141.

[137] UNCLOS, *supra* n80, Art. 87; D Armitage, ed, *Hugo Grotius: The Free Sea* (Liberty Fund, 2004) 10-13.

the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all."[138] The *res communis* nature of the high seas is partly guaranteed by Article 89, which states that "no State may validly purport to subject any part of the high seas to its sovereignty," and Article 136, stating that "The Area [the seabed, ocean floor, and subsoil in ABNJ] and its resources [minerals at or beneath the seabed] are the common heritage of mankind".[139] The opinions of ITLOS articulated certain rights of humankind to its ocean heritage including and extending beyond the Area, and described some rights and obligations as *erga omnes*, belonging to all.[140]

Progressive development of the law of the sea to incorporate sustainability has occurred in part through implementing agreements, notably the 1995 *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*[141] (FSA). The FSA balances environmental protection of fish populations, economic interests in harvesting seafood, and social equity in preserving fish for coastal fisheries and future generations by extending the management of fisheries to the high seas for species that spend a significant part of their lives moving between the high seas and coastal state jurisdictions, implementing Article 118 of UNCLOS. The Food and Agriculture Organization (FAO) *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*[142] obliges each Party to ensure that vessels flying its flag observe fishery conservation and management measures on the high seas, and to oversee the high seas fishing activities of its vessels. It also contributes to enforcement, and thus to the progressive development of the law, by encouraging flag states to allow port states to investigate foreign fishing vessels suspected of activities that undermine the effectiveness of international conservation and management measures. The 2009 FAO *Agreement on Port State Measures*[143] provides flag state obligations and minimum rules for port states that include: inspections to identify illegal, illegal, unreported and unregulated (IUU) fishing activities, authority to deny port facilities for activities like transhipment, recognition of the port state's right to deny entry to vessels, the obligation to deny entry to IUU fishing vessels other than for enforcement or emergency, and capacity building to assist developing states.

---

[138] *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, (1974) ICJ Reports 3.

[139] UNCLOS, *supra* n80, Part XI (The Area).

[140] Advisory Opinion on Responsibilities and Obligations with respect to the Area, *supra* n133, Para. 180; CR. Payne, "Collective Responsibility for Sound Resource Management: *Erga Omnes* Obligations and Deep Seabed Mining" in Organization of American States (OAS), *Environmental Rule of Law: Trends from the Americas*, 108-125 (OAS, 2015).

[141] *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 4 August 1995 (in force 11 December 2001), 2167 UNTS 3. [FSA]

[142] *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, 24 November 1993 (in force 24 April 2003), 2221 UNTS 91.

[143] *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, 22 November 2009 (in force 5 June 2016), FAO Resolution No. 12/2009.

Numerous multilateral, regional[144] and bilateral treaties govern fishing,[145] whaling,[146] the protection of biodiversity, and conservation of specific regions,[147] as do resolutions of the UNGA.[148] Four of the thirteen Regional Seas programs address ABNJ in addition to coastal areas through conventions and action plans. Regional seas organizations are involved in establishing marine protected areas (MPAs), managing fisheries, and other activities that contribute to sustainability. Regional fisheries management organizations (RFMOs) have been established for particular target species[149] and for regions,[150] with authority to manage or in some cases only to advise on managing fisheries, through controls on fishing gear, fishing effort, trade and other measures. UNGA Resolutions 44/225, 45/197, and 46/215 established a moratorium on driftnets longer than 2.5 kilometres on the high seas, thus reducing mortality of non-target animals (including dolphins, whales, seals, birds, fish species, and turtles). A 2013 report stated the moratorium has been generally successful.[151]

Sustainability is a goal of many of these instruments, though the emphasis is often on its "sustained yield" aspect. For example, both Australia and Japan "emphasized conservation and sustainable *exploitation* as the object and purpose of the Convention" (emphasis added) most relevant to their dispute over interpretation of the International Convention for the Regulation of Whaling's provision on scientific exemptions from whaling moratoriums.[152] Through the FAO, states adopt influential, voluntary guidelines, including the important 1995 FAO *Code of Conduct for Responsible Fisheries* and four implementing International Plan of Action (IPOA) guidelines on conserving seabirds and sharks; IUU fishing; and management of fishing capacity.[153] The Code of Conduct's objectives reflect

[144] The FAO lists six global and trans-ocean regional fishery bodies; 34 for four oceans; and 11 for continental bodies.

[145] There are hundreds of international agreements related to fisheries alone, see United Nations Treaty Collection.

[146] *International Convention for the Regulation of Whaling* 2 December 1946 (in force 10 November 1948), 161 UNTS 72 ("ICRW").

[147] *Convention on the Conservation of Antarctic Marine Living Resources*, 20 May 1980 (in force 7 April 1982), 1329 UNTS 47.

[148] E.g. *Large-scale pelagic drift-net fishing and its impact on the living marine resources of the living marine resources of the world's oceans and seas*, UN Doc. A/RES/46/215 (1991).

[149] Tuna, for example, is monitored and managed by the Commission for the Conservation of Southern Bluefin Tuna; Inter-American Tropical Tuna Commission; the International Commission for the Conservation of Atlantic Tunas (ICCAT); Indian Ocean Tuna Commission; and the Western and Central Pacific Fisheries Commission.

[150] See, e.g. Sub-Regional Fisheries Commission, an organization of West African coastal states and its 2012 *Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission*, 8 June 2012 (in force 16 September 2012).

[151] US National Marine Fisheries Service, *2013 Report of the Secretary of Commerce to Congress concerning U.S. Actions Taken on Foreign Large-Scale High Seas Driftnet Fishing*, online: http://www.nmfs.noaa.gov.

[152] *Whaling in the Antarctic, Australia and New Zealand (intervening) v Japan*, Judgment, ICJ GL No 148, ICGJ 471 (ICJ 2014), 31st March 2014, Para. 57 (the Court found that the relevant article of the ICRW serves a broader purpose).

[153] MAE Palma, M Tsamenyi & WR Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Brill 2010), 67.

sustainable development concerns: food security, especially for local communities; trade in fish and fishery products; and habitat protection. The IPOA-IUU guideline was noted with approval by ITLOS.[154] The adoption in 2014 of *Voluntary Guidelines for Flag State Performance* supports the legal principles of flag state responsibility for preventing IUU fishing, "to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems."[155]

Two treaties that address species preservation and biodiversity globally have limited application to the high seas. First, trade in endangered species, including trading in listed species taken on the high seas ("introduction from the sea"), is regulated by the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*[156] (CITES). Second, each Party to the CBD commits to obligations regarding "processes and activities" carried out under its jurisdiction or control with effects on biodiversity anywhere, including the high seas.[157] The CBD establishes objectives that reflect the three pillars of sustainability in Article 1 and defines the concept of biodiversity to reflect the complex interactions between organisms and the ecological complexes of which they are part in Article 2. Parties have an affirmative duty to cooperate for conservation and sustainable use of biodiversity in ABNJ, under Article 5. This obligation is further defined in Article 14(1)(c) to include sharing information on activities that are likely to significantly adversely affect biodiversity in ABNJ, and in Article 14(1)(d) to notify and act to minimize imminent or grave damage. Of particular importance to the implementation of sustainability, the CBD COP adopted Decision IX/20 in 2008 to establish criteria for ecologically and biologically significant areas (EBSAs) in need of protection in open-ocean waters and deep-sea habitats and to identify locations to include in a network of MPAs, a process which continues to be implemented.

Institutional arrangements for oversight of the Area are provided by the International Seabed Authority (ISA), authorized by UNCLOS[158] and the 1994 *Agreement Relating to the Implementation of Part XI of the Law of the Sea Convention*[159] (Agreement on the Area). The ISA has the capacity to promulgate regulations to ensure the protection of the marine environment from harmful effects of mineral prospecting, exploration and exploitation under UNCLOS Article 145; to conduct resource assessments and environmental assessments; to approve plans of work for exploration or exploitation proposed by mining interests; to fund scientific research; and to educate.

Pollution on the high seas is primarily the responsibility of the International Maritime Organization (IMO), which oversees several conventions addressing shipping safety, security and pollution. The *International Convention for the Prevention of Pollution from*

---

[154] ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion* (2015), Para. 92. ("SRFC Advisory Opinion")

[155] FAO Committee on Fisheries, 31st Session, COFI/2014/4.2/Rev.1 (2014).

[156] *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973 (in force 1 July 1975), 993 UNTS 243, Art. 1(e) ("CITES").

[157] CBD, *supra* n74, Art. 4.

[158] UNCLOS, *supra* n80, Arts. 1(1)-(2), 156, 157.

[159] *Agreement Relating to the Implementation of Part XI of the Law of the Sea Convention*, 16 November 1994 (in force 28 July 1996), 1836 UNTS 3.

Ships[160] (MARPOL) and its annexes regulate dumping of wastes generated on-board ship. The 1972 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*[161] (London Convention) prohibits many categories of land-created waste in the ocean and the 1996 *Protocol to the London Convention*[162] prohibits all ocean dumping other than substances that are specifically permitted. Geoengineering techniques affecting the oceans are addressed to a very limited extent by the London Dumping Convention and its Protocol and the CBD.[163] Experiments that dumped iron dust into the ocean in ABNJ—intended to demonstrate a possible carbon sequestration technique and to increase fish populations—showed the weakness of the legal controls.[164] The parties to the London Convention and Protocol placed a moratorium on all ocean fertilization other than "legitimate scientific research" by Resolution LC/LP.1 (2008) and Resolution LC/LP.2 (2010). The resolution creates an assessment framework directing the countries conducting the research to notify and consult with potentially affected countries. Decisions about allowing the research rest with the researching countries. The CBD resolution is even milder: CBD parties are requested to ensure that ocean fertilization does not take place until more science and governance are in place.[165]

As Prof Payne's contribution argues, State Practice is also important. States demonstrate increasing commitment to ocean sustainability by participation in the treaties, non-binding agreements, UNGA resolutions, and other measures referred to above. However, both flag states and coastal states often show a lack of will and/or a lack of capacity to enforce international obligations on the high seas. In particular, flag states have not been willing or able to compel compliance by those subject to their jurisdiction, including ships they register, with their international obligations, as required by UNCLOS, Article 91. On the other hand, there is extensive state practice in the fisheries sector supporting evolving legal principles that include flag state responsibility. Many coastal states have legislation requiring that agreements for access to the coastal state's EEZ fisheries must include a provision establishing the foreign flag state or association's responsibility to ensure that its vessels comply with the agreement and the coastal state's fishing laws.[166]

---

[160] *International Convention for the Prevention of Pollution from Ships*, 2 November 1973 (in force 2 October 1983), 1340 UNTS 184.

[161] *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 29 December 1972 (in force 30 August 1975), 1046 UNTS 120.

[162] *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 7 November 1996 (in force 24 March 2006), 36 ILM 1.

[163] *Ibid*, Art. 1; SP Broder & M Haward, "The International Legal Regimes Governing Ocean Iron Fertilization" in HN Scheiber & J-H Paik, eds, *Regions, Institutions, and Law of the Sea: Studies in Ocean Governance* (Martinus Nijhoff, 2013); CP Carlarne, *Arctic Dreams and Geoengineering Wishes: The Collateral Damage of Climate Change*, (2010-2011) 49 Columbia Journal of Transnational Law 602 at 642–51.

[164] RK Craig, *Response: The Social and Cultural Aspects of Climate Change Winners*, (2012–2013) 97 Minnesota Law Review 1416 at 1426–27; LM Russell et al., *Eastern Pacific Emitted Aerosol Cloud Experiment*, (2013) 94 Bulletin of the American Meteorological Society 709.

[165] CBD COP Decision IX/16, UN Doc. UNEP/CBD/COP/Dec/ IX/16.

[166] International Union for Conservation of Nature (IUCN), Written Statement to the International Tribunal for the Law of the Sea, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (29 November 2013), Annex.

The ISA is developing deep seabed mining regulations and applying its regulations for mineral prospecting and exploration in the Area. Many states have adopted national legislation, as required, to implement their obligations under UNCLOS. The United States is not a party to UNCLOS and is therefore not able to participate. Despite advice that this meant the legal regime of the Area does not apply to US companies, the US company Lockheed Martin used its subsidiary to obtain British sponsorship,[167] suggesting that legal advisors saw legal risk for non-Parties to flout the treaty rules established for the Area.

Taking a focus which extends beyond the high seas, the contributions of Prof Konstantia Koutouki et al highlight the relevance of treaties and practice in a different yet complementary light. They note that while a wide range of international law relates to SDG 14, central instruments include the 1982 UNCLOS, the FSA, the New York Convention, the Helsinki Convention and the Ramsar Convention.

UNCLOS is uniquely positioned for implementation in SDG 14. In paragraph 158 of *The Future We Want*, it is recognized as providing the legal framework for the conservation and sustainable use of oceans and their resources and, as such, is of principal importance to an analysis of how international law and governance can help to implement SDG 14. Indeed, target 14.c aims to enhance "the conservation and sustainable use of oceans and their resources by implementing international law as reflected in the [UNCLOS], which provides the legal framework for the conservation and sustainable use of oceans and their resources…" Under UNCLOS, States have agreed to a general obligation on States to protect and preserve marine life.[168] For instance, States must individually or jointly establish measures to prevent, reduce and control marine pollution, specifically: toxic or harmful land-based dumping, pollution from vessels, and pollution resulting from natural resources exploration on the seabed or subsoil and other marine installations.[169] As target 14.1 seeks to prevent and significantly reduce marine pollution of all kinds, particularly from land-based activities by 2025, these UNCLOS provisions are directly relevant. Scientific collaboration under UNCLOS, for instance, could be used to trace and prevent or stop illegal marine pollution, and to monitor the effectiveness of collaborative efforts. Further, under UNCLOS, measures taken by States must not create unjustifiable interference to lawful activities of States, may not directly or indirectly transfer the damage from one location to another, and shall address the use of technology and the accidental introduction of species into the marine environment.[170]

Target 14.2 aims to sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts by 2020. Supporting this goal, UNCLOS establishes measures relating to global and regional cooperation.[171] States, in cases of imminent or actual damage, must provide notification to other affected States, and cooperate with other international organizations to develop joint contingency plans.[172] Monitoring and

[167] Lockheed Martin, "UK Government sponsors Lockheed Martin UK subsidiary for licence to harvest Polymetallic Nodules", Press Release, 14 March 2013, online: http://www.lockheedmartin.co.uk.
[168] UNCLOS, *supra* n80, Art. 192.
[169] *Ibid,* Art. 194.
[170] *Ibid,* Art. 195-196.
[171] *Ibid,* Art. 197.
[172] *Ibid,* Art. 198-199.

evaluation measures are facilitated, including publication of reports, with particular emphasis on activities which are planned and permitted.[173] Planned activities which have a reasonable potential to cause harm are to have the potential effects assessed, with the results integrated into reporting.[174] In addition, target 14.4 aims, by 2020, to effectively regulate harvesting, and end overfishing, IUU fishing, and destructive fishing practices. In target 14.4, countries also seek to implement science-based management plans, to restore fish stocks in the shortest time feasible at least to levels that can produce maximum sustainable yield as determined by their biological characteristics.

Supporting this aspect of SDG 14, and implementing provisions of UNCLOS, the FSA seeks to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks.[175] In particular, the general principles of the FSA are measures which optimize utilization of fish stocks, adoption of an ecosystem approach, and application of the precautionary approach.[176] States are further required to apply the precautionary approach to conservation and management of straddling fish stocks, and exercise caution in cases of uncertain, unreliable or limited information.[177] In implementing the precautionary approach, States shall improve decision-making, apply common guidelines relating to stock condition, develop data collection and research programs, provide for enhanced monitoring for concerned species, and implement precautionary management measures including modest catch limits.[178] Organizations such as the Marine Stewardship Council (MSC) provide valuable consumer capacity-building with regard to the sustainable use of fish stocks. MSC sets standards with regards to supply chains to ensure that the goal of sustainability in terms of fish and seafood harvesting. Of course public participation is an important aspect of governance and via organizations such as MSC the public is given the opportunity to vote with their purchasing power. MSC and others like it however, need to work on their own transparency so that the public feels confident that the standards set do in fact make a difference.

Prof Koutouki et al also note that other treaty regimes, backed by key principles, governance arrangements, and scientific and policy collaborations, remain relevant to the delivery of SDG 14. In particular, by 2020, target 14.2 aims to sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and take action for their restoration; target 14.5 aims to conserve at least 10 per cent of coastal and marine areas, consistent with national and international law and based on best available scientific information. Supporting these aspects of SDG 14, the Ramsar Convention establishes international cooperative measures to facilitate the conservation and wise use of wetlands,[179] adopting an ecosystem approach to wetlands that includes lakes, rivers, underground aquifers, peatlands, mangroves and other coastal areas such as coral reefs.[180] It requires Parties to establish domestic monitoring of listed wetlands to monitor changes in ecological character with changes noted on

[173] *Ibid,* Art. 204-205.
[174] *Ibid,* Art. 206.
[175] FSA, *supra* n141, Art. 2.
[176] *Ibid,* Art. 5.
[177] *Ibid,* Art. 6 (1-2).
[178] *Ibid,* Art. 6(3-7).
[179] Ramsar Convention, *supra* n9, Art 6.
[180] *Ibid*, Art. 2(1).

the Montreux Record, among other mechanisms,[181] providing a useful tool for implementation and monitoring of target 14.2. Further, the Helsinki Convention, which establishes cooperative measures to address, mitigate and prevent transboundary pollution of watercourses, can assist to address the quality, quantity and integrated management of water basins, supporting targets 14.2 and 14.5, by encouraging measures relating to, among other issues: (1) pollution prevention; (2) source licensing; (3) waste-water discharges; (4) water quality; (5) pre-discharge treatment; (6) EIA; (7) sustainable water management; and, (8) contingency planning to minimize effects of accidental pollution.[182] In addition, the New York Convention, which aims to harmonize measures grounded in watercourse agreements facilitating cooperation and consultation relating to protective and governance measures relating to international watercourses, and amicable settlement of disputes,[183] recognizes principles such as (1) a duty of reasonable and equitable use of the watercourse; (2) an obligation to provide good faith cooperation; (3) application of an ecosystem approach; and, (4) facilitation of information sharing.[184] Under the New York Convention, in their efforts to establish environmental protection measures, including notification requirements and individual or joint mechanisms to prevent pollution or the introduction of alien species,[185] the Parties are delivering on targets 14.1 and 14.2.

With regard to other aspects of SDG 14, such as the aim to minimize ocean acidification as per target 14.3, and to support small-scale artisanal fishers as per target 14.b, Prof Koutouki et al have observed less international collaboration. They argue that these remain areas for further international development and cooperation, particularly where institutional governance or capacity building, through horizontal and vertical collaboration, can remove obstacles to achieving these aspects of SDG 14. To this end, States are helped by organizations like the International Council for the Exploration of the Sea (ICES), whose motto is "science for sustainable seas." ICES as an intergovernmental organization has as a mandate to "increase the scientific knowledge of the marine environment and its living resources and to use this knowledge to provide unbiased, non-political advice to competent authorities."[186] ICES could further aid States with the science of sustainability by integrating Indigenous and local community knowledge into their reports and assessments, they note, pointing to this work in the Arctic.

3.3 Legal Obstacles Facing the Implementation of SDG 14 on Marine Resources

Prof Cymie Payne notes several important gaps and obstacles, with specific consideration of the high seas. Although UNCLOS Part XII was intended to provide a framework for the protection and preservation of the marine environment, divergence between the law of the sea and international marine environmental law principles has been observed.[187] The future promises to integrate these approaches as gaps in the legal regime for ocean ABNJ are filled. First, there is an institutional gap. There is no institution comparable to the ISA mandated to act on behalf of humanity with regard to the rest of the ocean

[181] *Ibid,* Art. 3(2).
[182] Helsinki Convention, *supra* n8, Arts. 3(1)(a)–(l), 3(3).
[183] New York Convention, *supra* n7, Preamble*,* Arts. 6(2), 33.
[184] *Ibid*, Arts. 5, 7-9, 20.
[185] *Ibid*, Arts. 21-27.
[186] International Council for the Exploration of the Sea, "About," online: http://www.ices.dk/.
[187] RM Warner, *Conserving marine biodiversity in areas beyond national jurisdiction: Co-evolution and interaction with the law of the sea*, (2014) 1 Frontiers in Marine Science 1.

environment in ABNJ and activities other than seabed mining. It has been suggested that existing institutions, such as the RFMOs and the IMO, can fill that role. But the sectoral organizations do not coordinate with each other, and fundamental differences in "culture, processes and epistemic communities" between them make the prospect doubtful.[188] Moreover, the existing institutions act through flag states, which often have failed to fulfil their obligations or refused to accept new commitments. The RFMOs typically base management decisions on consensus and allow objectors to opt out of conservation measures. Some states simply remain outside the treaty and refuse to cooperate, although virtually all states have conservation and cooperation obligations as parties to UNCLOS. Moreover, it is not yet known what—if any—state, international organization, or other entity has standing to litigate a dispute, compensation claim, or enforcement matter in cases of environmental harm, even in the case of the far better-developed regime for the Area.[189] Second, there is also a gap in coverage, geographic and functional. Problems that are ocean-wide, like IUU fishing, are difficult to address effectively. Cumulative impacts from multiple environmental insults are even more difficult to prevent or counter. The regional fishery agreements do not cover all species, they generally do not address non-target species and they often do not have a mandate for ecosystem protection.[190] As a result, ecosystems like the Sargasso Sea fall through the gap, and their vital global functions are left largely unprotected from pollution of all sorts, the passage of ships, and the impacts of fishing.[191] Treaties that might provide protection, like the World Heritage Convention, are silent as to ABNJ; it is argued that silence might be permissive and the Sargasso Sea would be a prime candidate for listing.[192]

Third, as she notes, accountability is a puzzle—concepts of responsibility and liability are in place but difficult to apply. Yet without enforcement, obligations provide only guidance but no real leverage to compel preventive activities. Without a robust mechanism, there is nothing to ensure that a responsible party undertakes response and remediation if it causes significant environmental damage to humanity's common heritage. For example, a state that sponsors a company to mine the deep seabed in the Area has an obligation to ensure that the company complies with the terms of its contract with the ISA and the obligations set out in UNCLOS and related instruments, as well as several direct obligations.[193] However, these are obligations for the sponsoring state to make best possible efforts—to exercise due diligence. The sponsoring state is liable only if it does not try, but it might not be liable if it tries and fails. The result: a liability gap that no one is responsible for. This is not unique to deep seabed mining; due diligence is the standard.[194]

---

[188] D Freestone, *International governance, responsibility and management of areas beyond national jurisdiction*, (2011) 27 International Journal of Marine and Coastal Law 191, 198.

[189] Advisory Opinion on Responsibilities and Obligations with respect to the Area, *supra* n133, Paras. 178-184.

[190] *Conserving marine biodiversity in areas beyond national jurisdiction: Co-evolution and interaction with the law of the sea*, *supra* n187.

[191] D Freestone, O Varmer, M Bennett, TA Wilhelm, TM Beuttler, J Ardron, S Maxwell, & K Killerlain Morrison, *Place-Based Dynamic Management of Large-Scale Ocean Places: Papahānaumokuākea and the Sargasso Sea*, (2014) 33(2) Stanford Environmental Law Journal 191.

[192] *Ibid,* 234-6.

[193] Advisory Opinion on Responsibilities and Obligations with respect to the Area, *supra* n133, Para. 242.

[194] SRFC Advisory Opinion*, supra* n154, Para. 125.

Fourth, even if a state does fail in its due diligence obligations, standing is a challenge, as is the availability of a forum for dispute settlement and accountability. The ISA has standing and ITLOS's Seabed Disputes Chamber is a forum, but only for activities in the Area.[195] The Seabed Disputes Chamber has suggested that others may be entitled to standing—other Parties to UNCLOS, for example[196]—but the scope and nature of the right to enforce remains undefined and limiting it to UNCLOS parties seems to fall short of the "common heritage of humankind" standard. This leaves an accountability gap within the regime for mining in the Area, and an even vaster gap for other activities on the high seas. Fifth, many activities, such as those occurring on the deep seabed that do not involve exploration, prospecting or collection of minerals, are unregulated at present. Exploration and extraction of marine genetic resources are in this category. Scientific research is also virtually unregulated; concerns include under regulation that allows environmental damage, identification of criteria to allow research without risking harm, and knowledge transfer appropriate to this global commons. The complement to the lack of prohibitive regulation is the lack of facilitating governance: for example, approaches that require international cooperation and enforcement, such as establishing MPAs to ensure healthy fish stocks and biodiversity, are unauthorized because there is no entity with the capacity to permit them. Finally, there is no governance mechanism to ensure that the living and non-living ocean continues to function as a healthy whole. The interactions between the physical and biological ocean create the conditions we consider normal. The international law regimes for the high seas marine environment address only pieces of the system.

Several efforts to fill these lacunae are underway. Firstly, The ISA is overseeing the development of deep seabed mining regulations for the Area that will address a host of issues, including EIAs, with goals including protection for the living marine environment from mining damage, "a fair financial return to mankind for its resources," and "orderly, safe and rational management of the resources."[197] Secondly, the preparatory committee process for the negotiation of an *Implementing Agreement for Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction* (BBNJ) began in March 2016, pursuant to UNGA Resolution 69/292 (2015). The package of issues for negotiation is limited to: marine genetic resources, including benefit-sharing, area-based management tools including MPAs, EIAs, and capacity-building and marine technology transfer. It is intended to complement existing agreements, institutions, and arrangements. Thirdly, Governance models being developed for the Arctic centre on the work of the Arctic Council and IMO. Lastly, the non-legally binding 2014 *Hamilton Declaration on Collaboration for the Sargasso Sea* calls for the use of existing international law and existing regional and international organizations to safeguard the unique Sargasso Sea ecosystem. The Declaration sets a precedent for protecting an area of special value that is defined by ocean currents rather than fixed points. The use of existing instruments is a

[195] UNCLOS, *supra* n80, Arts. 162(2)(u) (non-compliance), 185(2) (suspension), 187 (jurisdiction of Seabed Disputes Chamber), 189 (limitation on jurisdiction with regard to decisions of the Authority), 191 (advisory opinions).

[196] Advisory Opinion on Responsibilities and Obligations with respect to the Area, *supra* n133, Paras. 179-180.

[197] ISA, *Developing a Regulatory Framework for Mineral Exploitation in the Area: Report to Members of the Authority and All Stakeholders* (2016).

different approach from declarations of legally binding high seas MPAs elsewhere. It is hoped that the BBNJ negotiation will provide strong legal rules to create high seas MPAs.

In this fragmented, complex legal regime, authoritative interpretation of duties and rights provides clarity and consistency in the application of the law. ITLOS's Seabed Disputes Chamber has jurisdiction to provide advisory opinions regarding the Area on the interpretation of UNCLOS, Part XI, the 1994 Agreement on the Area, and the relevant annexes and regulations for the organization and management of activities in the Area on questions referred to it by the ISA, and contentious jurisdiction to settle disputes,[198] as it did in its first advisory opinion Advisory Opinion on Responsibilities and Obligations with respect to the Area. The first advisory opinion of the full Tribunal answered several questions about coastal state and flag state obligations with regard to IUU fishing in the Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) on 2015. This advisory opinion also confirmed ITLOS's advisory jurisdiction where an international agreement related to the purposes of UNCLOS provides for submitting an advisory opinion request to ITLOS.[199] Including an appropriate provision should be considered in the negotiation of any future agreements relating to the high seas.

3.4 Future International Law Research on Sustainable Management of Marine Resources

In addition to the conclusions of Prof Payne above, which focus on the high seas, several other observations can be made concerning obstacles and priorities for future international law research. First, as noted by Prof Koutouki et al, main legal and governance obstacles highlighted in global debates on SDG 14 include fishing fleet overcapacity, perverse subsidies, poor governance arrangements, challenges in coordination of scientific data on stock assessments and other matters, and lack of compliance with rules on by-catch and discards.[200] Increased cooperation is particularly necessary to address data-collection and sharing and collaboration on enforcement of catch quotas. Perverse subsidies which artificially maintain the fishing sector in main jurisdictions fundamentally undermine conservation measures in neighboring States. Lack of integrated governance at the regional and national levels leads large segments of impacted local communities to remain marginalized. Data shortages regarding fish stocks and broader ecosystem metrics remain prevalent, significantly impacting development of mitigation measures. Incidental capture of threatened or non-targeted species, often through inappropriate methods or technologies, continues to impact fish stocks. While a majority of coastal countries do undertake coastal zone management planning and have developed competent authorities to address coastal issues, watershed pressures including hydropower development, degradation of potable water sources, and large-scale irrigation for agriculture, coupled with poorly managed land uses, continue to exacerbate problems of sustainable use of marine resources. Capacity concerns, increases in marine habitat degradation and lack of implementation of sustainable marine planning principles continue to plague conservation efforts. Lack of stakeholder engagement or integration into

---

[198] UNCLOS, *supra* n80, Arts. 159(10), 187, 191.

[199] *Ibid*, Annex VI, *Statute of the International Tribunal for the Law of the Sea*, Art. 21 and *Rules*, Art. 138; SRFC Advisory Opinion, *supra* n154, Para. 60.

[200] MRAG, *Towards sustainable fisheries management: international examples of innovation* (London: MRAG, 2010).

decision-making procedures – particularly at the local level – continues to significantly restrict collaboration, knowledge transfer and the effectiveness of compliance or monitoring efforts. In essence, as Prof Koutouki et al argue, there remain many obstacles to overcome for sustainable management of marine natural resources.

Second, as Prof Koutouki observes, while UNCLOS remains the most comprehensive international legal instrument pertaining to oceans and marine environment, there has been progress in post-UNCLOS agreements to address issues of sustainability. Under the FSA there is integration of the precautionary principle and acknowledgement of the importance of an ecosystem approach to questions of development. Many significant steps and measures are being taken collaboratively, though important gaps remain. However, enforced properly, the existing legal, policy and governance framework can be strengthened to have a positive influence in sustainable use of marine resources. A spectrum of other instruments including the Ramsar Convention, the New York Convention, and the Helsinki Convention provide for cooperation and collaboration relating to protection of wetlands, international watercourses or transboundary watercourses. Leveraging synergies across Conventions to drive mutually supportive implementation, and engage key stakeholders in relevant forums, will support complementarity and diffuse organizational costs of implementation. Increased emphasis is needed on capacity building and transfer of marine technologies for sustainable development. Lastly, the cultural and spiritual dimensions of oceans, seas, lakes, rivers and other waterways are important under SDG 14. Organisations such as the United Nations Permanent Forum on Indigenous Issues have worked to emphasize the importance of nature in general to the preservation and further development of Indigenous culture and that of local communities. Water is a spiritual symbol for many societies and hence its contribution to the physical, psychological, spiritual and cultural well-being of individuals and communities should be given a more central role.

4. Contributions of International Law to SDG 15 on Sustainable Management of Terrestrial and Biological Resources

Based on a Legal Brief with Prof Jorge Cabrera, HQ/Costa Rica, Mr Frederic Perron-Welch, Canada and Dr. Balakrishna Pisupati, India, with further review by Prof Arie Trouwborst, The Netherlands

4.1 Sustainable Management of Terrestrial and Biological Resources

This section focuses on SDG 15 to protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss, highlighting potential contributions of international law and policy in delivering targets 15.1 – 15.9. It provides a cursory survey of principal international law, policy and governance measures can contribute to realizing SDG 15. It considers options for legal and policy preparedness, notes potential for mainstreaming and more integrated implementation at international and national levels, and offers some recommendations on these matters. The analysis suggests that the SDG 15 targets are backed up by international environmental governance systems and legal measures, including multilateral environmental agreements (MEAs) that need to be appropriately linked to discussions on the development of indicators related to targets and national implementation.

Box 5: SDG 15 - Protect, Restore and Promote Sustainable Use of Terrestrial Ecosystems, Sustainably Manage Forests, Combat Desertification, and Halt and Reverse Land Degradation and Halt Biodiversity Loss

15.1 By 2020, ensure the conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems and their services, in particular forests, wetlands, mountains and drylands, in line with obligations under international agreements

15.2 By 2020, promote the implementation of sustainable management of all types of forests, halt deforestation, restore degraded forests and substantially increase afforestation and reforestation globally

15.3 By 2030, combat desertification, restore degraded land and soil, including land affected by desertification, drought and floods, and strive to achieve a land degradation-neutral world

15.4 By 2030, ensure the conservation of mountain ecosystems, including their biodiversity, in order to enhance their capacity to provide benefits that are essential for sustainable development

15.5 Take urgent and significant action to reduce the degradation of natural habitats, halt the loss of biodiversity and, by 2020, protect and prevent the extinction of threatened species

15.6 Promote fair and equitable sharing of the benefits arising from the utilization of genetic resources and promote appropriate access to such resources, as internationally agreed

15.7 Take urgent action to end poaching and trafficking of protected species of flora and fauna and address both demand and supply of illegal wildlife products

15.8 By 2020, introduce measures to prevent the introduction and significantly reduce the impact of invasive alien species on land and water ecosystems and control or eradicate the priority species

15.9 By 2020, integrate ecosystem and biodiversity values into national and local planning, development processes, poverty reduction strategies and accounts

15.a Mobilize and significantly increase financial resources from all sources to conserve and sustainably use biodiversity and ecosystems

15.b Mobilize significant resources from all sources and at all levels to finance sustainable forest management and provide adequate incentives to developing countries to advance such management, including for conservation and reforestation

15.c Enhance global support for efforts to combat poaching and trafficking of protected species, including by increasing the capacity of local communities to pursue sustainable livelihood opportunities

4.2 Contribution of International Law, Policy and Governance to SDG 15 on Terrestrial Ecosystems and Biodiversity

International and domestic environmental law and policy supporting better management of the environment, natural resources and ecosystems is guided by three principles of governance, namely, good governance (the process of inclusive decision making), effective governance (dealing with set goals and targets) and equitable governance (based on distributive justice).[201] In the context of realizing targets under SDG 15, countries

[201] D Shroeder & B Pisupati, *Ethics, Justice and the Convention on Biological Diversity* (UNEP, 2010).

have had some success establishing effective governance measures through implementation actions related to MEAs. Good and equitable governance related issues need more attention when countries are preparing to set a national agenda on SDG implementation. For the purpose of this analysis, focus is placed on using the MEAs related to biodiversity as the primary trigger to further strengthen governance, law and policy.

Underlying SDG 15, countries have established legally binding obligations to implement actions for conservation and sustainable use of biodiversity and equitable benefit-sharing at national, regional and international levels through the cluster of biodiversity-related conventions. Complementary governance approaches have been developed to address inter-linkages between the issues addressed under the respective treaty regimes and to provide a basis for cooperation.[202] The governing bodies have also set out specific mandates for cooperation, backed by formal memoranda of cooperation and joint work programmes. Of the key biodiversity related conventions, only the CBD supports actions at ecosystem, species and genetic levels. It focuses on the conservation of biological diversity, the sustainable use of biological resources, and the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including through appropriate access to genetic resources and transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding. The CBD is the most comprehensive international instrument dealing with justice and governance of biodiversity and ecosystems.[203]

The CBD reflects the international principle that States have the sovereign right to exploit their own natural resources, namely biological and genetic resources, pursuant to their own national laws and policies, subject to the constraint that such actions do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[204] Furthermore, Parties are expected to cooperate with other Parties directly, or through international organizations, on conservation and sustainable use of biodiversity in areas beyond national jurisdiction, and on other matters of mutual interest.[205] For implementation, commitments to collaborate with financing and capacity development are also key.[206] In 2010, CBD COP 10 adopted the Strategic Plan for Biodiversity 2011-2020[207] with the purpose of inspiring broad-based action by all countries and all stakeholders in order to meet the three objectives of the CBD through the establishment of a shared vision and mission, grounded in 5 cross-cutting strategic goals and 20 targets known as the Aichi Biodiversity Targets. The vision of the Strategic Plan is that "by 2050, biodiversity is valued, conserved, restored and wisely used, maintaining ecosystem services, sustaining a healthy planet and delivering benefits essential for all people." Its mission is to "take effective and urgent action to halt the loss of biodiversity in order to ensure that by 2020 ecosystems are resilient and continue to provide essential services, thereby securing the planet's variety of life, and contributing to human well-being, and poverty eradication. To ensure this, pressures on biodiversity are reduced, ecosystems are

[202] B Pisupati, *Biodiversity Governance: Lessons for International Environmental Governance* (National Biodiversity Authority, India, 2012).
[203] Shroeder & Pisupati, *supra* n201.
[204] CBD, *supra* n74, Art. 3.
[205] *Ibid*, Art. 5.
[206] *Ibid*, Arts. 1, 20.
[207] CBD COP Decision X/2.

restored, biological resources are sustainably used and benefits arising out of utilization of genetic resources are shared in a fair and equitable manner, adequate financial resources are provided, capacities are enhanced, biodiversity issues and values mainstreamed, appropriate policies are effectively implemented, and decision-making is based on sound science and the precautionary approach." This language is reflected in targets 15.1, 15.5, 15.6, 15.9 and 15.a.

A significant part of SDG 15, related targets, and indicators,[208] are in direct alignment with the provisions of CBD and several other biodiversity MEAs, including Protocols under the CBD such as the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* (Nagoya Protocol). The CBD COP has also adopted a series of programmes of work to further the conservation and sustainable use of biodiversity in particular ecosystems, including the *Programme of Work on Dry and Sub-humid Lands* which supports target 15.3,[209] *Expanded Programme of Work on Forest Biological Diversity* which supports target 15.2,[210] *Programme of Work on Mountain Biodiversity* which supports target 15.4,[211] and the *Revised Programme of Work on Inland Water Biological Diversity* which supports target 15.1.[212] The COP has also adopted a series of principles, guidelines and other tools to support implementation of specific provisions of the CBD, such as the *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity*,[213] *Guidelines on Biodiversity and Tourism Development*,[214] *Guiding Principles for the Prevention, Introduction and Mitigation of Alien Species that Threaten Ecosystems, Habitats or Species* which supports target 15.8,[215] *The Ecosystem Approach*,[216] *The Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities* which supports target 15.6[217] and *Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment* which supports target 15.9.[218] Through new policies and innovative governance arrangements, including monitoring and peer review mechanisms, these COP decisions can contribute to the implementation of SDG 15. National reports provided by Parties in accordance with Article 26 will provide a valuable window on the status of implementation.

The Strategic Plan and Aichi Targets have been adopted by the UN and several biodiversity MEAs as the framework for their work.[219] In addition to the CBD, a number of biodiversity related MEAs offer opportunities to implement SDG 15 effectively at different levels. To preserve threatened and endangered species that are subject to international

---

[208] B Pisupati, *Role of multilateral environmental agreements in achieving the sustainable development goals (SDGs) with special focus on Biodiversity MEAs* (UNEP, 2016).
[209] CBD COP Decision V/23, Annex.
[210] CBD COP Decision VI/22, Annex.
[211] CBD COP Decision VII/27, Annex.
[212] CBD COP Decision VII/4, Annex.
[213] CBD COP Decision VII/12, Annex II.
[214] CBD COP Decision VII/14, Annex.
[215] CBD COP Decision VI/23, Annex.
[216] CBD COP Decision VII/11, Annex I.
[217] CBD COP Decision X/42, Annex.
[218] CBD COP Decision VIII/28, Annex.
[219] CBD COP Decision X/20, Paras. 4, 7-11.

trade, CITES aims to control the trade in designated species to avoid their extinction[220] based on the precautionary approach.[221] With the revisions made at COP 16 in 2013, the Parties to CITES have embraced the Aichi Targets and the Strategic Plan for Biodiversity in the *CITES Strategic Vision: 2008-2020*, which aims to "conserve biodiversity and contribute to its sustainable use by ensuring that no species of wild fauna or flora becomes or remains subject to unsustainable exploitation through international trade, thereby contributing to the significant reduction of the rate of biodiversity loss and making a significant contribution towards achieving the relevant Aichi Biodiversity Targets."[222]

Threats to the survival of transboundary species are addressed in the *Convention on Migratory Species* (CMS), which aims to conserve terrestrial, marine and avian migratory species throughout their range.[223] The 120 Parties work together to conserve migratory species and their habitats by providing strict protection for the most endangered species by conserving or restoring the places where they live, mitigating obstacles to migration and controlling other harmful factors, concluding regional multilateral agreements for the conservation and management of specific migratory species or categories of species with unfavourable conservation status which require international agreements for their conservation and management, or species with a status which would significantly benefit from international cooperation under an agreement (listed in Appendix II), and undertaking co-operative research and conservation activities.[224] Appendix II agreements range from legally binding agreements to less formal instruments like memoranda of understanding, and are adapted to the requirements of particular regions. At CMS COP 11 in 2014, the Strategic Plan for Migratory Species was adopted, with the goal of being applicable beyond the CMS by adapting the Aichi Targets as appropriate, thus allowing for the harmonized implementation of the CMS and the CBD through tools such as NBSAPs and the SDGs.[225]

Furthermore, the *Convention concerning the World Cultural and Natural Heritage*[226] (World Heritage Convention) aims to identify and conserve the world's cultural and natural heritage, establishing a list of sites identified by its Parties whose outstanding values should be preserved for all humanity.[227] Parties pledge to conserve their natural heritage, including natural features of outstanding universal aesthetic or scientific value, geological and physiographical formations and areas that are the habitat of threatened species of animals or plants, and natural sites or areas of outstanding universal value from the point of science, conservation or natural beauty.[228] Each Party recognizes its duty to

[220] CITES, *supra* n156, Art. II.

[221] CITES COP Resolution Conf. 9.24.

[222] CITES COP Resolution Conf. 16.3; see also John E. Scanlon, "How CITES is Taking Concrete Action for a World Living in Harmony with Nature: CITES' Contribution to the UN Decade on Biodiversity" (2014) IISD Biodiversity-L Guest Article #23.

[223] *Convention on the Conservation of Migratory Species of Wild Animals*, 23 June 1979 (in force 1 November 1983), 1651 UNTS 333, Preamble.

[224] *Ibid*, Arts. III(4), IV(1).

[225] Bradnee Chambers, "CMS COP11: A Substantive Summary of Critical Outcomes", (2014) IISD Biodiversity-L Guest Art. #28.

[226] *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 23 November 1972 (in force 15 December 1975), 1037 UNTS 151.

[227] *Ibid*, Art. 3.

[228] *Ibid*, Art. 2.

identify, conserve and transmit its natural heritage to future generations and to do all it can to this end, to the utmost of its own resources, and with any international assistance and co-operation required.[229]

The Ramsar Convention, Parties creates a framework for national action and international cooperation for the conservation and wise use of internationally significant wetlands and their resources, recognizing that wetlands are ecosystems that are important for biodiversity conservation in general, and for the well-being of human communities.[230] In this context, the term "wetlands" includes all lakes and rivers, underground aquifers, swamps and marshes, wet grasslands, peatlands, oases, estuaries, deltas and tidal flats, mangroves and other coastal areas, coral reefs, and all human-made sites such as fish ponds, rice paddies, reservoirs and salt pans.[231] Parties must formulate and implement plans to promote the conservation of wetlands designated to the List of Wetlands of International Importance, wisely use wetlands in their territory as far as possible, promote the conservation of wetlands and waterfowl by establishing nature reserves on all wetlands, and provide adequately for their protection.[232]

The *International Plant Protection Convention*[233] (IPPC) aims to prevent the introduction and spread of plant pests and promote the appropriate measures for their control to protect the world's cultivated and wild plant resources.[234] Parties must establish national plant protection organizations to conduct phytosanitary inspection, certification, disinfestation and disinfection, protection of endangered areas, surveillance, and pest risk analysis.[235] Parties also cooperate by exchanging information on plant pests and technical and biological information for risk analysis, establish regional plant protection organizations, and provide technical assistance to Parties, especially developing countries.[236] To ensure uniform application, the FAO Commission on Phytosanitary Measures developed the International Standards for Phytosanitary Measures (ISPMs), recognised by the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures*.[237]

The *International Treaty on Plant Genetic Resources for Food and Agriculture*[238] (ITPGRFA) provides a framework for its 133 Parties to promote the conservation, sustainable use and equitable sharing of benefits arising from the use of plant genetic resources for food and agriculture (PGRFA), in harmony with the CBD, to ensure sustainable agriculture and food security. As a primary mechanism, the treaty establishes a multilateral system (MLS) for access and benefit-sharing to facilitate equitable access

---

229 *Ibid*, Art. 4.
230 Ramsar Convention, *supra* n9, at Art. 3(1).
231 *Ibid*, Art. 1(1).
232 *Ibid*, Art. 4(1).
233 *International Plant Protection Convention*, 6 December 1951 (in force 3 April 1952), 150 UNTS 67.
234 *Ibid*, Art. 1.
235 *Ibid*, Art. IV.
236 *Ibid,* Arts VIII, IX and XX.
237 *WTO Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994 (in force 1 January 1995), 1867 UNTS 493.
238 *International Treaty on Plant Genetic Resources for Food and Agriculture,* 3 November 2001 (in force 29 June 2004), FAO Resolution 3/2001.

to designated categories of PGRFA.[239] This system operates in parallel to the access and benefit-sharing rules of the CBD and Nagoya Protocol.

In addition to these seven specialized biodiversity instruments, the Rio Conventions are also relevant to SDG 15. The *United Nations Convention to Combat Desertification*[240] (UNCCD) calls upon national governments, NGOs, and local populations to cooperate to combat desertification and mitigate the effects of drought and dryland degradation.[241] The UNCCD contains five regional annexes, with the initial focus on the African continent as it is the region most threatened by desertification. It promotes sustainable development as the primary means to combat desertification.[242] A strategic planning framework is also established to coordinate national action programs on sustainable development to operationalize the goals of the UNCCD.[243]

Further, through the UNFCCC, Parties aim to prevent dangerous climate change.[244] States commit to promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of greenhouse gases, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems.[245] The reduction of emissions from deforestation and forest degradation in developing countries, particularly through conservation, sustainable management of forests and the enhancement of carbon stocks (REDD+), has taken on particular significance in this regard. Depending on how it is executed, REDD+ could either support or undermine the conservation and sustainable use of biodiversity.[246] Parties adopted the Cancun Safeguards at COP 16 to address the issue of adverse impacts through the concept of biodiversity safeguards.[247] Safeguards were also addressed in the Warsaw Framework for REDD+ at COP 19.[248] The Paris Agreement reinforces the importance of forests as sinks and reservoirs of greenhouse gases, and encourages Parties to take action to implement and support the existing framework for REDD+ and alternative policy approaches, such as those on joint mitigation and adaptation.[249]

Besides the aforementioned global instruments, there are many relevant legal instruments with a regional scope. For instance, in southern Africa, the SADC *Protocol on Wildlife Conservation and Law Enforcement*[250] (Maputo Protocol) provides a framework to be taken into account. Likewise, in Europe a role can be played by the *Convention on the*

---

[239] *Ibid*, Arts. 1, 10-13.
[240] *United Nations Convention to Combat Desertification in Those Countries Experiencing Drought and/or Desertification, Particularly in Africa*, 17 June 1994 (in force 26 December 1996), 1954 UNTS 3.
[241] *Ibid*, Art. 2.
[242] *Ibid*, Preamble, Arts. 1(a), 2-3.
[243] *Ibid*, Art. 6.
[244] UNFCCC, *supra* n78, Art. 2.
[245] *Ibid*, Art. 4(1)(d).
[246] L Miles & B Dickson, "REDD-Plus and Biodiversity: Opportunities and Challenges" (2010) 61(236) Unasylva 56-63.
[247] UNFCCC COP Decision 1/CP.16, Appendix I.
[248] UNFCCC COP Decision 12/CP.19.
[249] Paris Agreement, *supra* n2, at Art. 5.
[250] *Protocol on Wildlife Conservation and Law Enforcement*, 18 August 1999 (in force 30 November 2003).

Conservation of European Wildlife and Natural Habitats[251] (Bern Convention) and its implementation through EU legislation. Similar considerations apply in the Arabian Peninsula regarding the *Convention on the Conservation of Wildlife and their Natural Habitats in the Countries of the Gulf Cooperation Council*,[252] and so on.

4.3 Legal Obstacles Facing the Implementation of SDG 15 on Terrestrial Ecosystems and Biodiversity

Considering the need to deliver on national commitments to deliver on the various MEAs that countries are Parties to, there is a direct correlation between country level legal and policy preparedness to deliver MEAs and the implementation of the SDGs. One key opportunity for connecting various MEAs and help countries prepare to deliver on SDG 15 exists in the form of NBSAPs. Currently more than 100 countries are finalizing their NBSAPs. Repeated calls are being made through various Governing Bodies of MEAs and UNEP to use the NBSAPs as a key entry point to deal with both legal preparedness and policy coherence on issues of biodiversity and ecosystem governance.[253] The UNGA encouraged Parties and all stakeholders, institutions and organizations concerned to consider the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets in the elaboration of the post-2015 UN development agenda, taking into account the three dimensions of sustainable development.[254] Member States attending the Rio+20 Conference also committed to strengthening the role of UNEP given its role the leading global environmental authority that sets the global environmental agenda, promotes the coherent implementation of the environmental dimension of sustainable development within the UN system, and serves as an authoritative advocate for the global environment.[255]

A reality check in terms of how countries are progressing towards achieving the Strategic Plan for Biodiversity indicates that in most cases, progress on meeting the Aichi Biodiversity Targets is insufficient to achieve them by 2020, and that additional action is required to keep the Strategic Plan for Biodiversity on course.[256] Targeted intervention is urgently required at the national level to ensure that the international environmental legal and policy commitments made through MEAs such as the CBD are seriously pursued using principles of both environmental rule of law and natural law, supported by more effective governance measures. Though countries have shown better policy preparedness to deal with the issue of achieving the objectives of the Strategic Plan for Biodiversity,[257] current legal and governance measures need to be further strengthened.

---

[251] *Convention on the Conservation of European Wildlife and Natural Habitats*, 19 September 1979 (in force 1 June 1982).

[252] *Convention on the Conservation of Wildlife and their Natural Habitats in the Countries of the Gulf Cooperation Council*, 30 December 2001 (in force April 2003).

[253] B Pisupati, *Enhancing cooperation among the seven biodiversity related agreements and conventions at the national level using national biodiversity strategies and action plans* (UNEP, 2016).

[254] *Implementation of the Convention on Biological Diversity and its contribution to sustainable development*, UN Doc. A/RES/67/212 (2012).

[255] The Future We Want, *supra* n3, Para. 88.

[256] *Global Biodiversity Outlook 4: A mid-term assessment of progress towards the implementation of the Strategic Plan for Biodiversity 2011-2020* (SCBD, 2014), 10.

[257] B Pisupati & C Prip, *Interim assessment of post 2010 national biodiversity strategies and action plans (NBSAPs)* (UNEP-WCMC & FNI, 2015).

4.4 Future International Law Research on Sustainable Management of Terrestrial and Biological Resources

The SDGs and Agenda 2030 can promote the transformational change in economies and societies necessary to acknowledge the role and value of biodiversity and ecosystems for economic and social development, and provide the enabling conditions for biodiversity conservation and sustainable use, for more equitable sharing of benefits, and a reduction of the drivers of biodiversity loss.[258] The effectiveness of these efforts is likely to play a key part in the successful realization of SDG 15. Domestic law, policy and governance reform is likely to play an important role in many countries, and updated NBSAPs can be used as a key instrument to chart a road map to develop more effective legal, policy and governance measures. However, a review of about 86 post-2010 NBSAPs reveals that they are yet to integrate and mainstream issues relevant to implementation of the SDGs.[259] Countries should be guided by the key requirements of considering issues relevant to the SDGs within NBSAPs, ensuring that appropriate guidance is provided to the Governing Bodies of MEAs on the need to link with SDGs in implementation of MEAs, developing appropriate tools and methodologies to deal with rule of law at national level using MEAs as an anchor, and building the requisite capacities of stakeholders, including those in national statistical offices.

The means of implementation of Agenda 2030 reflect this, noting the critical importance of cohesive nationally owned sustainable development strategies, supported by integrated national financing frameworks.[260] The protection of natural resources and ecosystems, and environmental sustainability can only be achieved where there are fair, effective and transparent national governance arrangements, and the rule of law is firmly established. Effective legal and policy regimes are essential, as are effective implementation measures, accessible legal procedures and collective access to justice, and a supporting legal and institutional framework and principles. An independent judiciary and judicial process can also prove vital for the implementation, development and enforcement of sound environmental laws. Members of the judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and implementation and enforcement of, international and national environmental law. Collaboration on international research and implementation at all levels, especially among the legal research community, law schools, and international organizations, and among lawyers and researchers from other disciplines, can also strengthen and further support innovative initiatives and solutions to promote and protect biodiversity. By building and supporting the capacity of courts and tribunals, as well as prosecutors, law enforcement officials and other related stakeholders at national, regional and local levels to implement the aforementioned legal instruments, and by facilitating exchanges of best practices through continued knowledge transfer and research, there is great potential to contribute to the pursuit of the SDG 15 on terrestrial ecosystems and biodiversity.[261]

---

[258] The Future We Want, *supra* n3, Para. 197; UN, *The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet. Synthesis Report of the Secretary-General* (2014), 34.

[259] Interim Assessment of Revised National Biodiversity Strategies and Action Plans, *supra* n257.

[260] Agenda 2030, *supra* n4, Para. 63.

[261] "Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability" in *Advancing Justice, Governance and Law for Environmental Sustainability: Rio+20 and the World Congress of Chief Justices, Attorneys General and Auditors General* (UNEP, 2012), 3-4.

5. Note on Sustainable Development Goal 16 on Peace and Justice for All
Based on a brief by Dr Kamal Hussein, Bangladesh

Goal 16 in very clear terms identified democracy and the rule of law to be essential for building peaceful and inclusive societies, for providing access to justice for all, and for building effective, accountable and inclusive institutions at all levels. Violence both by state and non-state actors were declared to be uncompromisingly subordinated to the rule of law. The resolution urged that erosion of respect for law observed in most of our societies must be decisively reversed. Pathological developments had led to escalation of the levels of violence which threaten democracy and present the most formidable impediment to the emergence of just and stable societies under the rule of law. In this context, effective strategies to reduce and ultimately eliminate violence assume critical importance.

The starting point must be recognition of non-violence as a governing principle for relations between citizens and between the state and its citizens. In order to implement this principle, an effective legal framework needs to be developed. Impartial and effective law enforcement and elimination of double standards must be ensured, when 'police functions' are performed at the international or national level. In particular, national police and internal security forces must function as the protectors and not as the violators of the human rights of citizens. For the rule of law to be upheld, there is need for an active citizenry and for their empowerment. Empowerment requires nurturing and strengthening of civil society by harnessing the energies of people, through their active participation in both governmental and non-governmental bodies. Decentralisation and strengthening of local government institutions must be an integral part of the strategy. Conscious citizens must exercise vigilance, articulate their priorities, monitor the activities of those who exercise governmental powers, and ensure that the checks and balances written in the constitution function as more than paper safeguards.

In this context, SDG 16 powerfully reaffirms the critical importance of sound governance and the rule of law in curbing violence and terrorism as being essential for achieving sustainable development. It is noteworthy that it specifies as its very first objective that significant reduction of all forms of violence. To realize the SDGs, the following objectives are identified as the ones which need to be pursued: (a) promotion of the rule of law to ensure equal access to justice for all; (b) promotion and enforcement of non-discriminatory laws; (c) significant reduction by 2030 of illicit financial and arms flows; (d) reduction of corruption and bribery in all forms, and to that end, developing effective and transparent institutions; (e) ensuring responsive, inclusive and participatory decision making at all levels; (f) strengthening relevant national institutions by ensuring protection of fundamental freedoms and access to information; and (g) international cooperation for building capacity at all levels. The global response to the violence recently perpetrated in different states has led to a call for prompt and effective action at all levels. Goal 16 provides clear guidance for the action needed to be taken to combat violence and terrorism.

6. Further Scoping to be Completed in 2017

Initial scoping of the current rules and practices, and the most important contributions of international law to sustainable resources management has been conducted in 2015 and 2016 by Committee Members and respected expert colleagues in relation to key natural resources highlighted by the 2015 SDGs. In accordance with point (i) of the Work

Programme, further scoping notes shall be completed by Committee Members in 2017, building on and adopting the agreed format of the initial Committee discussion and research outcomes, and covering the following additional topics:

6.1 Rules and Practices of International Law for the Sustainable Management of Precious Mineral Resources, including Silver, Gold & Diamonds
Abstract by Prof Isabel Feichtner, Germany & Dr Guy Jules Kounga, HQ/Cameroon

A new scoping brief for the Committee will set out the economic relevance of precious mineral resources, the main mining sites and trade flows. The demand for gold, in particular, increases in times of global financial instability as gold performs a monetary function as a store of value. Not only developing countries perceive gold mining as a potential way to stimulate the economy, to generate employment and public revenue, but also in Europe renewed interest in gold mining could be observed during the Eurocrisis, e.g. in Greece and France. Given the high environmental costs of gold mining as well as the limited demand for gold by the real economy this development can be deemed worrisome from a sustainability perspective. It raises the question how the institutions of money and finance may be reformed to de-incentivize gold mining which is driven purely by a profit or money motive. After sketching the politico-economic context of precious mineral extraction the scoping brief will give an overview of the international and transnational law, including soft law initiatives, seeking to promote their sustainable management. The focus will be on legal regimes of particular relevance for the precious minerals industry. These include regimes that aim to contain trade in conflict minerals such as the Kimberley Process Certification Scheme, as well as US and EU legislation on conflict minerals trade, as well as regimes that seek to contain the environmental damage caused by mining, such as the Minamata Convention of 2013 which seeks to phase out mercury use and specifically regulates the informal sector of artisanal and small-scale gold mining. Finally, the scoping brief will indicate obstacles to the realization of the legal regimes' objectives, such as enforcement deficits (e.g. of the Kimberley Process standards) or unintended side effects such as trade diversion caused by conflict minerals certification regimes. The brief will further discuss how such obstacles may be overcome, an important innovation in this area being technologies that allow for the tracing of minerals. The brief will propose further research on the question how the international financial system promotes unsustainable resource extraction and how financial institutions may be reformed to enhance the sustainable management of precious minerals.

6.2 Rules and Practices of International Law for the Sustainable Management of Mineral Commodity Resources, including Nickel, Copper & Bauxite
Abstract by Dr Ilaria Espa, Italy

An additional scoping brief shall be prepared for the Committee surveying and discussing developments for mineral commodity resources. As the brief will demonstrate, attention to mineral commodity resources has grown exponentially in recent years due to a number of structural and cyclical factors. First, the major ongoing transformations occurring in China and other emerging economies, from urbanization to industrialization, have created unprecedented demand for mineral resources. Second, the dynamics at the root of the 2000s commodity 'supercycle' have increased competition for scarce and heavily geographically concentrated mineral resources, challenging the traditional South-North patterns against the backdrop of skyrocketing commodities prices. The sudden and

profound reversal of this trend as of the mid-2010s, with mineral commodity resources prices plunging to their lowest levels in more than a decade, has moreover brought back the issue of commodity price volatility. Finally, the irreplaceable role of many mineral commodities, including nickel, copper and bauxite, in key manufacturing sectors and many emerging technologies, matched with the typical low elasticity of supply and demand in the mining industry, have contributed to an escalation of tension between newly industrializing resource-rich economies and import-dependent Western countries over access to mineral supplies, leading to three major World Trade Organization (WTO) disputes (the most recent one, launched in July 2016 by the US, involves the use of export restrictions by China on several mineral commodities, including copper). In this context, the aim of this scoping brief is to review the international law instruments that are currently promoting a more sustainable management of mineral resources. Although there are some references to mineral exploration and exploitation in international legal instruments, many treaties, conventions and declarations deal with subjects that are only at a first glance peripheral to the development of natural resources and that have thus direct implications for mining related activities in light of their social costs and environmental impacts. Examples include human rights and environmental and waste management issues, as well as measures to alleviate and eradicate diseases, poverty, and improve living conditions. Importantly, these also include the seven principles of the New Delhi Declaration. The challenge for international law in regulating the issue of how to ensure sustainable management mineral resources consists of the fact that mining activities, albeit for the vast part conducted by a few international mining companies that invest in mining exploration and exploitation depending on price trends, are ultimately dependent upon concessions which are granted by national states, which detain sovereign rights over natural resources and remain in principle free to determine by means of national law what are the conditions for the concessions. The development of the international investment law framework in this respect is important inasmuch as, according to recent statistics, one fifth of all investment disputes concern the resource sector. Yet, it remains to be seen whether a system which historically revolved around the protection of the investment rather than its 'regulation' is still adequate in light of the emerging body of international law on sustainable development, particularly with respect to the principle of sustainable management of natural resources. The scoping brief will analyse the challenges coming from this complex interplay and will attempt to identify future trends and research priorities in this field.

6.3 Further briefs

Further briefs are projected for additional topics such as Rules and Practices of International Law for the Sustainable Management of Forests (Prof Konstantia Koutouki, Canada & Dr Christina Voigt, Norway), Rules and Practices of International Law for the Sustainable Management of Rare Earth (Dr Marc Burgenberg, Germany), and Rules and Practices of International Law related to Social and Environmental Aspects of Natural Gas Exploitation, including Shale Gas Resources[262] (Prof Paolo Farah, Italy & Prof

[262] To be based on P Farah, "A Comparison Between Shale Gas in China and Unconventional Fuel Development in the United States: Water, Environment and Sustainable Development" (2016) 41(2) Brooklyn Journal of International Law 579 and P Farah,"Offshore Natural Gas Resources in the Eastern Mediterranean in the Relations to the European Union: A Legal Perspective through the Lenses of MedReg" (2015) 8(6) Journal of World Energy Law and Business 559.

John Dernbach, USA/Chair). Once these notes have been considered by the Committee, cross-cutting lessons learned shall be discerned and extrapolated to better understand the current relevance and role of international law in the sustainable management of natural resources, both transboundary and, more problematically, in the purely domestic context.

III. Commitments to Sustainable Development and Sustainable Use of Natural Resources in the New Paris Agreement on Climate Change[263]

Breaking nearly seventeen years of deadlock, 197 Parties to the UNFCCC concluded a new international agreement on climate change in 2015. After intense negotiations during UNFCCC COP 21, the Paris Agreement was adopted on 12 December 2015. Parties aim to hold increases in global temperatures well below 2 °C, pursuing efforts toward a 1.5 °C limit, to increase adaptation to climate impacts and foster resilience, and to harness finance flows for low-greenhouse gas (GHG) emissions and climate-resilient development.

1. Commitments to Sustainable Development in the New Paris Agreement and its Adoption Decision

Sustainable development permeates the Paris Agreement and its Adoption Decision, which aim to "strengthen the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty."[264] In the accord, States set a 'high ambition' framework for new climate mitigation, adaptation and finance commitments by countries, backed by measures for inter-governmental cooperation on loss and damage, forests and land management, technology development and transfer, education and capacity building, with a fit-to-purpose framework of transparency, peer review, stock-taking and compliance support. Adopting a 'bottom up' approach, the accord builds on submissions of climate action plans to the UNFCCC by 188 countries, as Nationally Determined Contributions (NDCs) to the global response to climate change. Through a series of cooperative frameworks and mechanisms, each of which establishes different legal rights and obligations for Parties, the Paris Agreement explicitly makes provision for the needs of developing country Parties, especially the most vulnerable. These multilateral mechanisms, some of which link directly to previous COP Decisions or flow from experience under the Kyoto Protocol, while others are shared with the UNFCCC itself, seek to support Parties to (1) achieve nationally determined contributions to mitigation and adaptation (NDCs), through (2) mobilization of resources, (3) transparency, global stocktaking and review, (4) a sustainable development mechanism and non-market approaches, (5) technology transfer, and 6) further implementation measures, such as capacity-building, education, as well as a compliance and implementation mechanism. The focus on sustainable development is especially relevant for the leading high ambition countries, for emerging economies and for the most vulnerable countries of the world that are otherwise often excluded from international law making.

The commitment to sustainable development permeates the Paris Agreement and its Adoption Decision. Indeed, the Decision begins by welcoming Agenda 2030 and the SDGs, particularly Goal 13, and acknowledging that climate change is a common concern of humankind. The Adoption Decision also recognizes that when taking action on

[263] Section based on analysis by Prof Marie-Claire Cordonier Segger et al, as an article for the Cambridge Journal of International and Comparative Law, forthcoming in 2017.

[264] Paris Agreement, *supra* n2, Art. 2(1).

climate change, States must respect, promote and consider their human rights obligations; the right to development; the rights of indigenous peoples, children and others in vulnerable situations; gender equality and empowerment; and inter-generational equity. It acknowledges the need to promote universal access to sustainable energy in developing countries, as well as the deployment of renewables, especially in Africa. Operationally, the Adoption Decision also clarifies that the Subsidiary Body for Scientific and Technological Advice will undertake a work programme under the framework for non-market approaches to sustainable development referred to in Article 6 of the Paris Agreement,[265] invites all UN agencies and financial institutions to provide information on how their development assistance and climate finance programmes incorporate climate-proofing and climate resilience measures,[266] recognizes the link between adequate and predictable financial resources and sustainable management of forests,[267] recognizes the co-benefits of voluntary mitigation actions for adaptation, health and sustainable development,[268] recognizes the importance of taking national sustainable development priorities into account in the existing technical examination process on mitigation[269], and encourages Parties to make effective use of the Climate Technology Centre and Network to obtain assistance to develop economically, environmentally and socially viable project proposals in the high mitigation potential areas identified in the process.[270]

2. Principles of Sustainable Development in the Paris Agreement and its Adoption Decision

In the New Delhi Declaration, seven principles of international law on sustainable development are highlighted, as discerned from a decade of analysis.[271] These principles are increasingly reflected in the decisions of international courts and tribunals on sustainable development.[272] The principles include: 1) sustainable use of natural resources whereby States have sovereign rights over their natural resources, and a corresponding duty not to cause (or allow) undue damage to the environment of other States in the use of these resources, 2) inter and intra-generational equity and the eradication of poverty, 3) common but differentiated responsibilities and respective capabilities, 4) the precautionary approach to human health, natural resources and ecosystems, transferring the burden of proving lack of significant harm from an undertaking to the proponent, in cases of scientific uncertainty, 5) public participation, backed by access to information and justice, 6) good governance, with measures to support rule of law, coherence and anti-corruption,

[265] Paris Agreement Adoption Decision, *supra* n88, Para. 40.
[266] *Ibid*, Para. 44.
[267] Paris Agreement, *supra* n2, Art. 55.
[268] *Ibid*, Art. 109.
[269] Paris Agreement Adoption Decision, *supra* n88, Para. 110(a).
[270] *Ibid*, Para. 110(d).
[271] N Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Hague Academy of International Law, 2008); D Freestone & V Lowe, *Sustainable Development in International Law* (OUP, 1999); MC Cordonier Segger & A Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (OUP, 2004); N Schrijver & F Weiss ,eds, *International Law and Sustainable Development* (Martinus Nijhoff ,2004); MC Cordonier Segger & CG Weeramantry, eds, *Sustainable Justice* (Martinus Nijhoff, 2004); D French, *International Law and Policy of Sustainable Developmen*t (Manchester University Press 2005).
[272] MC Cordonier Segger w CG Weeramantry, eds, *Sustainable Development in International Courts and Tribunals* (Routledge, 2017 forthcoming).

and the 7) integration and interrelationship of human rights and social, economic and environmental objectives. As has been noted elsewhere, this last principle may sometimes be called (in short-hand) a 'principle of sustainable development', holding that States must take into account the environmental and social (including human rights) aspects of economic plans or projects, integrating related measures and costs, to promote more sustainable development.[273] These important sustainable development principles such as transparency and public participation, integration of environmental concerns and human rights into economic decision-making, good governance, precaution, inter-generational equity, common but differentiated responsibilities and respective capacities (CBDRRC), and sustainable use of natural resources such as energy, are reflected in the Preamble to the Paris Agreement Adoption Decision. Each of the New Delhi Declaration principles of international law on sustainable development is also reflected in the Paris Agreement in different ways.

The duty of States to ensure sustainable use of natural resources

In the Paris Agreement, atmospheric and carbon resources are framed as key resources to be managed in a sustainable manner that avoids dangerous climate change, as noted in the preamble and substantive sections on mitigation. For example, in Article 2, Parties recognize that limiting the temperature increase to 1.5 °C above pre-industrial levels "would significantly reduce the risks and impacts of climate change." As emphasized in Article 5, Parties are encouraged to take action on sustainable management of forests as a key natural resource and carbon sink, including through REDD+ and alternative policy frameworks such as joint mitigation and adaptation approaches for the integral and sustainable management of forests. The protection of ecosystems, biodiversity, and oceans is also prioritized in the Paris Agreement, alongside the need to build the resilience of socio-economic and ecological systems, including through sustainable management of natural resources, in Article 7.9(e) on adaptation.

The principle of equity and the eradication of poverty

The notion of equity arises frequently in the Paris Agreement, as was posited prior to the conclusion of the treaty by leading legal scholars. In the Preamble of the treaty, there are two references to equity and intergenerational equity, which also appear in the Preamble of the Adoption Decision. In the operation of the Paris Agreement, it is noted that Parties should protect the climate on the basis of equity and the principle of CBDRRC, as per Articles 2 and 4. The importance of efforts to eradicate poverty are also highlighted in the Preamble to the Agreement at paragraphs 8 and 9, in the statement of the general objective of the Agreement at Article 2, and in relation to cooperation to implement NDCs at Article 6.

The principle of common but differentiated responsibilities and respective capacities

The Paris Agreement will be implemented to reflect the principle of CBDRRC, in light of different national circumstances, as per Article 2. Each Party's successive NDC will

[273] MC Cordonier Segger & A Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford University Press, 2004); MC Cordonier Segger & CG Weeramantry, eds, *Sustainable Justice* (Martinus Nijhoff, 2004); MC Cordonier Segger, "International Law on Sustainable Development" in D Armstrong, *Routledge Handbook on International Law* (Routledge, 2008).

represent a progression beyond their earlier one, with its highest possible ambition, reflecting its CBDRRC as per Article 4.3. Each Party will also strive to formulate and communicate long-term low GHG development strategies, mindful of CBDRRC, as per Article 4.19, and as also recognized in the Preamble at paragraph 3. The Paris Agreement, to reflect CBDRRC, also commits to assistance in adaptation efforts, the provision and the mobilization of financial assistance, facilitation of technology transfer, and capacity building.[274]

The principle of the precautionary approach to human health, natural resources and ecosystems

As is clear in the Preamble at paragraph 4 on the urgent 'threat' of climate change, and in Article 2.1 on the need to strengthen global response to the 'threat' of climate change and to significantly reduce the risks of climate change, the Paris Agreement and the UNFCCC itself are founded on the precautionary principle. To stabilize GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system and in order to allow ecosystems to adapt naturally to climate change, so as to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner, mitigation and adaptation actions must be taken even in the event of scientific uncertainty as to the exact contours of the challenge. As asserted in several places in the Paris Agreement, including the Preamble at paragraph 4, action on climate change should also be guided by the best available scientific knowledge. While not detracting from the precautionary nature of the Agreement, the emphasis on continuing to advance scientific knowledge is recognized at Article 4.1 on the long-term goal, at Articles 7.5 and 7.7(c) on adaptation, and at Article 14.1 on the global stocktake, with specific reference to the work of the IPCC. Such 'best available scientific knowledge', however, is evolving over time, and precaution may be required when the science is uncertain.

The principle of public participation and access to information and justice

As noted in the Adoption Decision and the Paris Agreement, public participation and access to information are crucial for global responses to climate change, and for the success of the new framework established by the Paris Agreement itself.[275] Public participation is emphasized throughout, including at Article 4 on mitigation, at Article 7 on adaptation, also Article 6 on the Sustainable Development Mechanism and non-market approaches, aiming to enhance public and private sector participation in the NDCs. Further, as per Article 12, Parties shall enhance education, training, public awareness, public participation and public access to information, recognizing their importance for actions. The treaty depends on public engagement, informed by the information that is made available through National Communications submitted to international registries, the global stocktake and the peer review, to assist Parties to progressively intensify their contributions to mitigation, adaptation, finance and other aspects of the global response to climate change. There is an unprecedented recognition of the importance (for some) of "climate justice" in taking action to address climate change, in the Preamble at paragraph 13. Climate change is arguably the justice challenge of this century, particularly for those

[274] Paris Agreement, *supra* n2, Arts. 7(7)(d), 9(1)-(3), 10(6), and 11(1)-(3).

[275] Paris Agreement Adoption Decision, *supra* n88, Paras. 83-84, 110; Paris Agreement, *supra* n2, Preamble at Para. 14

disproportionately affected by its impacts. Further, as recommended by the International Bar Association, there is a need to "ensure communities, individuals and governments have substantive legal and procedural rights relating to the enjoyment of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national legislative and judicial systems and, where necessary, at regional and international levels, to mitigate sources of climate change and provide for adaptation to its effects in a manner that respects human rights." Although "access to justice" is not expressly mentioned, Parties can access UNFCCC dispute settlement measures, as per Article 24.

The principle of good governance

Good governance is essential in the context of the Paris Agreement, particularly for the cooperative approaches that involve the use of internationally transferred mitigation outcomes towards NDCs. Indeed, Article 6 notes that transparency and robust accounting are required in the measurement of such outcomes. In the establishment of the Capacity-building Initiative for Transparency, Parties seek to build institutional and technical capacity with regard to the transparency requirements defined in Article 13 of the Paris Agreement.[276] Further, they are committed to ensuring transparency of action and also support, including the provision of climate finance, among other measures.[277]

The principle of integration and interrelationship, in relation to human rights and social, economic and environmental objectives

By recognizing the far-reaching nature of climate change across environmental, social and economic domains, as well as the need to act in a timely and effective manner in order to prevent detrimental impacts, the principle of integration of environmental and social/human rights considerations into economic decision-making permeates the Paris Agreement. The integration of economic and environmental concerns is found in the reference to "climate-resilient development" in Art 2.1(c), and in the linking of economic growth and sustainable development in the context of technology transfers at Article 10.5. Integration is also apparent in the references to economic diversification and sustainable resource management in the context of adaptation at Article 7.9(e), which also highlights the resilience of socioeconomic and ecological systems, underlining the need for adaptation measures to integrate all three objectives. The Paris Agreement supports the integration of environmental considerations into economic and social development, while ensuring that climate change actions are economically viable and respect human rights.[278] This principle is also reflected in references to safeguarding food security, and to respect for human rights, gender equality, indigenous rights, and the integrity of Mother Earth.[279]

---

[276] Paris Agreement Adoption Decision, *supra* n88, Para. 74(a), (b), (h).
[277] *Ibid*, Para. 93(c).
[278] *Ibid*, Preamble at Para. 7; Paris Agreement, *supra* n2, Preamble at Para. 11
[279] Paris Agreement, *supra* n2, Preamble at Paras. 9, 13.

As the ILA's 2014 Washington Resolution on Climate Change[280] affirms, States have an obligation "to employ due diligence efforts to mitigate climate change impacts"[281] in the design of any social and economic development plan which may result in significant emissions of greenhouse gases. In determining whether the substantive and procedural actions taken are in accordance with the due diligence principle, it suggests that "economic development and available resources, scientific knowledge, the risks involved in an action, and the vulnerability of affected states shall be taken into account".[282] The economic, social and environmental aspects of sustainable development are reflected in the new climate agreement, providing a framework to ensure that Parties' commitments are equitable, sustainable, and effectively implemented to avoid dangerous climate change. Indeed, based on the available scientific information, there can be no sustainable development if the worst-case scenarios for climate change are not averted. The effective implementation of the Paris Agreement, with due consideration for the applicable principles of international law, is necessary to achieving sustainable development.

3. Future Implementation of the Paris Agreement for Sustainable Development

The negotiation of the new climate change treaty occurred in an environment characterized by the emergence of new forms of international governance. Fragmentation of international law into increasingly specialized regimes; polycentricism and multi-level action in rule-making and implementation; experimentalism and revisability of legal obligations; increased participation of non-State actors; increased recourse to non-legally binding standards – such influences are reshaping the context for negotiation of treaties, and shall affect eventual implementation and compliance. Such developments inform and transform the roles and engagement of all actors in the UNFCCC process including State delegations, but also intergovernmental organizations and non-State observers from civil society, academia and the private sector. Indeed, jurists, inter-governmental organizations, countries, legal institutes and associations, law schools, judges' networks and other members of the law and governance community worldwide are collaborating, in the new Climate Law and Governance Initiative to advance effective legal and institutional reform on climate change.[283]

In order to develop the initial 'rulebook' for the implementation of the Paris Agreement, the Ad Hoc Working Group on the Paris Agreement (APA) was established at the 44th sessions of the UNFCCC Subsidiary Body for Implementation (SBI 44) and the Subsidiary Body for Scientific and Technological Advice (SBSTA 44) in Bonn, Germany from

---

[280] Resolution 2/2014, D*eclaration of Legal Principles Relating to Climate Change*, Committee On Legal Principles Relating To Climate Change, International Law Association 76th Conference, Washington D.C., USA 7-11 April 2014.

[281] *Ibid*, Para. 5.

[282] *Ibid*, Para. 7(A)(3).

[283] The Climate Law and Governance Initiative was launched in Paris in 2015 at the inaugural Climate Law and Governance Day, co-chaired and hosted by the Centre for International Sustainable Development Law (CISDL), University of Cambridge LCIL, La Sorbonne-Pantheon University IREDIES, University of Nairobi CASELAP, University of Chile CR2, and over 60 other faculties of law, relevant inter-governmental organizations, legal associations, law firm and others, including the ILA as a founding collaborator. Online: http://www.climatelawgovernance.org.

16–26 May 2016. The work of this APA was followed by the first Conference of the Parties serving as the Meeting of the Parties (CMA) to the Paris Agreement, which met for the first time in Marrakech, Morocco from 15-18 November 2016. Parties at the CMA committed to completing the 'rulebook' by COP 24 in 2018.

This Committee may find that its work to analyse and better understand the principles, practices and prospects of international law in this field to be even more crucial than anticipated.

IV. Future Work Programme and Forward Agenda

1. Future Work Programme

The Future Work Programme of the Committee considers three further issues. In particular, it will examine the principle of sustainable use of natural resources in international law over the next two years, alongside the regulation of natural resources in developing countries, in order to inform the next report. Finally, it will consider possible recommendations for guidelines for sustainable management of natural resources in accordance with international law. In particular, the focus shall be on:

(ii) **Principle of Sustainable Use of Natural Resources in International Law**

With regards the second tranche of work, on the **Principle of Sustainable Use of Natural Resources in International Law**, the following activities and deliverables are planned:

Activity 2: Form a working group to engage interested Committee Members in discussions and drafting of a series of short working papers leading to a report for peer discussion as took place during the 2016 Biennial Conference in South Africa.

Report II: An examination of the principle of sustainable use of natural resources, analyzing the duty of countries to use natural resources in a manner that is sustainable, considering the obligation to undertake impact assessments of plans and projects that might affect sustainable development, transboundary resources management, the sharing of resources in the world interest and taking into account the interests and needs of future generations, drawing on several Annexes:

Annex – Working Paper II-1: Survey of innovative economic instruments to support sustainable use of natural resources and their status and implementation in international law, including measures within regional trade agreements, international investment agreements and other economic treaties (Dr Markus Gehring, Germany & Dr Fabiano de Andrade Correa, Brazil);

Annex – Working Paper II-2: Survey of innovative instruments to support sustainable use of natural resources and their status and implementation in international law, including measures within multilateral environmental agreements (Prof Marie-Claire Cordonier Segger, Canada & Prof Arie Trouwborst, The Netherlands);

Annex – Working Paper II-3: Survey of the relationship between natural resource management and the enjoyment of human and peoples' rights, including measures within agreements and contracts related to indigenous rights (Prof Louis Kotze, South Africa, Ms Amanda Kron, Sweden, & Prof Maki Nishiumi, Japan);

Annex – Working Paper II-4: Summary analysis of key decisions of international courts and tribunals on matters related to natural resource management from 2002 – 2017 (Dr Freya Baetens, Belgium, Dr Ilaria Espa, Italy & Dr Ximena Fuentes, Chile).

(iii) **Regulation of Natural Resources in Developing Countries**
With regards the third set of work, on **Regulatory Approaches to Natural Resources in Developing Countries**, the following studies leading to deliverables are proposed:
Activity 3: Form a working group to engage interested Committee Members in discussions and drafting of a series of short working papers leading to a report, supported by a task team of legal researchers from Member law faculties, for peer review during an online process and an international conference event in 2017.
Report 3: A report examining innovative national and international approaches to the regulation of natural resources, commenting on the impact of such approaches on the sustainable use of natural resources and on the evolution of international law in this field.
Annex – Working Paper III-1: Survey of innovative regulatory approaches to support equitable access to and benefit-sharing from natural resources for the poor (Mr Frederic Perron-Welch, Canada);
Annex – Working Paper III-2: Review of innovative legal approaches to address the growing external ecological footprint from natural resource demand by major economies (tbc);
Annex – Working Paper III-3: Review of regulatory approaches to combat illicit flows and enhance governance of natural resource revenues (Prof Isabel Feichtner, Germany);
Annex – Working Paper III-4: Review of regulatory approaches to address sustainable use of wetlands and transboundary watercourses (Dr Otto Spijkers, The Netherlands & Prof Maki Nishiumi, Japan).

(iv) **Guidelines for Sustainable Management of Natural Resources in Accordance with International Law**
Activity 4: Rapporteurs and Committee Members draw together key issues and lessons learned from Reports 1-3 and their annexes, in consultation with IUCN and other relevant partners, taking into account the SDGs related to natural resources agreed in the post-2015 development agenda negotiations of the UNGA, producing draft Guidelines and a leading commentary for broad consultation and discussion in a parallel event during ILA 2018, and launch in ILA 2020.
Final Product 4: As a final product, the Committee intends to elaborate practical Guidelines for the Sustainable Management of Natural Resources in Accordance with International Law, in a first draft to be submitted at the ILA 2018 Biennial Conference and to be finalized and accompanied by a leading commentary, preferably in 2018 but no later than at ILA 2020 Biennial Conference in Kyoto.

2. The Forward Agenda

The Committee agreed the Work Programme and Methodology at the ILA 2014 conference in Washington, adopting a collaborative and inclusive approach, seeking to engage Committee Members as experts in joint preparation of Committee outcomes, using both in-person and online approaches. The Work Programme and Committee membership was finalized and agreed by email in 2014-15, as Committee Membership increased.

Committee Members are forming working groups based on their interests and research/practice agendas, towards elaboration of outcomes. Depending on their interests and expertise, Committee Members are welcomed in any/all working groups, and commit to the series of deliverables as co-author. The Reports are based on substantive analytical briefs or papers, prepared collaboratively by responsible Committee experts. Outcomes

of working groups are sent to all Committee members for review, and discussed in international meetings prior to adoption as Reports. Working groups organize research events with online collaborative elements, as space for peer discussions working papers and draft reports, this is likely to lead to book publications. Committee Members also engage young scholars and professionals to serve as pro bono research assistants in documenting innovative natural resources regulations and other tasks. Seminars to date have included a legal expert seminar kindly hosted by the Committee Chair, Prof Nico Schrijver from 12-14 November in Leiden in 2015 after the adoption of the SDGs by the United Nations. An international law conference may be held in Montreal in 2017. The eventual Guidelines and accompanying Commentary will be elaborated by the Rapporteurs, guided by the Chair, and reviewed by the Committee Members prior to adoption.

COMMITTEE ON THE ROLE OF INTERNATIONAL LAW IN SUSTAINABLE NATURAL RESOURCE MANAGEMENT FOR DEVELOPMENT

WORKING SESSION

Tuesday, 9 August 2016, 9.00am

Chair: Professor David Freestone (UK)

The Chair informed attendees that the Rapporteur was not able to attend the conference. However, copies of the report were available, and were distributed around the room.

Professor Nicolaas Schrijver (Netherlands) introduced the Committee as the youngest ILA Committee, having been established only a few years earlier. It built on the long and renowned history of the previous committees of ILA directed by Dr Kamal Hossain (Bangladesh). He expressed his gratitude that Dr Hossain was in attendance.

In 1978, the ILA established the Committee on Legal Aspects of a New International Economic Order (NIEO Committee). The NIEO Committee met for the last time in Seoul in 1986 and adopted a very interesting declaration on the progressive development of principles of public international law relating to the creation of a new international economic order. He also noted that the work of the Committee on Legal Aspects of Sustainable Development had resulted in the adoption of the 2002 New Delhi Declaration on Principles of International Law in the field of Sustainable Development, which Professor Schrijver presented here in Johannesburg in 2002 during the World Summit on Sustainable Development, on behalf of the ILA.

After New Delhi, a follow up Committee was established to look at more details on how the judiciary, especially at the domestic level, could make use of the New Delhi Declaration.

The core mandate of the present Committee was supposed to be more specific, focusing on how to manage natural resources in a sustainable way in order to contribute to development. The new Committee would focus on the principles of sustainable development and analyse the principle of sustainable use of natural resources as a crucial element of the evolving international law of sustainable development, in view of its firm status in treaty law and its frequent application in decisions of international courts and tribunals.

Professor Schrijver elaborated and highlighted that effective governance of natural resources, such as water, forests, biodiversity, landscapes, minerals, and energy (particularly from renewable sources), was crucial for sustainable development, as was the realization of the relationship between armed conflict and natural resource management. He stressed the need to analyse and build better global understanding of the role and legal status of principles and rules of international law for the sustainable use of natural resources, as well as their implementation in the practice of States and international organisations, and their reflection in the decisions of international courts and tribunals.

He then recalled the mandate of the Committee, especially on the crucial current issue of how international law could support the sustainable use and stewardship of natural resources, while also contributing to an adequate living standard and the realisation of human rights for all. There were several challenges to the work of the Committee reflecting on the concept of the principle of sustainable development. Nearly all countries,

economies and peoples depended on nature and its natural resources, yet there was a real danger of exhaustion of all natural resources and degradation of critical species, the ecosystem and the issue of climate change. These challenges were reflected in the Committee's mandate.

Professor Schrijver apologised for the late publication of the report, which he described as a very rich report, building upon very productive meetings in Leiden, the Netherlands, in November 2015. He then went on to note that, since the last ILA conference, at least two important developments had taken place that were relevant to the mandate of the Committee.

The first development was the adoption of the Sustainable Development Goals (SDGs) on the 70th anniversary of the United Nations. The SDGs differed from the Millennium Development Goals (MDGs), in at least three respects:

- The SDGs were universal, in a sense that they did not just formulate developmental goals for developing countries and for people living in developing countries, but they also addressed developed country issues such as those relating to their unsustainable patterns of production and consumption.
- The SDGs were inclusive in that they were not only addressed to States and international organisations, but also very much involved people; they were built upon the work of civil society organisations, business communities, trade unions, which all had a role to play.
- The SDGs used an integrated approach relating to issues of peace, security, justice for all, environmental conservation, sound macro-economic development, and respect for human rights.

Professor Schrijver noted that there were concerns that the 2030 Agenda for Sustainable Development was overloaded. Additionally, there was the issue of how to better to organise the implementation measures at all relevant levels, ie at the local, national, regional and global levels. This issue was discussed in the previous Committee's meetings and called for a better national and international institutional architecture for promoting sustainable development. The current system of consultation and decision making on sustainable development issues was very poorly organised, fragmented and ineffective.

Professor Schrijver highlighted that the SDGs, like the MDGs, might well be capable of generating important normative force. The ILA was in a unique position to analyse that and even to contribute to that work. The 17 SDGs were very important for the work of the Committee. Nearly half of them – if not all of them – were directly related to the mandate of the Committee, while others were indirectly relevant. The Committee should link its work with the goals of 2030 Agenda for Sustainable Development. The Committee had an important task not only to analyse but perhaps also to seek to contribute to the normative value of the SDGs, which were mostly of a political nature.

The second development was the adoption of the Paris Climate Agreement. It was very encouraging that the international community could finally adopt a new climate treaty after years of stalemates following the 1992 United Nations Framework Convention on Climate Change and the 1997 Kyoto Protocol. However, there were serious concerns. Was the Paris Agreement up to the task of really combating climate change effectively, noting

the innovative approach of countries submitting Nationally Determined Contributions (NDCs)? It was no longer like the Kyoto Protocol, which obliged States Parties to reduce their emissions of greenhouse gases in line with specific quantitative commitments.

Professor Schrijver also stressed the importance of having an implementation or monitoring machinery to verify that countries had achieved what they had committed to do, when they submitted their nationally determined contributions.

Nonetheless, in the Paris Agreement, there was a strong set of references to areas within the mandate of the Committee. There were also references to promoting respect for human rights, the right to development, the rights of indigenous people, and the right of children, gender equality, and the important principle of intergenerational equity. These rights were mentioned in the Paris Agreement. The report analysed the extent to which the New Delhi Declaration was reflected in the Paris Agreement. For example, the principle of sustainable use of natural resources, together with the important commitment not to raise the temperature higher than 2 degrees Celsius, was an important goal of the Paris Agreement. There were also several articles in the Paris Agreement relating to the principle of common but differentiated responsibilities, a principle that featured very prominently in the New Delhi Declaration. The precautionary principle was also reflected in the Paris Agreement. Professor Schrijver encouraged members to do more study to have a firm legal grip on the implementation of the Paris Agreement.

Professor Schrijver concluded by noting that in his own country, the Netherlands, there was an interesting case pending before the Supreme Court, the so-called Urgenda case. The case was brought by a foundation, some researchers and concerned citizens. They instituted legal proceedings to compel the government to do more to combat climate change. Significantly, the Court acceded their claim and ordered the government to speed up and to embark on a policy to reduce emissions by 2020 by at least 20% compared to 1990 levels. They based their claim on a combination of Dutch law, European Union law and international climate law. They also made use of the reports of the Intergovernmental Panel on Climate Change (IPCC), the Kyoto Protocol, court decisions, statements of the Dutch delegation, and argued that there was a hard core for a legal duty to reduce the emissions substantially lower than the current policy. If that would not change in years to come, then they would achieve at best a 16% reduction by 2020. In the view of the claimants this would result into a violation of the duty of care which the Dutch government had towards its citizens. This case was basically a civil action against the government to do more.

Dr Markus Gehring (Germany) presented the report of the Committee on behalf of the Rapporteur. He started by recalling that the Committee had had fruitful discussions at the Washington conference, in both open and closed session, where it decided to trace the sustainable use of natural resources principles through different subject areas. This was subsequently done, and Committee members were able to share their experiences in Leiden.

Now was a very busy period for sustainable development in general, and in particular as regards sustainable use of natural resources. Times were changing rapidly and the reason why the report had taken longer to produce was that the Rapporteur had just edited a 900 page book in which traced the development and principle of sustainable development

in recent decisions of international and national courts and tribunals. The work of the Committee had already resulted in the publication of a book (forthcoming), references to which were footnoted in the report.

Turning to the report, Dr Gehring indicated that the Committee decided in Leiden to take active note of the most recent developments on sustainable development goals and the Paris Agreement, and that they would try to reflect this in the report. He referred to the wealth of the decisions of international courts and tribunals that were referenced in the report, and which had been handed down in the last 18 months alone. They all concerned natural resources and sustainable development, and some of the crucial parts of those decisions reflected a growing understanding of sustainable development. Dr Gehring added his congratulations to Professor Schrijver and Professor Cymie Payne, who had been the trailblazers for the legal analysis, which was now filtering down through the decisions of international courts and tribunals. He stressed the need to have time to discuss some of those issues and to have the Committee members express their views on sustainable development elements of the recent PCA decision on the South China Sea.

The report was reorganised to reflect the SGDs. Different members of the Committee had contributed heavily to the report. The global view was that the Committee was not starting from zero with its work. When it comes to the SDGs, many of the targets were already part of international law in one shape or another.

Finally, Dr Gehring indicated that there are more SDGs that the committee needs to reflect upon and this report is not yet finished, since at this point is it a draft report and we need to gather more information going forwards. He then reiterated, before the next meeting of the ILA in Sydney, to have a seminar at Markel University in Canada just to advance the work.

What was done so far in the report was not only to show where the SDGs were at and the extent to which they were reflected in international law, but also to highlight the current obstacles and limitations to implementing the SDGs. In this regard, he drew attention to the final section of the report, which addressed how to move forward, what could be done to overcome these obstacles, and where more work or legal analysis was needed. He indicated that this analysis would serve as a starting point for discussion. The section was only finalised in the weeks following the Paris Agreement, and would benefit from further reflection and further analysis. It was necessary to focus on the NDCs and find more reflections of the sustainable development principles and the New Delhi Declaration. Dr Gehring encouraged the Committee to reflect on those principles where they found them, but not just by reference to the treaty text but also as highlighted in national and international court decisions as well as in national laws.

The Chair invited Dr Kamal Hossain to address Goal 16 of the SDGs.

Dr Kamal Hossain (Bangladesh) gave a historic overview of the evolution of sustainable development.

He referred to the Earth Summit in Rio de Janeiro in 1992, which set the challenge of facing the global economic order so that sustainable development could be achieved. 10 years later, the world came to Johannesburg for the World Summit on Sustainable Development. But just before then, the precursor ILA Committee produced the New

Delhi Declaration, which added further input to the Johannesburg Summit and the same Declaration was now described as the Johannesburg Declaration. Then it was back to Rio de Janeiro in 2012 for the Rio+20, which set the scene for the Sustainable Development Summit in 2015. There was a historic continuity, and younger colleagues, who were going to be the master builders of the coming 30 years, should understand that history.

Now was a very important moment for the Committee to reflect on how much of what they had aspired to do had actually been achieved and how much still needed to be done. This was an issue for the human race with very major expectations of all humanity. This was the agenda for all humanity. This was what had been aspired for in the Universal Declaration of Human Rights.

The SDGs were a global project where challenges were taken by all humanity, governments, and no one could refuse it because the good thing was that they had been working on this for the last 35 years or more and they had faced the scepticism but had succeeded in putting it in a global agenda. However, the problem was still ongoing but humanity did not go away, the aspiration of humanity could not go away.

The consensus affirmed on at the UN Summit on 18 September 2015 was truly a global consensus. All heads of states came together and reaffirmed what everyone had thought was ideological "mumbo jumbo". How things had changed. The youngest master builders of tomorrow needed to have that confidence. Young people needed to understand the things like gender inequality were manmade and what was manmade could be undone by the efforts of man.

He thanked the Chair for being deeply committed to the work of the Committee and for making efforts to come to Johannesburg. He indicated that this was a lifetime commitment where those of them who were part of the Committee passed away while still committed. Rebuilding the world was a major task and a major undertaking was about transforming the world not just conducting a study. In this commitment, they always thought three decades ahead. He reiterated that those who were taking over must know that they were taking over a historic undertaking. He appreciated the report and indicated that it was very impressive because it had a detailed mapping, it identified tasks, and showed the seriousness of everyone who had contributed. He had never seen such a comprehensive report. The 17 SDGs were identified. Goal 16 emphasised how important and critical issues of governance were in order to achieve the SDGs.

In a way, the very first objective was missing in the report. This included issues such as significant reduction of violence, the use of force by States or evolution of use of force by States, elimination of all forms of violence. Violence was what was taking the world today, not necessarily State violence or State actors.

Dr Hossain elaborated on how to achieve Goal 16 and the 7 principles on the New Delhi Declaration, making reference to:

- promoting the rule of law to promote justice for all
- promoting and enforcing non-discriminatory laws
- significantly reducing illicit finance and arms growth by 2030
- reducing all forms of corruption and bribery
- ensuring responsive and inclusive decision making at all levels

- strengthening relevant national institutions for ensuring the protection of fundamental freedoms and ensuring access to information
- international cooperation for building capacities in all levels, particularly in developing countries to prevent violence and to combat terrorism and crime.

He emphasised that the Committee could not miss this out in its next report. The next report should be circulated in time so that this could get due attention and he indicated that the whole team should be assigned this particular task. This violence which had spread globally must be taken on by humanity, not only by national governments and by its intelligence or homeland security but by all because it was much bigger than national security and was something against which all people of all countries must come together and fight.

Dr Hossain indicated that what was important for him now was handing over to the new generation because it was their future. Seniors would not be there from 2030! It was wonderful to be part of this effort and to be part of this historic moment. Dr Hossain felt like the spirit of Nelson Mandela was there, smiling and approving what they had done in Johannesburg.

The Chair thanked Dr Hossain for his inspiring words. He then informed attendees that a number of detailed papers and presentations would follow.

Dr Otto Spijkers (Netherlands) gave a presentation of the section of the report on the sustainable management of freshwater resources. The aim of the paper was to assess the importance of freshwater and its regulation for the world today. The paper also provided a survey of the international legal terrain (overview of applicable legal instruments), looked at the legal obstacles and opportunities, and referred extensively to the SDGs, especially Goal 6 (the socalled "water goal") and Goal 15 (the socalled "ecosystems goal)".

Professor Cymie Payne (US) gave a presentation on the section of the report on the sustainable management of fisheries and ocean resources.

Dr Gehring gave a presentation on the section of the report on the sustainable management of renewable energy.

Dr Freya Baetens (Belgium) gave a presentation on sustainability issues in the negotiation of the TransPacific Partnership Agreement (TPP), the Comprehensive Economic and Trade Agreement (CETA) and other treaties.

Dr Baetens explained that the topic was part of the Committee's future agenda and was still in development. Sustainable development scholars should be mindful there was a lot of sustainable development going on outside the sustainable development treaties, including in the area of free trade and investment. The megaregional agreements that were being negotiated by the European Union in this area included provisions that were relevant to sustainable development.

In 2009, pursuant to the Lisbon Treaty the competence of the EU vis-à-vis its Member States had expanded to include additional areas. The European Commission was given the mandate to negotiate treaties and the ideas was that this would replace the existing bilateral trade and investment treaties entered into by individual Member States. It also meant that there were to be mega-treaties between the 28 EU Member States and the

other countries such as the USA, Canada, Singapore, and Vietnam. These were the four treaties that would form the focus of Dr Baetens' presentation.

There was a lot of opposition to these treaties, including issues of potential "retrenchment" of data protection and regulatory "race to the bottom". Many people protested against the investment protection and dispute settlement provision in these treaties, but it was clear that what the EU was trying to do was to incorporate or regulate areas that previously were left out by such treaties. Such areas included sustainable development, environment and labour.

The first treaty was CETA between the EU and Canada. Negotiations were concluded in 2014. In July 2016, the European Commission decided to refer the agreement to the Council of the European Union for signature and conclusion.

The second treaty was the EU-Singapore Free Trade Agreement. This agreement is the subject of a case before the Court of Justice of the EU, which was expected to deliver an opinion on whether each and every individual Member State had to ratify it. If that was the case, such agreements would not enter into force for some time because some States took a long time to ratify. The Commission had issued a proposal for the provisional application of the agreement. Dr Baetens added that just because a treaty had not been fully ratified and entered into force did not mean that it had no effect on sustainable development.

The third treaty was EU-Vietnam Free Trade Agreement. Negotiations were concluded in February 2016 and the text was undergoing legal revision. After that occurred, it would go back to the Council for signature and ratification.

The fourth and most notorious and controversial treaty was the Transatlantic Trade and Investment Partnership Agreement (TTIP) between the EU and the US. The latest round of negotiations were concluded on 15 July 2016. There would be another round of negotiations before Christmas 2016. What was particular in this treaty was that it followed the most extensive model of regulating sustainable development.

These treaties could be grouped into two types. First, there was CETA, which forcibly split sustainable development, environment and labour into different chapters and included a lot of statements of intention (eg, strive to promote something). An institutional mechanism comprising a Committee on Trade and Sustainable Development had been established to oversee the implementation of these chapters, and there was also a Civil Society Forum to conduct a dialogue on the sustainable development aspects of the agreement. This did not represent any major change or reform.

Then there were the agreements with Vietnam and Singapore and the proposed TTIP, which were much more extensive.Sustainable development, environment and labour had been integrated into the one chapter.

Subsequently, the Chair gave the floor to other participants to raise questions on the presentations so far.

Professor Maki Nishiumi (Japan) appreciated the report for its deep and comprehensive presentation, analysis and consideration. He indicated that he would contribute to the work of the Committee on the sustainable management of freshwater resources by

introducing Japanese national law and jurisprudence on the subject. Professor Nishiumi also noted his desire to contribute to the future work programme of the Committee with respect to the relationship between sustainable development and indigenous rights.

With respect to the section of the report on the sustainable management of renewable energy, Professor Nishiumi referred to Japan's experience with the Fukushima accident and suggested that Committee critically evaluate the nuclear plant policy. In his view, it would fundamentally be in contradiction with the principle of inter-generational equity to continue to produce radioactive waste. He asked the panel what it thought about the relationship between sustainable development and nuclear energy plant policy?

Dr Gehring responded that nuclear energy production was incompatible with sustainable development. In terms of financial impact, nuclear plants were costly. With regard to sustainable renewable energy, it was better to think from a much more integrated angle, taking into consideration the aspects of conflict, proliferation, installation and transportation.

Professor Damilola Olawuyi (Nigeria) asked a question about the increased attempt by oil rich African countries to institute sovereign wealth funds as economic/legal instruments for the sustainable management of oil wealth. Nigeria, for example, had established a SWF system that transplanted the key legal tenets from the Norwegian SWF. The Nigerian SWF, however, faced several implementation challenges. He therefore recommended that the Committee provide some guidelines or normative recommendations on a law and governance framework for implementing SWF as an economic instrument for sustainable natural resources management.

Professor Schrijver responded by indicating that there was an attempt to create an independent organisation. He queried whether the Committee had the mandate, but observed that it could still consider the suggestion and look at it in the next report. He referred Professor Olawuyi to the discussion in the report on issues relating to social and environmental risk in petroleum and oil resources. He indicated that, in this context, oil should be seen as a public good.

Dr Aboubacar Fall asked Professor Payne to elaborate on the concept of deterritorialisation.

Professor Payne responded that de-territorialisation was placed in the context of biodiversity. When the natural resources were within national jurisdiction, the question was how to ensure protection, given that environmental impact did not have national boundaries. In Australia, the term was used in the context of sea level rise in the maritime zone. She indicated that biodiversity beyond national jurisdiction was a possible topic for the next report of the Committee.

Mr Mohan Katarki (India) queried whether the obligation to use river water in a sustainable manner was being misinterpreted as maintaining natural flow, which had been disregarded many years earlier in favour of the equitable apportionment doctrine.

Dr Spijkers responded that, when interpreting sustainable development obligations, consideration should be given to ethical stewardship, and optimal use of natural resources for the benefit of neighbouring States and future generations.

Dr Spijkers then referred to the Dutch court case cited earlier by Professor Schrijver. The case was decided by The Hague District Court in 2015 against the Dutch government. The court ruled that the government must take more actions to reduce the greenhouse gas emissions in the Netherlands. The government had to ensure that Netherlands emissions in the year 2020 could be at least 25% lower than 1990 levels. The government also had to do more to avert the imminent danger caused by climate change, in view of its duty of care to protect and improve the living environment. Moreover, the costs of the measures ordered by the court were not unacceptably high.

Dr Spijker observed that the Urgenda case meant that the Netherlands should not hide behind the argument that the solution to the global climate problem did not depend solely on Dutch efforts. However, he highlighted that there were several challenges that needed to be resolved before the court arrived at such conclusion. First, the claims needed to be established in court by lawyers. The court relies on the report of IPCC. It also needed to establish the link between the Dutch government duty of care and what was required under the law. Likewise, they needed to establish the violation, the nature of the danger, the knowledge and foreseeability of those damaged, the nature of the obligation of States to take necessary measures and the question of whether the Dutch government was adequately discharging its duties as required. The court's decision also raised concerns. The concerns arose because the Netherlands was part of the EU. If the Dutch courts obliged the government to reduce emissions, other States of the EU might increase theirs to compensate the loss.

Professor Schrijver indicated that the Committee now needed to finalise its report. He stressed that the Committee needed assistance, including ideas on how to complement as well as at the same time how to reduce the report.

Ms Amanda Kron (Sweden) echoed Dr Hossain's remarks on Goal 16, which could serve as an additional entry point to the work. In this context, the proposed survey of transparency, accountability and participation in decision-marking over natural resources spoke to different aspects of Goal 16. Moreover, the work of the Committee could also access gender equality in greater depth, for instance through analysing Goal 5, which recommended reforms to give women access to ownership and control over land and natural resources.

María del Pilar Vanegas Guzmán asked a question on Dr Spijkers' presentation. She observed that Dr Spijker had presented a picture of a fragmented international law of natural resources, with the SDGs as soft law. Moreover, treaties under negotiation in Europe provides non-mandatory commitments. In this scenario, Ms Vanegas Guzmán highlighted the importance of decisions by local courts dealing with matters which substantially intersected with the SDGs. Local practice could inform international law, and judicial decisions served to build customary practice towards the creation of binding obligations internationally.

Professor Schrijver responded by referring to the Rio Declaration, and Stockholm Declaration as examples in the field of statements with a strong normative force, and indicated that the Universal Declaration of Human Rights had been very progressive in contributing to the evolution which culminated in the adoption of the SDGs. He indicated that there was a gap in the law-making process. International law was not static but dynamic and evolving.

Dr Gehring suggested that there must be a meeting at the regional level which would provide a mechanism to address the problem and to fill the gap between human needs and the provisions of the law.

Dr Gehring also added that the SDGs had identified the exact scope of treaties. He indicated that it was better to remind States that, if they wanted to achieve the SDGs, they ought to ratify existing international treaties.

Nadia Sánchez CastilloWinckels (Chile) suggested including a section in the report that would provide guidance on how to bridge the gap between the normative level (which already included principles of sustainable development) and the implementation level. This would give concrete suggestions to those in charge of implementing the norms.

Dr Gehring responded that the analysis did often not match more with international treaty law but they were related to customary international law. He then indicated that the question to be asked was how to operate when so many treaties were not yet widely ratified and how to establish evidence of customary international law.Professor **Schrijver** added that there were indeed limited numbers of ratifications. For example, in issues of water management, Principle 21 of the Stockholm Declaration was agreed by States and had a very strong normative force. This also applied to the Helsinki Rules of the ILA on joint water management. However, it had not been ratified by many States. He then indicated that, in the next meeting, the Committee should consolidate its efforts and speed up for the 2017 meeting in Cambridge. He expressed his appreciation to Professor David Freestone for so ably chairing this meeting.

Professor Andre Thomashausen also commented that the principle of equity and the eradication of poverty should be re-focussed in the envisaged rules and guidance. The focus to be included should be the equitable requirement that the exploitation of natural resources contribute to the eradication of poverty and benefit the economy of the resource host countries. Resource exploitation serving only the economic interest of resource companies should be discouraged. Resource exploitation projects that would necessary lead to resource depletion should be considered as unsustainable.

The Chair thanked attendees for their participation and expressed his wish to see them again at the next ILA conference in Sydney in 2018.

Reporters: Lolah Nkosi and Kandala Lupwana

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

INTERNATIONAL SECURITIES REGULATION

Members of the Committee

Mr Alan Ewins (Hong Kong): *Co-Chair*
Ms Ida Levine (UK): *Co-Chair*
Mr Paul Stevens (USA): *Rapporteur*

Contributing Members (primary materials & substantive review/input)

Mr Edward Fleischman (USA)
Professor Cynthia Lichtenstein (USA)
Dr Klaus Follak (Germany) – Nominee of Chair
Mr Gustavo Grebler (Brazil)
Ms Barbara Green (USA)
Mr Peter G Willis (Australia)

Other Committee Members

Professor Mads Andenas (UK)
Professor Emilios Avgouleas (Hellenic)
Ms Nicola A Berry (Caribbean)
Professor Koen Byttebier (Belgium)
Professor Kenjiro Egashira (Japan)
Dr Anna Gardella (Italy)
Dr Armin J Kammel (Austrian)
Professor Etsuro Kuronuma (Japan)
Miss Katie Kwong (Hong Kong)
Professor Karl-Georg Loritz (Germany)
Professor Iain MacNeil (UK)
Dr Gustavo Ordonhas de Oliveira (Portugal)
Alt: Dr Paulo Fernando Pinheiro Bandeira
Dr Gunnar Schuster (Germany)
Dr Friedrich Schwank (Austria)
Dr Myriam Senn (Switzerland)
Alt: Laura Wasserscheid
Ms Christina Sinclair (UK)
Dr Nik Norzrul Thani (HQ)
Professor Gerhard Wegen (Germany)
Alt: Dr Dittmar Hagedorn
Ms Ning Zhu (HQ)

TWELFTH REPORT

FINDINGS
(in summary form for ease of reference)

The Twelfth Report of the Committee reviews continuing trends and themes in the area of international securities regulation following on from the Committee's 2014 report. Given the fast pace of regulatory change – it is designed to provide a snapshot of the current state of international securities market regulatory infrastructure and day-to-day operational measures; and highlight their profound effect on market participants and regulators (from a global, regional and domestic perspective).

This Committee's Reports have tracked progress in achieving coherent international derivatives regulation to govern a very global market. At least from the viewpoint of EU/US derivatives regulation – so far 2016 has been a banner year for regulatory harmonization

with regulators agreeing on central clearing counterparty (CCP) comparability standards and rolling out a more extensive "substituted compliance" regime on a cross-border basis. Asia is now following suit by implementing new derivatives regulation, and given its common roots in the G-20 measures from the Pittsburgh summit, there is some promise of truly global derivatives regulatory infrastructure.

We begin with an analysis of infrastructure issues: the Over the counter (OTC) Derivatives and CCP Resilience, Recovery and Resolution initiatives which have preoccupied the markets over recent years in the wake of the global financial crisis. We have found a high incidence of cooperation and communication among market players together with governments and regulators intent on demonstrating their adherence to perceived global behavioral and structural norms. But, the potential for inward-looking and protectionist approaches remains high as carefully developed but untested legal and regulatory structures are finally at some stage deployed.

CCP resilience is a case in point – there remain questions regarding practical concentration risks of channelling a high proportion of OTC derivatives transactions (eventually) and clearing through a relatively small number of central counterparties – their resilience and indeed how they could be "recovered" and at worst resolved at some point are explored below. An approach that is less than global, and does not incorporate such measure of coordination, could create more rather than less potential systemic risk.

The last two years also have seen a focus on financial firms other than banks, and the impact of their activities on the global financial stability. The Financial Stability Board (FSB) and the US Financial Stability Oversight Council (FSOC) began by considering asset managers and their clients – including some of the large public investment funds (generally known as "mutual funds" in the United States) – as possible candidates for designation as nonbank systemically important financial institutions (SIFIs). The systemic risk regulators have recently moved on, at least for the time being, to focus mainly on certain asset management activities, such as liquidity management, use of leverage, operational functions, securities lending and transition planning, for heightened regulation. This is currently in progress – with an analysis of any residual risks still on the agenda.

On a positive note, the EU Capital Markets Union proposal represents a potentially important market infrastructure development – the EU Commission has put forward a robust proposal to enhance Europe's relatively underdeveloped and fragmented capital markets. The European economy is as big as the American one, but Europe's equity markets are less than half the size, its debt markets less than a third. The EU now seeks to achieve more integrated capital markets to promote efficiency gains and support Europe's ability to fund growth. Stronger capital markets are meant to complement Europe's strong tradition of bank financing, and unlock more investment from the EU and the rest of the world – and to channel capital in to all companies, including SMEs, infrastructure and long term sustainable projects that need it to expand and create jobs. It also seeks to provide households with better options to meet their retirement goals.

At a more operational level, we have explored insider dealing and corporate governance issues, using particular jurisdictions as proxies for the discussion: insider dealing has international resonance, and it can be seen from the section of this Report concerning

State-Owned Enterprises and their ownership of securities (with a Brazilian perspective, given the increasing importance of that jurisdiction) that a number of universal lessons can be learned from such comparative analysis

It is not possible to cover all issues and subjects relevant to the international securities markets, but our intended focus has been on the major developments at a macro level and ongoing market developments, with a view to assessing their implications for market participants and actors at all levels.

This Report was substantially finalized prior to the UK referendum on Brexit, and the implications in that regard are a topic for another day, given the seismic change for the EU.

Moreover, this Report does not at this stage comment upon the FinTech phenomenon, nor cyber-security, both of which important emerging issues would clearly merit forming part of the Committee's future work.

IMPORTANT – We have adopted for the purposes of this Report the approach of arriving at the above summary Report findings. This Report is supported by the detailed materials contained in the accompanying Annex.

This reflects the broad scope of the Committee's work, taking into account international developments and their local/regional effects and consequences in relation to major market infrastructure issue, together with specific governance issues and their treatment in specific jurisdictions (and lessons that can be accordingly learned more widely).

END OF REPORT

(Please refer to the Annex to this Report for supporting materials)

ANNEX TO THE TWELFTH REPORT OF THE INTERNATIONAL SECURITIES REGULATION COMMITTEE OF THE INTERNATIONAL LAW ASSOCIATION

Johannesburg 2016

Part I – Market Infrastructure

1. International over the counter (OTC) Derivatives Regulation

A. Background (Ida Levine)

The G20 stated in Pittsburgh:

"All standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements".[1]

This 2009 pledge in the wake of the global financial crisis was the basis of global reform of the regulation of OTC derivatives. In our Committee's Report to the Association at the 76th Conference (Washington 2014), we covered the European Market Infrastructure Regulation (EMIR)[2] which regulates derivatives, central clearing counterparties (CCPs) and trade repositories. Europe – together with the US – is at a more advanced stage than Asia in enacting agreed measures to in order to increase transparency and reduce counterparty risk, but it is still well behind its intended schedule as set out in our 2014 report.

The 2014 report covered the scope, substantive requirements and the transactions and securities subject to EMIR's requirements. We also looked at the sources of regulation and guidance, as well as the extra-territorial reach of the rule, and the potential inconsistencies and duplication due to the extra-territorial impact of the US Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).

EMIR technical standards on OTC derivatives, reporting to trade repositories and requirements for trade repositories and central counterparties entered into force on 15 March 2013. The first obligations under EMIR included risk management through portfolio reconciliation, dispute resolution and trade compression. Double sided reporting by financial counterparties to trade repositories followed in 2014 – although in a format inconsistent with the single-sided approach in the US. There are informal indications that the EU regulators may be willing to revert to the US single-sided approach in the interests of standardization – but this is very much a work in progress.

The obligation for central clearing of OTC derivatives will come into force from June 2016. A Delegated Regulation imposing a mandatory clearing obligation for interest rate swap contracts entered into with any European counterparty has finally been published after a long wait. Clearing requirements for other types of OTC derivatives such as Credit Default Swaps (CDS) are still in process. Margin requirements for non-cleared OTC derivatives will also be implemented in 2016, but this still has not been finalized.

---

[1] G20 Leaders Statement: The Pittsburgh Summit, G20 Information Centre (September 24-25, 2009) available at http://www.g20.utoronto.ca/2009/2009communique0925.html

[2] European Commission, Financial Markets Infrastructure, Derivatives/EMIR http://ec.europa.eu/finance/financial-markets/derivatives/index_en.htm (last visited September 28, 2016).

But one of the big stories is about the CCPs and the transatlantic substituted compliance framework agreed between the US and EU earlier this year.

B. US/EU Cooperation (Ida Levine)

Part of the delay on the EU rules on clearing has been a positive development: greater transatlantic cooperation. We mentioned in our previous report, the start of international progress through the work of The Basel Committee on Banking Supervision (BCBS), through the Bank for International Settlements (BIS), together with the International Organization of Securities Commissions (IOSCO). This provided a framework for margin requirements for non-centrally cleared derivatives based on a standard approach.[3] Under these global standards, financial firms and systemically important non-financial entities that enter into these transactions exchange initial and variation margin to reduce counterparty risks arising therefrom using consistent principles.

The last two years have seen greater global regulatory convergence in the derivatives markets at least between the EU and US . The EU and North America account for about 90 per cent of the global derivatives markets meaning that the US Commodity Futures Trading Commission (CFTC) and the European Commission have the predominant oversight responsibility.[4] Until recently, they had been unable to agree common standards on to harmonize requirements across markets. But signs are that with the changes at both the CFTC and the Commission, things have improved, and a constructive working relationship has been established between the two agencies.

Common Standards on CCPs

CCPs provide financial market infrastructure which enhances market and financial stability by guaranteeing the obligations of each counterparty to a transaction. This is a foundation of the G20 measures following the financial crisis – and was meant to provide back-up to reduce market dependence on the financial health of individual counterparties. Cleared transactions include exchange traded and over the counter (OTC) derivatives as well as other financial products such as bonds, equities and securities financing contracts. If a counterparty to a transaction goes into default before settling its obligations, its other counterparties are protected by the financial resources held by the CCP. These financial resources are largely made up of high quality collateral, which is calculated and collected from the counterparties on a daily basis. In this sense, the CCP acts as a circuit breaker, mitigating a domino effect of financial losses across the markets when one participant fails.

Recognizing the importance of CCPs in mitigating risks in the financial system, G20 leaders committed in 2009 to make the use of CCPs mandatory for standardized derivatives contracts. Both the CFTC and the EU Commission have now adopted rules to this effect, increasing the use of CCPs across EU and US markets. As many derivatives are traded cross-border, EU and US market participants need access to CCPs that can serve both markets.

---

[3] See Bank for Int'l Settlements, Margin Requirements for Non-Centrally Cleared Derivatives (March 2015) available at http://www.bis.org/bcbs/publ/d317.htm.

[4] Bank for Int'l Settlements, Michael Chiu, Derivatives Markets, Products and Participants: An Overview http://www.bis.org/ifc/publ/ifcb35a.pdf.

CFTC/EU Commission Common Approach

In February 2016, EU Commissioner Lord Jonathan Hill and CFTC Chairman Timothy Massad announced a landmark agreement on a common approach regarding requirements for central clearing counterparties (CCPs).[5] This common approach to both the regulation and supervision of global derivatives markets had twin goals of supporting cross-border trade and investment while fostering financial stability.

In March 2016, the Commission adopted an equivalence decision for US CCPs. This decision was based on a determination that EU and US CCPs operate to the same high level standards, and alleviates the regulatory burden for US and EU CCPs, allowing compliance with only one set of rules. Thus, US CCPs once recognized by ESMA can operate in the EU with substituted compliance with US rules. The EU equivalence determination means that the EU have decided that the US rules achieve the same objectives as those in the EU – i.e., a robust CCP framework promoting financial stability through a reduction in systemic risk. It does not mean that there was a finding that identical rules are in place in the US.

During the same month, the CFTC unanimously approved a substituted compliance framework for dually-registered CCPs; this included a determination of comparability with respect to certain EU requirements, which will permit EU CCPs to provide services in the US complying primarily with their own local requirements.[6] The CFTC also has streamlined the registration process for EU CCPs wishing to register with them. The determination involved extensive analysis by the staffs of the CFTC and Commission to understand whether differences in their regulatory regimes were significant, and identified those EMIR requirements that are comparable to corresponding CFTC rules. The CFTC specifically noted that harmonization would enhance customer protections while reducing risk of regulatory arbitrage.

The elusive substituted compliance that this Committee has discussed in so many previous reports is finally beginning to come to fruition at least in relation to the global derivatives markets. The common approach discussed above followed detailed analysis of differences between the CFTC and EU regulatory requirements in relation to CCPs, undertaken over a number of years. Both the CFTC and EU requirements are based on international principles, and CFTC staff and the European Commission Services undertook to work together, along with counterparts across the global regulatory community, to further develop these principles and harmonize the standards to which internationally active CCPs are held.

Building bridges and relationships across the Atlantic between derivatives regulators has launched the beginning of a more harmonized approach to the massive regulatory infrastructure defining these global markets. This will be of benefit to firms, their customers, the integrity of the markets themselves and ultimately financial stability.

---

[5] See Statement of Chairman Timothy Massad Regarding Common Approach for Transatlantic CCPs, Commodity Futures Trading Commission (February 10, 2016) available at http://www.cftc.gov/PressRoom/SpeechesTestimony/massadstatement021016.

[6] See CFTC Approves Substituted Compliance Framework in Follow-up to Recent Equivalence Agreement between the US and the EU, U.S. Commodity Futures Trading Commission (March 16, 2016) available at http://www.cftc.gov/PressRoom/PressReleases/pr7342-16

C. Asian catch-up (Alan Ewins)

An interesting issue from an international law perspective is the inevitable creation of nuances in interpretation as regards the trades and persons caught in the net for any given jurisdiction, when compared with other Asian jurisdictions' requirements.

Following on from previous reports, we have continued to use Hong Kong as a useful proxy to reflect Asian developments, with a view to assessing progress in recent years towards achieving consistency with, and keeping pace with, the evolution of international standards. We have provided comparisons with developments in other Asian jurisdictions, where appropriate, to provide reasonable balance.

It remains fair to say that, in Hong Kong, there has been careful and measured, rather than rapid, progress towards arriving at a settled mandatory trading, clearing and reporting regime. When the Hong Kong Government passed the Securities and Futures (Amendment) Bill in 2014, that created the framework for the introduction of the three areas of regulation, with accompanying record keeping requirements. This enabled Hong Kong to point to its having formalized the regulation of OTC derivatives activity in line with international requirements. That framework contemplated that detailed implementation would be handled through the promulgation of rules by the SFC, with the HKMA's consent and after consultation with the Financial Secretary of Hong Kong. Accordingly, there is an intention to proceed on a cross-sector basis, subject to the formal final say of Government to ensure consistency with the international markets, while building in a degree of flexibility allowing changes to be made at a sub-statutory level to accommodate market changes. Given the complexities of the regime and the cross-border issues arising, this seems a sensible approach. The likely form of the ultimate regime tends to be foreshadowed in the consultation process, which (while not providing full certainty to market players to allow them to adjust their operations and procedures) normally provides a reasonably clear indication of the path the incoming regime is likely to follow.

The most significant progress, as anticipated, has been towards putting in place a **mandatory reporting** regime, followed by **mandatory clearing**, and leaving open the difficult issue of introducing mandatory trading in due course. That is not fully consistent or compliant with the aims referred to above expressed in Pittsburgh.

The new **mandatory reporting** regime has been split into two phases, showing the relatively slow pace of reform in this difficult area:

First phase reporting came into effect on 10 July 2015, following extensive market consultation. That first phase was restricted to certain types of interest rate swaps (IRS) and to non-deliverable forwards (NDF).

The consultation for second phase reporting was published in September 2015, with a view to expanding the mandatory reporting rules to cover all OTC derivative products. There have been no further developments to date on this consultation, but it is expected that the expanded reporting requirements will come into effect in early 2017.

Mandatory clearing was also put forward in the September 2015 consultation. It is expected that the first phase of mandatory clearing may come into effect by September 2016, ready for clearing of trades to commence in mid-2017.

There is no clarity at this stage as to when **mandatory trading** will be introduced in Hong Kong (consistent with the global trend of securing robust reporting regimes and, as far as possible, clearing regimes first).

Essentially, Hong Kong has approached the question of mandatory trading, clearing and reporting on the basis of taking steps to adopt international standards within parameters directly relevant to the Hong Kong market. Interest rate swaps (**IRS**) and non-deliverable forwards (**NDF**) make up by far the highest proportion of OTC derivative trades conducted in the Hong Kong derivatives market, and the mandatory reporting regime targeted those products from the outset. Those products also have the useful feature from the Hong Kong perspective of being relatively non-complex, lending themselves to a reasonably straightforward reporting environment.

The expansion to a much bigger universe of derivative products in the second phase will test the robustness of the Hong Kong regulators' information handling systems. There is an inevitable danger for the regulators that the sheer volume of information received may ultimately create problems in identifying and swiftly acting upon issues that arise in the market. Global collection and interpretation of derivatives-related information to enable early warning of potential crises remains a faraway goal rather than an imminent achievement. From a global perspective, piecemeal pockets of information in domestic repositories need to be linked in an effective manner to allow the big picture to be observed; at this stage, there is a sense that the local markets are still aiming to show their "good citizenship" in the global markets and to act in relation to their particular local issues rather than necessarily contributing to a cohesive international regime.

We have considered below certain aspects of the mandatory clearing regime proposed for Hong Kong, with a view to identifying potential issues and risks within the new regime.

Regionally, Hong Kong has been playing a version of catch-up with competitor markets, for example Japan, India, China and South Korea which have all introduced mandatory clearing regimes (clearing being in many respects the primary milestone rather than reporting, since implementation results in a sea change in structures and legal relationships), typically for restricted suites of products, normally interest rate based. The first phase of mandatory central clearing took effect in Australia in April 2016 in relation to OTC interest rate derivatives denominated in Australian dollars and in other major world currencies: US dollars, euros, British pounds and Japanese yen. Australian and overseas financial institutions which meet the clearing threshold need to comply with the clearing requirement. The Monetary Authority of Singapore (**MAS**) has put in place its mandatory clearing rules, although the clearing obligations are only planned to come into effect later this year.

Essentially, Hong Kong has accelerated its moves to establish its reporting and clearing regimes, presumably at least in part in the light of the other jurisdictions' regime changes.

Main areas of focus in this section concerning the Hong Kong mandatory clearing regime

- What is caught
- Who is caught
- Clearing thresholds (beyond the scope of this Report)

- Exemptions
- "Clearing channels" (i.e. what are "designated CCPs), including "substituted compliance"
- The treatment of uncleared trades (in brief)

The above elements rely heavily upon a combination of clear definitions and robust practical implementation, together with careful management of cross-border issues.

What is caught?

The intention is in the initial stage that only "specified" *plain vanilla* interest rate derivatives will be covered by the mandatory clearing requirement, being:

- Single currency fixed-for-floating interest rate swaps (IRS) and single currency basis swaps denominated in any of HKD, USD, GBP, EUR or JPY, with a tenor of between 28 days and 10 years; and
- Single currency overnight index swaps denominated in USD, GBP or EUR, with a tenor of between 7 days and 2 years

It is important to note that, unlike other jurisdictions, non-deliverable forwards (NDF) will not be covered when the regime comes into effect. Hong Kong has adopted the limited goal of achieving a functional mandatory clearing regime in a restricted range of products (which in this case also helpfully covers less complex products) to ensure as far as possible the timing considerations do not de-rail the process. IRS-denominated in certain G4 currencies, such as GBP, are not catered for by regional central counterparties, and this will accordingly lead to the need to use global CCPs which provide clearing services for these products. As a result, local market participants will need to become clearing members of the relevant CCP or enter into client clearing arrangements with clearing members of such CCPs.

There would naturally be a significant compliance cost for both approaches, in terms of use of resources generally to meet membership criteria and conditions where direct clearing membership is pursued or the time-consuming and expensive process of negotiating client clearing documents with established clearing members of the relevant CCPs.

This creates a significant commercial and practical issue: since the mandatory clearing obligation can only be satisfied by having the relevant specified OTC derivative transaction cleared by a "designated CCP" for Hong Kong purposes, then the relevant global CCP would need to have applied and been accepted as such a "designated CCP" for the relevant classes of OTC transactions. In addition, the CCP would need to have become an authorised provider of "automated trading services" in Hong Kong. The affected market participants would need to bear in mind this need for authorisation on the part of the global CCP in planning for the consequences of the launch of phase 1 clearing, which is scheduled to take effect later in 2016. They have no control or influence over those regulatory processes, and would need to modify trading strategies if no designated CCP were available at the relevant time.

An important point to bear in mind is that, as articulated in the Consultation Paper at paragraph 54:

> "[The Authorities] will…monitor activity levels in product types that are not subject to clearing in Hong Kong but subject to clearing in other jurisdictions, for signs of regulatory arbitrage that might undermine the G20 commitments."

This provides food for thought in the sense that clearly the various CCPs with their specific application of clearing (and reporting and trading) rules to the market will inevitably throw up potential mis-matches, including possible avenues for trading that adhere strictly to all the potentially applicable rules but where the trading arrangements and structure are designed to exploit available loopholes. This does not necessarily show malicious intent, more that dealers may be inclined to minimise their levels of interaction from a clearing perspective with clearing jurisdictions, to control costs, resources and potential liabilities. What that could mean is that the clearing picture might be distorted for individual jurisdictions and that in turn may lead to tinkering with local rules in an effort to redress any perceived imbalance.

Who is caught?

The clearing obligations will cover persons who enter into relevant OTC derivatives transactions where they are authorised institutions (banks and deposit-takers) regulated by the HKMA, corporations regulated by the SFC, and approved money brokers (regulated by the HKMA), being "prescribed persons" under the legislation. If they are authorised institutions or approved money brokers which incorporated overseas, then the deal is only caught where the transaction is recorded by way of entry in their Hong Kong books.

However, it does not end there.

A prescribed person is only caught where it deals with:

- *Another* prescribed person (*although – importantly – it does not matter whether the trade is recorded in that person's Hong Kong books*), or
- A "financial services provider" – a person included in a list of such "financial services providers", essentially intended to be limited to G-SIBs at this stage and (if different) to dealer groups who undertook to the OTC Derivatives Supervisors Group to work collaboratively with CCPs, infrastructure providers and global supervisors to continue to make structural improvements to global derivatives markets.

A G-SIB which is incorporated overseas and which has a licensed bank in Hong Kong (making it an "authorised institution") would be covered under *both* legs of the definition – as an "authorised institution" and also as a "financial services provider" by virtue of appearing on the list. The practical consequence is that the financial services provider list may include an entity which is a prescribed person (for example, an authorised institution) but which does not reach the clearing threshold in Hong Kong. In those circumstances, it will still need to be treated by its counterparty as caught under the clearing regime when dealing with it, making the assessment of whether a transaction falls under the regime as a multi-layered process. That is notwithstanding that the use of a published list is designed to provide greater certainty for market participants in their dealings.

Exemptions

There are three exemptions to discuss in the context of Hong Kong clearing, broadly reflecting the international trends: intra-group and trade compression (both beyond the scope of this Report) and, important from an international perspective.

As regards the jurisdiction-based exemption, the clearing obligation does not apply where a transaction is entered into by a *local* prescribed person counterparty in a jurisdiction which is "exempt" under the rules, the trade is recorded in the books of the prescribed person in that exempt jurisdiction and, at the end of a trading day, looking at *all* outstanding trades, the positions of the person for *each* jurisdiction do not exceed 5% of the total positions of that person; *and*

the aggregate of that person's positions for *all* jurisdictions that are exempt jurisdictions in relation to the person do not exceed 10% of the total positions of that person. Exempt jurisdictions for the trader must be identified and notified to the regulators before they can be treated as valid.

Clearing Channels

Although not described as such in the legislation, "substituted compliance" is provided for in the Hong Kong regime.. Please refer to the discussion above in relation to "substituted compliance" in the EU and US contexts.

A prescribed person is treated as having complied with the mandatory clearing requirement if, in relation to an OTC derivative trade to which it is a counterparty, all of the following conditions are satisfied:

- The SFC needs to have designated the jurisdiction in question;
- The trade was required to be cleared with a CCP;
- The trade has in fact been cleared with a CCP in accordance with the laws of that jurisdiction; and (in many respects most importantly in practice)
- The central counterparty through which the trade was in fact cleared is a "designated CCP".

There is further discussion above regarding the designation of CCPs and how that impacts upon the business of market participants, particularly in the early phases of the new regime.

The regulators in Hong Kong have clearly decided to ensure that there is an embedded mechanism catering for "substituted compliance" with a view to maintaining flexibility, having accepted that the Hong Kong market will need to build in such flexibility, especially when the suite of products needing to be cleared grows, given the realities of the global markets.

The ability of the SFC to designate an offshore CCP as suitably compliant for Hong Kong market purposes is subject to checks and balances to avoid the Hong Kong market becoming tied up in a welter of CCPs in an uncontrolled fashion: the SFC needs to obtain the consent of the HKMA and publish a notice in the Hong Kong Government Gazette, in respect of which jurisdiction the SFC is satisfied that the laws of the jurisdiction in question provide for requirements that are similar to, or serve similar purposes as, Hong Kong's clearing obligation, and those laws are appropriately administered supervised and enforced in that jurisdiction. This hammers home the point that where a jurisdiction simply puts into place infrastructure that on the face of it follows international trends, and is in line with Hong Kong's requirements, the jurisdiction would not be acceptable unless it ensured that those laws were properly applied. A paper trail would be insufficient.

Treatment of Uncleared Trades

On 3 December 2015, the HKMA published a consultation paper setting out a draft module in its Supervisory Policy Manual aimed at introducing margin requirements for uncleared OTC derivatives trades for Hong Kong authorized institutions. Initial margin and variation margin will need to be posted by authorized institutions with specified counterparties in respect of OTC derivatives trades. The requirement will take effect in September 2016. The requirements will broaden going forwards to cover a greater range of market players.

This is an important piece of the jigsaw, in particular encompassing non-standardized transactions, such as bespoke bilateral hedging arrangements, which would not otherwise be addressed by the overall OTC derivatives regime.

There will inevitably be a push towards use of cleared trades to avoid the more stringent uncleared regime, although given the evolutionary nature of the derivatives market, there will always be products which simply cannot be fitted into the cleared environment, or for which it would make no commercial sense to try to handle them in that environment.

It would be easy to say that Hong Kong had complied with its perceived international obligations as regards clearing (and reporting) of OTC derivatives trading activity, but it needs to be borne in mind, as with other jurisdictions in the region, the launch of mandatory clearing regimes is as much a political act as an economic or legal measure – Hong Kong has concentrated on specific, at this stage limited, products which relate to how its market operates, and has built in exemptions and an "exit" route in an effort to make the requirements reasonably palatable commercially to global businesses, while adhering sufficiently to the perceived international agenda to allow a robust position to be adopted in terms of international compliance and cooperation.

There is a great deal to be done before the Asian jurisdictions have fully functioning reporting clearing – and trading – regimes, and effectively cater for uncleared trades, but given the significant complexities of the various requirements and regimes, it is reasonable to view there having been a demonstrably positive start to the creation of relevant internationally acceptable legal infrastructure in Hong Kong and the main financial centers in the broader Asian region in relation to addressing issues viewed by the international establishment as needing to be addressed in relation to OTC derivatives.

2. Evolution of international resolution regimes for Global Systemically Important Financial Institutions (G-SIFIs)

A. CCP Resilience, Recovery and Resolution (Ida Levine)

Background

As we noted in the discussion of cross-border derivatives regulation in the Annex to this Report, the clearing of transactions through Central Clearing Counterparties (CCPs) was a lynchpin of the G20 measures following the financial crisis.[7] Clearing of derivatives transactions was meant to reduce market dependence on the financial health of individual

[7] See G20 Leaders Statement: The Pittsburgh Summit, September 24-25, 2009, University of Toronto G20 Information Centre available at http://www.g20.utoronto.ca/2009/2009communique0925.html#institutions

counterparties – and reduce the risk that firms engaging in transactions might be thought of as "too big to fail" (TBTF).

A CCP places itself between the original counterparties to a transaction, effectively guaranteeing that if a counterparty fails, the CCP will continue to perform on the transaction vis-a-vis the other party. A CCP protects itself from risk by taking collateral ("margin") from each party and from by collecting a "default fund" from its Clearing Members (CMs) to meet losses that exceed the margin it holds. The CCP itself and CMs also hold their own capital.

CCPs are becoming increasingly important in financial markets, in particular following the G20 commitment that all standardized over-the-counter (OTC) derivative contracts should be cleared through CCPs.

Risks inherent in CCPs

Central clearing brings many benefits, including increased transparency of positions for regulators and market participants, and reduced counterparty risks inherent in bilateral OTC transactions.

But central clearing results in certain risks being concentrated in a handful of global CCPs. Their clearing members (CMs) are big banks with brokerage businesses that must be prepared to take on additional risk – this also creates inter-connectedness with Systemically Important Banks (SIBs).

So the creation of CCPs brings with it the risk that the CCPs themselves – the foundation of the G20 solution – may become TBTF. This discussion makes some suggestions from a European perspective on measures around CCP resilience, recovery and resolution that are currently being considered by policymakers.

As a cornerstone, a robust and durable *global* framework seems to be in order – CCPs are international, CMs are international and so are their customers. It is essential that EU policymakers work together with their colleagues around the world to create a harmonized set of rules and practices that are coordinated globally in order to give these measures the best chance of success.

Progress to Date

In the EU, the European Markets Infrastructure Regulation (EMIR) will soon require clearing of OTC derivatives in accordance with the G20 mandate; Regulatory Technical Standards (RTSs) are now being finalised by the European Securities and Markets Authority (ESMA) and the European Commission.[8] The clearing obligation will be in place beginning in 2016 with interest rate derivatives. Further clearing obligations will be phased in over time.

The Commission, with the European System of Central Banks (ESCB), were required under EMIR to assess the need for measures to facilitate access of CCPs to central bank liquidity facilities. But in a move that has drawn some comment, the ESCB issued a

[8] See Adoption of a delegated regulation on central clearing for interest rate derivatives, European Commission (June 10, 2016) available at http://ec.europa.eu/finance/financial-markets/derivatives/index_en.htm#maincontentSec2.

report leaving central banks with discretion whether to provide liquidity to CCPs and has declined to introduce requirements in EMIR regarding CCP access.[9]

This has underlined the need to find ways to provide liquidity to CCPs in the event of the failure of one or more CMs. Where the so-called CCP "default waterfall", including CCP and CM resources and capital, is inadequate, policymakers have begun to look at whether other sources such as initial margin (IM) and/or variation margin (VM) posted by CMs and counterparties in relation to transactions cleared through CCPs.

CCP Resilience, Resolution and Recovery

Which brings us to the subjects of CCP resilience, resolution and recovery. Following the G20 agreement on clearing of standardised OTC derivatives, the Basel Committee on Banking Supervision (BCBS), the Committee on Payments and Markets Infrastructures (CPMI), the Financial Stability Board (FSB), and the International Organization of Securities Commissions (IOSCO)(together, the "Committees") agreed to coordinate individual policy work to enhance the resilience, recovery planning and resolvability of CCPs in close collaboration.

The Committees reported on the status of this important work in its Progress Report on the CCP Work-plan in September 2015.[10] They noted that fully realising the benefits of CCPs requires them to be subject to strong regulatory, oversight and supervisory requirements. To achieve this, they set out three separate areas of focus in relation to CCPs.

First, the group identified CCP resilience based on sufficient risk management standards and financial resources (including stress testing, margin, pre-funded default funds and liquidity resources) to allow CCPs to understand and mitigate risks, and withstand CM failures and other stress events to a high probability. Second, they looked to CCP recovery plans to allow CCPs to allocate excess losses and generate liquidity to safeguard CCP viability without endangering CMs and end-users. And third, they set out the requirement to have CCP resolution plans in place.

Financial Resources and Liquidity

There is general agreement that CCPs and CMs – and the CCP default waterfall – should be the first port of call in the event of a default, but at a certain level of capital, clearing could become unduly expensive. Another suggestion has been the issuance of bail-inable debt by CCPs. This could provide more access to capital, to keep down costs of clearing – but is at best a partial solution and presents other issues.[11]

End-users of OTC derivatives include businesses and institutional investors. The latter include clients and public and private funds advised by asset managers acting in fiduciary capacities who use OTC and exchange traded derivatives in their investment strategies. As part of the larger G-20 strategy, as end-users they are required to use CCPs as agents in connection with these activities.

[9] See Report of the ESCB on the need for any measure to facilitate the access of the CCPs to central bank liquidity facilities, European Central Bank (August 2015) available at https://www.ecb.europa.eu/pub/pdf/other/genc-2015-escb-reporten.pdf?a9e9416bb391b8515616e4fb78570479

[10] See Progress report on the CCP workplan, Bank for Int'l Settlements (September 2015) available at http://www.bis.org/cpmi/publ/d134.htm.

[11] See id.

In many cases, transactions are used to hedge and mitigate risk. End-users do not own or profit from CCPs or related market infrastructure and are required to deposit margin (IM and VM) in good faith. This could be undermined by haircutting of margin to cover losses due to the insolvency of a CM or CMs. In particular, the use of IM could create the wrong incentives and become pro-cyclical. Investors could decide to close-out hedging/risk management transactions rather than lose their good faith deposit. Moreover, given the original role of margin, this use of IM or VM to augment the default waterfall could have unintended consequences.

Margin v. Capital

Margin has a specific purpose serving as collateral in relation to the other counterparty or counterparties to a transaction; it is not a capital buffer. The CCP default waterfall structure should be designed so that there is a fair allocation of loss in the event of a default – this should rest with the CCP and the CMs. Before they reach into margin, CCPs and CMs should be required to maintain their own resources to absorb losses; loss absorbency and liquidity should be provided from sources other than margin to the extent commercially possible.

In reviewing the appropriateness of using IM and/or VM as a source of liquidity, it is useful to remember the very different roles of margin and capital in cleared transactions.

Margin is "defaulter-pay". In the event of a counterparty default, margin protects the surviving party by absorbing losses using the collateral provided by the defaulting entity. Margin offers enhanced protection against counterparty credit risk. Capital adds loss absorbency to the system, because it is "survivor-pay", using capital to meet losses consumes the surviving entity's own financial resources. Margin is more "targeted" and dynamic, each portfolio has its own designated margin for absorbing the potential losses in relation to that particular portfolio, and with margin being adjusted over time to reflect changes in that portfolio's risk. In contrast, capital is shared collectively by all the entity's activities and may thus be more easily depleted at a time of stress. Capital requirements against each exposure are not designed to cover the loss on the default of the counterparty, but rather the probability-weighted loss given such default. However, it is worth keeping in mind that the accuracy and precision of probability-weighted loss estimates in a default scenario by a CCP maybe no better than the same estimates that were (inaccurately) made by bilateral counterparties pre-financial crisis.[12]

A significant open issue in ongoing policy work is whether and which type of margin should be used to augment the default waterfall of CCP and CM capital and resources. From the vantage point of the end-user, the preferred approach should be to look to CCP and CM resources to provide liquidity in the event of a CM default. Margin should be used as a last resort and then not without careful thought as to the unintended consequences of such an action.

Resilience – the first line of defence and highest priority

As emphasized by Committees in their September 2015 update, the highest priority is to maintain the resilience of CCPs to minimize the risk of CCP insolvency and reduce the impact of any CM default. In the first instance, policymakers would be well served by

[12] Id.

creating the right structures and incentives to support robust CCPs, including sufficient CCP "skin in the game".

Resilience will be aided by a strong emphasis on transparency and benchmarking of CCP risk management systems and practices – including a standard CCP stress testing framework with testing at regular intervals. Increased loss absorbing resources may be most effectively calibrated through standardized stress testing. And the amount of CM contributions required by CCPs should be risk based and also provide enough "skin in the game" to incentivize proper risk management within CMs.

Regulators should establish globally harmonized stress testing and capital standards. CCPs and CMs generally are global firms – a lack of coordination risks reducing the effectiveness of these measures, and could encourage regulatory arbitrage.

Current proposals under EMIR and other EU market structure regulation seem to be moving in this direction. Broader transparency to market participants (as well as regulators) of CCP stress testing will provide further scrutiny and allow them to perform due diligence on CCPs with better information.

Recovery – a quick, clear and transparent process

An opportunity for CCP recovery should be provided – with a defined recovery process and fully equipped toolbox. But given how quickly market confidence can spiral downwards, the recovery phase must be expeditious to allow end-users to close-out and cover positions quickly if recovery is not feasible.

As before, a cross-border recovery mechanism maybe essential. Swift decision on whether to move to resolution may need to be made by an established global resolution authority with decision-making power. In a resolution scenario, it would be important for CCP resources to not be used in a recovery process where resolution is the actual probable outcome. The goal should be to preserve capital and minimize resort to margin to create the right incentives and protect end-user interests.

Using margin to allow a CCP *to recover* (rather than as part of the ultimate resolution process) after other default waterfall resources are depleted could discourage use of OTC risk mitigation techniques by market participants. Haircutting of IM held by or through non-defaulting CMs should be off the table – this creates the wrong incentives for clearing participants to run for the exit – and away from the CCP. Moreover, VM haircutting should be seen as a measure of last resort rather than a liquidity source. In any event, any VM taken should receive a senior claim or other compensation.

CCP failures will arise where a CCP is unable to cover the positions guaranteed or owned by a defaulting CM or the cost of covering them exceeds CCP resources. During the recovery phase, broader auction participation may help where other CCP CMs want to avoid taking on further risk. Participants could be pre-cleared, with criteria published in the CCP's recovery and resolution plan.

Resolution – mitigating the impact of a CCP failure

Recovery should not be at all costs; CCPs could be allowed to fail with public resolution plans ultimately overseen by an appropriate resolution authority, particularly where there

is substitutability – in other words, CMs and participants can transfer activity to other CCP(s) because there is coverage of all OTC instruments they require.

A critical question is how to define the *Point of Non-Viability* triggering the resolution process. One option is that it could be the point at which no bids for any of the failing CCPs positions are received in an auction or where the losses from accepting the best bids are less than the CCP's total loss absorbing resources. But this is clearly a crucial part of the ongoing rule-making process that will require practical input from market participants.

Again, process should be clear and rapid. The goal must be to wind-down positions and pay back available margin. This gives market participants optionality to transfer position to a viable CCP, use other instruments or leave positions unhedged if credit risk is greater than market exposure. Thought might also be given to suspending the clearing requirement temporarily to enable market participants to re-establish hedges on a bilateral basis.

This more open approach recognises the reality that failure of a CCP reflects a flawed risk management process and will undermine confidence in the CCP. The primary function of the CCP is to appropriately size default funds and capital amounts so to maintain recourse even in unexpectedly adverse market conditions. Once a CCP is in the resolution phase, it has failed in its purpose as well as in a more literal sense. And end-users – who are ultimately taxpayers – should be given the greatest latitude to take actions to remain whole and/or recoup as much of any loss as possible.

C. Assessment of efforts by the FSB and other "soft law" efforts to deal with the need for harmonised resolution procedures for systemically significant financial institutions (Barbara Green)

The "soft law" level of the international bodies presently comprising the "international financial architecture", the Financial Stability Board (FSB) has taken the lead in international efforts to promulgate standards for national resolution legislation supported by IOSCO, the BCBS and the IAIS. In October 2011, the Key Attributes were published and were endorsed as an international standard by the G20 at their Cannes summit in November 2011.

These requirements refer to so-called "global systematically important financial institutions" (G-SIFIs) and call, inter alia, for institution-specific cooperation agreements between home and host authorities A comprehensive overview of the FSB's Key Attributes was given in the ILA International Monetary Law Committee's (MOCOMILA) Report to the Sofia Conference, and summarized in this Committee's Report to Sofia. Dr Eva Huepkes, who authored the portion of the 2012 MOCOMILA Report on the FSB's work on the Key Attributes has reported again in the MOCOMILA Report to the Washington Conference, but this time, the emphasis is on how the work of the FSB produces so-called "soft law". In short, the Key Attributes are an informal architecture, not treaty-based, but rather relying on international co-operation. However, the FSB has put an iterative process of conducting reviews of its member jurisdictions in place in order to assess implementation.[13]

[13] The progress of each individual FSB member is regularly published on the FSB website most recently on 5th September, 2013.

However as this Committee reported to the ILA Sofia Conference, the scope of the Key Attributes is even wider than credit institutions and insurance undertakings: it is setting the standard for the resolution procedures for all SIFIs and financial market structures (FMIs).

In parallel, the impact of the so-called "shadow banking entities" on financial stability has been tackled by the October 2011 FSB Consultation Paper "Shadow Banking: Strengthening Oversight and Regulation". Accordingly, the definition of systemically significant non-banks includes "credit intermediation that involves entities and activities outside the regular banking system", in particular credit risk transfer, maturity transformation, liquidity transfer and leverage. In this context, five workstreams have been identified: (i) banks' interactions with shadow banks; (ii) regulation of money market funds (entrusted to the IOSCO); (iii) regulation of other shadow banking entities, entrusted to the FSB task force; (iv) regulation of securitisation, entrusted jointly to IOSCO and the BCBS; and (v) regulation of securities lending and repos, entrusted to the FSB task force.

Apart from "Policy Recommendations for Money Market Funds" (IOSCO, October 2012), the most recent outcome of the "soft law" architecture is an FSB/IOSCO Consultative Document "Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important Financial Institutions", published on 8th January 2014. This paper aims at "extending the SIFI framework that currently covers banks and insurers to all other financial institutions". It identifies SIFIs as institutions whose distress or disorderly failure, because of their size, complexity and systemic inter-connectedness, would cause significant disruption to the wider financial system and economic activity. The framework for identification will comprise:

- size
- inter-connectedness
- substitutability
- complexity
- global (cross-jurisdictional) activities

As far as size is concerned, the following benchmarks have been proposed:

- finance companies and market intermediaries (broker dealers): $100m balance sheet (total assets)
- investment funds: $100bn net assets under management
- hedge funds: $400–600bn gross notional exposure
- other non-banks non-insurance (NBNI) financial entities: $100bn balance sheet (total assets)

Any attempt to apply the Key Attributes to the extended scope of SIFIs—banks, insurance companies and NBNI entities—will impose major legislative efforts on the individual national jurisdictions. The FSB Chairman's letter[14] to the G20 finance ministers and central bank governors sets ambitious targets:

[14] See the Chairman's 17 February 2014 letter at https://www.financialstabilityboard.org/publications/r_140222.pdf.

> By the Brisbane Summit: A global standard for a minimum level of gone-concern[15] loss-absorbing capacity that global systemically important banks should hold will be proposed by the FSB. Proposals will be developed by the FSB for contractual or statutory approaches for cross-border recognition of resolution actions, including bail-in and temporary stays on the close-out of financial contracts, and cross-default rights when a firm enters resolution.

This latter target for proposals suggests that the FSB is planning to propose for all its constituents the procedures laid out in the FDIC/ Bank of England White Paper described herein. In that "bail-in" is jargon for the bearing of failed firm losses by shareholders and unsecured debt holders, the proposal if made will be a far cry from the Key Attributes which pussyfooted around the notion of "burden sharing".

D. Systemic Risk Regulation (Barbara Green)

Asset Management Industry

For almost five years, regulators have been considering how to pursue their mandate to consider risks to financial stability in the asset management industry. The first round of studies, reports and positions taken by the FSB and the Financial Stability Oversight Council (FSOC) fell spectacularly short in the eyes of experts. The criticisms centered on the lack of familiarity of the systemic risk regulators with the structure, diversity, historical patterns and comprehensive regulation of the asset management industry and the differences between banks and asset managers and their largest clients – including investment funds. After considering asset managers and their clients – including some of the large public investment funds (generally known as "mutual funds" in the United States) – as possible candidates for designation as nonbank systemically important financial institutions ("SIFIs"), the systemic risk regulators have recently moved on, at least for the time being, to focus mainly on certain asset management activities, such as liquidity management, use of leverage, operational functions, securities lending and transition planning, for heightened regulation. In the U.S., the Securities and Exchange Commission ("SEC"), as the primary regulator of the asset management industry, has launched rulemaking initiatives in these areas. Most of these new rules will likely be in place by the end of 2016.

FSOC and the Nonbank SIFI Designation Process

In response to the global financial crisis, the U.S. Financial Stability Oversight Council ("FSOC") was established in July 2010 pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank) to identify risks to, and monitor and respond to emerging threats to U.S. financial stability.[16] Chaired by the U.S. Treasury Secretary, the FSOC has ten voting members. These include the heads of several banking agencies, such as the Chairman of the Board of Governors of the Federal Reserve System ("FED"), the Comptroller of the Currency, and the Chairman of the Federal Deposit Insurance Corporation. Also, the Chairs of the SEC and the Commodities Futures Trading Commission and an independent member with insurance expertise are voting members. Five non-voting members serve in an advisory capacity.[17]

---

[15] A "gone-concern" is the new jargon for a failed or about to fail SIFI.
[16] 12 U.S.C.5301 et seq.
[17] 12U.S.C. 5321 (b).

Among its roles, FSOC is empowered to identify a non-bank financial company as a SIFI for supervision by the Federal Reserve (FED) under heightened prudential standards, including requirements relating to risk-based capital, leverage, liquidity, concentration, resolution planning and risk management.[18] A company is eligible for SIFI designation if (1) material financial distress at the company could pose a threat to the financial stability of the U.S. or (2) the nature, scope, size, scale, concentration, interconnectiveness, or mix of activities of the company could pose such a threat.[19] The FSOC is required to "consult" with the primary financial regulator for a nonbank financial company before a final SIFI designation is made. [20]

Significantly, Dodd-Frank also gave the FSOC a powerful tool to pressure primary federal financial regulators to follow FSOC recommendations relating to financial stability risk. Under the statute, the FSOC can recommend more stringent regulation to a primary federal financial agency to address activities or practices the FSOC determines pose potential risks to financial stability. If the other agency does not adopt the recommendations, the other agency must provide its reasons in writing to the FSOC.[21]

In April 2012, FSOC released a final rule and guidance[22] on how it would proceed with designating nonbank SIFIs under Dodd-Frank ("2012 Final Rule and Guidance"). Based on the statutory standards set out in Dodd-Frank,[23] the FSOC outlined six categories it would use for assessing a non-bank financial firm – size, interconnectedness, substitutability, leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny ("Six-Category Framework").[24] The FSOC also outlined a three-stage review process and metrics that would be used in each stage of a nonbank SIFI determination.[25] The procedures set out in the 2012 Final Rule and Guidance were supplemented by the FSOC in February 2015 generally to provide for more engagement with the companies under review and their primary regulators. ("Supplemental Procedures")[26]

In Stage 1, using information from public sources or other regulators, the FSOC evaluates whether the company has $50 billion or more in total consolidated assets and meets several other quantitative thresholds, such as $3.5 billion in derivative liabilities or $20 billion or more of debt outstanding.[27] A company meeting the Stage 1 standards is then

[18] 12 U.S.C.5322.
[19] 12 U.S.C.5323 (a).
[20] 12 U.S.C. 5323(g).
[21] 12 U.S.C.5330.
[22] 12 C.F.R sec. 1310.1 et seq.
[23] Dodd-Frank sets forth ten standards, which the FSOC grouped into six categories in its guidance. One of the statutory standards relevant to the asset management industry is "the extent to which assets are managed rather than owned by the company, and the extent to which ownership of assets is diffuse."
[24] 77 Fed. Reg. 21637, at 21657-21660 (April 12, 2012).
[25] 77 Fed. Reg. 21660-21662.
[26] 80 Fed. Reg. 7595, 7596 (February 11, 2015). The Supplemental Procedures are available at www.fsoc.gov. The U.S. Government Accountability Office studied FSOC's nonbank designation process and issued a report in November 2014 that identified areas where the FSOC could improve accountability and transparency. GAO Report, *Financial Stability Oversight Council, Further Actions Could Improve the Nonbank Designation Process*, November 2014.
[27] Other quantitative thresholds are $30 billion or more in credit default swaps, minimum 15 to 1 leverage ratio and minimum 10 percent in short term debt ratio. 77 Fed. Reg. 21637, 21661.

evaluated in greater depth in Stage 2 under the Six Category Framework. In this stage, the FSOC evaluates the risk profile and characteristics of each company, including the extent of regulation of the company and whether resolution of the company could threaten U.S. financial stability. As modified by the Supplemental Procedures, at the commencement of Stage 2, the FSOC gives written notice to the company that it is being considered for nonbank SIFI designation. Also, for any company regulated by a primary financial regulatory agency, or home country supervisor, the FSOC will notify and begin consultation with the regulator or supervisor no later than when the Company is notified it is under active review in Stage 2. Beginning in Stage 2, the FSOC can request information from the company, and the company can meet with FSOC analytical staff and submit materials to challenge the FSOC's consideration of the Company.[28]

The FSOC will notify a company if the FSOC decides to advance a company's review from Stage 2 to Stage 3. In Stage 3, an in-depth evaluation of the company will continue. In Stage 3, the FSOC considers channels of transmission through which a company's material financial distress or activities could be transmitted to other companies or markets or impair market functions. The transmission channels include (1) exposure to creditors, counterparties, investors or others participating in the markets, (2) asset liquidation which could result in a sudden drop in asset prices and disrupt trading or cause funding problems for other firms and (3) critical functions or services on which other market participants rely, but the company will no longer provide.[29] The FSOC also may look at such factors as the company's complexity, opacity of its operations, and resolvability. If the FSOC approves a proposed nonbank SIFI designation, it will provide a written explanation, and the Company can request a non-public hearing to contest the proposed designation. Thereafter, with the affirmative vote of two-thirds of the FSOC voting members, including the U.S. Treasury Secretary, the FSOC can determine that material financial distress at the company or its activities could pose a threat to U.S. financial stability.[30] At least once a year, the FSOC is required to reevaluate each nonbank SIFI designation and rescind the designation if the company no longer meets the nonbank SIFI standards.[31]

Money Market Fund Reform

In its 2012 Final Rule and Guidance, the FSOC indicated that it would be looking at U.S. asset management firms and the extent to which they pose potential threats to U.S. financial stability.[32] A sector of the asset management industry FSOC quickly turned to was money market mutual funds. Citing the market-wide instability among money market funds after the Reserve Primary Fund "broke the buck" during the financial crisis, the FSOC believed that money market funds were susceptible to destabilizing runs, which may spread quickly to other funds and result in liquidity, credit or other problems in the financial system.[33] The SEC had adopted money market fund reforms in 2010 in direct response to the financial crisis that considerably strengthened and improved the ability of money market funds to address market problems.[34] Furthermore, commentators criticized

[28] Supplemental Procedures at www.fsoc.gov, pages 2-3.
[29] 77 Fed. Reg. 21637, 21657-21661.
[30] 77 Fed. Reg. 21637, 21661-21662.
[31] 12 U.S.C. 5323 (d).
[32] 77 Fed. Reg. 21637 footnote 6, 21660-21661.
[33] 77 Fed. Reg. 69455, at 69455-69466.
[34] Money Market Fund Reform, 75 Fed. Reg. 10060 (March 4, 2010).

the use of bank-centric views and terminology like the term "runs" in the money market fund context. Nevertheless, FSOC believed that additional structural reforms were necessary to address what the FSOC viewed as remaining vulnerabilities in the money market fund context. Using its authority to recommend regulatory action to other federal financial agencies,[35] in November 2012, the FSOC released for public comment proposed recommendations to the SEC involving three alternative reforms, including a floating net asset value ("NAV") alternative, which were intended to address the structural vulnerabilities of money market funds.[36]

Following this recommendation, the SEC proposed in 2013 and eventually adopted in July 2014 reforms that require institutional non-government money market funds to maintain a floating NAV for sales and redemptions based on the current market value of the portfolio securities they hold.[37] The 2014 SEC reforms also permit boards of most money market funds to impose liquidity fees and redemption gates to address the risk of runs, impose expanded disclosure and stronger diversification requirements, and call for enhanced money market fund stress testing. On the date the SEC adopted the money market structural reforms, the FSOC announced it would assess the reforms and their potential impact on financial stability, signaling the FSOC was leaving the door open to push for any additional reforms it may find necessary.[38]

Other Asset Management Products and Activities

In September 2013, the Office of Financial Research ("OFR"), an office of the Treasury Department established by Dodd-Frank, released a report on "Asset Management and Financial Stability," prepared at the request of the FSOC.[39] The report focused to a great extent on asset management firms and identified four areas of vulnerability: "(1) reaching for yield and herding behaviors; (2) redemption risk in collective investment vehicles; (3) leverage, which can amplify asset price movements and increase potential for fire sales; and (4) firms as sources of risk."[40] In the months that followed, the report was widely criticized for factual inaccuracies, analytical defects, the dearth of empirical data, a lack of understanding of the asset management industry, and the failure to call upon the expertise of the SEC and to obtain industry and public input, among other things.[41] The SEC Chair in an unusual step opened a public comment file on the OFR Report, thereby providing a formal public forum for debate on the report.[42]

---

[35] The FSOC released its proposed recommendations after the then SEC Chair had announced in April 2012 that the SEC would not call a meeting to consider additional money market reforms due to the lack of support at that time by other SEC Commissioners.

[36] 77 Fed. Reg. 69455 (November 19, 2012).

[37] Money Market Fund Reform; Amendments to Form PF, 79 Fed. Reg. 47736 (August 13, 2014).

[38] Statement on Behalf of the FSOC on the Final MMF Rule the SEC, July 23, 2014, at www.fsoc.gov.

[39] Office of Financial Research, Asset Management and Financial Stability, September 2013 ("OFR Report").

[40] Id.at 2.

[41] *See* Speech of SEC Commissioner Luis A. Aguilar, Taking an Informed Approach to Issues Facing the Mutual Fund Industry, April 2, 2014, at 3-5 and footnotes 23-46, which catalogues many of the criticisms of the OFR Report.

[42] *See* Public Feedback on OFR Study on Asset Management Issues, SEC Release No. 2013-208 (September 30, 2013) (Announcing opening of comment file on OFR Report).

A few months later, the FSOC hosted a conference to hear directly from industry members, academics and other stakeholders, including regulators from the SEC and CFTC, on the impact of the asset management industry on financial stability.[43] The SEC staff presentation at the conference underscored that asset managers serve as agents and follow investment mandates from their clients so that the investment risks and rewards are borne by the clients, not the asset management firms. The presentation also described the structure and diversity of the asset management industry and the comprehensive regulation of the industry by the SEC and the states, and the significant data on the industry that is filed with or collected by regulators.[44] Following that, in July 2014, the FSOC directed its staff to engage in a more focused analysis of the potential risks of the industry with the emphasis on 'industry-wide products and activities' rather than focusing on designating asset management firms as nonbank SIFIs.[45]

In December 2014, the FSOC issued a notice for public comment on whether asset management products and activities pose potential risks to U.S. financial stability ("2014 Notice")[46]. While the 2014 Notice invited comment generally on risks posed by the asset management industry to U.S. financial stability, comment also was requested on four principal areas with numerous questions relating to each area: liquidity and redemptions, leverage, operational risk and resolution.

With respect to liquidity and redemptions, the FSOC asked whether redemption incentives associated with various types of pooled investment vehicles could increase the incentive for investor runs during periods of market stress and make fire sales in the assets in which the vehicles invest more likely.[47] On the topic of leverage, the FSOC requested comment on ways leverage used by various kinds of investment vehicles, including separately managed accounts ("SMAs"), could result in forced asset sales or expose lenders or other counterparties to potential losses or unexpected market risks. Questions were also posed relating to the implications of the use of leverage, and, in particular, derivatives, for U.S. financial stability.[48] Regarding operational risk, the FSOC sought comment on operational risk generally in the asset management industry and more specifically particular risks associated with the transfer of client accounts or assets from one asset manager to another, and risks arising when one or more asset managers use one or a limited number of third party providers for significant services such as pricing, valuation or portfolio risk management.[49] On the subject of resolution, the FSOC asked whether there are financial interconnections, such as transactions or investments across affiliated investment vehicles, between an asset manager and an investment vehicle or with third parties, or

[43] The conference agenda and other materials are available at www.fsoc.gov.

[44] Norm Champ, Director, Division of Investment Management, U.S. Securities and Exchange Commission, FSOC Conference on Asset Management, Overview of the Asset Management Industry, May 19, 2014.

[45] 2015 Annual Report, Financial Stability Oversight Council, section 6.5.3, Asset Management Analysis at 103.

[46] FSOC Notice Seeking Comment on Asset Management, 79 Fed. Reg. 77488 (December 24, 2014).

[47] 79 Fed. Reg. 77490.

[48] 79 Fed. Reg. 77491.

[49] 79 Fed. Reg. 77492-77493.

other potential issues that could make resolution in the asset management industry more complicated in periods of market stress.[50]

In the 2014 Notice, the FSOC acknowledged that SEC initiatives were underway that might address some of the risks outlined.[51] The FSOC noted that, while the focus of these initiatives was not U.S. financial stability, it would consider their impact on reducing risks to financial stability.[52]

SEC Responds with Proposals for Enhanced Risk Monitoring and Asset Management Regulation

With the possibility of FSOC action again in traditional areas of SEC jurisdiction, the SEC moved to address the subjects raised in FSOC's 2014 Notice in three sets of rule proposals in 2015. These proposals generally are widely seen as intended by the SEC to provide more information to FSOC about funds' portfolio holdings and transactions and to promote risk monitoring and risk management.

Portfolio Information reported by Funds and Investment Advisers (May 2015).[53] Under these proposals, the SEC would require registered funds, other than money market funds, to provide new portfolio-wide and position-level holdings data on a monthly portfolio holdings reporting form (Form N-PORT). Data collected would also include information related to the pricing of portfolio securities, repurchase agreements, securities lending, the terms of derivatives contracts and portfolio level and position level risk measures. With respect to investment advisers, the proposals would require certain aggregate information relating to SMAs, including assets held and the use of borrowings and derivatives in those accounts.

*Mutual Funds' Liquidity Risk Management and Swing Pricing (*September 2015).[54] These SEC proposals are intended to reduce the risks that funds will not be able to meet redemption requests or that redemptions result in dilution of fund shareholders' interests. In these proposals, the SEC would require mutual funds and exchange-traded funds ("ETFs") to have a liquidity risk management program that would include classification of the liquidity of portfolio assets, assessment, periodic review and management of each fund's liquidity risk, establishment of a three-day liquid asset minimum, and board approval and review of the program. Classification would be required for each of the assets in the fund's portfolio into one of six categories based upon the number of days each asset position would be convertible to cash at a price that does not materially change the value

[50] 79 Fed. Reg. 77494.

[51] In a December 11, 2014 speech, SEC Chair White described three SEC initiatives: expanding data reported to the SEC by funds and advisers to permit effective evaluation of risks; enhancing controls on portfolio composition risks; and improving transition planning and stress testing. Chair Mary Jo White, Speech to the New York Times DealBook Opportunities for Tomorrow Conference, New York, NY (December 11, 2014).

[52] 79 Fed. Reg. at 77489.

[53] Proposed Rule: Investment Company Reporting Modernization, 80 Fed. Reg. 33590 (June 12, 2015); Proposed Rule: Amendments to Form ADV and Investment Advisers Act Rules, 80 Fed. Reg. 33717 (June 12, 2015).

[54] Proposed Rule: Open-end Fund Liquidity Risk Management Programs; Swing Pricing; Reopening of Comment Period for Investment Company Reporting Modernization Release, 80 Fed. Reg. 62274 (October 15, 2015).

of that asset immediately before sale. A fund must determine the fund's three-day liquid asset minimum, considering certain factors, such as the size, frequency, and volatility of past purchases and redemptions during both normal and stressed market conditions. The fund cannot acquire any less liquid holding if following the acquisition the fund would have invested less than the three-day liquid asset minimum in three-day liquid assets. In addition to this proposed liquidity classification, the SEC's guidance limiting a fund's holdings of illiquid assets to 15 percent would be codified in a rule.

These proposals also would permit mutual funds (other than money market funds and ETFs) to elect to use "swing pricing." Swing pricing would allow for the adjustment of a fund's net asset value (NAV) so that purchasing and redeeming investors would bear part of the costs of trading in the fund shares in certain circumstances. The goal of swing pricing would be the protection of existing shareholders from dilution related to the purchases and redemptions of fund shares.

Regulation of Funds' Use of Derivatives. (December 2015).[55] This SEC proposal would require a fund to comply with one of two alternative portfolio limitations in order to restrict the amount of leverage a fund may have through derivatives and certain other transactions. A fund also would be required to segregate certain assets (in general cash and cash equivalents) in an amount to permit the fund to meet its obligations in connection with derivative transactions and certain other transactions, such as reverse repurchase agreements. A fund would need a formalized derivatives risk management program and designated derivatives risk manager if the fund utilizes complex derivatives or more than a limited amount of derivatives.

Beyond these proposals, the SEC is developing rules to require transition planning for investment advisers in case of a major business disruption and stress testing for large investment advisers and funds,[56] which is required by Dodd-Frank[57] Additionally, reflecting the increased focus on risk monitoring, the SEC has added two offices to expand monitoring risk – the Risk and Examinations Office in the Division of Investment Management, which analyzes industry and firm operational data, including the risk-taking activities of asset management firms, and the Risk Assessment Office within the SEC's Division of Economic and Risk Analysis to provide risk modeling expertise and guidance on the analysis of data to promote risk-based examinations.

FSOC April 2016 Update: FSOC Focuses On Liquidity and Redemptions and Leverage Risks

In April 2016, the FSOC published an update on its asset management review.[58] In the update, FSOC identified five areas of potential financial stability risk that may arise from asset management products and activities and specific steps to address these risks. The five areas are: liquidity and redemptions, leverage, operational functions, securities

---

[55] Proposed Rule: Use of Derivatives by Registered investment Companies and Business Development Companies, 80 Fed. Reg. 80844 (December 28, 2015).

[56] David W. Grimm, Remarks to the Investment Company Institute's 2016 Mutual Funds and Investment Management Conference, Thoughts on Other Initiatives (March 14, 2016).

[57] 12 U.S.C. 5365.

[58] Financial Stability Oversight Council, Update on Review of Asset Management Products and Activities (April 2016), at www.fsoc.gov ("FSOC April 2016 Update").

lending and, lastly, resolvability and transition planning. The key areas of focus of the update were liquidity and redemptions and leverage risks.[59]

With regard to liquidity and redemptions, the FSOC pointed to two features of pooled investment vehicles. The "Liquidity Transformation" feature permits investors to redeem daily while the vehicle is invested in less liquid assets. During market stress, the FSOC explained, the price of assets held may decrease quickly if there are heavy redemptions.[60] The other feature highlighted by the FSOC was "First Mover Advantage." This occurs when the costs of satisfying investor redemptions are borne to a great extent by the shareholders remaining in the fund, which may create incentives for some investors to redeem ahead of others.[61] Despite the acknowledgement that there is scant evidence of widespread runs by mutual fund investors, the FSOC concluded that large redemptions in mutual funds holding less liquid assets in periods of market stress could lead to price drops in the asset class and forced asset sales at declining prices, which, in turn, could transmit stress to other market participants and result in broader market disruptions.[62]

The FSOC referred to the situation in December 2015 of a high yield bond fund, the Third Avenue Focused Credit Fund ("Third Avenue Fund"), which had suspended redemptions to protect the fund's investors. While the FSOC conceded that no other high yield bond funds had been unable to satisfy redemption requests in this period of market stress, the FSOC concluded that the closure of the Third Avenue Fund "illustrates both liquidity and redemption risk in less-liquid mutual funds and raises questions about the implications for financial stability." [63]

The FSOC listed several steps that could help address the liquidity and redemption risks: (1) robust liquidity risk management for mutual funds; (2) clear regulatory guidelines regarding limitations on mutual funds holding less liquid assets; (3) greater reporting and disclosure with respect to mutual funds' liquidity profiles and liquidity risk management practices; (4) allocation of redemption costs to investors redeeming shares intended to eliminate "First Mover Advantage;" and (5) greater public disclosure of external sources of financing, such as interfund lending and lines of credit, for mutual funds.[64] Despite the FSOC's concerns, virtually all of these steps are either addressed by existing rules and regulations that have proven effective at preventing risks to financial stability originating from asset management firms or addressed to some extent in the SEC's 2015 rule proposals on expanded reporting of portfolio holdings information, liquidity risk management and swing pricing. The FSOC acknowledged the SEC's ongoing rulemakings and indicated it would await the results of the SEC's 2015 rule proposals and then would consider if financial stability risks remain.[65]

With respect to leverage, the FSOC considered ways in which leverage used by investment vehicles could make direct or indirect losses more likely for counterparties or other market participants and possible implications for the broader financial system. The FSOC

[59] *Id.* at 2.
[60] *Id.* at 4-5.
[61] *Id.* at 5.
[62] *Id.*
[63] *Id.* at 7-8.
[64] *Id. at* 12-13.
[65] Id.at 13.

noted that leverage appears to be concentrated in private funds, and, in particular, hedge funds, and the need to gather more information. To this end, the FSOC stated that an interagency working group was being created to share and analyze information about hedge funds, with the goal of improving regulators' understanding of hedge fund activities and their use of leverage. If the working group concludes that financial stability risks arise from hedge funds' use of leverage, the FSOC will decide whether the appropriate regulators have the authorities to address these risks or need additional authorities.[66]

On the subject of operational risk, the FSOC decided that additional information and analysis is needed relating to the potential for disruption or failure of a service provider that might result in wider market risk. The FSOC also called for further information and analysis relating to securities lending. The FSOC was concerned that there could be a widespread termination of securities loans by borrowers, which might create unanticipated and heavy redemptions in pooled investment vehicles that are holding the cash collateral of the lenders, in turn, leading to potential financial stability risks.[67]

In the FSOC's view, resolvability and transition issues resulting from the failure or stress of clients of asset management firms, and possibly asset management firms themselves, could exacerbate the risks relating to liquidity or leverage. The FSOC noted that advance planning could help to mitigate risks and it would monitor the outcome of an SEC rulemaking underway on the subject of transition planning.[68]

Challenges to the FSOC on Multiple Fronts

Public push back to FSOC. Beginning with issuance of the 2013 flawed (and embarrassing) OFR Report, independent experts, investors, representatives of the asset management industry, and Commissioners of the SEC themselves, have called for changes in the FSOC process and thinking. Several themes have emerged. Both funds and advisers have been highly regulated by the SEC and the states for the past 75 years; this comprehensive regulatory scheme has worked to promote financial stability, and SEC expertise and the transparent SEC rulemaking process should be used when additional regulation is being considered. Unlike banks, fund managers are agents that invest on behalf of the funds and their investors, not the fund managers, bear the losses and benefit from the gains. The vast majority of investor assets are in long term, large-cap stock and bond mutual funds, and investors in these funds have for 75 years been long-term stable owners, mostly saving for retirement, and have not tended to rapidly withdraw from the funds or initiate "runs." Historical experience also shows funds and advisers exit the business regularly without government intervention, "bailouts" or financial stability repercussions. The review of the asset management business should be based on the historical record and empirical evidence, not hypothetical situations, such as theoretical shareholder runs on funds or "herding," when history shows that fund outflows are muted in periods of market stress and there is no evidence that millions of shareholders act in concert. In light of the Dodd-Frank requirements for the FED to impose prudential standards on nonbank SIFIs, the FSOC, with its concentration of banking regulators, is intent on imposing bank-style regulation on the asset management industry despite the potential for harm to investors through higher costs and less investment flexibility.

---

[66] *Id.* at 14-18, 20-21.
[67] *Id.* at 23-24.
[68] *Id.* at 26-27.

FSOC Loses the MetLife Case: Setback to the Nonbank SIFI Designation Process. In 2013, the FSOC designated three companies as nonbank SIFIs, American International Group, Inc., and Prudential Financial, Inc., both insurance companies, and General Electric Capital Corporation, Inc. ("GE Capital"), a financial services company. In December 2014, MetLife, Inc. ("MetLife"), another insurance company, was designated as a nonbank SIFI by the FSOC. Within a month, MetLife became the first company to bring suit against the FSOC challenging the nonbank SIFI designation. [69]

On March 30, 2016, the U.S. District Court in the District of Columbia agreed with MetLife and rescinded MetLife's nonbank SIFI designation as arbitrary and capricious on two grounds.[70] First, the Court noted that the FSOC had determined that material financial distress at MetLife could pose a threat to the financial stability of the U.S. but the Court found that the FSOC had not analyzed MetLife's vulnerability to financial distress and had not assessed how there would be an impairment of financial intermediation or financial market functioning severe enough to inflict significant damage on the broader economy as required by FSOC's 2012 Final Rule and Guidance.[71] Notably, the Court found that the FSOC had not projected any estimated losses to other market participants, what financial institutions would be affected or how the market would destabilize. Second, the Court determined that FSOC was required to but did not consider the costs to MetLife of the SIFI determination. The FSOC's action, the Court said, was "unreasonable" and the result of a fatally flawed process"[72]

The FSOC has decided to appeal the *MetLife* Court decision,[73] and the case will likely not be finally resolved for some time. Some commentators have viewed the *MetLife* decision as a "knockout" and a signpost of the failure of Dodd-Frank.[74] The *MetLife* decision does place the onus on the FSOC in future nonbank SIFI determinations to conduct and present a rigorous analysis based on empirical data to show how and why financial distress at a firm will have the required effect on U.S. financial stability and to provide a careful analysis of the costs of a nonbank SIFI determination. While the *MetLife* case calls for some revamping of the nonbank SIFI designation process, it does not suggest there will be any dismantling of the Dodd-Frank scheme of systemic risk regulation. Certainly, the *MetLife* case provides grounds for demanding historical evidence, empirical data and rigorous analysis, rather than theoretical and hypothetical scenarios, in a nonbank SIFI designation proceeding involving the asset management industry.

GE Capital SIFI Rescission Request. GE Capital is taking another route to challenge its nonbank SIFI designation. On March 31, 2016, the day after the court decided the *Metlife* case, GE Capital filed a request with the FSOC for rescission of its nonbank SIFI designation.[75] GE Capital asserted that it has significantly reduced its risk profile,

[69] MetLife, Inc. v. Financial Stability Oversight Council, Civil Action No. 15-0045 (U.S.D.C. D.D. Filed January 13, 2015).

[70] MetLife, Inc. v. Financial Stability Oversight Council, Civil Action No. 15-0045, Slip Op. (U.S.D.C. D.C. March 30, 2016).

[71] *Id.* at 24-28.

[72] *Id.* at 1, 14.

[73] Statement from a Treasury Spokesperson on the Decision to Appeal MetLife v. Financial Stability Oversight Council, April 7, 2016, at www.treasury.gov/presscenter.

[74] "Dodd-Frank in Retreat, The Wall Street Journal, April 13, 2016.

[75] GE Capital Files Request for Rescission of Status as a Systemically Important Financial Institution, Press Release, March 31, 2016.

is substantially less interconnected to the financial system and thus does not meet the requirements for SIFI designation. GE Capital had downsized through asset sales, exiting various businesses, including leveraged lending and U.S. consumer lending, and reducing real estate debt, real estate equity and outstanding commercial paper. The firm also said it has reorganized and simplified its structure and thereby reduced its complexity and increased its resolvability.[76]

U.S. Congressional Action. A number of bills regarding the FSOC and its nonbank SIFI designation process have been introduced in the U.S. Congress. H.R.3340, The Financial Stability Oversight Council Reform Act, which passed the U.S. House of Representatives on April 4, 2016, would require that the budgets of the FSOC and the OFR be subject to the annual appropriations process, giving the U.S. Congress control over the purse strings and thus oversight over the FSOC and OFR. [77] This bill notes that the FSOC and OFR currently receive funding from assessments on financial firms that are deposited into the Financial Research Fund and become immediately available for spending without any Congressional review or approval. H.R. 1550, the Financial Stability Oversight Council Improvement Act of 2015, would require the FSOC, before making a proposed nonbank SIFI designation, to identify with specificity the risks the company poses to U.S. financial stability and to consider the appropriateness of imposing prudential standards rather than other forms of regulation to mitigate the risks FSOC has identified.[78] Prior to a proposed designation of a company with a primary regulator, the FSOC would be required to allow the primary regulator to address the identified risks, including undertaking regulatory action to mitigate the risks if appropriate. In addition, the bill would permit a company that the FSOC has proposed to designate as a nonbank SIFI an opportunity to provide a plan that modifies the company's structure, business or operations to address the identified risks.

FSB and IOSCO Examination of Asset Management

Since 2011, the Financial Stability Board ("FSB"),[79] in consultation with the International Organization of Securities Commissions ("IOSCO"), have been conducting an examination of the asset management industry from a global standpoint for potential identification of non-bank non-insurer ("NBNI") global systemically important financial institutions ("G-SIFIs").[80] On March 4, 2015, the FSB and IOSCO released their second Consultative Document called "Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important Financial Institutions, Proposed High-Level Framework and Specific Methodologies" ("2015 Consultation"). The 2015 Consultation sets forth

[76] *Id.*

[77] H.R. 3340, Financial Stability Oversight Council Reform Act (Introduced July 29, 2015; passed House April 14, 2016; referred to U.S. Senate Committee on Banking Housing and Urban Affairs April 16, 2016).

[78] H.R. 1550, Financial Stability Oversight Council Improvement Act of 2015 (Introduced March 23, 2015; passed House of Representatives Committee on Financial Services November 4, 2015). Along the same lines, S. 1484, The Financial Regulatory Improvement Act of 2015, would require the FSOC to consider the extent to which a company being evaluated for nonbank SIFI status is already regulated by a financial regulatory agency, including the appropriateness of applying prudential standards instead of, or in addition to, other regulations.

[79] The FSB was created by the G-20 in April 1999.

[80] The FSB was asked by the G-20 in November 2011 to prepare the assessment methodologies in consultation with IOSCO.

revised methodologies based on responses to the previous FSB/IOSCO Consultation issued in January 2014. The methodologies are intended to help identify NBNI financial institutions "whose distress or disorderly failure, because of their size, complexity and systemic interconnectedness, would cause significant disruption to the wider financial system and economic activity across jurisdictions."[81]

The 2015 Consultation sets out the same three systemic risk and transmission mechanisms as in the 2014 Consultation: the exposures/counterparty channel; the asset liquidation/market channel and the critical function or service/substitutability channel.[82] The same basic impact factors also are used in the 2015 Consultation: size, interconnectedness, substitutability, complexity and global/cross-jurisdictional activities.[83] The 2015 Consultation proposes a methodology for identifying global systemically important individual investment funds with a focus on leverage, taking into account that more leverage taken on by a fund leads to higher interconnectedness through borrowing. A separate methodology for identifying global systemically important individual asset managers also is proposed, which will focus on asset managers whose distress or disorderly failure could result in "significant disruption to the global financial system and economic activity across jurisdictions.[84] Proposed thresholds for evaluation as a G-SIFI were enumerated in the 2015 Consultation. For public investment funds, these were:

- $U.S. 30 billion in net asset value ("NAV") and balance sheet financial leverage of 3 times NAV, with a size-only backstop of $U.S.100 billion net assets under management (AUM)
- $U.S. 200 billion in gross AUM unless it can be shown that the fund is not a dominant player in its markets[85]

For private funds, the proposed threshold was: $U.S. 400 billion of gross notional exposure.[86] This threshold was selected to include private funds that are highly leveraged. For asset managers, the proposed thresholds were:

- $U.S. 100 billion (or another specific number) in balance sheet assets
- $U.S. 1 trillion (or another specific number) in AUM[87]

The 2015 Consultation outlines the process to be followed.[88] After approval of the methodologies, the FSB would give the relevant national authorities a list of entities that meet the thresholds. The national authorities would then develop a list of entities recommended for G-SIFI evaluation. The FSB and the national authorities together would agree on a final list of G-SIFIs.

---

[81] Consultative Document (2nd), Assessment Methodologies for Identifying Non-Bank Non-Insurer Globally Systemically Important Financial Institutions, Proposed High- Level Framework and Specific Methodologies, March 4, 2015, at 1-3.
[82] *Id* at 4.
[83] Id.at 6.
[84] Id.at 7-8, 30.
[85] Id.at 11.
[86] *Id.*
[87] *Id.*
[88] *Id*. at 12-15.

The proposed methodologies in the 2015 Consultation have been met with many of the same criticisms as FSOC pronouncements. The thresholds, in particular, have been objected to for relying too heavily on asset size as an indicator of risk. In fact, under these thresholds, a large number of U.S. SEC-registered funds would automatically become subject to G-SIFI evaluation – an absurd result since a large portion of these would be unleveraged, diversified large-cap index funds invested in the S&P 500, which are widely regarded as some of the simplest, most popular, least-complex and least-risky funds available to investors.[89]

In June 2015, IOSCO announced that "a full review of asset management activities and products in the broader global financial context should be the immediate focus of international efforts to identify potential systemic risks and vulnerabilities,"[90] and this work would take precedence over work on the methodologies. Further work on the methodologies would be reassessed after the review is completed.

Following IOSCO's statement, the FSB changed the focus of the asset management review to certain activities. In a March 31, 2016 press release, the FSB announced the launch of a public consultation on policy recommendations to address structural vulnerabilities from asset management activities.[91] The press release stated the key policy recommendations are intended to address risks posed by funds' liquidity mismatch, funds' use of leverage, operational risks, risks in transferring investment mandates in circumstances of stress and securities lending by funds and asset managers. In addition, the FSB encouraged authorities to use stress testing to assess the ability of funds to meet redemption requests in periods of market stress.

E. Implementation in the EU[92] (Dr. Klaus Peter Follak)

In the immediate aftermath of the global credit crisis, the subject of resolution of financial institutions has been taken up by several national jurisdictions, including Germany and the UK. As is delineated below, the UK through the Bank of England is also collaborating with the resolution authority for SIFIs designated under the US's 2010 financial reform legislation, Dodd-Frank, to ensure that the UK's legislation in the area is harmonized not only with the EU legislation but also with the agreed-upon (between FDIC and the Bank of England) procedures for SIFI resolution, which in essence are those described by the FSB's Chairman in his February 17, 2014 letter above. These national attempts will have to be adapted and supplemented (but not totally abolished) in the course of the EU harmonisation, which will also implement the FSB requirements.

Due to the creation of the Banking Union within the Euro zone, the EU harmonisation will have to be implemented within a dual structure: The Directive establishing a framework for the recovery and resolution of credit institutions and investment firms[93] must be

---

[89] Investment Company Institute, Comment Letter on Consultative Document 2nd, at 11-12 (May 29, 2015).

[90] Media Release, OICU-IOSCO, Meeting the Challenges of a New Financial World, at 2 (June 17, 2015).

[91] Press Release, Financial Stability Board, Meeting of the Financial Stability Board in Tokyo on 30-31 March, at 1 (March 31, 2016).

[92] See also the MOCOMILA Report, part III D.

[93] latest draft COM (2012) 280 final, 6.6.2012.

implemented into national legislation by the Member States of the EU and the EEA (EU plus Iceland, Liechtenstein and Norway). After the EU Council reached an agreement with the EU Parliament on December 18, 2013, the Directive provides that it will come into force on January 1, 2015, whereas the bail-in tool will be postponed for another year.

The Regulation, which under EU constitutional procedures has direct force of law in the Member States of the Banking Union (Euro Zone)[94] establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund, will be adapted to the above-mentioned general agreement of December 18, 2013. As the Directive has to be implemented by all Member States including the Banking Union Members, the Regulation will have to be consistent with the general Directive.

The scope of both drafts is still limited as compared with the latest FSB drafts in respect of insurance companies and the Shadow Banking System: Within the Regulation, to the extent parent undertakings, investment firms and financial institutions are included in consolidated supervision by Europe's central bank, the European Central Bank (ECB) (basically, the scope of banking supervision by the ECB – Art. 2 of the Regulation); Within the Directive, the scope "…is identical with that of the Capital Requirements Directive (CRD), which harmonises prudential requirements for institutions including financial institutions included in a banking group, and investment firms", and "…should also apply to holding companies where one or more subsidiary credit institutions or investment firms meet the conditions for resolution."

On the other hand, following the traditional EU principle of minimum harmonisation, the scope of application is not restricted to individually designated systemically significant entities, but will be applied to all banks, investment firms, and all relevant insurance companies and financial institutions operating in the EU.

Both the Directive and the Regulation will supersede the Directives on mutual recognition and enforcement of reorganisation or winding up measures in relation to credit institutions (2001/24 EU) and insurance companies (2001/17, now integrated into the so-called Solvency II Directive 2009/138) that have branches in other Member States. Both 2001 Directives had introduced the recognition of the respective national home country insolvency regime.

The respective national insolvency law will still be maintained as the general basis:

> Losses, once identified through a valuation process, are to be allocated between the shareholders and the creditors…in accordance with the hierarchy of claims established by each national insolvency regime. However…the resolution framework establishes certain principles for the allocation of losses…irrespective of what each national insolvency regime establishes:…that the losses should first be allocated in full to the shareholders and then to the creditors that creditors of the same class might be treated differently if it is justified by reason of public interest and in particular in order to underpin financial stability.[95]

---

[94] latest draft COM (2013) 520 final, 10.7.2013

[95] Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending council directives (COM 2012) available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012PC0280.

In accordance with the general international insolvency procedures, security, collateral and guarantees will remain untouched, as well as certain priorities of claims under the aspect of the general good, such as social security liabilities, wages of employees etc.:

> It is not appropriate to apply the bail-in tool to claims in so far as they are secured, collateralised or otherwise guaranteed. Nevertheless, it is appropriate to exclude certain kinds of unsecured liability from the scope of application of the bail-in tool for reasons of public policy and effective resolution…[96]

In respect of the general aim of insolvency procedures, the new resolution regime allows for re-structuring versus liquidation: "Resolution constitutes an alternative to normal insolvency procedures and provides a mean to restructure or wind down a bank that is failing and where failure would create concerns as regards the general public interest", threatening financial stability, the continuity of a bank's critical functions and/or the safety of depositors, client assets and public funds. Therefore, the introduction of the following tools into national legislation will be mandatory:

- transfer (sale) of the business
- transfer to a bridge institution
- asset separation (in particular deposits)
- bail-in of unsecured debt instruments.

As far as relations with third countries are concerned, the Directive contemplates the negotiation of binding agreements. In their absence, the European Banking Authority (EBA) has the ability to recognize, on a case by case basis, third country resolution proceedings relating to an institution having its residence in a third country. In these cases, third country resolution proceedings have to be enforced under the national jurisdiction of individual EU Member Countries. Apart from that, as long as soft law principles or the EU Directive have not been implemented by national law or the Banking Union Regulation, courts will apply exclusively national law, subject to the general principles of international insolvency law.

Needless to say, the implications of Brexit will need to be considered in detail over the coming period in the UK context, given the negotiated changes to the relationship with the EU that will be hammered out in time.

Cross-border Issues

The aim of resolution frameworks is to avoid formal insolvency. As they are due in a pre-insolvency situation, the principles of international insolvency law are not applicable, at least not directly. Nevertheless, cross-border issues and problems are similar. Like insolvency law, resolution frameworks are mandatory national law, not subject to choice of law by related parties. They provide for the legal basis of implementing measures by the competent authorities, giving regulators a range of tools including statutory powers to write down and/or convert into equity a financial institution's liabilities. Such measures have to be considered as administrative acts, i.e. acts of state. This means that the scope of application hinges on the interpretation of sovereign power according to the principles of international law. Under the law of nations, national jurisdiction is restricted to the national territory, i.e.

[96] *Id.*

- jurisdiction in personam to citizens, and to individuals and legal persons with residence in the respective territory;
- jurisdiction over assets situated in the respective territory (lex rei sitae).

Regularly, cross-border transactions involve several jurisdictions:

- the law of the contract;
- the law of the residence of the individuals and legal persons subject to resolution measures, and
- the lex rei sitae in respect of the affected assets.

This means that the enforcement of a Bail-In or Resolution "Stay" may be challenged under the law of contract before the courts of another country in cases where a jurisdiction different from the residence of the obligor (i.e. the respective financial institution) has been agreed upon. In consequence, the outcome in view of established legal principles such as frustration, force majeure, mandatory law and extraterritorial jurisdiction might be very doubtful. This is why the FSB has affirmed the importance of contractual clauses that recognize the effectiveness of resolution actions taken in the jurisdiction in which the affected financial institution is established.[97]

Solution in EU/EEA Jurisdictions

The EU has chosen the established path of minimum harmonization and Europe-wide application of home country legislation by issuing a Directive on Resolution Frameworks[98] (BRRD) which has to be transformed into national legislation by the EU and EEA Member States. The tool of minimum harmonization has proved to be very successful in creating the Single Market in the financial services area. The BRRD had to be implemented by EU and EEA governments to come into force on the1st of January, 2015. National Legislators have to make sure that a minimum set of resolution tools is in place and that related statutory powers of the financial institutions' home country regulations are effective throughout the EU/EEA.

The BRRD applies to EU incorporated credit institutions and investment firms, their EU incorporated holding companies and their EU subsidiaries, including non-EU branches of EU incorporated institutions but excludes non-EU incorporated institutions and their EU branches. Resolution tools under the BRRD, in particular Bail-In of financial institutions' liabilities, Write down and Conversion powers have to be effective Europe-wide in respect of all liabilities under a document established from the 1st of January 2016 and governed by respective law, regardless of the terms of that document. The following exceptions to the Bail-In requirement are applied:

- Secured liabilities;
- Client money and fiduciary relationships separated from the financial institution's assets in ways which are insolvency-proof;
- Certain short-term liabilities to financial institutions;
- Certain short-term liabilities to settlement systems;

[97] FSB, Principles for Cross-border Effectiveness of Resolution Actions, 3rd Nov. 2015.
[98] Directive 2014/59 EU

- Deposits covered by a deposit guarantee scheme;
- Deposits from private individuals or SME companies;
- Liabilities for contributions to a deposit guarantee scheme;
- Certain liabilities to employees;
- Certain liabilities to tax or social security authorities;
- Certain liabilities for the provision of goods and services which are critical to the daily functioning of the financial institution's operations.

Due to transformation of the BRRD into national law, exercises of Write-Down and Conversion Powers will be effective in respect of any liabilities under a document governed by the law of an EU/EEA country. However, as the FSB rightly stated, such effectiveness is at least doubtful in the case of an EU/EEA financial institution's liabilities under a document governed by the law of a non-EU/EEA country. The EU has solved the problem by obliging EEA financial institutions to include a Bail-In clause in certain of these documents. The Bail-In clause introduced by Art. 55 of the BRRD has to require the EU/EEA financial institution's counterparties to agree that the institution's liabilities under that document are subject to the Bail-In or Conversion request by the institution's regulator. The scope of application of Art. 55 BRRD is very wide and, according to current interpretation practices of leading counsels worldwide that are adopting conservative approaches to compliance, involves any potential contractual or non-contractual liability including ancillary claims such as confidentiality obligations. However, Art. 55 BRRD does not provide for any retro-active effect (which could be challenged under the principles of national constitutional or administrative laws anyway). Rather, the Art. 55 requirement will be triggered by any of the following events:

- an EU/EEA financial institution becomes a party to a document from 1st of January 2016;
- material amendment to an existing document from 1st of January 2016;
- new liabilities arising under an existing document from 1st of January 2016.

Although the use of Art. 55 clauses is already mandatory since 1st of January 2016, the respective draft EU Regulatory Technical Standards (RTS) have not yet been finalized by the European Banking Authority (EBA).[99]

A couple of industry associations have published or are working on standard terms:

- The Assoc. for Financial Markets in Europe (AFME): Model Clause re. Art. 55 for issuers of debt securities established in the UK but governed by NY law; additional versions for capital market transactions will follow;
- International Capital Markets Assoc. (ICMA);
- Loan Market Assoc. (LMA) and Loan Syndications and Trading Assoc. (LSTA) for European and US style loan documentations.

It has to be noted that the BRRD regime for conflicting Third Country laws is by no means complete. As the BRRD has been established following the principle of minimum harmonization, Member Countries can introduce stricter and more comprehensive regimes. For example, there is no BRRD requirement for clauses recognizing suspension

[99] Final EBA Report on RTS: EBA/RTS/2015/06.

or disapplication of contractual termination rights or rights to enforce a security interest (so-called "Stays"). Both Germany and the UK have included related contractual requirements for financial contracts under third country jurisdictions. There is still much room for coordination by FSB member countries.

F. Asia (Alan Ewins)

It would be a serious mistake to assume that resolution and recovery is essentially relevant only for banks or only mainly relevant in the US and the EU. Securities markets would be significantly affected by the resolution of banking groups containing securities businesses

The Financial Stability Board (FSB) framework is on the face of it an expression of hope that the resolution and recovery machinery created will at the very least smooth the process of resolution as and when needed. The new regimes target the major global institutions to ensure as far as possible that they have plans in place to head off delay, confusion and over-complexity (by improving their resolvability). The underlying intention is for mechanisms to be in place to allow regulators to take strong action at a time of crisis to revive institutions where they have reached non-viability (and it is not appropriate for them simply to be put into insolvency). All of these regimes need to work together as seamlessly as possible cross-border. The level of necessary trust in relation to the international dimension is a primary obstacle in relation to the smooth operation of resolution regimes.

Asia suffered greatly during the Asian Financial Crisis in the late 1990s. It is fair to say that Asian jurisdictions learned from that crisis, modified their regulatory regimes and consequently their institutions fared better in the recent Global Financial Crisis (GFC) than their US and EU counterparts. Banks in Asia did not fold in the same way as in "First World" countries, particularly given the increased strength and stability of the banks in Asia which had evolved from the earlier turmoil under tightened requirements.

However, following the GFC, the international moves described above and degree of consensus developed with a view to embedding in domestic legislation powers designed to be used in times of impending crisis, or actual crisis, to resolve systemically important institutions which were in danger of failing.

Those powers are intended to allow relevant regulators (so-called "resolution authorities") essentially to take swift stock of a troubled institution and take strong action. including over-riding shareholders' property rights, to transfer the institution's assets to third party purchasers, "store" parts of its business in asset managers or "bridge" (holding) institutions, and otherwise allow steps to be taken to "save" vulnerable institutions in the sense of allowing critical functions and services, such as deposit taking, payment systems and so on, to be maintained during the crisis. The underpinning aims are to allow covered institutions to fail "safely", without major systemic disruption while at the same time as far as possible protecting public funds, restoring or maintaining critical market functions and limiting "moral hazard" (that is, avoiding institutions from complacently assuming that there will be a "bail out" using public funds of their liabilities and obligations) – the key resolution objectives are maintaining stability, protection of creditors to no less extent than they would be protected under a winding up, protecting client assets of

the in-scope financial institution to an extent no less than under a winding up and (subject to those objectives) containing costs and protecting public money.

The resolution concept is designed to act as an alternative to liquidation where the cost, speed and ultimate outcomes of the blunt tool of insolvency would not suffice to achieve those objectives. Essentially, insolvency is "personal" to an institution, whereas resolution is intended to consider the wider safety and continuity of the market.

There has been a temptation in Asia to view these issues overall as principally amounting in a practical sense to "First World" issues. This is subject to the desire on the part of the major Asian jurisdictions to be viewed as being an integral part of world markets. That is particularly the case for places such as Hong Kong and Singapore, which are viewed, individually, as major international financial centers. China continues to assess its own position in relation to recovery and resolution, in the light of international developments. There is accordingly, and naturally depending on the viewpoint of the observer, good citizenship, herd mentality or lip service in respect of the adoption of resolution regimes in Asia.

The FSB Key Attributes act as a blueprint for regimes internationally, and although the target date of the end of 2015 for the implementation of regimes has been missed, significant steps have been taken by many jurisdictions to put such a regime in place, in keeping with the expectations set out in the Key Attributes, with a view to fully functioning regimes working as soon as possible. The relative calm after the GFC has given regulators some breathing space in which to develop suitable regimes. President John F. Kennedy, in his State of the Union address in January 1962, said that 'The time to repair the roof is when the sun is shining.' Or in this case, at least when there have been no further catastrophic storms to date.

Australia, Singapore, Korea and Australia are among the jurisdictions which have already adopted special resolution regimes, broadly along the FSB lines. Hong Kong is discussed in detail below. Hong Kong is one of the G20 members based in Asia (together with Australia, China, India, Indonesia, Japan and South Korea) .

Total Loss-Absorbing Capacity (TLAC) is a related concept that is designed to bolster the capital of institutions by requiring capital to be held and readily available to enable failing institutions to withstand shocks. That involves allowing for financial support to be distributed within a multi-national group to where it is needed – this is crucial for ensuring the overall credibility of cross-border responses to a crisis. TLAC provisions will be set out in subsidiary legislation in Hong Kong in due course, to conform with the recent FSB publication of the final TLAC standard for globally systemically important banks.

Relevance of resolution regimes to Asian securities markets

In this section, we will consider developments in Hong Kong, a key international financial center in Asia, which nicely demonstrates certain issues in relation to the evolution of an international resolution environment. Hong Kong has been a later mover in this area. Accordingly, it has had the benefit of taking into account various developments in resolution regimes as part of the evolution of its incoming legislation, rules and guidance, hence its usefulness as a case study and proxy.

The Hong Kong banking, securities and futures and insurance regulators jointly published, together with the Financial Services and Treasury Bureau (i.e. the Hong Kong Government), a series of consultation papers and consultation conclusions on recovery and resolution. There is clear evidence in support of the assertion that banks are viewed as the primary targets for the incoming regime, where the Hong Kong Monetary Authority (HKMA) has taken the lead in pursuing the implementation of a new resolution and recovery regime. There has been no substantive follow-up from the securities and futures regulator, the Securities and Futures Commission (SFC), which has adopted more of a monitoring stance in relation to the new regime. Having said that, the SFC is an active member of the IOSCO Task Force on Unregulated Fund Entities and on Supervisory Cooperation, and the IOSCO Implementation Task Force, reviewing the methodology for assessing implementation of IOSCO objectives and principles of securities regulation, and of the Working Group on Systemic Risk; the HKMA is a member of the FSB; the Hong Kong Insurance Authority is a member of IAIS.

The publication of Hong Kong's Financial Institutions (Resolution) Bill in November 2015 (Bill) has crystallised the series of consultations, consultation responses and "soft" industry consultations that have been published and taken place in Hong Kong. The Bill attempts – for the first time in Hong Kong – to place recovery and resolution issues into a legislative framework.. The Bill is currently progressing through the Hong Kong Legislative Counsel legislation process, with a view to implementation later in 2016. It covers the creation of resolution authorities (to manage resolution), pre-resolution requirements (in relation to ensuring resolvability of institutions), sets out the resolution objectives of the regime, sets out the stabilisation options available to a resolution authority and includes a range of important provisions concerning controls such as remuneration clawback and various checks and balances for the authorities to observe.

Notwithstanding the center of gravity of resolution and recovery measures is the banking sector, it is important to consider the potential effects on the securities industry of the inclusion of securities entities.

In terms of *scope*, in addition to banks and insurers, the following types of entity are to be included under the regime:

- Licensed broker-dealers, asset managers and other securities firms are in-scope where they (not being a bank or an insurer) stand alone as a global systemically important financial institution
- Licensed broker-dealers, asset managers (considered in more detail below as a specific sub-topic) and other securities firms are in-scope where they are a branch or subsidiary of, or a subsidiary or holding company of, a global systemically important bank or global systemically important insurer
- Entities that are "primarily engaged in the provision of financial services or the conduct of financial activities" are in-scope when designated as such by the Hong Kong Financial Secretary
- Financial markets infrastructures (FMI) – clearing houses, payment systems, central securities depositaries, securities settlement systems, central counterparties and trade repositories – are in-scope; the above discussion on resilience, recovery and resolution of CCPs is pertinent here

- A recognized stock exchange (the Hong Kong Stock Exchange) can be designated as in-scope by the Hong Kong Financial Secretary on the recommendation of the SFC
- Affiliated operational entities (AOE), which are corporates that are members of an in-scope financial institution's group and that provide services (directly or indirectly) to the financial institution, are themselves in-scope – AOEs essentially cover outsourcees within the group, and they are themselves directly subject to the resolution powers of the relevant resolution authorities to protect critical services that are needed for the institution's operations outsourced to them
- Holding companies of in-scope financial institutions are themselves in-scope

Note: A useful point to bear in mind is that securities firms within a group headed by a globally systemically important bank or insurer, even where those securities firms are unregulated (where they operate outside the defined limits of the licensing regime, including under applicable exemptions), would potentially still be affected by resolution, where the resolution authority for example acted to sell off the bank's or insurer's assets, including the securities firm, or otherwise used its resolution powers so as to steady the failing group as a whole.

As is evident from the above list, the scope of the regime is designed to encompass globally systemically important securities firms (there are none designated at present), securities firms regardless of their size when they form part of a globally systemically important bank or insurer, or a branch of such a bank or insurer in Hong Kong, and any other entity which might be, or be part of a sector constituting, a potential global risk which has not to date been identified as such. That could for example include hedge funds or groups of funds which have not as yet been treated as globally systemically important, but may develop in a manner by which the international view of them may change and require them to be so designated.

Groups of hedge funds could ultimately prove to be large enough to create systemic instability and therefore be included as in-scope entities, but the likelihood at present is that they would not individually be of sufficient size to do so. A "collective" grouping of unaffiliated funds may accordingly at some stage fall under the jurisdiction of resolution authorities if that "bundling" approach were adopted in the future. That would have profound implications, since regulators, in the form of resolution authorities, may then be able to directly affect and direct the disposition of the assets and structure of those entities, subject to powers significantly more far-reaching than those currently available under licensing, prudential and enforcement rules. That would amount to an additional step-change in the way in which securities markets are currently governed.

FMI are automatically treated as caught, and a "wait and see" attitude has been adopted for exchanges given that the more likely source of substantive problems is the failure or impending failure of a clearing house. The counter-argument in that regard is of course that any troubled (or rumored to be troubled) stock or other exchange for whatever reason is likely to create shock-waves of instability within the jurisdiction in which it operates, and perhaps further afield .

AOE and holding companies are drawn into the scope of the regime to ensure that resolution powers and actions can be flexibly applied to groups, including groups containing securities firms, to ensure that the response of the regulators can be fine-tuned to achieve

the overall aim of rescuing an in-scope financial institution or institutions without allowing the practicalities of continuity (outsourcing) or group structure (holding companies) to act as a barrier to resolution.

The need for not just the flexibility of inclusion of particular entities (exchanges), and as yet unspecified entities or collections of entities which may in due course have a significant adverse effect on the global or local markets, as well as affiliated entities, is clear, but just as clear is the need for those designations to be enabled by the resolution regime, so as to ensure that slow-moving legislative machinery would not de-rail a regime which is fundamentally required to be able to be implemented swiftly and decisively.

The Hong Kong proposition is accordingly a practical, risk-based, assessment in relation to the overall initial scope of the regime: focus on the banks (and insurers), but ensure that the securities firms are within the scope of the regime to ensure that they do not unwittingly skew or unbalance the authorities' powers and options under the resolution regime. It is of critical importance that a seamless range of resolution options is available to the authorities, given that the global financial institutions are typically made up of a mixture of banking/insurance and securities elements. Not securing powers over the securities arms of the banks or insurers would potentially make the resolution process considerably harder to manage.

As a result, securities firms, such as broker-dealers and asset managers, whether or not they are in scope of the resolution regime, can be fundamentally affected by the application of resolution powers to their group.

There have been moves to determine the role of asset managers in the context of resolution regimes, initiated by the FSB and IOSCO, which had carried out early work to determine the level of systemic importance of major asset managers. The process had been a consultation exercise on whether non-bank non-insurer (NBNI) financial institutions such as asset managers (and pension funds) are systemically important to financial markets. That exercise has been halted following the pronouncements of IOSCO on the matter.

Instead, work is now progressing on conducting a full review of asset managers in a global financial context. Following that exercise, there could then be a more measured approach to determining any specific asset managers or groups of asset managers and related entities which may be of systemic importance and therefore require further regulation under the resolution framework.

We agree that this is the appropriate method to approach this issue, rather than taking a more narrow and focused view at the outset.

It is important to establish the precise universe of "asset managers" for the purposes of such study (for these purposes, references to *asset managers* mean fund managers (including self-managed funds, hedge fund managers and fund management companies), whether regulated or unregulated. In addition, there is a need to identify those aspects of the relevant businesses which could have a systemic impact and the most appropriate – targeted – ways by which to address those issues.

That can then be incorporated into the overall matrix of how the global financial markets operate and are potentially at risk in relation to crises from the activities of asset managers (including their possible contribution to exacerbating crises).

The main issue which needs to be borne in mind is that asset managers act as agents of their clients, and accordingly act as intermediaries in the markets for channelling capital as between investors and investee assets. This means that care needs to be taken before assuming that even very large asset managers could create a systemic global threat in the event of a crisis affecting them individually, hence the brake having been put on the FSB initiative.

In our view, the issue relates very much to asset managers' status as effectively a potential catalyst or accelerant in a crisis (rather than the entity in crisis), as a result of triggering action in other parts of the market and/or being or contributing to concentration risk in the markets generally (the quality, liquidity and spread of their assets held in respect of funds inevitably has a significant bearing on the following)

Borrowing – where the asset manager on behalf of the fund has borrowed in line with its investment objectives/strategy – in a crisis, lenders could recall their loans, thereby potentially prompting fire sales of fund assets into the market.

Derivatives transactions – where the asset manager on behalf of the fund has entered into derivatives transactions in line with its investment objectives/strategy – in a crisis in respect of a counterparty, normally the asset manager on behalf of the fund would consider its ability to trigger close-out clauses in the derivatives documentation, but this would be subject to any temporary stay on such behaviour under the relevant legislation. Accordingly, there would be unlikely to be significant impact on the part of the asset manager during the course of a resolution weekend.

Stock borrowing/lending – where the asset manager on behalf of the fund has borrowed stock in line with its investment objectives/strategy – in a crisis, lenders could recall the borrowed stock, thereby potentially prompting fire sales of fund assets into the market.

Sales of fund assets – where the asset manager on behalf of the fund decides to sell fund assets as a protective measure for the fund in a time of crisis, thereby potentially feeding the crisis by way of a fire sale of assets.

Risk disclosure – where clients of the asset manager recognise the inherent risks of a fund concentrated in a particular market or product and, in a crisis, act, by way of redemption application, to protect their position, again potentially worsening fire sale conditions.

Redemption management – where a crisis precipitates significant levels of redemptions by investors, potentially impacting on the ability of the asset manager to satisfy all investor requirements and either leading to a closure of the redemption "gate" insofar as permissible, or fire sale activity in respect of the fund assets

Proprietary trading – we would not expect this to add substantially to the development of a crisis

There could accordingly be a potentially significant overall impact by asset managers in the evolution of a crisis, principally in the context of the knock-on effects of activities and functions directly triggered in the event of a crisis.

We consider that, subject to the outcome of the ongoing IOSCO study, the likelihood is that individual asset managers should not necessarily be viewed as globally systemically important, but their ordinary course responses to a crisis could worsen the effects of a crisis.

Coupled with considerations of geographical spread and concentration of asset manager business amongst the main asset managers, our expectation is that there is the potential for groups of fund managers, not necessarily affiliated and not necessarily members of globally systemically important groups, could have a "herd" effect on the markets in the context of a crisis. As a result, it may prove to be appropriate to identify on an ongoing basis the networks of asset managers concentrated in particular asset classes and particular geographies/markets, since certain "clusters" of such asset managers may amount to a collective systemically important group that goes significantly beyond the consideration of individual legal entities.

Therein lies a major obstacle to assessing such "clusters" and their potential impact on global markets: sufficiently up to date information on global asset management markets and players to allow rigorous examination of their activity empirically, to enable a proper assessment of their potential role as globally systemically important entities. We do not consider that such "clusters" would be capable of clear identification and regulation as the markets currently stand, given the relative paucity of relevant information. Our expectation is that local resolution authorities would need to keep track of major asset management groups in their jurisdiction and, for example in the case of Hong Kong, consider whether any such "clusters" relevant to the jurisdiction warrant being separately classified under the "wild card" provision as in-scope financial institutions.

Ultimately, we would not expect asset managers to be viewed as globally systemically important in their own right, rather that they may be viewed as secondary sources of systemic risk based on their activities and functions in the event of a crisis of a globally systemically important third party. We consider the identification of globally systemically important "clusters" of asset managers and funds to be a potentially fruitful way forward in terms of the identification of relevant components of future crises, and worth exploring further.

Resolvability is a key element of recovery and resolution, being the extent to which an in scope entity in crisis can be quickly and efficiently scrutinised to determine whether it should be allowed to fail by leaving the entity to the operation of the relevant insolvency regime, or whether it is more appropriate to bring to bear the resolution regime. Where resolution is viewed as the most suitable approach, there is the need for the structure and operations of the institution to have been analysed in an earlier, non-stressed, situation so as to have arrived at an understanding of how an entity is organised: its group members, governance, service providers (including material outsourcees) and other inter-dependencies, and otherwise. This is so as to have enabled a plan to be drawn up to map the most appropriate ways to achieve a safe resolution of the entity.

Resolution planning is essential to the success of resolution, given the potential for rushed and potentially bad decisions to be made without that having been done. Typically, a recovery plan is written, confirming the major elements of the business and assets, and the expectations as to the most likely routes that could be followed when the entity's materially adverse financial position or other factors dictate the need for action to stabilise the entity (without the need for resolution or insolvency). The exercise necessary to create such a rescue programme (which itself needs to have sufficient flexibility to be built in to avoid unwelcome surprises in a crisis) is then used as an indicator for the resolution authorities to be able to determine, where recovery is not enough and the entity is on the brink of failure, how the resolution powers can be suitably exercised over the institution to achieve appropriate resolution. There is in practice a significant overlap between the exercise of creating a recovery plan and a resolution strategy (in Hong Kong, the larger banks have prepared recovery plans and resolution strategies), and given that their group structure typically includes securities firms, the exercise has potentially far-reaching implications for those securities firms drawn into the scope of the regime.

As and when a crisis appears imminent, the regimes are designed to filter and identify those situations where decisive action is required and insolvency would not deliver a sufficiently swift and effective outcome (in reality, insolvency is unlikely to suit many of the larger major institutions given their potential to result in "runs on the market" and typically the cumbersome nature of insolvency processes).

Resolution can only be triggered by a resolution authority where it is satisfied that the *relevant trigger conditions* are met in relation to an in-scope financial institution, which could include broker-dealers, asset managers, etc. as described above. The conditions are that:

- The financial institution has ceased or is likely to cease to be viable (Viability Condition),
- There is no reasonable prospect that private sector action, outside of resolution, would result in the financial institution again becoming viable within a reasonable period (Prospects Condition), and
- The non-viability poses risks to the stability and effective working of the financial system of Hong Kong, including to the continued performance of critical financial functions (being activities carried on by the institution which – if discontinued – would amongst other things give rise to "contagion" within the Hong Kong financial system) – provided that initiation of resolution would avoid or mitigate those risks (Stability Condition).

The resolution authority, in determining whether it is satisfied that all the conditions have been met, is entitled (not bound) to take into account the effect of resolution on other group members and indeed on the stability and effective working of any offshore jurisdiction.

This means that for regulated (in Hong Kong) securities firms which form part of a globally systemically important financial institution, they will potentially be subject to having all or part of their business shut down, hived off, or have the scope of the products

and services that they provide narrowed, insofar as that would achieve the resolution objectives.

What this means is that securities firms within a broader financial services group need to be conscious of such possible outcomes and plan accordingly in respect of their longer term business plans in an appropriate joined-up manner with the rest of the group. This is of particular importance for example in relation to the inter-connectedness of the provision of functions and services within the group, to ensure that there are no material barriers to resolution.

It is noteworthy that, short of the initiation of resolution itself, the Hong Kong resolution authority would have the power to give directions to an in-scope financial institution where the Viability Condition and the Stability Condition are met, but not *the Prospects Condition, thereby giving a degree of greater flexibility to the authorities. The available directions can be given to either the institution itself (which would include regulated securities firms who are members of the group) or related persons (group companies, directors of the institution or any group company) and the chief executive officer (CEO) or deputy CEO of any of them. Under the Hong Kong regime, the directions can be given to offshore persons who are within the scope of this power, as well as onshore, making for difficult enforcement issues. The directions can be made "in relation to the affairs, business or property in Hong Kong" of an in-scope institution or group company.*

The Bill contemplates, in line with the FSB framework, the following *resolution tools*:

- Transfer to a commercial purchaser
- Transfer to a bridge institution
- Transfer to an asset management vehicle
- Bail-in (beyond the scope of this Report)
- Transfer to a temporary public ownership company (i.e. a government vehicle) (TPO) (beyond the scope of this Report)

Transfers to a commercial purchaser are effected by the issue of a "securities transfer instrument" and/or a "property transfer instrument". The transfer takes effect (subject to any applicable condition imposed in relation to a property transfer instrument) despite any restriction, including a restriction requiring the sanction of the Court, or the approval of a regulatory body, for a transfer) arising under contract or legislation or in any other way. Securities transfer instruments are freed from any trust, liability or other encumbrance, and are able to extinguish rights to acquire securities (e.g. to cancel option rights). Property transfer instruments are similarly wide-ranging in effect. Accordingly, by virtue of these provisions, the practical effect is that the ownership and rights of the in-scope entity (either directly in the case of a licensed broker-dealer, or indirectly and structurally where an instrument is issued in respect of a holding bank that is aimed at transferring all or part of the securities business), can be fundamentally, and on the face of it expeditiously, clarified in the pursuit of a rapid and decisive stabilisation of the group.

It should be noted that the built-in exclusion of any approval requirement on the part of a regulatory authority – in the case of a securities firm, the SFC in the context in particular of the SFC's fit and proper suitability criteria – removes a highly sensitive obstacle to this resolution tool. It is highly likely in any event that, given the nature

of the in-scope institutions, commercial purchasers would be selected on the basis of their existing licence/registration and likely ability to absorb the relevant firm or business without exerting strain on their business model and infrastructure. That of course begs the question of how that would in practice be evaluated and would require swift action over the resolution weekend.

Similar considerations are relevant where there is a *transfer to a bridge institution or asset management vehicle*, designed to act as a "holding area" for assets. An additional protection measure for the resolution process is that the SFC can defer the requirements for a licence or registration to be put in place for the relevant entity, to avoid the need for a time-consuming vetting process in the context of the resolution exercise.

The overall result would be that any securities firm forming part of the in-scope institution's group would be liable to change of ownership at short notice, and either become part of the purchaser's group (with all the integration issues that would entail) or be held by a bridge institution or asset management vehicle in a degree of limbo prior to either sell-off or break-up. Again, this demonstrates the need for a clear resolution plan.

As a result of the above, there is a clear potential for securities businesses to be significantly affected by resolution action, either in relation to parent banks or insurers, or where the regulated securities firm is either non-viable or in danger of becoming so, cannot be privately rescued, and for example is seen to pose a systemic risk to Hong Kong if it fails (and insolvency would not adequately address the problem). In a market such as Hong Kong, where market intelligence is key, any potential failure of a "brand name" (i.e. major) securities firm within a globally significant group, could be seen to potentially create a panic within the Hong Kong market if not stabilized. This gives significant latitude to the resolution authorities to safeguard the market, and creates a very broad scope for inclusion of entities within the resolution regime. The collapse of a broker-dealer, even if not itself globally systemically important, could trigger resolution if that were viewed as the best way to stave off a market run. That could also have cross-border consequences – see below.

The Bill provides for *temporary stays*, i.e. suspension, in respect of obligations to make payment or delivery under a contract to which an in-scope financial institution, or its subsidiary, is a party. Where the holding company of the in-scope financial institution is the entity in resolution, then contracts to which the holding company is a party, as well as those to which the institution and/or subsidiaries are a party, are also covered. The resolution authority is required to consider the impact of any such suspension on the orderly functioning of the Hong Kong financial markets before exercising its suspension power. Any suspension is for a specified period, ending no later than the end of one business day after the suspension is put in place. The purpose of the suspension is to achieve such a "breathing space" for a financial institution over a "resolution weekend" to enable an assessment of its financial position and a reasonable opportunity for the resolution authority to arrive at an appropriate plan to take the institution through resolution.

In Hong Kong, the types of contracts covered by a suspension of payment or delivery would not be restricted to financial contracts, but also to leases, IT contracts and so on which may have trigger clauses on change of control, financial adverse change and so on. The statutory provisions provide a flexible framework for resolution authorities' responses.

The list of excluded obligations, i.e. those which cannot be suspended, include for example a financial institution's obligation in relation to its participation – directly or indirectly – in an FMI. That is a sensible exclusion to ensure that CCPs are not prevented from ensuring their smooth operation through margin calls and the like so as to avoid contagion risk.

In addition, the right of counterparties to put into effect any termination/close-out rights they may have under a contract, such as under an ISDA Master Agreement or equivalent derivatives contract, can be suspended by the resolution authority. Such rights would normally be incorporated as a matter of course, in an expanded manner to take into account resolution regimes. The "freezing" of those contracts under such a suspension provides the opportunity to take resolution action over the in-scope institution's assets and liabilities without the need to bring into the equation immediately the typically very wide range of counterparties standing ready to make claims under contracts which would complicate the already highly complex resolution exercise. The implications for the Hong Kong financial markets again needs to be considered before effecting a suspension, and the suspension would last only for a maximum specified period, as for payment and delivery obligations. Financial institutions would normally include provisions in their contracts to re-instate the close-out/termination rights as soon as the suspension ceases, subject to the measures taken during the suspension period by the resolution authority.

The execution by 21 globally systemically important banks of a revised Resolution Stay Protocol has resulted in the amendment of the ISDA Master Agreement for over-the-counter bilateral derivatives to improve the effectiveness of cross-border resolution actions. The Protocol also covers securities financing transaction master agreements. Under the Protocol, there is agreement by the counterparties to cross-border enforceability of existing statutory stays on resolution-related early termination in OTC bilateral derivatives contracts and securities financing transactions. This is intended to facilitate orderly resolution of a globally systemically important bank in a similar way for both domestic and foreign counterparties, while aiding continuity of critical functions and minimalizing wider market impact. The intention is to extend further such contractual recognition beyond globally systemically important banks. This is in line with the FSB Key Attributes. This development dove-tails with the statutory changes in an effort to minimise conflicts of laws issues cross-border.

As a result of the above, the international securities markets (derivatives) are significantly impacted by the incoming regimes. The material interference with counterparty rights is a ground-breaking change in the markets.

Cross-border issues are a key element of the overall picture in relation to recovery and resolution. In Hong Kong, the Bill provides for the operation of the resolution regime in terms of "Non-Hong Kong Resolution Action", being an action under the law of a non-Hong Kong jurisdiction to manage the failure or likely failure of a non-Hong Kong financial institution or non-Hong Kong group company,

- The anticipated results of which are, in relation to such institution or group company, broadly comparable to results that could have been anticipated from the application of a stabilization option (i.e. resolution powers) to an entity in Hong Kong; and

- The objectives of which are, in relation to that jurisdiction, broadly comparable to the resolution objectives as they apply in relation to Hong Kong.

The Hong Kong resolution authority is entitled to recognize all or only part of the off-shore action, after having first consulted the Hong Kong Financial Secretary. Recognition cannot be given where the resolution authority is of the opinion that:

- Recognition would have an adverse effect on financial stability in Hong Kong;
- Recognition would not deliver outcomes that are consistent with the (Hong Kong) resolution objectives; or
- Recognition would disadvantage Hong Kong creditors or Hong Kong shareholders (or both) relative to other creditors or shareholders of the entity in relation to which the non-Hong Kong resolution action has been taken.

The resolution authority is entitled to take into account any fiscal implications for Hong Kong of the making of the instrument.

Where the Hong Kong resolution authority is notified of any non-Hong Kong resolution action being taken, it is entitled to support that action by exercising its powers under the Hong Kong regime if it considers that the support would be consistent with the Hong Kong resolution objectives.

The above powers are broadly consistent with the FSB Key Attributes, but raise difficult questions as regards the potential for true harmonization of international action in the event of a crisis.

29 out of the 30 currently designated G-SIBs (i.e. globally systemically important banks) have operations in Hong Kong, and the predominant model is that of operating through a branch structure and with accompanying securities firms in their group, such as brokers and asset managers. What that means is that Hong Kong is for all practical purposes a "buyer" of resolution action cross-border. (Restricting the regime to on-shore entities would emasculate the regime, and not be in line with the over-arching FSB concept of seamless cross-border cooperation in times of crisis.)

Looking more closely at the particular characteristics of the incoming Hong Kong regime, as it currently stands, and as is broadly reflected across a number of the important Asian financial centers, the FSB Key Attributes are in many respects observed, but in Hong Kong's case the structural nature of its markets (i.e. branch-based for G-SIBs) changes the center of gravity of the regime.

Given the emphasis on global systemic importance, the head offices of the affected institutions are offshore Hong Kong, and the inevitable consequence is that resolution action splits into two parts: domestic-specific action to protect the Hong Kong market in relation to the potential or actual failure of a G-SIB branch or its subsidiaries (including securities firms), particularly where such failure would have an adverse material effect on the stability of the Hong Kong markets. That would be where say a "brand name" securities firm suffered from a major set-back (litigation, regulatory investigation or otherwise) which adversely affected its viability and therefore, through a potential domino effect, could create panic in the Hong Kong market. In that situation, the Hong Kong resolution

authority could step in to trigger resolution of the securities firm as a subsidiary of the G-SIB, regardless of the ongoing stability and viability of the G-SIB parent. That could create cross-border issues for the Hong Kong resolution authority in terms of liaising with and reaching agreement on the planned action (which could itself potentially have knock-on effect for the parent).

More importantly, the Hong Kong resolution authority, when notified by an offshore resolution authority of a G-SIB in difficulties, would need to make the relevant decisions to determine Hong Kong's stance in relation to that entity. The various decisions, which are hard-wired into the regime, arguably act as – depending on the observer's perspective – a check and balance or an escape clause for Hong Kong. If the offshore resolution action would not be likely to have a material adverse effect on the Hong Kong markets, then it should presumably be a straightforward decision to support the action.

The more difficult situation is where the offshore G-SIB's position is such that its failure could damage Hong Kong. That would be the time that the international cooperation regime is truly stress-tested.

In those circumstances, the legal position arguably becomes a means of potentially acting as a self-protection mechanism for Hong Kong, bearing in mind the list of relevant considerations/issues. If cooperation with and support to the offshore resolution authority would potentially:

- Harm Hong Kong market stability
- Disadvantage Hong Kong creditors more than under a winding up
- Put at risk client assets of the in-scope financial institution to a greater extent than under a winding up
- Subject to the above three bullets, generate significant resolution costs and fiscal costs for Hong Kong and put at risk public money that would create substantial tension in relation to Hong Kong's part in that resolution exercise

Would Hong Kong simply recognize and/or support the offshore resolution action and take steps to resolve the relevant Hong Kong element of the G-SIB? Would it seek to negotiate with the offshore resolution authority (or college of resolution authorities) in respect of the action to be taken to dampen adverse effects on Hong Kong (which would necessarily need to be carried out within a very short timeframe), or would it exercise its prerogative (supported by carve-outs in the FSB framework) to refuse to act so as to protect its local interests? While the political issues in Hong Kong are in some ways less directive than in fully democratic systems, there would be extreme pressure placed on the resolution authority in this type of scenario given the potential public outcry from potentially being seen to fall in line with foreign regulators. If Hong Kong failed to recognize/support a resolution exercise then that could of course lead to serious adverse consequences for Hong Kong's status as a major financial center if it were seen to have reneged on its international commitments. The required consultation with the Hong Kong Financial Secretary would bring the political issue into sharp focus, and the time pressures created by a "resolution weekend" would exacerbate the situation.

The legal position would arguably not be sufficiently clear in such a situation to cater for the particular circumstances. Arguably, the resolution regime would effectively amount

to a framework to assist relevant resolution authorities, in Hong Kong and offshore, to act within wide and flexible parameters rather than within strict legal boundaries.

Recognition or support of a "non-Hong Kong resolution action" is not a bright line test.

Non-Hong Kong resolution action is where a non-Hong Kong jurisdiction notifies the Hong Kong resolution authority that it has taken action under its laws "to manage the failure or likely failure of a non-Hong Kong financial institution or non-Hong Kong group company". Presumably a clear notification to that effect is all that is required.

However, there can be no recognition or support *unless* the offshore action taken is expected to have results "broadly comparable" to results that could have ben anticipated from the application of a stabilization option (i.e. resolution powers) to an entity in Hong Kong. How would that be determined? There would need to be sufficiently clear guidance to jurisdictions as to the equivalency of various types of resolution action. We anticipate that a matrix of such equivalencies would be a useful underpinning for the swift and secure satisfaction of this requirement.

Also, there can be no recognition or support unless the "objectives" of the offshore resolution action are, in relation to that jurisdiction, "broadly comparable" to the resolution objectives as they apply in relation to Hong Kong. This requires the Hong Kong resolution authority to take a view as to the "objectives" underlying the offshore resolution action. Clearly, this is subject to significant subjective interpretation.

Accordingly, the starting point for recognition or support is, arguably, effectively a subjective – and inevitably politically influenced – decision making process rather than a rigorous legal process, notwithstanding the trappings of international consensus and local supporting legislation. The key to resolution of securities firms within systemically important banking and insurance groups can therefore be seen as the subject of mutual ongoing discussion and communication among relevant resolution authorities and governments, with a view to the creation of ongoing trust among resolution authorities and the embedding of that trust to stand as firmly as possible in the event of future crises, relying on the legislative infrastructure to articulate the crucial areas of pre-agreement in as firm a manner as possible, given the substantial complexities and inherent unpredictability of such crises.

3. EU Capital Markets Union –analysis of the proposals and in particular the perceived potential unintended consequences, together with commentary from a broader international perspective (Dr. Klaus Follak)

The EU Capital Markets Union

The EU Capital Markets Union is a project to help complete a Single Market for capital with a focus on increasing and diversifying the funding sources for business and long-term projects.[100] It started in February 2015 with an EU Commission consultation on related measures[101] and covers the following areas:

[100] For an overview see EU Commission, Press Release (IP/15/5731), 30th September 2015, and the Green Paper „Building a Capital Markets Union"- COM (2015) 63 final (18.2.2015).
[101] IPI15/4433; MEMO/15/4434

- Alternative sources of finance complementary to bank financing including capital markets such as venture capital, crowdfunding,[102] and asset management institutions;
- Supporting SMEs and start-ups;
- Fostering infrastructure projects;
- Removing barriers to cross-border investments.

A first set of initiatives is already under way, comprising:

- Re-starting securitization: The Commission is working on a regulatory framework "securitization light" to facilitate and simplify transparent and standardized transactions, including less burdensome capital requirements.
- Solvency II treatment for insurance companies involved in infrastructure projects: Based on the advice of the European Insurance and Occupational Pensions Authority (EIOPA), a separate infrastructure asset class is created to reduce inadequate capital requirements for insurers' debt and equity investments in qualifying infrastructure projects.
- Public consultation on venture capital: the Commission is considering to amend the EuVECA and EuSEF Regulations on collective investment funds in order to attract private investors in SMEs. The consultation period ended on 6th January, 2015.
- Public consultation on covered bonds: the Commission is considering to harmonize the existing national frameworks. The consultation period ended on 6th January, 2015.
- Public consultation on the cumulative impact of financial legislation: the Commission is analyzing related negative impacts on long-term investments and growth.

Part II – Focus on market conduct issues relevant to the international securities industry

1. Market manipulation/fraud/insider trading (Barbara Green)

In its broader sense, bearing in mind the FX and rates scandals and the likely international fall-out, coupled with ever-increasing aggressive enforcement against insider dealing and other fraud/manipulative conduct, is highly topical in terms of cross-border regulator cooperation, etc.

The following is an analysis, using the US as the principal focus, of the increasing importance of enforcement of abusive market behavior as a counterpoint to the vigorous rule-building undertaken by jurisdictions internationally.

U.S. Insider Trading Law 2016: The U.S. Supreme Court Will Weigh In on the Personal Benefit Requirement

Many insider trading cases brought in the U.S., and, in particular, some recent high profile cases arising from investigations in suspected insider trading at hedge funds, involve "tipping" by a company insider. In the typical case, the insider (or "tipper") discloses material nonpublic information about the company in breach of his fiduciary duty to the company's shareholders. The information is disclosed to a friend, family member or other non-insider who then trades in the company's securities ("tippees").[103] Since the 1983

[102] See also MOCOMILA report, part

[103] Insider trading is considered a form of securities fraud prohibited by various antifraud statute and rules in the U.S., most prominently Section 10(b) and Rule 10b-5 under the Securities Exchange Act of 1934.

U.S. Supreme Court decision in *Dirks v. Securities and Exchange Commission,*[104] the test for determining if a company insider has breached his fiduciary duty is "whether the insider personally will benefit, directly or indirectly, from his disclosure."[105] Without the personal benefit to the insider, there is no breach of duty.[106]

In January 2016, the Supreme Court agreed to hear *United States v. Salman*,[107] one of two significant insider trading cases decided by federal appellate courts since late 2014 that addressed the personal benefit requirement. Three months earlier, in October 2015, the Supreme Court had declined to hear *United States* v. *Newman*,[108] the other case that focused on the personal benefit requirement. In *Salman*, the Supreme Court is set to decide whether and what type of a personal benefit must be received by the insider to establish insider trading liability. The Court's decision should establish, or at least clarify, the perimeters for future Government insider trading prosecutions, particularly in tipping cases involving friends and family.

Background: The Dirks Case

In the *Dirks* case, the U.S. Supreme Court rejected the theory advanced by the Securities and Exchange Commission ("SEC") that any non-insider who trades while in possession of inside information violates the antifraud prohibitions of the U.S. federal securities laws.[109] In *Dirks*, the Supreme Court reasoned that a tippee assumes the insider's fiduciary duty owed to the company's shareholders not to trade on material nonpublic information, and the test for tippee liability for insider trading is whether the insider has breached his fiduciary duty by passing on the inside information for his personal benefit, whether direct or indirect, and the tippee knows or should have known of the breach.[110] *Dirks* went on to explain that the direct or indirect personal benefit to the insider from the disclosure to the non-insider could be "a pecuniary gain or a reputational benefit that will translate into future earnings"[111] and that "[t]here may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter…."[112] With respect to friends and family members, *Dirks* further elaborated that "[t]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient."[113]

The Newman *Case*

In *United States* v. *Newman*,[114] the U.S. Court of Appeals for the Second Circuit, reversed the convictions of two hedge fund portfolio managers, Todd Newman of Diamondback Capital Management LLC ("Diamondback") and Anthony Chiasson of Level Global Investors, LLC ("Level Global"), for conspiracy and insider trading and ordered the

[104] 465 U.S.646 (1983).
[105] Id. at 662.
[106] *Id.*
[107] 792 F.3d 1087 (9th Cir. 2015) cert. granted in part, No. 15-628 (U.S. January 19, 2016).
[108] 773 F.3d 438 (2d Cir. 2014).
[109] 465 U.S. at 656-659.
[110] *Id*. at 660-663.
[111] *Id*. at 663.
[112] *Id*. at 663-664.
[113] *Id*. at 664.
[114] 773 F.3d 438 (2d Cir. 2014) cert . denied, 136 S. Ct. 242 (2015).

trial court to dismiss their indictments with prejudice.[115] The Government had provided evidence at the jury trial that a group of financial analysts at various investment firms and hedge funds had received certain quarterly earnings numbers in 2008 for two publicly traded companies, Dell Inc. ("Dell") and NVIDIA Corporation ("NVIDIA"), both directly and at times indirectly from insiders at those companies, before the earnings information had been publicly released. The information was shared among the analysts and ultimately passed on to portfolio managers, including Newman and Chiasson, who then traded in Dell and NVIDIA stock making $4 million and $68 million, respectively for the funds they managed.[116]

In *Newman*, the Second Circuit, relying on the *Dirks* case, held that a tippee must know of the insider's breach of fiduciary duty, which the Court said, requires not only knowledge that the information divulged was confidential, but also that it was disclosed in exchange for a personal benefit.[117] In both the Dell and NVIDIA tipping chains, Newman and Chiasson were three or four steps removed from the company insiders who had divulged the pre-announcement earnings numbers, and the Second Circuit concluded that there was no evidence that Newman and Chiasson as remote tippees knew they were trading on information from insiders or that they knew, or avoided knowing, that the insiders received any benefit in exchange for divulging the information.[118] The Court took notice that neither of the Dell or NVIDIA insiders had been charged with insider trading.[119]

The Second Circuit in *Newman* also found that the evidence was insufficient to prove that the corporate insiders had received any personal benefit in exchange for disclosing the inside information. In the Dell tipping chain, Rob Ray, the insider who worked in Dell's investor relations department shared the nonpublic earnings numbers with Sandy Goyal, a friend who had previously worked at Dell. Goyal had provided some career advice to the Dell insider, such as editing Ray's resume and sending it to a Wall Street recruiter, but was not a "close" friend. The NVIDIA tipping chain began with Chris Choi, an employee in NVIDIA's finance unit, who passed on the nonpublic earnings information to Hyung Lim, a family friend from church. They only occasionally socialized. Based on this thin record, the Court in *Newman* concluded that the Government could not prove receipt of a personal benefit by the "mere fact of a friendship, particularly of a casual or

---

[115] *Id.* at 442-442.

[116] *Id.* at 444.

[117] *Id*. at 446. The Second Circuit held that the jury instructions at trial had been erroneous because they did not instruct the jury that the Government had to prove beyond a reasonable doubt that Newman and Chiasson knew that the tippers disclosed the confidential information in exchange for a personal benefit. *Id.* at 444, 45-451.

[118] *Id*. at 453. The Dell tipping chain began with Rob Ray in Dell's investor relations department who tipped the pre-announcement earnings information to Sandy Goyal, an analyst at Neuberger Berman, who, in turn, provided the information to Jesse Tortora, a Diamondback analyst, who then passed it on to his manager, Newman, and to other analysts, including Spyridon Adondakis, a Level Global analyst, who relayed it to Chiasson. With regard to the NVIDIA tips, the insider, Chris Choi, in NVIDIA's finance unit tipped the pre-announcement earnings information to Hyung Lim, a former technology company executive who Lim knew from church. Lim relayed the information to Danny Kuo, an analyst at Whittier Trust, who, in turn, provided the information to a group of analyst friends, including Tortora and Adondakis, who relayed the information to Newman and Chiasson.

[119] *Id*. at 443-444.

social nature."[120] Instead, the Court noted that, to the extent "a personal benefit may be inferred from a personal relationship between the tipper and tippee, such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature."[121]

Newman's rejection of casual or social relationships as a basis for satisfying the personal benefit requirement and the requirement of a consequential or valuable personal benefit raised the bar for the Government's proof in insider trading prosecutions[122]. The Government's reaction to the *Newman* decision was forceful. In its petition for a rehearing of the *Newman* case by the Second Circuit *en banc*, the Government asserted that the *Newman* decision will "dramatically limit the Government's ability to prosecute some of the most common, culpable, and market-threatening forms of insider trading"[123] and that the opinion's "exchange-based pecuniary limitation on what constitutes a personal benefit … arguably represents one of the most significant developments in insider trading law in a generation.[124] Until there is further word from the Supreme Court, the limitations that the *Newman* case articulated will apply to insider trading cases within the jurisdiction of the Second Circuit, which includes Wall Street.

The Salman *Case*

In *United States v. Salman,*[125] the United States Court of Appeals for the Ninth Circuit affirmed the conviction at a jury trial of Bassam Yacoub Salman for conspiracy and insider trading.[126] Salman was found to have traded on material nonpublic information disclosed by Maher Kara, his future brother-in-law, who worked in Citigroup's healthcare investment banking group. Over time, Maher regularly divulged inside information about transactions of Citigroup clients to Michael Kara, his older brother, who became "fast friends' with Salman. Michael disclosed the inside information to Salman who, in turn, shared the inside information with his sister-in-law and her husband who traded on the information and split the profits with Salman. There was evidence that the Kara and Salman families became close, that Salman knew that Maher was the source of the inside information and additionally that Salman knew that Maher and Michael Kara had a close and mutually beneficial relationship.[127]

On appeal, Salman urged the Ninth Circuit to apply *Newman* to the case and argued that the evidence had been insufficient for a finding that Maher had disclosed the inside

---

[120] *Id*. at 452.
[121] *Id*.
[122] Shortly after rehearing was denied in the *Newman* case, the SEC argued that that *Newman* did not apply to the misappropriation theory of insider trading. The Court rejected that argument and noted that the *Newman* case explicitly addressed this question. *SEC v. Payton*, No. 14 Civ. 4644 (S.D.N.Y. April 5, 2015).
[123] Petition of United States for Rehearing and Rehearing E*n Banc in United States v. Newman* at 3.
[124] Id.at 22-23.
[125] 792 F.3rd 1087 (9th Cir. 2015) cert. granted in part, No. 15-628 (U.S. January 19, 2016). The opinion in the *Salman* case was authored by the Honorable Jed Rakoff, a Senior District Court Judge for the Southern District of New York.
[126] *Id.* at 1088.
[127] *Id.* at 1088-1090.

information to Michael in exchange for a personal benefit or that Salman knew of any such benefit as required under the *Newman* decision. The Ninth Circuit disagreed and found that the Supreme Court's holding in the *Dirks* case, rather than the Second Circuit's *Newman* decision, governed.[128] The Court recited the language in the *Dirks* case that "[t]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend"[129] and found that Maher's disclosure of the nonpublic information to his brother Michael when Maher knew Michael would trade on the information was exactly "the gift of confidential information to a trading relative" envisioned by *Dirks.*[130]

Salman also argued that, under *Newman*, evidence of a friendship or familial relationship between tipper and tippee, without more, is not sufficient to prove that the tipper received a benefit. Again, the Court disagreed and pointed out that *Newman* had recognized that personal benefit is broadly defined to cover not only pecuniary gain, but also "the benefit one would gain from simply making a gift of confidential information to a trading relative or friend."[131]

When the Supreme Court declined to review the Second Circuit's decision in the *Newman* case, many thought that the Court was not interested in hearing an insider trading case. The Court's decision to review the *Salman* case suggests that the Court was waiting for the right vehicle to redefine or clarify the personal benefit test.

2. Corporate governance issues – State Ownership (Gustavo Grebler)

A. Corporate Governance in State-Owned Enterprises ("SOEs")

Corporate Governance in SOEs has gained prominence in the period after the last ILA International Conference, and awareness of SOEs' impact over the interest of securities holders has increased accordingly.

SOEs are not new, nor is the knowledge that a material share of securities traded across the globe are issued by SOEs and carry risks associated with their control holder. The latest OECD report on the subject states that SOE securities account for 6% of the total market capitalization of securities traded in developed countries and between 18% and 24% of securities traded in developing countries.

But times of increased globally available standardized information have caused the review of States' and SOEs' market conduct – and of its alignment to responsible business practices and interests of non-State securities holders – to gain momentum.

States' conduct impacts the market in ways different than that of private enterprises. Like the latter, at least where States retain corporate control, they guide the investment, financial and distribution policies of the company. But differently than private enterprises, States are given wider latitude by law to deviate from securities price maximization if it can be established that deviation is a condition to attaining a public policy objective.

Also like private enterprises, SOEs materially impact the relevant market in which they supply goods and services. However, because States do not generally subordinate their

[128] Id.at 1091-1093.
[129] Id.at 1092.
[130] *Id.*
[131] Id.at 1093.

investment decisions to market standards of cost of capital and rates of return, they cause a transfer of wealth from shareholders of competitor companies to the SOEs, as the former forgo the benefit of cash flows that became economically unviable, which are in turn captured by SOEs.

Perhaps most notably, impact of States' conduct over interests of securities holders distinguishes itself from that occasioned by private companies in respect to its alignment to the spirit of the law of the various legal systems to which they are subject. Shareholders of private companies suffer the consequences of bad investments, whether economically or politically – if we broaden the term to encompass management ousting – whereas the disutility of bad investments hurts States less due to taxation prerogatives, exposure strongly correlated to the party's mandate, and the fact that governments cannot be ousted or bought out if the SOE underperforms, as it would happen to private control holders.

It is no surprise that in many States securities of non-State securities holders incorporate in their prices supervisory and management bodies whose dexterity are better traced to the political arena than to the arts of the trade, or subservience to a party's political agenda. Or, as it has been the case, incorporate the failure by members of the political body to resist the opportunity to extract rents from economic agents with whom the SOE deals.

After a decade, in November 2015, the OCDE updated the Guidelines for Corporate Governance of State-Owned Enterprises ("OECD SOE Guidelines"), which, according to the organization, are to be used in conjunction with the G20/OECD Principles of Corporate Governance.

OECD SOE Guidelines are a set of instructions adopted by the General Council, aimed at the governments of member and non-member States, conveying the internationally agreed standards on the exercise of state ownership. OECD goals are threefold: (i) it intends to discipline governments into finding actual objectively verifiable public policy reasons prior to creation of the SOE, (ii) it intends to mitigate the agency conflict between public officials and constituencies, as there is wide perception that public officials have not been fully accountable to the consequences of their actions, and (iii) it intends to limit the State role in the marketplace to the satisfaction of constituents' needs that cannot or should not be total or partially satisfied by private enterprises.

As the information is known or can be derived by States from known principles, it can be said that OECD SOE Guidelines are not so much intended to inform, but rather to constrain States to responsible market conduct, inasmuch as the State chooses to deviate from the collective and generally agreed standards and must bear the cost of justifying it to securities holders, constituencies and opposing political forces. Deviation can be in the best interests of the State, but demonstrating compelling concern not collectively shared is a high waterline.

The OECD believes States' market conduct should extend through seven different areas, which are set forth below. This description is interpretive and economizes on detailing conducts shared by States and private enterprises in order to focus on those particularly important to the States. The reader should consult OECD SOE Guidelines for authoritative purposes:

1. Rationale for State Ownership
Prescribed conduct: States should (i) objectively and formally determine the policy rationale and SOE objective that must be achieved through ownership of securities holdings, and the actions it and the SOE reasonably expects to take for its achievement, and (ii) submit the predetermined policy rationale and SOE policy objective to the scrutiny of the general public.

2. Role of the State as Owner:
Prescribed conduct: States should (i) subordinate SOEs to operating practices and legal forms within market standards, (ii) enable management and supervision bodies to discharge their duties according to their technical judgment, (iii) transfer ownership of securities to a single or coordinated ownership bodies, whose functioning and communication with other branches of the government follows formal routines; and (iv) exercise the holdings rights actively and intelligently, including through adoption of transparent and merit-based criteria for nomination of board members and, where applicable, management.

3. SOEs in the Marketplace:
Prescribed conduct: States should (i) be bound, and cause SOEs to be bound, by decisions taken through arbitration, (ii) command SOEs to make known the cost and revenue sums allocated to achievement of the public policy objective; (iii) fund public policy objectives, (iv) subject SOEs to the legal regime applicable to private enterprises where possible, including to insolvency and recovery procedures; (v) subject SOEs to terms, in respect to cost of capital, of inputs, and rates of return, consistent with those borne by comparable private enterprises; and (vi) command SOEs to adopt non-discriminatory, competitive and transparent procurement processes in contracting with third parties.

4. Equitable Treatment of Shareholders
Prescribed conduct: States should cause SOEs to: (i) confer non-State securities holders the same access to corporate information, (ii) actively promote communication and consultation with securities holders, (iii) facilitate shareholders engagement, particularly in meetings destined to election of board members; (iv) constrain related-party transactions to market conditions; (v) adhere to the practices of corporate governance codes; (vi) inform the general public of SOE public policy objective; and (vii) obey contractual obligations and their enforcement.

5. Stakeholder Relations and Responsible Business:
Prescribed conduct: States should cause SOEs to (i) obey securities holders legal and contractual rights, (ii) report on relations with stakeholders, (iii) build controls for fraud and corruption prevention and combat, (iv) disclose the mechanisms for discharge of obligations of responsible business conduct, and (v) abstain from the financing of political activities, including campaign contributions.

6. Disclosure and Transparency:
Prescribed conduct: States should demand SOEs (i) report financial and non-financial information under internationally recognized standards. Information should cover (a) the public policy objective, (b) an assessment of the actions taken for its achievement, (c) the company financials break-down, (d) company governance standards, (e) board and

executive members qualifications, selection process, compensation, and whether they are independent, (f) company risk factors and risk mitigating measures, (g) financial commitments received from the State or given by the State to third parties on the SOE's behalf, (h) related-party transactions; and (i) issues with stakeholders of the SOE. States should demand that (j) the SOE be audited by well-reputed independent auditing firms, and that (k) the State ownership entity(ies) report on SOE data in aggregate form, annually, via world wide web.

7. Responsibilities of SOE Board Members:

Prescribed conduct: States should make the mandate of SOEs boards part of statutory laws, preferably within the corporate laws of each State. The mandate should require that board members be (i) free from conflicts of interests and political interference (ii) in charge of the decision of appointing and dismissing the CEO, of management compensation schemes, (iii) elected on the basis of technical expertise and responsibilities, (iv) led by a Chair, other than the CEO, responsible for monitoring efficiency of the body and representation before the State, (v) supported by expert committees, (vi) reviewed annually, (vii) subject to internal controls with discretion to directly report to an audit committee besides the board itself; and (viii) where an employee representative is part of the board, it should have rules contributing to such member's effective representation.

There a number of cases where the State's use of the SOE falls short of basic standards of good corporate governance. Given the aggressiveness of practices involved and cross-border effects, the Brazilian SOE Petrobrás is a particularcase in point. As addressed in more detail below, the State and the SOE both conceded that that value of the SOE's financial assets and therefore of its securities were severely impaired as a result of criminal activities of the SOE's management, and a corresponding lack of proper oversight by its board of directors]

The Petrobrás case:

1. In 2010, Brazilian State Owned Oil Company Petróleo Brasileiro S.A. – Petrobrás came to be the 12th largest global corporation, measured by market capitalization, and held investment grade ratings from all three internationally recognized major ratings agencies.

2. Petrobrás securities were listed in the São Paulo Stock Exchange, in the New York Stock Exchange and in the Latibex of Madrid Stock Exchange. The company's preferred shares accounted for 12,31% of the total weighted average of the São Paulo Stock Exchange Index – IBOVESPA.

3. Petrobrás securities and derivatives based on the São Paulo Stock Exchange Index include a substantial number of domestic retail investors and domestic and international institutional investors in search of comparatively low risk grade securities.

4. In 2016, Petrobrás is embroiled in scandals ranging from the use of the SOE's assets to finance political campaigns to variegated corruption practices involving members of Executive and Legislative branches. Petrobrás has also been involved in controversy by informing securities holders it would not raise its prices with the purpose of preventing international oil prices oscillations to be transmitted to the domestic market.

A comparison between OECD SOE Guidelines and factually established market conduct of Petrobrás in the relevant period is set forth in the table below. For ease of interpretation, OECD SOEs Guidelines are transcribed to the extent they correlate to conduct practiced by Petrobrás:

General guidance	Participant's market conduct
Rationale for State ownership	
• Detailed formulation of SOE public policy objective. • Full and continuous disclosure of the public policy objective.	• Detailed policy non-existing. • Company justified refusal to increase prices with the need to protect domestic market from international prices.
Role of the State as owner	
• Hands-off approach in respect to SOE board of directors and management. • SOE board and management to be elected on basis of technical expertise and responsibilities.	• Company board predominantly composed of Ministers of State, public officials and other SOE officers. • Some company officers admittedly appointed for political reasons.
SOEs in the marketplace	
• Detailed formulation and disclosure of SOE public policy objective. • SOE public policy objective to be funded by the State. • Subject to insolvency and recovery procedures. • Rates of return consistent with those of private enterprises. • Contracting through competitive procurement processes.	• Detailed policy non-existing. • SOE public policy objective are born by all securities holders jointly. • Company not subject to insolvency or recovery procedures. • Company officers admitted to contracting in exchange for political donations and bribery. • Company justified refusal to increase prices with the need to protect domestic market from international prices.
Equitable treatment of shareholders	
• Detailed formulation and disclosure of SOE public policy objective. • SOE public policy objective to be funded by the State.	• Detailed policy non-existing. • SOE public policy objective are born by all securities holders jointly.
Stakeholder relations and responsible business	
• No use of SOE assets to finance political activities.	• Company officers admitted contracting in exchange for political donations and bribery.

General guidance	Participant's market conduct
Disclosure and transparency	
• Detailed formulation and disclosure of SOE public policy objective.	• Detailed public policy non-existing. • Company justified refusal to increase prices with the need to protect domestic market from international prices.
Responsibilities of SOE board members	
• SOE board members must be free of conflicts of interests. • SOE board members to be elected on the basis of technical expertise and responsibilities.	• Company board predominantly composed of members of the Executive branch or subordinate to it. Composition has included Brazilian Ministers, public officials, and other SOE officers.

The facts available do not support the understanding the view that that the Petrobras Case should be taken as an isolated incident. Rather, , but rather that securities markets suffer the effects of from the current institutional arrangement's incapacity incapacity to of keeping in check the market conduct of States as control holders, and high-powered globally traded SOEs in check.

In fact, Both the knowledge and the experience currently available send regulators a loud and clear message that private ordering by market participants on behalf of securities holders is insufficient to purge market misconduct when States are involved, and consequently that economic resources of non-State securities holders will continue to be unduly appropriated transferred to/by the States.

States market conduct impose far-reaching risks over securities holdings, that surpass States geographical borders as a result of increased capacity by international intermediaries, including low risk institutional investors, to mobilize savings of retail investors in their local markets, and invest the resources in SOEs domestic markets, if not via international markets where SOEs are listed, or via synthetic products originally intended to track low economy-wide risks. In addition, publicly held SOEs are no longer small players and have now occupied too large a portion of their States' and of international economies, calling for a countervailing claim to States that they bring their conduct on par with the risks their size impose on the system.

The Committee understands it is time for the internationally recognized organized markets, in response to their material role in capital formation, as well as in risk sharing and transmission among securities holders, to review OECD SOE Guidelines and, in coordinated efforts, to establish a set of conducts to be required from States and SOEs in order to allow access to investors in their markets.

B. "Reasonable expectations" in the international markets

The doctrine of "reasonable expectations" has evolved into a powerful tool for judicial and regulatory activism and, as a result, a bellwether for the trajectory of the law. The concept has broadened – both in scope and in the range of potential claimants. It is

particularly relevant to contemporary society, where legislative processes have become constrained by various factors, including the difficulties faced by governments in tackling long-term, systemic policy issues because of the short-term incentives that inform and motivate political processes. This challenge is reinforced by the growing degree of inter-dependence and inter-connectedness that have come to define the world we live in — a world where domestic regulation no longer provides adequate instruments to deal with public stewardship challenges.

As the tension between "public expectations" and legislative responsiveness becomes more severe, a growing role has emerged for our courts and independent regulatory bodies to attach the term "reasonable" to nouns such as "expectations" (or "doubt", "person" and the like) to forge new, often radical, legal pathways. This section of our report outlines what appears to be an accelerating trend — first by reflecting on the nature of "reasonable expectations" and then exploring how the doctrine has been and is likely to be applied.

This topic is covered in greater depth and detail in the article written by Edward J Waitzer and Douglas Sarro in the March 2016 edition of the Canadian Business Law Journal, entitled "Protecting Reasonable Expectations: Mapping the Trajectory of the Law".

While the references in that article are to Canadian law, the principles are of broader application.

INTERNATIONAL SECURITIES REGULATION COMMITTEE

WORKING SESSION

Tuesday, 9 August 2016, 3.00pm

Chair: Professor Manuel Almeida Ribeiro (Portugal)

The Chair welcomed the members of the Committee and the members of the ILA present in the room. The Chair then invited Mr Alan Ewins, the Co-Chair of the Committee to give the first presentation.

Mr Alan Ewins (Hong Kong) acknowledged that it was National Women's Day in South Africa. Mr Ewins provided a brief background to National Women's Day and noted that the day was about unity, trust and harmony, something that would feature prominently during the course of the afternoon. Mr Ewins explained that the report of the Committee was drafted in short form. It addressed a number of current issues in international securities markets. There was an annexure that supplemented the report by covering the issues in more detail.

Mr Ewins said that the issues covered during the working session would be split into two main parts. The first part related to infrastructure issues. The second part of the report related to more operational and day-to-day issues, in particular inside dealing type issues and also other corporate governance and related issues. Mr Ewins noted that the Committee would also look briefly at the EU Capital Markets Union as one of the areas that needed to be covered. He then introduced the panel.

The Chair invited Ms Ida Levine, the Committee's other Co-Chair, to present on a number of topics.

Ms Ida Levine (UK) noted that the first topic that she would be covering the OTC derivatives. There had been substantial progression in the past year in harmonisation and "substituted compliance". 2015 was a banner year. It started in 2009 with the G20 mandating that standardised OTC derivative contracts be cleared, that there should be margining for non-cleared contracts to provide protections, and that clearing should be through central clearing counterparties (CCPs). She noted that this was in the wake of the global financial crisis and that there were twenty countries that pledged to follow this mandate from the G20 meeting. The US and the EU were the first out of the block, the US with the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which was largely implemented in this area. There were also five hundred regulations that were unimplemented but that legislation around clearing and margining was basically completed. In the EU, there was the European Market Infrastructure Regulation (EMIR), where trade reporting had been implemented. Some risk management features of EMIR had been implemented. The EU was in the process of putting into effect the clearing and margining of non-cleared derivatives.

Ms Levine noted the reason why it was a banner year was that in the beginning of the year saw very effective dialogue between the US and the EU on funding equivalences for CCPs.

Professor Cynthia Lichtenstein (US) asked what CCP stood for.

Ms Levine responded that CCPs were central clearinghouses and that they were basically organisations which brought together members, which were clearing members (the banks). She noted that when a party entered into a derivative transaction with the clearinghouse, the clearinghouse was their counterparty, not the other side of the transaction. She noted that the G20 was trying to achieve change credit exposure in these transactions so that no counterpart would be at the mercy of any one of these institutions. There were clearinghouses throughout the world. Most of them were global. This was where the whole situation around substituted compliance became important. In February, there was dialogue between the US and the EU about equivalence, which would allow the very global CCPs to register in the EU or the US rather easily, and provided that the concept of substituted compliance meant that the US CCPs who registered in the EU would be able to comply with US rules and that the European CCP's that registered in the US would be able to use their own EU rules.

Mr Ewins added that the great advantage of the CCPs was that when parties entered into a derivative contract, one party was basically taking a credit risk on behalf of the other party. If one reversed those contracts so that the CCP as the counterparty with massive reserves, it was then able as a much stronger entity to stand as a credit risk. Basically, one was taking a credit risk of a massive entity rather than the counterparty, which was the advantage.

Professor Lichtenstein asked whether on each side laws mandated the CCPs or the CCP reserves.

Ms Levine responded in the affirmative and noted that, in the EU, the resilience of the CCPs was mandated by EMIR, which was one of the critical parts of EMIR, which covered derivatives. There was much anticipation in the Committee to see the implementation of substituted compliance, which was something that had been spoken about in the past three reports.

Mr Ewins added that the emerging markets had been observing the US and EU and had now come to some degree of accommodation. A number of the emerging market jurisdictions had essentially agreed to participate in the same environment because it was more concrete.. Now the foreign authorities had the ability to say that if you had cleared in a suitable foreign CCP then we would treat it as having fulfilled your obligations in Hong Kong as an example, which was one of the interesting advantages. Emerging markets were not only discussing it principally but the economic reality had struck in that the US and EU had a 90% share of the market. As a result, that had pulled the emerging markets into play. Asia and other parts of the world would become more important as time went on because the emerging markets increased in size as a result of the way that history was beginning to work. This was one of the reasons why everyone should be playing by the same rules.

Ms Levine added that this brought out a lot of international law topics and non-state actors because the G20 was actually a supranational organisation that had a real influence. There had been an observance of the meeting of the minds between the International Association of Insurance Supervisors (IAIS) and the EU, which covered 90% of the derivatives markets. Then Asia was waiting to see what was going to happen but then followed suit. This had been a real event in international securities law, particularly

for practitioners. With global firms, the more they saw consistent standards and ways to operate more easily globally the better. There were also regulatory and supervisory benefits as well because it discouraged arbitrage. She noted that there were a number of areas where it was very important that supervisors and regulators work together in such supervision because most of the major gains and financial institutions were global and supervision necessarily had to have a global element. Equivalences determinations and getting through the relatively small issues to come to a greater understanding on the bigger issues was very promising and was something that had been spoken about in the Committee for a very long time.

She noted that the foregoing discussion basically summed up the topic of OTC derivatives, which was to point out the milestone in having a substituted compliance regime for CCPs.

Mr John Taylor (Australia) asked what was going to happen with respect to the remaining 10% of the OTC market that was not settled through CCPs.

Ms Levine responded that part of the 10% was Asia and handed the query over to Mr Ewins, whom she noted was the expert on Asia.

Mr Ewins commented that Asia was fragmented. There was China, which did its own thing, never following and always learning from the Western markets. Then there were monster economies like Japan, Singapore and Hong Kong which were huge international trading centres and everyone was trying to get a piece of the pie. So essentially the way that it had worked in Asia and the way it was developing, looking at clearing for the moment, was not just the case of accepting international standards; it was a case of accepting them in the context of local requirements and the local economies. For example, in Hong Kong, clearing only related to interest rate swaps and non-deliverable forwards., because those were the biggest sector in the Hong Kong market. All other OTC derivatives were not going to be covered by clearing, which was not going to come in until 2017. Mr Ewins noted that what had happened was that Hong Kong had effectively taken a practical view of this and said that it would be going along with clearing because it acknowledges it as a good concept, but that it would only do it insofar as it had to and needed to. Australia had done the same, having a very limited amount of cleared products, and Singapore.

Mr Ewins noted that basically what you ended up with was a number of different standardised transactions which would be covered and then there was the bucket of lots of other types of relatively standard transactions and products which would not be cleared within the Asian concept.

Ms Levine asked whether they would be margined.

Mr Ewins responded that the question would come under the uncleared margining. He noted that one had to take a holistic approach to what was covered and how it dealt with standard CCP and then assess what remained.

Ms Levine added that, with a large transaction, you needed not have the benefit of a CCP counterpart but what you did have was collateral that was held against the transaction.

Mr Ewins noted that one of the problems was that you would be penalised for going that route if you could clear and if you could structure your transaction so that it was

not standard and not cleared to an exchange. He noted that if you chose to go down that route, you would be hammered with quite penal margin requirements, which acted as an incentive to basically encourage players to get onto the standardised contract. He noted that you would either be cleared or not cleared and if you were cleared, you were directed into having a CCP and if you were not cleared than you would be hammered with the margin requirements. Mr Ewins noted that one of the interesting parts of the OTC markets was what was standardised and what was not. He noted that this was quite an intuitive experience with the market players because you had to work out what was a standardised product to see how far it was going to get into exchange derivatives. He noted that this was an extension of the exchange trade.

Ms Levine reverted back, noting that the Committee was completing the segment of the report on OTC derivatives and introduced the next topic of CCP Resilience, Recovery and Resolution initiatives. She noted that with the CCPs the counterparts had a certain measure of protection because their counterparty was the CCP. She noted that you ended up with a very concentrated amount of risk in the CCPs and put forward the question of how such risk should be dealt with which was the next "too big to fail" issue. She noted that the CCPs were becoming increasingly important in financial markets.

Ms Levine noted that Dodd-Frank and EMIR did focus a lot of attention on the resilience of the CCPs. EMIR concentrated on risk management and other techniques and measures for the CCPs. The counterparts and the asset managers who were for the counterparts also had their own due diligence requirements with respect to both the CCPs and their clearing members. She noted that if you were clearing through a particular institution you must perform due diligence on the institution you were clearing with as well as the CCPs. Essentially with both, the regulations and the due diligence obligations of counterparts and their agents, there was quite a lot of focus on the CCPs, which was one of the most important areas for focus. The reason was that once you got to the point where clearing members were having financial difficulties, there was a very small universe of clearing members and CCPs. Once you got to the point where there wee considerations of recovery, it was a very precarious time.

Ms Levine introduced the next point of the report, which focused on recovery. She noted that, from a practical standpoint, the recovery phase of the CCPs seemed like an issue that needed to be observed carefully. Recovery was a time where there was a loss of comfort in the clearing member(s) at the same time as the institutions were becoming more financially distressed. Someone (at the moment there was a concept of a college) needed to watch the whole situation very carefully, ensuring that the recovery phase did not continue for prolonged periods. The reason was, during the recovery phase, the "default waterfall", which was the resources of first the CCP (because they were required to hold capital), the resources of the clearing members (because they were also required to hold capital) and margin that was held with the clearing members. She reiterated that it was extremely important to have supervision of this recovery phase and that when it was clear that the CCP was not going to be able to recover, that there was a quick resolution to the extent possible. To the extent possible, it was advantageous for the counterparts to the OTC derivatives transactions to be able to transfer their transaction to another CCP, another clearing member, which would only be possible for some types of OTC derivatives but not all because some were specialised. However, where it was possible, this should be the goal. Whether that was possible was unknown but the report advised

that it would be preferable to have a closely supervised recovery period and, where it was clear that the CCP was not able to recover, to appoint a viability resolution.

Mr Ewins added that where the CCP was in difficulties, the recovery process was designed to do something about that to improve the situation. Mr Ewins said that if you could not manage to save the CCP as a whole, then put in place resolution measures to try to recover as much value as possible.

Ms Levine stated that in the report the thesis was that global supervision of the process was needed together with a very short sharp recovery period with the supervisory resolution. She added that the main point was to preserve the transactions for the counterparts and whether this was possible in an interconnected market that was reacting to the whole situation was unknown.

Mr Ewins said that it was quite interesting because this was the new clear option; the recovery and resolution process for the CCP. It would have been unthinkable in 2006 or 2007 to talk about a CCP blowing up because that sort of thing never happened. Suddenly you had banks falling over, you had a volatile position in the market and as a result what was coming out of it was very much the case of looking at the worst-case scenario and the worst case being if the CCP got into trouble. Experience showed that, as impossible as it may seem, these things might happen and you had to have measures in place to try fix the situation.

Ms Levine said that this is why resilience was so important. One additional point to be made from the customer standpoint was the issue of how much margin and which margin was used during the recovery or resolution phase. There was probably some recognition that variation margin, which was margin that was used to collateralise the day-to-day movements and the value of the derivatives, might have to be used in extraordinary circumstances. At least from the customer standpoint, there was a strong belief that it was inappropriate to use the initial margin which was a quick phase deposit. In the report, the Committee discussed the difference between margin and capital. This point was being made from the customer standpoint but there were different points to be made on the same topic from the banks' perspective, the CCPs' perspective, the regulators' or supervisors' perspective.

Mr Ewins said that ultimately the regulators did not really care as long as the entity either survived, gracefully failed, or was moved onto another entity. So long as one of the techniques was effective, the regulators or resolution authorities were not so concerned with the customer's position as they were concerned with the market stability. This showed that there was quite some tension in the market.

Ms Levine added that this was still being resolved. There were still discussions about the default waterfall and how the recovery resolution procedures would work and how the global oversight would work. It was however still important and was the next new frontier of the "too big to fail" with the concentration on CCPs.

Professor Chiara Zilioli (Italy) referred to an earlier comment that clearing was global and therefore required very close coordination of supervision and resolution procedures. She asked whether this idea could be developed in terms both of cross-border coordination but also crosssector coordination.

Ms Levine said that this took the discussion out of the realm of securities regulation and into more banking and global stability. Ms Levine could not provide an answer on the specifics, but stressed the importance of having predetermined procedures that brought supervisors from different jurisdictions together. She agreed that it was impossible to have absolutely the same regulations and procedures. When crises happened, they happened so fast. She stressed the importance of a close knit group of people who could make decisions quickly in these situations. This was because, once the CCPs started becoming precarious, its members could be affected and vice versa.

Mr Ewins added that it was important to bear in mind that the CCPs element of resolution and recovery was one of the newer elements. He contrasted this to the situations with the banks, where there is regular dialogue between regulators in the US, Europe and Asia.

Ms Levine added one point following from what she had previously mentioned. She said that she had been involved in the Baring Bank crisis in the mid-1990s, and recalled the way that the Singaporean regulators stepped into Barings really quickly and continued settling trades. The crisis would have been much worse if they had not done so. When supervisors acted quickly, when they tried to preserve transactions in the market and things were set up in an organised manner, it could make a huge difference.

Mr Ewins added that, one way or another, the markets tended to want quick decisive action. It almost did not matter what the action was, as long as something happened in terms of stabilising the position.

Professor Lichtenstein asked whether, under legislation, the CCPs and the structures were examined before there was difficulty in the recovery phase, and whether it was the traditional securities system that controlled compliance.

Ms Levine responded that in the UK, the Financial Conduct Authority (FCA) was the conductl regulator for all financial institutions.

Professor Lichtenstein asked whether the CCPs are examined as banks.

Ms Levine responded that, as far as she was aware, the CCPs were examined as banks but she was not certain.

Professor Zilioli added that UK banks also had a prudential regulatory body – the Prudential Regulatory Authority (PRA).

Ms Levine noted that, at least in the UK, the CCPs would be supervised by the FCA. She also noted that the UK had equal capital, unlike the US.

Professor Lichtenstein added that coordination in the case of recovery and resolution was not simple because the far-out branches had already been synchronised. The regulators had been cooperating and so forth.

Ms Levine commented that it was the same with regulators in the UK and that the US was different.

Mr Paul Stevens (US) added that the supervision examiners for banks were in the profit-making business compared to the supervisory bodies for the CCP, which was not out there to score in terms of profit. He would disagree slightly with the SEC as they did have

credential experience but it was more statutory rather than discretionary. Therefore, when they dealt with financial firms, they are more restricted in terms of credentials.

Mr Ewins stated that it was mirrored in Hong Kong where the requirement existed that the main CCPs be recognised as Ms Levine was speaking about.

Ms Levine commented that the supervisors would be supervising the CCPs against the EMIR resilience rules, tracking their mismanagement, procedures and the use of the right capital.

Mr Ewins noted that it was possible to try to avoid a crisis by trying to make sure that it was set up properly. It was difficult to prevent a crisis but there were recognised means.

Ms Levine said that, in terms of the structure of the meeting, they were going to move around the report as amounts to resolution which Mr Ewins was going to cover both in Europe and Asia, Banking and Security included.

Mr Ewins added that the report used Hong Kong as a proxy to reflect Asian developments, which broadly followed the Financial Stability Board (FSB) G20 requirements in the process of implementing those requirements into the regime. He said that one of the aims of the report was to make the point that securities firms were just as affected by recovery and resolution as banks because typically in the modern world there were multinational and multidiscipline entities such as banks and asset managers sitting underneath them, and that these were integrated groups that were mostly too complex to separate.

He mentioned that one of the interesting things about recovery and resolution was that, upon discussion with banks and securities firms on how they were set up, and about all of the requirements for recovery plans and resolution plans and how they actually organised themselves to make it easier to resolve, it was discovered that all of these things were done previously. Therefore, the myriad pronouncements from the FSB and the G20, are all really aiming to say that everything needed to be in order so that a financial regulator could put it into action when there was a problem. He added that the regulators needed to know what you had so that they could decide how to utilise their powers effectively to put the organisation back on its feet.

He stated that it is very true of the banks and of securities firms that the regulators and the global supervisors, who confirmed what the global regulations and trends were, were getting bent out of shape at the moment in terms of asset managers because they were not sure where to place asset managers. Therefore, part of the securities market had an ongoing work in progress in order to work out what to do with these strange creatures.

Mr Ewins highlighted that a critical question was who was systemically important and what to do with them. There was not just a systemic dealer that had been identified. They were all part of the banking group, and then there were asset managers and privatised funds. He mentioned that the FSB had just published a report asking the question on whether to include liquidity type requirements, work out derivatives and activities in the context of the requirements. One of the areas that was causing a problem was actually having insufficient information at the global level, and trying to work out how to centralise the information and how to use it effectively to work out whether organisations were systemically important and to work out, if they were, what to do with them.

Just to show that there was not complete harmony in the international community, the FSB and the International Organization of Securities Commissions (IOSCO) published a paper towards the end of 2015 where they discussed financial managers and how to treat them for recovery and resolution purposes. One of the issues that they tried to highlight in the report was that if you had asset managers, they themselves were not going to be globally systemically important. One of the things that asset managers were important for was what they did with their assets. For example, did they sell them off etc. Those things created ripples in the market and therefore they were potentially systemically important. It could do things in a crisis that could actually act as an accelerator or trigger, creating ripples that fuelled the problem. A fund could itself act as a catalyst in the crisis, particularly if it was highly leveraged. Once derivatives were involved, there were multipliers in the issues that were happening. Therefore, if there was a perceived potential crisis in the market, any clients who were potentially affected under the fund would hit the button for redemption. The assets would then be needed to make that redemption and then the worry was that, although it did not necessarily all happen at once, there would be knock-on effects for the crisis. It tended to happen in a very short order and that is why these ripples could reach beyond the resolutions and further into the market.

Ms Levine added that the FSB consultation on asset management activitiess was very well done and she though that the paper showed a deep understanding of the asset management industry and its activities. She said further that one thing that was interesting was that the US had an almost parallel process going on. They had the Financial Stability Oversight Council (FSOC) and that something that was written on in the report. She said that Mr Stevens would be covering the US side where the SEC had come in and proposed legislation in some of the key areas.

Mr Stevens thanked the chair for the introduction. He continued in saying that one of the outcomes of the financial crisis in 2007 on Wall Street was the Consumer Protection Act. One of the many things that was mandated as part of that legislation was the creation of the FSOC. The goal was to have a kind of "best of the best" committee to imagine what financial stability might be like in the future. FSOC was made of major US regulatory and was chaired by the head of the US Treasury. It also included among its members the SEC, the chairman of the Commodity Features Trading Commission (CFTC) as well as an insurance regulatory representative. Uniquely, in the US there was no federal agency controlling insurance. It was regulated by 50 states. Of course, having 50 state insurance regulators on the committee would be cumbersome, so they decided to have one insurance regulatory representative.

Ms Levine added that it was just the opposite of the UK, where there was a single regulator.

Mr Stevens continued by saying that FSOC's composition was the result of traditional legal structures in the US that gradually progressed into federal regulation of securities markets and insurance was one of them, which was traditionally regulated by the states. He said that all the regulators, as a collective, tried to establish what threats might emerge from asset management, insurance and banking; but the focus here would be the non-banking side of FSOC. He said that they had already mandated the designation of the banking firms.

He highlighted that FSOC composition was important because it had a great deal of functional banking regulators. He said further that FSOC was probably created to determine whether non-banks that posed a threat to financial stability. The non-bank designation process had been a work in progress since the creation of Dodd-Frank and since the creation of FSOC. It had taken time to designate its criteria for what firms should be designated as systemically important. He said that, once the criteria have been established regarding which firms should be designated as systemically important, it would develop criteria to supervise them. Until it was designated as systemically important, it would continue to be regulated by its primary regulator. In the case of asset managers those were regulated by the SEC.

The designation process had gone through a couple of phases and continued to mention the four phases stating the initial phase as being the examination of the asset management industry. He added that FSOC was aided by its research arm, being the Office of Financial Research (OFR). The OFR produced a report in 2013 in which it catalogued potential financial risk stemming from non-bank asset management firms. The report identified a risk of increasing asset prices, particularly in a time of low interest rates. He continued to say that the search for robust returns for clients raised concerns that investors would be herded into the same assets that otherwise might be too risky. The second thing they identified in their report was a redemption risk in collective investment vehicles. He said that, as Mr Ewins was mentioning, there was a concern that if assets would all of a sudden drop in price or become illiquid, or if there was a concern regarding the quality of the assets, there would be a redemption from the funds and that would create selling pressure on the assets held by the funds, which would in turn create selling pressure on broader market and would have ripple effects on the economy. The third risk was leverage in applying those asset price movements. Fourthly, was that firms themselves formed a systemic risk category.

Mr Stevens continued to mention that the 2013 report was widely criticised by the asset management industry and some experts; however, it was a tenable effort by the OFR. The OFR was a new organisation in the US, and it would be wrong to criticise it too much. It did, however, get some fundamental things wrong about how the asset management industry worked. It failed to differentiate between asset managers who were investing money on behalf of their clients and did not distinguish the asset managers from their funds which were two separate corporate entities with two separate balance sheets. He said that it followed that the report was collectively looking at the asset managers and their funds. He explained that asset managers in general, except for maybe the very large ones, tended to have relatively small balance sheets compared to their clients and their funds. He added further that the 2013 report was criticised for a variety of errors as regards to wording, and generalising a great deal. So the industry pushed back against the report with the experts and so did the SEC itself.

The SEC, however, heard what the FSOC's concerns were generally and had another consultation. The SEC started coming out with proposals for reform on its own and said that these were now starting to emerge in the asset management industry and in proposals for enhanced liquidity monitoring for the US and US funds.

There had been a series of rule makings regarding money market funds that were impacted by the crisis. During the financial crisis, the reason why there was a concern for

the financial oversight councils was because the Reserve Primary Fund"broke the buck". Money market funds were designed to return one dollar for every dollar that was invested in them. The fund did not necessarily go bankrupt, but it broke that 1:1-dollar promise. It would be worth noting that the reason why it "broke the buck" was because they had a great deal of assets in Lehman Brothers commercial paper so it was worth asking the fund managers of that fund why. He said that the shareholders of the Reserve Primary Fund did what they were supposed to do and they stayed in, but then they got left with the short stick when Lehman Brothers went bankrupt.

Money market funds were now primarily moving away from this 1:1dollar promise in response to FSOC's concerns. The value of the money market funds now would generally oscillate around one dollar and it would not necessarily be guaranteed at one dollar as it might be something less or it might be something more. FSOC has been urging SEC to impose liquidity fees and redemption gates to prevent a run and/or close before it actually happens.

Mr Stevens added further that there was a report out today (9 August 2016) which talked about dislocations in the market that had occurred, and whether or not money market funds would survive as a vehicle. These might be changing as we speak.

Ms Levine mentioned that there were parallel changes in Europe with the money market consultation and changes underway in money market fund structure.Mr **Ewins** stated that it is interesting how the US clearly fed into the consultations.

Mr Stevens continued in saying that the FSB was chaired by Mark Carney but had significant input from all jurisdictions. He said that the money market funds had been transformed and there had been additional efforts in FSB to move away from regulating asset management firms at an entity level. In one of the FSB reports, FSB noted that it was shifting focus from looking at all activities of asset management firms to looking more at leverage and liquidity. Mr Stevens referred back to what Mr Ewins had mentioned – that historically speaking, there was a great deal of diversity amongst asset manager firms. When one was talking about the industry there were all sorts of firms that might propose varying levels of risk and complexity that might be of concern to regulators. He gave the example that if a regular person might be invested in a firm through their government pension plan which was structured very differently from private equity funds. That might all be brought under the term of "asset management", but it was important to note that different types of funds had different restrictions on them already, and had had them for a long time, for instance on liquidity, leverage and on asset quality. He said finally that it was a very complex area and it was not easy to fit under a "one size fits all" solution.

Ms Levine mentioned what it was interesting to see the SEC do some dramatic things, particularly with regards to the liquidity rules, which were not very popular but were very focused on the sorts of issues that had come out of the FSB report and could alleviate some of their concerns.

Mr Stevens added that the chairman of the SEC was very active in this area. There would be an investigation into how firms under US jurisdiction were regulated, ways that they could improve, listen and respond to relevant comments from FSOC. The FSOC had not foreclosed, but it did not have the power to necessarily designate asset managers as

systematically important. He said that it might do so in the future and it remained to be seen whether it would do so.

Ms Levine clarified by saying that the focus at the moment was still on activities along with the FSB, IOSCO and that it was ongoing.

Mr Ewins stated that the rest of the regulators in Hong Kong had been very clear in that they had a set of potential systemically important entities as, essentially, a "catch-all" so that, for example, when the FSB ultimately came to a view, then it would be relatively straight forward to slot these categories into the framework. He commented that there was a desperate attempt to try to make it as flexible and mobile as possible.

Ms Levine stated that one thing that Mr Stevens did not mention that she felt was interesting was the MetLife decision. One thing about that which was notable was the role of the Administrative Procedure Act in the US. It was something which they do not have in Europe wherethere are not very defined procedures around agencies' decisions. The MetLife decision illustrated how the US system works.

She mentioned that Mr Edward Fleischman (US) could not make it on the day and it was his intervention to talk about this case. She said that she was therefore asking the question on his behalf.

Mr Stevens replied saying that MetLife is a large US insurance company. Insurers in the US were required to hold assets sufficient for all their liabilities for their policy holders. Insurers went about it in different ways and some took greater risks than others. Based on its activities, FSOC designated Metlife as a systemically important institution. MetLife management decided that it was going to fight the designation so it sued the United States in the District Court, as allowed under Dodd-Frank. Taking a step back, he noted that there was an internal appeals process for FSOC and there was a possibility to appeal its designation to the Council and have it re-examined. Ultimately, it followed its other avenue of relief which was to sue in the District Court under the Administrative Procedure Act (APA).

He continued in highlighting that the APA was essentially applicable to any US (federal) regulatory agency and provided that regulation by US regulators must be reasonable and with a minimum standard of due process that is embedded in the APA. The District Court found that MetLife's designation process by FSOC was flawed, citing that it was not adequately explained how the activities of MetLife would spread to the broader market place, identifying with specificity which particular activities were dangerous.

Ms Levine added that this was a procedural claim.

Mr Stevens agreed, noting that MetLife did not say that it was not systemically important or that it could not be. It simply said that FSOC did not explain, adequately, its decision with enough evidence. He explained that basically MetLife's argument was that FSOC did not follow its own procedural rules. The main point of criticism was that, because FSOC's purpose was to identify emerging or potential threats, it was important to realise that if you were dealing with hypothetical scenarios then you could imagine all sorts of possible harm. What the APA said and what the District Court found was that you could deal with purely hypothetical situations under Dodd-Frank, and that FSOC had to have an element of causation, procedure and evidence that was more than just hypothetical.

Mr Stevens asked Ms Levine what it was like in Europe.

Ms Levine replied that, in Europe, there was no equivalent of the APA, but a member of the audience might be more expert than she was on this matter.

Sir William Blain (UK) commented that, from a financial perspective, it had been a healthy discussion. He admitted that he had not fully appreciated the example that had been decided under the APA or the DoddFrank procedure. Nor had he appreciated that there was an internal appeal, but that he could probably have guessed that the decision went on procedural grounds rather than on substantive grounds. He said that he would, as a judge himself, say that the big thing that had come out of 2008 was the idea of systemic designation. He found that a decision that lay at a body, as was identified, which had the overall picture in front of it and not just institutional procedures, would hold more weight. He commented further that he would hope that the responsible regulator, or supervisor, was in a better position to make that kind of decision which, whether you dressed it up procedurally or not, ultimately, the court was not in the field to make that kind of decision.

Ms Levine noted that there was a very large contingent from the International Monetary Law Committee present, which was very much appreciated.

Sir Ross Cranston (UK) stated that, by his experience, parties were arguing procedural points and they were arguing, in their system, lack of consultation. At the end of the day, it was better for the regulators who made these decisions to abide by these procedural points because they had the expertise and should be making the decisions.

Mr Stevens added that it was decided that they would appeal the decision of the District Court to the Court of Appeals.

Ms Levine added that, in the meantime, FSOC could just take the evidence again and do it properly.

Mr Ewins (Hong Kong) commented that he would agree that they should just go back and do it again. He was of the opinion that it had been a delay tactic.

Mr Stevens commented further that the choice to appeal was a tough one because if the decision of the District Court was wrong, they did not want it to become precedent. Therefore, they did not want to go back and deal with their analysis again. They would rather have the Court of Appeals say that FSOC was right or wrong.

Ms Levine added that it was a very interesting case for the study of this Committee.

Mr John Taylor (Australia) asked whether the CCPs themselves had entered into arrangements with their owners and or their counterparties to protect themselves in the event of a crisis. He reference to Ms Levine's earlier comments about risk in the CCP and queried whether they had sought to lay that risk off.

Ms Levine responded by saying the CCPst held capital. She continued by saying that they had risk management procedures that were mandated in EMIR in the EU that were quite strong. She said that quite a lot of time had been spent on developing those properly and they are closely supervised.

Mr Taylor (Australia) followed up by noting that the reason he asked the question was because, within the banking system, the requirement on a bank holding company was to ensure that there was sufficient capital to support the banks or some sufficient other protective method. He rephrased his question by asking within the CCP framework if there was an equivalent or something similar.

Ms Levine responded by saying that she was not the expert but would attempt to answer the question. She said that, first, at CCP level there was the CCP, which itself had to hold capital. This was part of the so-called "default waterfall" and then the clearing members, who were banks, had to hold capital. There was also the margin that was held at the CCP, which hopefully you would not have to resort to. There was the variation margin, which was collateral against the transactions and the change in value of the transactions. So there was capital within the CCP and within the clearing members themselves and then collateral at a transactional level – which was different and meant to protect counterparties to the transaction.

Mr Ewins added that, from a bank's point of view, at this point the shareholders would get taken out because, in the banking sector, it was the shareholders who were first up against the wall when there was a major problem. He said that this would broadly be implemented in the CCP sector.

Mr René Smits (Netherlands) began his intervention by complimenting the Committee on the very clear report and transparent explanations, especially on the difference between margin and capital. The first point he moved onto was with respect to the APAand the absence of an EU equivalent. What the EU did have was case law which clarified the steps to be taken in terms of reasoning or in terms of conducting an internal review at the agencies. There were different administrative review mechanisms for different agencies (eg, the European Banking Authority (EBA), European Central Bank (ECB) and Single Resolution Board (SRB).

Having said this, there was a convergence over time. On applying standards to review requests, the varied bodies could rely on decade-long case law of the European Court of Justice, which had identified due process requirements for administrative agencies like the European Commission in the area of competition law enforcement. So essentially there was no consolidated EU law but reliance on a history of consistent case law.

Professor Lichtenstein asked who the shareholders were in the CCPs. She understood that they were cleared on a series of banks within the derivative business, but who owned the CCPs?

Ms Levine responded by saying that, to her knowledge, CME, for instance, was a public company. That was one of the derivatives clearing houses. Professor **Lichtenstein** asked whether they were State owned.

Ms Levine responded in the negative – CCPs are public companies.

Professor Lichtenstein queried whether they were public utilities.

Ms Levine responded that they were not public utilities.

Professor Lichtenstein asked whether Ms Levine meant that they sold public equities.

Ms Levine responded by saying that they were public entities as well and there had been a lot of thought around how CCPs could be funded as well as the clearing members. There were instruments such as CoCos, which could be used for capital and augment the capital of the CCPs or the clearing members. She said that there were a lot of techniques and that it was quite a complicated area but the CCPs themselves were public companies and not state owned. The shareholders would take a risk if the CCP failed.

Ms Levine then moved on to introduce the topic of Capital Markets Union (CMU) and the initiative of the European Commission. This brought up the topic of Brexit because CMU was initially an initiative that came from Commissioner Lord Jonathan Hill. She said that CMU was a very hopeful and exciting proposition. It was an attempt to expand the European capital markets and to provide more market financing to companies, to promote growth in the economy and to create jobs. There was recognition that bank financing was the primary source of financing in Europe whereas market financing and the capital markets went against the US. As far as she was aware, it was 80/20 in the US and 20/80 in Europe, but she could not certify the accuracy of those figures. In essence, there was a lot of potential for growth in the capital markets in Europe.

There was a very comprehensive program of looking at possible impediments to the growth of the capital markets in Europe, including whether bank regulations could be creating issues. There was a call for evidence and there was a focus on, for instance, the rules around distribution of funds and other areas to see where there could be an impetus towards more capital markets. There was also a focus on venture capital and creating venture capital funds and a review of securitisation. Ms Levine believed that this was ongoing and that the European Commission was certainly looking at fund distribution, which was a big priority for that part of the Commission. The Commission was currently conducting a EU consultation but one wondered with the Brexit scenario and the unfortunate situation with Commissioner Hill resigning, whether that would continue in the same way. She further mentioned that parts of it were continuing but said that it would be affected by Brexit.

Mr Ewins made a brief comment on the ironies of the situation.

Ms Levine concluded on the topic of CMU. She then introduced the last topic on insider dealings and corporate governance, into which she would not go into any detail. She mentioned that the relevant section of the report included an analysis of a recent US case. From a comparative perspective, the case highlighted the difference between the US rules and at least the UK rules. The actual interpretation of US rules by the courts was , in her opinion, looser then the UK rules. But the SEC in particular had taken a very tough stance on insider dealings in enforcement. A personal opinion was that this was very warranted. Ms Levine mentioned an article in the *Financial Times* recently that there was still a substantive amount of trading before takeovers and that distorted the markets and was not the right thing. Hopefully supervision in this area would be as effective as possible. In the US, the issue was around whether there had to be a financial benefit to the tipper if the issue had surrounded a tipee disclosing information.

Mr Stevens commented that this is what was dealt with in the Salman case. He said that the issue was whether giving information to a relative or friend was enough of a personal benefit to support a finding of benefit to the tipper under the US federal insider

trading rules – this focussed on the personal relationship. **Ms Levine** commented on the comparative position in the UK in this respect.

Mr Stevens added that in the US it was all mostly case law.

Mr Ewins commented that, in Hong Kong, legislation regulated insider trading, and a stricter approach was taken.

Ms Levine then introduced the last topic on corporate governance, the continuing theme in the Committee. She attributed the part of the report to Mr Gustavo Grebler (Brazil), who discussed some of the issues in Brazil and in particular state-owned enterprises and the Petrobrás case and the fact that these SOEs created many issues around corporate governance and shareholders not getting their full rights because the state owner just took different positions that disadvantaged the public float.

Mr Ewins added that there were many other areas, which would be discussed in future, such as cyber security and others.

The Chair asked whether there were any questions about the last issues addressed.

Professor Zilioli commented on CMU that she did not think that there would be any breaking of the promise. She said that there was more going on to make the flow of money more fluent in Europe. Of course, there were signs that CMUs were slowing down because of Brexit. On the contrary, the securitisation draft was being discussed in Parliament. A new draft on venture capital with investment funds was being discussed.

Ms Levine said that this was good news and that it was a very powerful and important initiative.

Mr Ewins added that the reality was that once the UK came out, it still had the EU pushing it forward.

Professor Zilioli agreed, but said that the real risk was for the EU. It could be that the EU had a stronger interest than the others but this was a new thing so it could be that non-Euro countries had less interest than the UK had but it did not matter because the engine was also elsewhere.

Professor Lichtenstein asked whether Professor Zilioli meant that the legal structure of the CMU was such that countries that were not members of the EU could nevertheless participate.

Professor Zilioli responded to Professor Lichtenstein by saying that this was not what she meant. She was simply saying that the Euro area, which was a sub sector of the EU of course, had a strong interest to develop this, but first they were not alone and second, this was the frame of dichotomy between the single market and the Euro area. The two were not mutually exclusive and there were some things that could only work if it was for the EU as a whole because this was a single market issue. Whether it was then broadened to other countries was an extra step and it should first be achieved internally which was proving not to be easy. She said that she was sure that there was an interest but this was an extra step.

Professor Lichtenstein agreed and said that she was asking because if the UK was part of the EU, it was no longer a member of the single market and in order to participate, if

the structure was limited to members of the single market, it would need the next step to keep them in.

Professor Zilioli said that this applied to all that had been and that if the UK withdre, some sort of solution needed to be developed.

Ms Levine commented that this was a really great topic for the next report to talk about some of the solutions.

Professor Zilioli said that the next ILA convention was in two years and hopefully there would be more solutions then there were at the moment.

Ms Levine said that there would be and that there were currently solutions out there.

Professor Zilioli agreed with Ms Levine, but said that it was one thing to get out proposals but another thing to decide and agree on how to continue, which should take longer.

Ms Levine commented that another interesting development was the third country regime for the Alternative Investment Fund, and how that could create a blueprint for equivalence, determinations.

Professor Zilioli said that this was not an improvement from what there was currently.

Ms Levine agreed that it was not.

The Chair thanked the Committee for the report and attendees for their and closed the session.

Reporters: Jessica Odendaal and Natalie Venter

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

RECOGNITION/NON-RECOGNITION IN INTERNATIONAL LAW

Members of the Committee

Professor Wladyslaw Czaplinski (Poland): *Chair*
Professor Christopher Borgen (USA): *Co-Rapporteur*
Professor Aziz Tuffi Saliba (Brazil): *Co-Rapporteur*

Professor Nisuke Ando (Japan)
Alternate: Professor Shotaro Hamamoto
Dr Valentina Azarova (HQ)
Professor Chun-I Chen (China (Taiwan))
Alternate: Professor Pasha Hsieh
Dr Aristotle Constantinides (Hellenic)
Professor Gerhard Hafner (Austria)
Professor Matthew Happold (UK)
Mr Daud Ilyas (UK)
Natia Kalandarishvili-Mueller (Switzerland)
Dr Khoti Kamanga (East Africa)
Professor Petr Kremnev (Russia)
Nicholas Levrat (Switzerland)
Rick Liew (Australia)
Professor Monica Lugato (Italy)
Alternate: Professor Enrico Milano
Professor Margaret McGuinness (USA)
Dr Robert Muharremi (Albania)
Professor Stefan Oeter (Germany)
Dr Alison Pert (Australia)
Alternate: Stephen Tully
Dr Olivier Ribbelink (Netherlands)
Dr Yael Ronen (Israel)
Professor Brad Roth (USA)
Alternate: Professor Chris Naticchia
Professor David Ruzie (France)
Professor Werner Scholtz (South Africa)
Professor Mirjam Skrk (Slovenia)
Professor Christopher Waters (Canada)
Professor Andreas Zimmermann (Germany)

THIRD REPORT

Introduction

The Committee on Recognition/Non-recognition in International Law was established by the Executive Council of the International Law Association (ILA) in May 2009, with the purpose of examining "whether contemporary issues of secession, break-up of States and the creation of new States have changed international law and policy with respect to recognition." The Committee first met at the 2010 ILA Conference in The Hague, Netherlands. It also held meetings in the 2011 Regional ILA Conference, in Taipei, Taiwan, in Vienna in January 2012, in the 2012 ILA Conference in Sofia, Bulgaria, in Warsaw in June 2013 and in Washington in 2014.

The First Report of the Committee was presented at the 2012 ILA Conference in Sofia. It focused on the fundamental aspects of recognition of States. The Second Report, presented in Washington in 2014, focused on the international and domestic aspects of non-recognition and unrecognized entities.

This third report deals with the issue of recognition of governments. In preparation for this text, the members of the committee provided reports on their respective national practices, addressing the following questions:

- Does the State on which you are reporting formally recognize governments of other State entities? If so, has it stated its criteria? Once recognition is conferred upon a government, do any domestic legal consequences flow from such act?
- What are the important examples, if any, of the State on which you are reporting recognizing or not recognizing governments or other entities?
- Are there examples of domestic legal consequences due to the recognition of the government of another State entity?
- Do governments view acceptance of credentials under Vienna Convention on Diplomatic Relations as leading to other legal obligations, and if so, what are they?
- How does the State on which you are reporting address a disputed transition of government?

Responses were submitted by the following branches (and members): Austria (Gerhard Hafner), Australia (Alison Pert and Stephen Tully), Canada (Christopher Waters), Cyprus (Aristoteles Constantinides), France (David Ruzié), Italy (Enrico Milano), Japan (Shotaro Hamamoto), Kosovo (Robert Muharremi), Palestine (Valentina Azarova), Slovenia (Mirjam Škrk), Taiwan (Chun-I Chen and Pasha Hsieh), Tanzania (Khoti Kamanga), The Netherlands (Olivier Ribbelink), United Kingdom (Daud Ilyas and Matthew Happold), and the United States (Christopher J. Borgen, Margaret E. McGuinness, and Brad Roth). Additional research was conducted on Brazil.[1] Members of the committee were asked to provide, whenever possible, pertinent diplomatic, administrative, judicial or parliamentary practice of the countries on which they were reporting.

I. The recognition of governments as a legal concept

A. Defining the recognition of governments

Ordinarily, changes in the government of a State occur in accordance with the respective legal order and there is no dispute over who the legitimate representative of that State is. However, when a new government arrives in power in a manner not prescribed by that State's domestic legal order, such as a coup d'état or a revolution, the attitude of other States towards the new authority may be of fundamental importance to ascertain its international legal standing.

States have a spectrum of possible responses towards the new regime including: refusing diplomatic relations, maintaining pre-existing diplomatic relations, or interacting with the regime on an *ad hoc* basis without clearly stating whether it views the regime as a legitimate government. The executive, legislature, and judiciary of a State may, either in concert or separately, make declarations, enact laws, or decide cases that may explicitly or implicitly address whether the regime in question is the government of a particular State.

[1] The co-rapporteurs acknowledge the aid of research assistants Bruno Biazatti, Mariana Ribeiro and Mariana Ferolla in the preparation of this report and of Bruno Biazatti for his preparation of the Brazilian report.

The recognition of a government[2] may be defined as accepting certain institutions and/or individuals as the lawful representatives of a State in its international affairs.[3] It does not need to be formally or publicly announced[4] and it may be "more a matter of implication than of express declaration".[5] This report, however, focuses on the *formal* and express recognition of governments.

The practice of formally recognizing governments has been criticized by some commentators. For example, former International Court of Justice Judge Richard Baxter has written:

> [A]n institution of law that causes more problems than it solves must be rejected and replaced by working arrangements that are flexible and realistic. The partial withdrawal of law from this area of international relations will facilitate the maintenance of relations with states in which extraconstitutional changes of government are taking place, and that in itself is a good thing.[6]

---

[2] A definition of government, in the international legal context, was formulated by KELSEN: "A government, according to the norms of international law, is the individual or body of individuals which by virtue of the effective constitution of a state, represents the state in its relations with other states, i.e., is competent to act on behalf of the state in its relations with the community of states." KELSEN, Hans. Recognition in International Law: Theoretical Observations. *American Journal of International Law*, vol.35, pp. 605-617, Oct., 1941, p.614-615.

[3] In this sense, see Feldmann: "Recognition of a new government means that recognizing States consider it to be the only representative of this State in international affairs". FELDEMANN, David. The recognition of new governments and other types of recognition. In: _____. *International Personality*, 1985, pp. 395-405 (Collected Courses of the Hague Academy of International Law, vol. 191). In previous course, in 1933, Sir Williams stated that with the recognition of government, the State "(...) donne à entendre qu'il est prêt à accepter certains individus comme étant les agents effectifs d'un autre Etat dans toutes les activités internationales". See WILLIAMS, John Fischer. *La doctrine de la reconnaissance en droit international et ses développements récents*, 1933 (Collected Courses of the Hague Academy of International Law, vol. 044). A resolution of the Institute de Droit International defines recognition of governments as "l'acte libre par lequel un ou plusieurs Etats constatent qu'une personne ou un groupe de personnes sont en mesure d'engager l'Etat qu'elles prétendent représenter, et témoignent de leur volonté d'entretenir avec elles des relations." INSTITUTE DE DROIT INTERNATIONAL. *La reconnaissance des nouveaux Etats et des nouveaux gouvernements*. Session de Bruxelles, 1936. Available at < http://www.justitiaetpace.org/ > The U.S. *Restatement of the Law (Third) of the Foreign Relations Law of the United States* explains that recognition of a government constitutes a "formal acknowledgment that a particular regime is the effective government of a state and implies a commitment to treat that regime as the government of that state." *Restatement (Third)* § 203, *comm. a. The Restatement (Third)* is a publication of the American Law Institute. Although is not a code or even an official document, it is perceived as "an accurate distillation of the state of the law" at the time of its publication. The third and most recent version of "The Restatement of the Law" was published in 1987.

[4] JENNINGS, Robert; WATTS, Arthur. *Oppenheim's International Law*. Vol.1, 9 ed, London: Longman, 1992, p. 146.

[5] Ibid. See, however, the Restatement of the Law (Third) of the Foreign Relations Law of the United States, which regards recognition of governments as a "formal acknowledgment that a particular regime is the effective government of a state and implies a commitment to treat that regime as the government of that state."

[6] GALLOWAY, L. Thomas. *Recognizing foreign governments*: the practice of the United States. Washington: American Enterprise Institute, 1978, foreword.

As will be discussed in Part II, below, State practice itself shows a certain ambivalence regarding the recognition of governments.

B. Criteria for recognizing governments: theoretical and historical perspectives

Jurists have long opined on when a State should (or must) recognize or refuse to recognize a regime as the government of another State.

Effectiveness[7] seems to be a common requisite for almost all legal authors who wrote about criteria for recognition of governments. As put by Feldemann "it is of such great

[7] According to Jiménez de Aréchaga, "[c]abe definir la efectividad como el control de hecho de la machinaría administrativa de Estado, y la aquiescencia de la población del Estado al nuevo gobierno, la cual se manifiesta por la falta de resistencia armada a las nuevas autoridades. La efectividad se expresa por la continuada obediencia a ese nuevo centro de poder. Esta continuada obediencia se puede manifestar en forma expresa, mediante actos plebiscitarios, en los cuales el pueblo de un Estado adhiere al nuevo gobierno; o en forma tácita, mediante la falta de resistencia armada, la continuada obedecía de la población a las órdenes o mandatos del nuevo centro de poder." ("[e]ffectiveness can be defined as the *de facto* control of the administrative structure of the State, and the acquiescence of the State's population to the new government, expressed through the absence of armed resistance to the new authorities. Effectiveness expresses itself by the continuous obedience to the new center of power. This continuous obedience can manifest itself expressly, through plebiscites, in which the people adhere to the new government; or tacitly, through the lack of armed resistance or the population's continuous obedience to the orders and mandates of the new center of power.") ARÉCHAGA, Eduardo Jiménez de. *Derecho Internacional Publico,* vol.II, Montevideo: Fundación de Cultura Universitaria, 1995, p.57. For Feldemann, "If an old government is overthrown or the result of the struggle against it is predetermined, the question of effectivity of the new government arises, that is whether the latter is effective in realizing its power over the State territory, whether the great majority of the population of the country obeys it and if it really represents this State in international relations. That is, it must be evident that the new government is capable of living, that it can and really does accomplish the State power." In FELDEMANN, David. *International Personality*, 1985, p.400 (Collected Courses of the Hague Academy of International Law, vol. 191). See also Scipione: "On peut dire, en thèse générale, avec M. P. Costal qu'il existe une autorité effective là ou une personne, un comité ou une assemblée est obéi par la population d'un territoire déterminé et dans une forme telle que ses ordres sont respectés et observés, tout au moins en ce qui concerne l'impôt du sang et les autres contributions. Il n'est cependant pas toujours facile de juger de la généralité et de la continuité de cette obéissance. Quant à la généralité, on ne pourra prétendre que toute résistance cesse dans tout le territoire de l'État. Chaque gouvernement nouveau peut avoir sa Vendée. Quant à la continuité, on ne peut pas non plus se formaliser de quelques efforts pour la briser, pourvu que ces efforts n'arrivent pas jusqu'à la compromettre. (...) C'est donc la stabilité dans l'exercice du pouvoir, c'est la réalité de son action qui démontre le caractère effectif du gouvernement de facto." SCIPIONE, Gemma. Les gouvernements de fait. 1924, p.337 (Collected Courses of the Hague Academy of International Law, vol. 004)

importance that some lawyers consider it to be the only criterion of recognition."[8] Many authors also include *stability* as a criterion for recognition.[9]

Lauterpacht pointed out that effectiveness, "either in its literal sense or as evidenced by an adequate expression of popular consent-within the territory of the State is an essential and the principal condition of recognition both of States and of governments".[10] Moreover, "reasonable prospect of permanency and stability […] or the final and apparently irrevocable defeat of the pretensions of the parent State [...] are generally admitted".[11] According to Lauterpacht, the "free acceptance of the new regime by the majority of the population", and the "ability or willingness to fulfill international obligations" are also found in State practice, though less commonly than the other criteria.[12]

Schwarzenberger, however, presented a rather critical view of the role of acceptance by the majority of population: "In view of the means of control and repression at the disposal of any present-day government, it is hardly convincing any longer to imagine that, ultimately, any government depends on the consent of those governed." [13]

For Hans Blix, "the criteria of effective control, independence and stability is all that need be fulfilled by an authority legally to constitute a government."[14] Nevertheless, States

---

[8] FELDEMANN, op.cit., p.400. See, also, Pellet (et al.), "[l]a reconnaissance de gouvernement est une competénce de chaque État, competénce qu'il exerce de façon discrétionnaire, mais en se fondant, en principe, sur l'effectivité du gouvernement nouveau." DAILLER, Patrick; FORTEAU, Mathias; PELLET. *Droit International Public*. 8 ed. Paris: L.G.D.J., 2009. For Dupuy, "[L]a conduite la plus conforme au respect de la règle de non-ingérence dans les affaires intérieures d'un État consiste pour un État tiers à ne subordonner sa reconnaissance qu'à la seule exigence de l'effectivité des pouvoirs du gouvernement considéré, ce qui constitue d'ailleurs la position classique défendue en principe par la France." In DUPUY, Pierre-Marie. *Droit International Public*. Paris: Dalloz, 2002, p. 100.

[9] See, for instance, Scipione: "Mais, puisque liberté n'est pas caprice, les États ne se décident à donner ou à refuser leur reconnaissance à un nouveau gouvernement qu'à la suite de considérations très complexes. Une première appréciation est toujours une appréciation de fait. Elle précède toute décision. On ne trouvera point d'État disposé à reconnaître un changement qui ne présente pas des caractères d'effectivité et de stabilité." In SCIPIONE, Gemma. *Les gouvernements de fait*. 1924, p.337 (Collected Courses of the Hague Academy of International Law, vol. 004). In the same line of thought, Benadava wrote: "Un Estado no está obligado a reconecer a un nuevo gobierno, pero está facultado para reconocerlo si dicho gobierno es estable y efectivo" (A State is not under an obligation to recognize a new government, but is allowed to recognize it if such government is *stable* and *effective*). In BENADAVA, Santiago. *Derecho Internacional Publico*. Santiago (Chile): LexisNexis, 2001, p. 113. See also BARBOZA, Julio. *Derecho Internacional Publico*. Buenos Aires: Zavalia, 2004, p. 185; DIEZ DE VELASCO, Manuel. *Instituciones de Derecho Internacional Público*. 15 ed. Madrid: Tecnos, 2005, p. 272.

[10] LAUTERPACHT, H. De Facto Recognition, Withdrawal of Recognition, and Conditional Recognition. *British Yearbook of International Law*, vol. 22, pp.164-190, 1945, p. 172.

[11] Ibid.

[12] Ibid.

[13] SCHWARZENBERGER, Georg. *The fundamental principles of international law*. 1955, p.241 (Collected Courses of the Hague Academy of International Law, vol. 087)

[14] BLIX, Hans Martin. *Contemporary aspects of recognition*, 1970, p.643 (Collected Courses of the Hague Academy of International Law, vol. 130)

may withhold recognition of a government until the regime fulfills certain conditions, which are "extraneous to its quality as a government in the international law sense."[15] According to Blix:

> Such extraneous conditions may be of great diversity. Demands for democratic legitimacy as well as monarchic or any other "legitimacy" would be among them. Others could be more closely linked to the national interests of the foreign State, such as willingness of the new régime to respect obligations under treaties or general international law, to protect foreigners or foreign property, etc.[16]

With the perspectives of these jurists as context, we will turn to observations of State practice drawn from the reports submitted by Committee members. We stress that the descriptions and preliminary conclusions in this report are based on a small subset of States. They point to possible interesting trends and areas for further investigation.

II. The current practice of recognition of governments

A. Do States actually recognize governments?

The national reports found that, in general, the States studied did not formally recognize governments as part of their standard practice. One older example of a State *not* making *formal* declarations of governmental recognition is Mexico's Estrada Doctrine. In 1930, Genaro Estrada, the Secretary of Foreign Relations of Mexico announced that:

> [...] the Mexican Government is issuing no declarations in the sense of grants of recognition, since [this] nation considers that such course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments [...].[17]

The set of national reports submitted by the Committee Members revealed that the reasoning of the Estrada Doctrine finds place today in the practice of most of the States studied. The Australian report explained that Australia had abandoned the practice of

---

[15] "The criteria of effective control, independence and stability is all that need be fulfilled by an authority legally to constitute a government. When they are satisfied the authority can claim of other States conduct based on cognizance of its legal status: to be accepted in those functions in the international sphere which as of right may vest in it, e.g., representing the State in an international organization of which it is a member. This is not to say that it can claim close, friendly or even normal relations with other governments. It is open to a foreign State to reject any "optional co-operation". This latitude may evidently be used until the régime becomes more attractive to the State in question by fulfilling other conditions which may be raised, and which are extraneous to its quality as a government in the international law sense." Ibid, p.643-644.

[16] Ibid, p.644: "In short, in determining whether to recognize another government, States do not find the democratic quality of the government as decisive; other factors are taken into consideration as well. The stated reason for recognizing the government may be that the transition to democracy is better achieved by engaging in relations with the non-democratic government, rather than isolating it. Indeed, the willingness to recognize a non-democratic government is not necessarily detrimental to the best interests of its people; respectable arguments are made by respectable commentators that a democratic form of government is not the best form for some States depending on their stage of economic and political development."

[17] AMERICAN JOURNAL OF INTERNATIONAL LAW. Estrada doctrine of recognition. Vol. 25, n.4, Official documents, 1931, p. 203.

extending formal recognition to new governments in 1988.[18] Australian authorities chose to "conduct relations with new regimes to the extent and in the manner which may be required by the circumstances of each case."[19]

The reports concerning the State practice of Austria,[20] Canada,[21] Cyprus,[22] France,[23] the Netherlands[24] and the United Kingdom[25] made reference to express policies of recognizing States, not governments. Documents cited in the reports on Dutch[26] and British[27] practice also alluded to the practice of other States of not recognizing governments. The

---

[18] PERT and TULLY, Australian Report.

[19] Quoted in PERT and TULLY, Australian Report.

[20] HAFNER, Austrian Report.

[21] WATERS, Canadian Report.

[22] CONSTANTINIDES, Cypriot Report.

[23] "La pratique de la France est, en effet, d'entretenir des relations diplomatiques non pas avec des gouvernments mais avec des États. C'est ainsi qu'elle n'a accomplit pas d'acte formel de reconnaissance lorsqu'un nouveau gouvernment est instauré à la suite d'un changement de régime. Il s'agit d'une position constante." (Quoted from a response provided by the French Minister of Foreign Affairs on March 16, 1979). "Dans nos relations avec le Tchad, nous suivons les règles du droit international (...) nous reconnaissons les États et non les gouvernments" (Quoted from a response provided by the French Minister of Cooperation on November 25th, 1982). Both quotes appear in SALMON, Jean. *Dictionnaire de Droit International Public*. Brussels: Bruylant, 2001.

[24] RIBBELINK, Dutch Report.

[25] HAPPOLD, British Report.

[26] "The Netherlands Minister of Foreign Affairs sent a letter to Parliament on 4 July 1990 in which he informed Parliament "(…) of the practice that will be followed in future by the Dutch Government with regard to the recognition of governments." And he continued: "The Dutch view is that there is no duty to recognize a new government and no right to recognition of a new government. Factors which the Netherlands believes to be important in relation to the recognition of a new government are not only the effectiveness of its rule but also its willingness and ability to maintain relations on a footing of equality with other governments and to observe international obligations entered into by the previous government. Finally, in certain circumstances attention is paid to whether a new government has the support of a large part of the population." The Minister of Foreign Affairs then refers to the practice of the other states partners in the European Political Cooperation (EPC) which has become that "in the last few years in particular almost all of them have to some extent applied the doctrine 'we recognize states, not governments' (…) and since it is desirable to follow the policy of all the other EPC partners, the Dutch Government has come to the conclusion that it will no longer recognize governments." The letter concludes: "The answer to questions whether the Dutch Government regards an entity as a foreign government will have to be inferred from the nature of the relations which it has with that entity. Discussion of such issues will not disappear as a result of a change of this kind in Dutch policy, but will instead concentrate on the nature of the relations." RIBBELINK, Dutch Report.

[27] From 1981 onwards, the British government decided it would no longer formally recognize governments, as stated in a written answer in the House of Commons by the Lord Privy Seal: "We have conducted a re-examination of British policy and practice concerning the recognition of Governments. This has included a comparison with the practice of our partners and allies. On the basis of this review we have decided *we shall no longer accord recognitions to Governments*. The British Government recognizes States in accordance with common international doctrine." UNITED KINGDOM. House of Commons. Parliamentary debates, Written Answers, vol. 983, 25 April 1980, c.278. Reprinted in: United Kingdom Materials on International Law, *British Yearbook of International Law*, vol.51, 1980, p.367 (italics in original). Quoted in HAPPOLD, British Report.

Cypriot report also stated that "in the view of Cyprus, separate recognition of governments is an outdated practice (…)".[28]

Additionally, the Kosovar[29], Palestinian[30], Taiwanese[31] and Tanzanian[32] reports also mentioned a policy of according formal recognition to States, not governments. Also Polish[33] and Israeli[34] practice is limited to recognition of States, and no case of recognition of a government was reported.

The Italian report denoted a less explicit policy. Italy has never expressly stated its position of not recognizing governments, but it normally abstains from doing so. Recognition of governments is "implied from diplomatic relations and accreditation of diplomatic personnel".[35]

The U.S. report explained that, in the past forty years, as a means of exercising political approval or disapproval of foreign regimes, United States practice has shifted from the use of formal recognition of governments to deciding whether or not to have diplomatic relations with the regime in question. In most cases, the U.S. does not emphasize whether that government was "recognized."[36] As noted in the Restatement of the Law (Third) of the Foreign Relations Law of the United States, "[r]epeatedly, the State Department has responded to inquiries [about the recognition of governments] with the statement: 'The question of recognition does not arise: we are *conducting relations* with the new government'"[37].

Moreover, the *Restatement (Third)* notes that, while one State may recognize the government of another State, it may choose not to establish or to break off diplomatic relations with that government. The act of "breaking off [diplomatic] relations does not constitute de-recognition of the government."[38]

---

[28] Quoted in CONSTANTINIDES, Cypriot Report.

[29] "The Republic of Kosovo is independent since 2008, and without international supervision since 2012. Within this relatively short period of time as an independent state, Kosovo has focused on recognition of states and not on recognition of governments." In MUHARREMI, Kosovar Report.

[30] "Palestine abstains from formally recognizing foreign governments, nor maintains any formal policy position on the bright-line criteria for which governments it would be unable to recognise. It simply engages in relations that imply such recognition."AZAROVA, Palestinian Report.

[31] HSIEH and CHEN, Taiwanese Report.

[32] KAMANGA, Tanzanian Report.

[33] CZAPLINSKI, Personal communication with the co-rapporteurs via e-mail, 31 July 2016.

[34] RONEN, Personal communication with the co-rapporteurs via e-mail, August 1st, 2016.

[35] Quoted in MILANO, Italian Report.

[36] "In the past forty years, United States practice has moved away from focusing on the recognition of governments as a means of exercising political approval or disapproval of foreign regimes to one where diplomatic relations serve this function. While the U.S. may extend, withhold, or even "downgrade" diplomatic relations with various governments, in most cases (with the exception of certain instances, such as those discussed in Part II) the U.S. has not emphasized whether that government was "recognized."

[37] Reporters' Note 1 of Section 203 of the Restatement of the Law (Third) of the Foreign Relations Law of the United States. Quoted in BORGEN, MCGUINNESS and ROTH, U.S. Report.

[38] *Restatement (Third)* § 203, *comm. d*, quoted in BORGEN, MCGUINNESS and ROTH, U.S. Report; see also, *Oppenheim*, op. cit., Withdrawal of recognition, p. 177, § 52 (explaining that the U.S. has stated that severing diplomatic relations us not a withdrawal of recognition).

Within the sample of researched countries, only two clearly express a policy of recognizing governments: Japan and Brazil. Based on an official statement of the Government of Japan, the Japanese report explained that Japan may recognize a government even if it came to power by means that did not conform with that country's constitutional framework.[39] It should be noted, however, that Japan has not granted any express recognition of government since 1976.[40]

B. Criteria for the recognition of governments: evidence from State practice

According to the Japanese report, Japan sets two conditions for recognition of governments: territorial effective control and willingness and capability of observing international law. However, even when both conditions are present, there is no obligation to grant recognition.[41]

Brazil has listed four criteria to recognize a government: "(i) effective control over the territory and population; (ii) commitment to follow international obligations; (iii) the consent of the government to be recognized; and (iv) the democratic and constitutional character of the government transition in question."[42]

Even States that do not engage into the practice of recognizing governments may, occasionally, have to deal with competing claims of representation of a government. Most

[39] "Japan in principle grants both recognition of States and recognition of governments. […] Recognition of governments […] is granted when a new government is established in a State in a way not in conformity with the constitution of that State, for example by revolution." Statement by Mr. Akira Hayashi (Director-General, Treaties Bureau, Ministry of Foreign Affairs), Committee on Foreign Relations, House of Representatives, 16 April 1997, p. 8 [quoted and translated by Hamamoto]. HAMAMOTO, Japanese Report.

[40] HAMAMOTO, Japanese Report.

[41] "I think that there are two conditions for such recognition: first, the newly-formed government has established its effective control in the State; and second, the newly-formed government is willing to and capable of observing international law. Be it recognition of a State or of a government, recognition is a unilateral act of the recognizing State. There is no obligation to grant recognition where the above conditions are met and it depends on the will of the recognizing State." Statement by Mr. Akira Hayashi (Director-General, Treaties Bureau, Ministry of Foreign Affairs), Committee on Foreign Relations, House of Representatives, 16 April 1997, p. 8 [Translated by Hamamoto]. Quoted in HAMAMOTO, Japanese Report. Mr. Hayashi further explains: "When deciding whether to recognize a government, we consider whether such conditions are met. This is a decision to be made from a purely legal point of view. It goes without saying that, looking at the situation from another perspective, we consider it important that democratic regimes and respect of human rights spread all over the world. However, I trust that you understand that we will not necessarily withhold recognition of a government or of a State simply because […] there is no democratic election or no such political regime as the one we consider desirable in that State. When an entity is newly created as a State or a new government exercising effective control is objectively formed, it will be necessary to maintain relations with it concerning various questions […]"Statement by Mr. Akira Hayashi (Director-General, Treaties Bureau, Ministry of Foreign Affairs), Committee on Foreign Relations, House of Representatives, 16 April 1997, p. 9 [Translated by Hamamoto]. Quoted in HAMAMOTO, Japanese Report.

[42] Telegram sent by the Ministry of Foreign Relations of Brazil to the Brazilian Embassy in Washington, about the Brazilian Position in Matters of Recognition of Government. 14 October 1975. In BRAZIL, Brazilian Foreign Policy Handbook: 1961-1981, 2nd ed., Brasília: FUNAG, 2012, pp.180–181.

reports indicate that, in such situations, a position is developed on a case-by-case basis. Different criteria were mentioned, including legitimacy, effectiveness, effective control, national interest, position taken by regional[43] and international organizations and observance of democratic and constitutional procedures.

The United Kingdom seems to have a defined set of conditions concerning recognition during a contested transition. In the case *Republic of Somalia v Woodhouse Drake & Carey*[44], Justice Hobhouse enumerated the following criteria for acceptance of a government as the government of the State *in casu*:

(a) whether it was the constitutional government of the State;
(b) the degree, nature, and stability of administrative control – if any – that it exercised over the territory of the State;
(c) whether the United Kingdom government had any dealings with it and if so, the nature of those dealings; and
(d) in marginal cases, the extent of international recognition that it had as the government of the State.

As it will be later discussed, these criteria were applied in the case *Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc.*

C. Cases in which governments or other entities were (or were not) recognized

Members of the Committee were asked to provide relevant examples in which the State they were reporting on recognized (or did not recognize) governments or other entities. An example common to many reports is the recognition of "the Government of the People's Republic of China as the only legal Government of China".[45] National reports cited bilateral communiqués between the People's Republic of China and Austria (1971)[46], Brazil (1974)[47], Italy (1970)[48], Japan (1972)[49] and the United States (1978)[50], in which recognition of government was addressed, among other issues.

---

[43] Kosovo Report: "In conformity with its general foreign policy, Kosovo would follow the line taken by the European Union." In MUHARREMI, Kosovar Report. The Tanzanian report also made reference to the role played by the African Union in the recognition of the "NTC-led Government in Libya". KAMANGA, Tanzanian Report. See also MURPHY, Sean D. Democratic Legitimacy and the Recognition of States and Governments. *International and Comparative Law Quarterly,* vol. 48, pp. 545-581, 1999.

[44] UNITED KINGDOM. High Court. Queen's Bench Division. *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA,* 1993, p.54 ('*Woodhouse*'). Available at <http://www.uniset.ca/other/cs3/1993QB54.html > .

[45] HAFNER, Austrian Report; BIAZATTI, Brazilian Report; MILANO, Italian Report ; HAMAMOTO, Japanese Report ; BORGEN, MCGUINNESS and ROTH, U.S. Report.

[46] See HAFNER, Austrian Report.

[47] See BIAZATTI, Brazilian Report.

[48] See MILANO, Italian Report.

[49] Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, adopted on 29 September 1972. Available at <http://www.mofa.go.jp/region/asia-paci/china/joint72.html >. Quoted in HAMAMOTO, Japanese Report.

[50] The complete text of the joint communiqué between the United States of America and the People's Republic of China is available at <http://www.taiwandocuments.org/communique02.htm>.

More recent examples have focused on the legal significance of new terminology coming into practice.

The Austrian, Canadian, Palestine and Slovenian reports mentioned, as an example of not recognizing a government, the case of the National Transitional Council (NTC), in Libya. In the midst of the struggle for power between the Qaddafi regime and NTC, these States reconciled their respective positions of not recognizing governments and their will to politically support the NTC by recognizing the NTC as the "legitimate *representative* of the Libyan people" and not as the "government of Libya".[51] Similar statements concerning the status of the NTC were made by France, Qatar, the Maldives, Gambia, Senegal, Turkey, Jordan, Spain, and Germany.[52]

Analogous expressions were used to refer to the NTC by other States. Italy described the NTC as "the only legitimate interlocutor for bilateral relations".[53] The United States used the terminology "legitimate governing authority," and also stated that it no longer recognized the government of Muammar Qaddafi.[54] In considering this, the authors of the U.S. report wrote:

> We note that the U.S. government did not state that it was recognizing a "government" but a "legitimate governing authority." Whether there is a legal significance to the difference terms remains to be borne out in further practice. However, please note the similar practice concerning the Syrian Opposition Coalition, [...] which explicitly stated that in that case, recognizing a legitimate representative of the people was not tantamount to recognizing a government.[55]

Taiwan, for its part, explicitly stated that it regarded the NTC as the new government of Libya:

> The government of the Republic of China (Taiwan) respects the people of Libya's pursuit of democracy and recognizes the National Transitional Council (NTC) as the sole legitimate *governing authority* for Libya. Taiwan is willing to work with the *new Libyan government* to promote various cooperative projects, so as to enhance substantive bilateral relations. It is hoped that the welfare of the Libyan people will be enhanced under the leadership of the *new government*.

---

[51] HAFNER, Austrian Report; WATERS, Canadian Report, AZAROVA, Palestinian Report and ŠKRK, Slovenian Report. According to Azarova, "Palestine recognized the NTC *as legitimate representative of Libyan people* on 22 August 2011 through a declaration by President Mahmoud Abbas [no written record]. [...]the President's authority is art. 40 of the 2003 amended Basic Law: 'The President shall accept the credentials of foreign delegates to the Palestinian National Authority.' […] the 2003 draft Permanent Constitution makes similar provision at art. 125: 'The president of the state […] shall accept the credentials of representatives of foreign states and international and regional organizations.'" See < http://www.naharnet.com/stories/en/13431 >.

[52] TALMON, Stefen. Recognition of the Libyan National Transitional Council. *ASIL Insights*, vol. 15, issue 16, June 2011. Available at <https://www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council>. According to Talmon, France was the first country to recognize the NTC as"the legitimate representative of the Libyan people".

[53] MILANO, Italian Report.

[54] BORGEN, MCGUINNESS and ROTH, U.S. Report.

[55] Ibid.

In the case of Syria, some States demonstrated support to the National Coalition by acknowledging its position as the legitimate representative of the Syrian people, but not using the term "government". See, for examples, the reports concerning Australia[56], Japan[57], Slovenia[58], Netherlands[59], the United Kingdom[60] and the United States[61].

The Libyan and Syrian cases point to the emerging practice of declaring or even "recognizing" an entity as a "legitimate representative" or a "legitimate governing authority" or some other new term. Do such declarations depart from the preceding practice of some States of not formally recognizing governments? Are such statements tantamount to recognizing a government? In the Syrian case, the United States clarified its view of the legal significance of the "legitimate representative" terminology it was using:

> The U.S. Department of State announced at the Friends of the Syrian People meeting in December 2012 that the United States was recognizing the Syrian Opposition Coalition ("SOC") as the legitimate representative of the Syrian people. The United States does not recognize the SOC as the government of Syria.[62]

The U.S. made this announcement over a year after its recognition of the TNC in Libya as a "legitimate governing authority." While in the Libyan case there was certain ambiguity concerning whether that recognition was tantamount to the recognition of a government, in the Syrian case the U.S. government clearly stated in its practice, a "legitimate representative of the Syrian people" is not co-extensive with being the government of Syria.

---

[56] Australian Minister for Foreign Affairs, "Syrian Opposition Council", media release 13 December 2012. < http://foreignminister.gov.au/releases/2012/bc_mr_121213.html >. Quoted in PERT and TULLY, Australian Report.

[57] The Fourth Ministerial Meeting of The Group of Friends of the Syrian People, Marrakech, Chairman's conclusions, 12 December 2012. Quoted in HAMAMOTO, Japanese Report.

[58] ŠKRK, Slovenian Report.

[59] RIBBELINK, Dutch Report.

[60] UNITED KINGDOM. House of Commons. Parliamentary debates, vol. 553, 20 November 2012, cs. 445-450. Reprinted in: United Kingdom Materials on International Law, *British Yearbook of International Law*, vol.83, 2012, p.358; UNITED KINGDOM. House of Commons. Parliamentary debates, vol. 541, 28 February 2012, c. 266W Reprinted in: United Kingdom Materials on International Law, *British Yearbook of International Law* reprinted in , vol.83, 2012, p. 356.

[61] UNITED STATES OF AMERICA. Office of the Legal Adviser United States Department of State. *Digest of United States Practice in International Law.* 2012, CarrieLyn D. Guymon (ed.), p. 281. <http://www.state.gov/s/l/2012/index.htm >.

[62] *Ibid.* As quoted in BORGEN, MCGUINNESS and ROTH, U.S. Report, the U.S. Department of State spokesperson said: " As the President said last night, this reflects our positive view of the progress that the Syrian Opposition Council has made in establishing organizational structures, in making connections with the political opposition on the ground. And it also will give us the opportunity to better direct the nonlethal assistance that we are providing so that it can get directly to political leaders on the ground in the local coordinating councils, particularly in those areas of Syria that have now been liberated from regime control, and where these local coordinating councils are taking on functions of having to provide basic services, et cetera. So we want to strengthen a political opposition that's committed to a democratic transition." *See*, UNITED STATES OF AMERICA. Department of State Daily Press Briefing. Victoria Nuland Spokesperson Washington, DC, (December 12, 2012). Available at <http://www.state.gov/r/pa/prs/dpb/2012/12/201930.htm#SYRIA>.

Other reports, in addition to the American, assert that these declarations of support do not constitute formal recognition of government.[63] However, the real meaning of the expression "the legitimate representative of the people" remains unclear.[64] The Australian report affirms that "[...] it is merely a political expression of support for a particular group".[65] On the other hand, the Slovenian report states that these declarations "[...] concern the recognition of the legitimacy of relevant political movements or coalitions in the chaotic circumstances due to the dissolution of the previous regime or, in case of an internal armed conflict (civil war)."[66] The Dutch report mentions that recognizing a regime as the legitimate representative of the people "[...] is a political matter without international law implications."[67] From the practice of the States studied, is not possible to extract a definitive conclusion. We can only say that the evolving use of such "legitimate representative" terminology is one area of evolving State practice in relation to the law of recognition.

In contrast to the use of these new terms, once can in fact see recent clear statements of recognition. Consider the recognition of the government of Somalia, discussed in the Japanese and U.S. reports. As quoted in the Japanese Report, the State Minister for Foreign Affairs had previously declared:

> Since 1991, armed conflicts continue. Although a Transitional Federal Government was established in 2005, it still does not exercise effective control over the whole territory of Somalia. For these reasons, Japan has not recognized it. […] We are certainly aware that the TFG is now considered to represent Somalia in the United Nations or the African Union and there is an increasing necessity to cooperate with the TFG on the international plane. We will therefore carefully examine the matter, considering various circumstances surrounding Somalia.[68]

Japan only recognized the government of Somalia in November, 2012, after the adoption of the Somali provisional constitution.[69] Assistant Vice-Minister for Foreign Affairs Kazuyuki Yamazaki said: "The Japanese Government recognized the new government of Somalia, which was established for the first time […] 21 years ago". [70]

Similarly, the United States explicitly recognized the government of Somalia on January 17, 2013. The Note from the Spokesperson of the U.S. Department of State explained:

> In 2012, after more than a decade of transitional governments, Somalia completed its political transition process. This culminated in a new provisional constitution, a new parliament, and

[63] HAMAMOTO, Japanese Report; ŠKRK, Slovenian Report; PERT and TULLY, Australian Report; BORGEN, MCGUINNESS and ROTH, U.S. Report.

[64] The Japanese report says that the meaning of the expression "the legitimate representative of the people" "[...] remains ambiguous". See HAMAMOTO, Japanese Report.

[65] PERT and TULLY, Australian Report.

[66] ŠKRK, Slovenian Report.

[67] RIBBELINK, Dutch Report.

[68] JAPAN. House of Councilors. Committee on Official Development Aid. Mr. Yamane Ryuji (State Minister for Foreign Affairs), 27 March 2012, p. 3. Quoted in HAMAMOTO, Japanese Report.

[69] "The Japanese Government recognized the new government of Somalia, which was established for the first time since 21 years ago." JAPAN. House of Representatives. Committee on Land and Transportation. Mr. Kazuyuki Yamazaki (Assistant Vice-Minister for Foreign Affairs), 29 May 2013, p. 7 [translated by Hamamoto]. No reason for the recognition was indicated by the Assistant Vice-Minister. Quoted in HAMAMOTO, Japanese Report.

[70] Ibid.

> the election by that parliament of Mr. Hassan Sheikh as Somalia's president. In recognizing President Hassan Sheikh's government as the Government of Somalia, the United States is committing to sustained diplomatic engagement with the Somali authorities.[71]

Two straightforward statements of recognition of a government, without any new terminology.

III. The domestic legal consequences due to the recognition or non-recognition of the government of another state

Recognition of a regime may have a variety of legal consequences such as access to the domestic courts of the recognizing State, control of State property located abroad (such as bank accounts), possibility to claim certain privileges and immunities and the attribution of legal value to foreign official acts and documents.[72]

The case *Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc* (QBD 25 Feb. 1998) provides an example of a domestic consequence due to the recognition of another State entity.[73] Sierra Leone Telecommunications Co Ltd (Sierratel), a company incorporated in Sierra Leone, was wholly owned and controlled by the Sierra Leone government. It held an account with Barclays Bank in London. Under its mandate, Barclays Bank was required to act on the authority of the directors of Sierratel.

When a military coup took place in Sierra Leone in 1997, the democratically elected government of President Kabbah was forced into exile in Guinea, where it claimed to continue to act as the government of Sierra Leone. Barclays Bank was then notified by the alleged new controllers of Sierratel that the old board of the company had been dissolved and that, with immediate effect, the previous signatories were suspended. Following the notification, Barclays Bank refused to meet payments. Sierratel applied to the court for a declaration of right, contending that the previous mandate remained valid and that the authority of the signatories had not been validly revoked.

The court applied the criteria set in the case *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA*.[74] It concluded that the military junta was not the constitutional government of the State and had no control over more than two-thirds of the country. Additionally, the government of the United Kingdom had consistently censured the

---

[71] UNITED STATES OF AMERICA. Office of the Spokesperson. Somalia President Hassan Sheikh Mohamud's Visit to Washington, DC. Media Note, Washington, DC. January 17, 2013. Available at <http://www.state.gov/r/pa/prs/ps/2013/01/202997.htm>. See also UNITED STATES OF AMERICA. Office of the Legal Adviser United States Department of State *Digest of United States Practice in International Law.* 2013, CarrieLyn D. Guymon (ed.), p.251-52. Available at <http://www.state.gov/s/l/2013/index.htm>. Quoted in BORGEN, MCGUINNESS and ROTH, U.S. Report.

[72] BORGEN, MCGUINNESS and ROTH, U.S. Report and KAMANGA, Tanzanian Report. See, in this regard, Peterson, who states that "Differences of treatment persist in three fields: a new government's ability to sue in foreign courts, suits involving governmental acts having extraterritorial effect, and possession of state property located abroad." (PETERSON, M.J. Recognition of Governments Should Not Be Abolished, *American Journal of International Law*, vol.77, pp. 31-50, 1983, p.36.)

[73] UNITED KINGDOM. High Court. Queen's Bench Division. *Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc*, 1998.

[74] *Woodhouse*, op. cit.

military coup and continued to deal with the Kabbah government; finally, the coup had been condemned by the United Nations Security Council, the Commonwealth, the Organization of African Unity and the European Community.

The *British Arab Commercial Bank plc v National Transitional Council of the State of Libya* case[75], a decision rendered by the Queen's Bench Division in 2011, provides another illustration of disputed transition of government. It addressed the status of the National Transitional Council of the State of Libya (NTC) and the prerogative of its representatives to control funds held by the Libyan embassy in the United Kingdom.

The Libyan embassy had funds in the British Arab Commercial Bank. A significant portion of those funds was intended to finance student grants for Libyan students in the United Kingdom.

In 2011, after the adoption by the United Nations Security Council of economic sanctions against Libya, the United Kingdom's relation with the Gaddafi government deteriorated and, in July, the NTC was recognized as the sole government of Libya. Subsequently, diplomats from the previous regime were asked to leave the country and new representatives were indicated by the NTC[76].

Following these events, the British Arab Commercial Bank received a series of contradicting instructions regarding the management of the student grant funds. The Bank was instructed by both contending sides, diplomats of the Gaddafi government and the Libyan Foreign Bank, its major shareholder, to prevent further withdrawals from the accounts. Despite these orders the Libyan embassy requested the payment of certain student grants[77].

The Bank started proceedings before the Queen's Bench Division asking for a declaratory judgment as to who could operate the mandate over the funds. The Court decided that the accounts belonged to the Libyan embassy and, as the NTC diplomats where the only accredited representatives of Libya in the UK, the funds owned by the Libyan government were under their control[78].

The Japanese report also discussed a case adjudicated by the Japanese Supreme Court in 2007 (*Kokaryo* case). In 1952, a dormitory in Kyoto (named "Kokaryo") was purchased by the Republic of China, to be used by Chinese students.

Some residents, as an act of political support of the government of the People's Republic of China, refused to observe residential regulations. The consulate of the Republic of China, unable to have the students comply with the regulations or to leave, brought a claim to the Kyoto District Court in 1967.[79] Meanwhile, in 1972, with the suit still

[75] UNITED KINGDOM. High Court. Queens Bench Division. Commercial Court. *British Arab Commercial Bank plc v National Transitional Council of the State of Libya, ex parte Foreign and Commonwealth Office*, Case No 2011 FOLIO 944, 2011.
[76] Ibid, paras.2-6.
[77] Ibid, paras.7-9.
[78] Ibid, paras.25-28.
[79] ANDO, Nisuke. Khoka-Ryo Case and International Law: A Critique of the Japanese Supreme Court Decision. *Japanese Yearbook of International Law*, vol.53, 2010, pp.1-18.

pending, Japan recognized the Government of the People's Republic of China as "the only legal Government of China".

Two legal issues relating to the shift in the recognition of the Chinese government were brought before the lower courts (i.e., the Kyoto District Court and the High Court of Osaka): (1) whether or not the Republic of China (Taiwan) had lost all *locus standi* before Japanese courts and (2) whether or not the ownership of *Kokaryo* had been transferred to the People's Republic of China.[80]

The lower courts recognized the *locus standi* of the Republic of China (Taiwan) and rejected the transfer of *Kokaryo*'s ownership to the People's Republic of China. The decision, however, was reversed by the Japanese Supreme Court. The relevant parts of the decision, quoted in the Japanese report, are the following:

> [T]he party to be identified as the plaintiff in this case is the State of China whose name was the "Republic of China" at the time of the filing of this lawsuit, but then changed to the "People's Republic of China" on 29 September 1972, when this case was first pending before the first instance court. […]
>
> Nevertheless, on the premise that the party identified as the plaintiff was the party existing as a de facto State with control over Taiwan, the court of the first instance carried out the proceedings and gave judgment […].
>
> Accordingly, the Court cannot but conclude that on and after 29 September 1972, while this case was first pending before the first instance court, the court proceedings were carried out without delegation of powers necessary to perform procedural acts on behalf of the person identified as the plaintiff, i.e., the State of China, and therefore the original judgment shall inevitably be quashed without passing judgment on the parties' arguments […].[81]

Therefore, the Japanese Supreme Court considered that the Republic of China (Taiwan) had lost the right to represent China in Japan, left the issue of ownership open and sent the case back to the court of first instance (Kyoto District Court). The case is still pending at the present time.[82]

In regards to U.S. law, the recognition of a regime as the government of a State can lead to that government being able to: (a) maintain a suit before a U.S. court, (b) claim sovereign immunity if sued in U.S. court, (c) access property of the State, such as bank accounts, within the jurisdiction of the U.S., and (d) have its lawful acts recognized by the U.S.[83]

---

[80] Ibid.

[81] Judicial Decisions in Japan. *Japanese Yearbook of International Law*, vol. 51, pp.512-569,2008. Judgment, Supreme Court, 27 March 2007 p. 512. Quoted in HAMAMOTO, Japanese Report.

[82] It is further explained in the Japanese Report that the "2007 Judgment of the Supreme Court has been severely criticized by a number of Japanese international lawyers. Nisuke Ando argues that the Kokaryo case, being a civil one, has nothing to do with the right to represent the State of China and that the 1972 Joint Communiqué (...) does not prevent Japan from allowing its nationals to engage in various transactions of private character with the people of Taiwan or with the government of the Republic of China." In HAMAMOTO, Japanese Report.

[83] BORGEN, MCGUINNESS and ROTH, U.S. Report., referring to discussions in MURPHY, Sean. *Principles of International Law*. 2nd ed., West Academic Publishing, 2012, p. 41; BEDERMAN, David. *International Law Frameworks*. Foundation Press, 2001, p.56-57); *Oppenheim's*, op. cit., p.158-160, § 47 and accompanying notes concerning U.S. practice; see, also, *Restatement (Third)* § 205 concerning the effects of non-recognition.

In *Banco Nacional de Cuba v. Sabbatino*, the U.S. Supreme Court stated that foreign States are allowed to access U.S. courts based on the principle of comity.[84] It also decided that the U.S. courts may accept suits brought by governments with which the U.S. does not maintain diplomatic relations, such as the Castro regime in Cuba. [85] It is further explained that

> This followed earlier jurisprudence that suits by corporations owned or controlled by unrecognized regimes may be permitted. In cases where the Executive has explicitly stated that a particular government is barred from accessing U.S. courts, courts will defer to that decision. In cases where the Executive is silent, a U.S. court may then determine whether to treat an entity as the government of a state.[86]

While U.S. courts have not held recognition of a government by the Executive to be a necessary condition for sovereign immunity,[87] they have held it to be a sufficient basis for immunity.[88] Moreover, where the Executive has recognized a competitor government or has made a definitive determination that a *de facto* government is not to be recognized, the courts would be unlikely to confer sovereign immunity on the *de facto* government and its agencies.[89]

A U.S. federal court surveyed practice across jurisdictions in the United States and discerned at least four "divergent approaches" to issues related to unrecognized entities, which may include issues of aspirant States or governments:

1. Unrecognized entities are denied comity and therefore denied access to courts and to property held in the U.S;
2. Unrecognized entities are generally accorded *de facto* juridical personality for the purpose of engaging in commercial transactions, conveying private rights and giving effect to judicial and ministerial acts within the recognized entities' territory;

---

[84] The U.S. Supreme Court wrote: "Under principles of comity governing this country's relations with other nations, sovereign states and allowed to sue in the courts of the United States, …This Court has called 'comity' in the legal sense 'neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.'" UNITED STATES OF AMERICA. Supreme Court. *Banco Nacional de Cuba v. Sabbatino*, 1964 ("*Sabbatino*"). In: United States Reports vol. 376 , 1964, p.408-409; Supreme Court Reporter, vol. 84, p.930. Quoted in BORGEN, MCGUINNESS and ROTH, U.S. Report.

[85] *Sabbatino*, 930-32. *See also*, *Restatement (Third)* § 205, Reporter's Note 1. Cited in BORGEN, MCGUINNESS and ROTH, U.S. Report.

[86] BORGEN, MCGUINNESS and ROTH, U.S. Report. Citations omitted.

[87] BORGEN, MCGUINNESS and ROTH, U.S. Report., citing to UNITED STATES OF AMERICA. Court of Appeals of New York. *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 1923. In: New York Reports, vol. 234, p. 372; North Eastern Reporter, vol. 138, p. 24.

[88] BORGEN, MCGUINNESS and ROTH, U.S. Report., citing to UNITED STATES OF AMERICA. Supreme Court. *National City Bank of New York v. Republic of China*, 1955. In: United States Reports vol. 348, p. 358 (continuing U.S. recognition of the Taiwan-based government compelled immunity, since "[t]he status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of the Court").

[89] BORGEN, MCGUINNESS and ROTH, U.S. Report., citing to Note, HINES, Julius H. Why do Unrecognized Governments Enjoy Sovereign Immunity--A Reassessment of the Wulfsohn Case. *Virginia Journal of International Law*, vol. 31, issue 4, pp. 717-760, 1991, p.759 (1991).

3. Courts defer to the Executive policy and statements when determining the scope of sovereign immunity of unrecognized entities;
4. In the absence of an Executive policy or Statement, courts permit jurisdiction over unrecognized entities if such jurisdiction does not violate public policy or the interests of justice.[90]

In addition, courts in the United States have given effect to acts "dealing solely with private, local and domestic matters," within the territory of the entity, as opposed to "with respect to matters extending beyond the borders [...]"[91]

There is a difference between an entity being regarded as simply "unrecognized" and a situation in which there is a U.S. policy of non-recognition. The key factual distinction between the two is whether the Executive has stated an affirmative policy of non-recognition, or has remained silent; in the latter case, the courts may treat the entity as simply unrecognized.

IV. The Vienna Convention on Diplomatic Relations and Recognition of Governments

Despite the relevance of the issue, little has been written on the potential link between diplomatic relations and recognition of governments. When addressing the matter in 1924, Scipione asserted that the admission of a right of diplomatic representation culminated in the admission of the legal existence of the government.[92] Hans Blix, in a later work (1970), affirmed that there had been no examples of the establishment of diplomatic relations without recognition:

> A government can recognize another State or government without establishing diplomatic relations with it. If official contacts will be numerous, voluminous or important, it may, however, prove practical or even indispensable to establish a channel for official contacts by

[90] BORGEN, MCGUINNESS and ROTH, U.S. Report, the list is adapted from UNITED STATES OF AMERICA. District Court for the Southern District of New York. *Knox v. PLO*, 2004. Federal Supplement 2nd series, vol.306, p. 441-43. Section 205 of the *Restatement (Third) of Foreign Relations Law*, "Effects of Nonrecognition: Law of the United States," states, in part: "Under the law of the United States:…(1) an entity not recognized as a state, or a regime not recognized as the government of a state, is ordinarily denied access to courts in the United States;…(2) courts in the United States ordinarily give effect to acts of a regime representing an entity not recognized as a state, or of a regime not recognized as the government of a state, if those acts apply to territory under the control of that regime and relate to domestic matters only. »

[91] UNITED STATES OF AMERICA. District Court for the Southern District of New York. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 1968. Federal Supplement, vol. 293, p.900 modified U.S. Court of Appeals for the Second Circuit. Federal Supplement 2nd series, 1970, vol. 433, p. 686 , cert. denied United States Reports vol. 403, p. 905; Supreme Court Reporter, vol. 91, p. 2205, 1971 (refusing to give effect to German Democratic Republic's legislation concerning the Zeiss Foundation) as quoted by BORGEN, MCGUINNESS and ROTH, U.S. Report. See also *Restatement (Third)* § 205, Reporter's Note 3.

[92] "Nous savons que, sauf engagements particuliers, un État n'a le devoir ni de reconnaître, ni de ne pas reconnaître un gouvernement de fait; mais ce qui est bien démontré par ces anciens débats et ce qui reste toujours incontestable est qu'admettre un droit de représentation diplomatique, c'est admettre aussi 1'existence légale du gouvernement dont on accepte officiellement les envoyés». In: SCIPIONE, Gemma. Les gouvernements de fait. 1924, p.372 (Collected Courses of the Hague Academy of International Law, vol. 004).

> means of diplomatic missions. The practice of States evidences no cases, on the other hand, in which such diplomatic relations have been established without recognition. Such relations are universally comprehended as implying recognition.[93]

In the same line of thought, Warbrick argued that "the opening of diplomatic relations is one of the few objective acts from which recognition may be implied".[94]

When asked about obligations which may flow from the acceptance of credentials under Vienna Convention on Diplomatic Relations, most reports made reference to the terms of convention itself, such as the diplomatic privileges and immunities. Others, which dealt specifically with the possible relation between diplomatic relations and recognition had distinct responses and also addressed recognition of States.

The Australian[95] and the Palestinian[96] reports stated that acceptance of credentials under the Convention necessarily meant that the sending State had been recognized by their respective States (i.e., Australia and Palestine). On the other hand, the Slovenian report pointed out that Slovenia had accepted the credentials of the Ambassador of Palestine, although it had not yet recognized it at the time.

As for the United Kingdom, as mentioned in one of the British reports, "the existence of diplomatic relations does not necessarily constitute dealings on a 'normal Government to Government basis', as diplomatic relations are said to be maintained with States rather than Governments." The Taiwanese report cautioned it was unclear whether acceptance of credentials led to "legal obligations in addition to those in the said Convention."[97]

Closing Observations

The practice of the States studied in this report reveals that formal recognition of governments seems to no longer be a widespread international practice. Accordingly, when faced with two or more competing regimes claiming to be the government, States frequently offer political support to one of them by treating it as the legitimate representative of the local people or the rightful authority. The word "government" is deliberately not used in order to avoid any contraction in the position of not recognizing governments.

The criteria to determine which competing claim shall prevail vary in the State practice. Most reports indicated that a decision choosing a regime to be supported is taken on a

---

[93] BLIX, op. cit., p.600.

[94] WARBRICK, Colin. The New British Policy on Recognition of Governments. *International and Comparative Law Quarterly*, vol. 30, issue 3 , pp. 568-592, July 1981, p. 569. See, also, Rosenne: "(…) acceptance by the competent authorities of a State of the accreditation of an individual such as an ambassador, means recognition of the accrediting authority" ROSENNE, Shabtai. *The perplexities of modern international law*: general course on public international law. 2001, p. 269 (Collected Courses of the Hague Academy of International Law, vol 291).

[95] "In the case of Australia, yes, but only because acceptance of credentials under the Convention necessarily means that the sending state has been recognised by Australia. The consequences are that the Convention's provisions on diplomatic privileges and immunities will apply." PERT and TULLY, Australian Report.

[96] "If Palestine as receiving state accepts the credentials of a diplomat from a sending state, the acceptance implies that Palestine recognizes the sending state as a state and the government of the sending state as the government of the sending state." AZAROVA, Palestinian Report.

[97] HSIEH and CHEN, Taiwanese Report.

case-by-case basis, considering, *inter alia*, effectiveness, national interest, the position adopted by regional and international organizations and respect for democratic and constitutional procedures.

Moreover, recognition of a regime may have legal and political implications in the domestic sphere of the recognizing State. For instance, recognition can affect the control of State property as well as privileges and immunities and the *locus standi in judicio in the courts of the* recognizing country.

A very uncertain aspect relating to the formal recognition of governments is its impacts on the diplomatic relations. The reports submitted by the members of the Committee indicates that the State practice is far from uniform on this issue. Thus, the maintenance (or severance) of diplomatic relations and the acceptance (or rejection) of credentials under the Vienna Convention on Diplomatic Relations do not necessarily mean that a new regime in the sending State had been or had not been recognized by the receiving States.

SUSTAINABLE DEVELOPMENT AND THE GREEN ECONOMY IN INTERNATIONAL TRADE LAW

WORKING SESSION

Tuesday, 9 August 2016, 2.00pm

Chair: Professor Toshiyuki Kono (Japan)

The Chair welcomed attendees and provided them with the minutes of the inaugural meeting of the Committee that was held in Geneva in June 2015. He then introduced Professor Mary Footer (UK), chair of the Committee, who went on to explain the history and development of the Committee, referring to its mandate of November 2014. The International Trade Law Committee, of which the Chair had been a member, was wound up at the 2014 Washington Conference, and it had been decided to build on some of the work of that Committee under the present Committee.

The Committee was interested in two specific areas of international law, namely climate change and sustainable development. This decision had been motivated by two events in, namely the adoption of the Paris Agreement on climate change in December, 2015 and the launch of the Sustainable Development Goals (SDGs) in September, 20165. The aim of the Committee was to analyse and study how far the rulesbased international trading system supported open, fair and developmentfriendly trade, which was both socially inclusive and environmentally sustainable as an enabling environment for sustainable development and a green economy.

There had not been any further developments in the WTO Doha Round. There had, however, been some developments in regional trade agreements, such as the Trans-Pacific Partnership Agreement and the EUCanada Free Trade Agreement.

At its inaugural meeting in June, 2015, the Committee had selected and allocated specific topics in the following areas of its mandate: trade and environment; climate and energy; trade and agriculture; and trade and development. The importance of transparency in international trade agreements had also been emphasised.

The Chair further questioned what needed be done, if anything, to ensure that everyone in the world received basic nutritional food or access to food as stated in the Sustainable Development Goals, specifically in developing countries.

Professor PeterTobias Stoll (Germany) queried what the possible the impact might be of the Sustainable Development Goals and the Paris Climate Agreement.

Professor Footer responded that the Cambridge meeting, scheduled for November 2016, would expand more on this issue. Professor Kati Kulovesi, a new member of the committee from Finland, would develop this issue in the context of the forthcoming UNFCCC (COP 22) meeting in Marrakech in November, 2016, which she would be attending.

Dr Markus Gehring (Germany), who had been in the ILA Committee meeting on the Role of International Law in Natural Resource Management for Development, observed that the latter Committee's work could complement the work of this Committee. He asked whether the Committee would also analyse how international trade law stands in the way of the transition to a greener economy.

Professor Footer responded that members of the Committee were practitioners with experience advising clients in various fields whilst having extensive experience in the fields of international trade law and the environment. The Committee could investigate these obstacles. She had suggested during the Geneva meeting that the Committee map out a clear route for identifying what these obstacles were.

As for advice to developing countries, she noted that there was developing country fatigue, in a sense that there was an inconclusive round of trade negotiations, the Doha Development Round having been put on ice. This took the pressure off the international trade community to think about the developing country context, which was very unfortunate. Many multinationals had access to information compared to governments in underdeveloped countries.

Dr Gehring made reference to carbon leakage and border adjustments. He also noted that carbon pricing after the Paris Agreement would be inevitable.

Professor Footer referred to the second area of the mandate, which addresses carbon pricing and carbon emissions trading.

Ms Luz Helena Hanauer asked whether the Committee was going to address the obligations of States in relation to environmental agreements outside the traditional trade system. She also queried whether the Paris goals were binding on States.

Professor Footer referred to the mandate of the Committee, which it had interpreted as having an emphasis on issues relating to the 'international trading system', which included regional trade agreements. She noted that disputes could not be avoided and that all WTO Members had the right to bring a complaint regarding any of the 'covered' multilateral agreements at the WTO. As for the Paris Agreement, it was not necessarily binding on all States, only those that had become parties to it.

Professor KilWon Lee (Korea) queried whether the Committee had been in talks with international organisations such as the WTO, UN and WIPO. He noted that the topics covered by the mandate seemed broad, and asked how the Committee proposed to manage and control these issues. Finally, he asked what the goal for the Committee was in the coming two to four years.

Professor Footer responded that the Committee was keen to take the discussion beyond the confines of international trade law. At its very first meeting in Geneva in 2015 the Committee had invited representatives from a number of institutions to address the Committee members.

The Committee intended examining what was being done in the UN system, where there was a "task team" looking at the post2015 Development Agenda. The UN system linked up all agencies and programmes, which is something that can never been done in the WTO.

The Committee could make recommendations to those working in the UN system on both the development system and development agenda. The Committee had sought to narrow down the topics within is mandate according to the degree of importance, with a view to encouraging a proactive approach in dealing with the issues, which fluctuated in

accordance with the sustainable development goals. All members of the Committee were willing to work on these issues one topic at a time.

As the breadth of the Committee's mandate, Professor Footer explained that, following discussion on the matter, it had been kept deliberately broad. Climate change and sustainable development discussions were not occurring mainly at the WTO so to limit discussions to those at the WTO would be an "own goal" by the Committee. Similarly, the Committee would not achieve its aims if it were to limit its work only to regional trade agreements. At this point nothing was ruled out but if some issues emerge as more pressing areas of work, then work of other aspects could be reduced accordingly.

Professor Junji Nakagawa (Japan) made reference to the detailed documentation tabled by the Professor Footer, which gave an indication of what would be discussed in the Committee.

Dr Gehring queried whether there were ways in which individuals could engage with the Committee without being ILA members and, if so, how they could get involved.

Professor Footer responded that non-members could indeed get involved through open sessions such as the present session during the biennial conferences. She voiced her support for greater cooperation and collaboration. It was important to reach out to other members. There was a need for greater transparency and improved communications amongst ILA members.

The Chair thanked attendees for their participation.

Reporter: Avela Jade Banda

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

IMPLEMENTATION OF THE RIGHTS OF INDIGENOUS PEOPLES

Members of the Committee

Professor Dalee Dorough (USA): *Co-Chair*
Professor Willem van Genugten (Netherlands): *Co-Chair*
Dr Federico Lenzerini (Italy): *Co-Rapporteur*
Professor Timo Koivurova (Finland): *Co-Rapporteur*

Mrs Elizabeth Ebun Abolarin (Nigerian)
Professor Christina Binder (Austria)
Alternate: Professor Rene Kuppe
Claire Winfield Ngamihi Charters (New Zealand) – Nominee of Chair
Alternate: Mr Andrew Erueti
Dr Cathal Doyle (Ireland)
Professor Tibaut Fleury (France)
Professor Felipe Gomez Isa (Spain)
Professor Lorie Graham (USA) – Nominee of Chair
Professor Rainer Hofmann (Germany)
Dr Gloria Esther Huaman Rodriguez (Austria) – Nominee of Chair
Professor Catherine Iorns Magallanes (New Zealand)
Dr Mara Kimmel (USA) – Nominee of Chair
Professor Maja Kirilova-Eriksson (Sweden)
Professor Takanobu Kiriyama (Japan)
Alternate: Professor Yuko Osakada
Andre Lopes Lasmar (Brazil)
Dr Jernej Letnar Cernic (Slovenia)
Dr Anna Meijknecht (Netherlands)
Alternate: Dr S J Rombouts
Professor Dwight Newman (Canada) – Nominee of Chair
Professor Oyvind Ravna (Norway)
Rafael Soares Leite (Brazil)
Professor Gerard Teboul (France)
Alternate: Professor Eric Canal-Forgues
Valmaine Toki (New Zealand) – Nominee of Chair
Dr Alexandra Tomaselli (Germany)
Professor Siegfried Wiessner (USA)

INTERIM REPORT

1. Introduction: Background, Mandate of the Committee and Methodology of Work[1]

During the fall of 2014, the Chair, the co-Chair, the Rapporteurs and some Committee members prepared a work-plan to serve as a basis for the first formal meeting of the Committee (after a small informal meeting during the combined ILA and American Society of International Law Meeting at the beginning of April 2014). The first formal meeting took place in The Hague, at the Institute for Global Justice, from 20 to 21 February 2015. The meeting attracted a good number of members and future members, some of whom took part via the Skype connection, while it was also attended by a number

[1] This Section is based on the Committee's "Report of the Meeting held in The Hague on 20-21 February 2015", circulated among Committee members in September 2015.

of observers. The initial work plan was intensely discussed during the meeting, since it would provide the direction for the work of the Committee.

The mandate of the Committee is to provide an in-depth study on the level of implementation of existing norms of international law – be it customary international law, treaty law or *soft law* – as ascertained and interpreted by the ILA Committee on the Rights of Indigenous Peoples, which completed its work at the ILA Biennial Conference held in Sofia in August 2012.[2] In particular, the present Committee aims at carefully looking at what legal, quasi-legal and practical barriers potentially block the road for existing international legal standards to translate into actual protection of indigenous peoples in a number of countries throughout the world. While the former Committee ascertained that in many countries significant practice and *opinio juris* have developed which are consistent with the provisions of the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP),[3] and, with respect to some rights, have risen to the level of customary international law, a range of problems remain which often hinder the full realization of the UNDRIP provisions and pertinent customary international law. Such problems need to be addressed taking as guidance *ILA Resolution No. 5/2012*,[4] which endorsed with a virtually unanimous vote and without any objections the findings and conclusions arising from the work of the former Committee. As to actual practical problems, one can refer to the fact that indigenous peoples are often confronted with discrimination and social, economic, and political marginalization. Other major violations of their rights relate to denial of justice, such as arbitrary arrests, unjust imprisonment and related inhumane treatment, denial of liberty of association, and collective punishment. In some cases, such violations arise solely as a result of their efforts to promote or safeguard their human rights. Other violations relate to reluctance shown by governments to recognize and implement in practice indigenous peoples' rights to lands and resources or cultural rights, as well as to lack of access to schools and health facilities, political recognition, representation, and participation. Often, the rights of indigenous peoples to their lands, territories, and resources have not been secured, leaving them with little or no access to natural resources on their territories and to their traditional economies. In some cases, they are forcibly removed from their lands in order for others, including foreign investors and multinational companies, to exploit their resources. Given the inter-related, interconnected, indivisible and inter-dependent nature of indigenous peoples' human rights, each violation of the latter reverberates on the whole social and cultural structure of the communities concerned. Denial of land rights, in particular, translates into the impossibility for indigenous peoples to enjoy their internationally recognized cultural and other rights, to maintain a livelihood of their own choice, to determine their own priorities for development, or, even more important, to foster and transmit their cultural identity to future generations. A key issue − in many ways: *the* issue − therefore relates to land rights, which are the focus of the mandate of the Committee, embedded in the notion that all indigenous peoples' human rights have a strong cultural dimension, the recognition of which is at the foundation of their very existence. At the same time,

[2] The documents produced by the ILA Committee on the Rights of Indigenous Peoples are available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> (accessed 11 June 2016).

[3] UN General Assembly Res. 61/295 of 13 September 2007.

[4] ILA Resolution No. 5/2012, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> (accessed 11 June 2016).

however, the approach of the Committee is based on the assumption that all the different human rights recognized by international law in favour of indigenous peoples are strictly interrelated and inseparable from each other. This relates, *inter alia*, to the interplay between economic and cultural rights.

In terms of legal standards used by the Committee to ascertain the level of effective implementation of the rights of indigenous peoples in the real world, priority is given to the standards established by the UNDRIP. However, attention is also devoted to other pertinent international legal standards, particularly pertinent rules of customary international law (which reflect some of the standards provided for by the UNDRIP), ILO *Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries* of 1989 (ILO Convention 169),[5] as well as other international instruments and/or rules which are directly or indirectly relevant to indigenous peoples, including (but not limited to) the *International Covenant on Civil and Political Rights* (ICCPR)[6] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),[7] the 1965 *Convention on the Elimination of All Forms of Racial Discrimination*,[8] the 1989 *Convention on the Rights of the Child*,[9] the 1992 *Convention on Biological Diversity*[10] and its *Nagoya Protocol*,[11] as well as bilateral treaties between the states and indigenous peoples. Furthermore, the case-law of the Inter-American Court of Human Rights (IACtHR) is devoted special attention, together with the practice of other human rights monitoring bodies, including the African Commission on Human and Peoples' Rights, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and the Committee of the Rights of the Child. Last but not least, the interplay between the domestic, national, regional and international level is also considered. More in general, the Committee's approach consists in considering any type of norms which are relevant to its study, irrespective of whether these are strictly legally binding or not.

As for the methodology used by the Committee, a range of cases have been studied, in order to collect empirical material for providing a response to the question concerning the way and the extent to which international legal obligations on the rights of indigenous peoples are actually implemented at the domestic level. The Committee has selected a number of key case studies from all regions of the world, so as to ensure that the study provides global coverage of the status of indigenous peoples on the planet. The study of the said cases has been carried out through applying an interdisciplinary analysis of them, taking into account relevant social, cultural and – in particular – legal factors, ranging from indigenous customs, practices, land tenure systems and law, as well as

[5] The full text of the Convention is available in the ILO website, at <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> (accessed 20 May 2016).
[6] 999 *UNTS* 171.
[7] 993 *UNTS* 3.
[8] 660 *UNTS* 195.
[9] 1577 *UNTS* 3.
[10] 1760 *UNTS* 79.
[11] *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity*, 2010, available at <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> (accessed 20 May 2016).

national, regional, and international law with a view to identifying an effective resolution of the existing conflicts hindering the effective realization of indigenous peoples' rights. In the context of this work, particular attention is devoted to cultural factors as well as to the cultural implications arising from violations of indigenous peoples' rights, culture being the cornerstone of the very existence of those peoples. Consideration is also paid to economic factors and actors, with a focus on States and third parties, including multinational companies, and the role they are playing, positively and negatively, in the lives of indigenous communities. The examination of the selected case studies is also aimed at identifying and selecting "best practices" relating to countries that have implemented or are attempting to implement the UNDRIP standards and provisions and imagining how such practices could be applied to other areas, taking into account existing cultural and social differences. Furthermore, through comparing the different case studies, the Committee aims at drawing general conclusions concerning whether and to which extent the recent evolution of international law in the field of indigenous peoples' rights has led to further concrete outcomes translating into positive impacts on the lives of indigenous peoples and communities. Last but not least, the Committee also pursues the objective of defining strategies which might be easily applied worldwide by a variety of legal researchers and activists, as well as to contribute to the prevention of future violations of indigenous peoples' rights.

2. The Current Status of International Law on the Rights of Indigenous Peoples[12]

An inclusive summary of the current status and rights of indigenous peoples under international law is provided by ILA Resolution No. 5/2012,[13] which, as noted in the previous section, is used as guidance for the work of the Committee. Resolutions of the International Law Association have been recognized as evidence of international law under Article 38(1)(d) of the International Court of Justice (ICJ) Statute. The *Third Restatement of Foreign Relations Law of the United States* affirms this characterization.[14] As stated by Graf Vitzthum, global resolutions of a body as qualified and diverse as the International Law Association are stating a rare consensus amongst, at times, radically different cultures and value traditions, and thus should be especially appreciated,[15] transcending the relevance of the writings of individual scholars. This is particularly true when, as in this case, a resolution passes not only uncontested, but with emphatic support.[16]

According to Conclusion no. 1 of the Resolution, indigenous peoples "are holders of collective human rights aimed at ensuring the preservation and transmission to future generations of their cultural identity and distinctiveness. Members of indigenous peoples are entitled to the enjoyment of all internationally recognised human rights – including

[12] This Section has been written by Federico Lenzerini, Co-Rapporteur of the Committee.

[13] ILA Resolution No. 5/2012, n. 3 above.

[14] American Law Institute, Third Restatement of the Foreign Relations Law of the United States, § 103 Reporters' Notes No. 1 (1987).

[15] W. Graf Vitzthum, in W. Graf Vitzthum (ed.), *Völkerrecht* (3d ed.), Berlin/New York, 2004, p. 72, para. 147.

[16] S. Wiessner, "The State and Indigenous Peoples: The Historic Significance of ILA Resolution No. 5/2012," in M. Breuer et al. (eds.), *Der Staat im Recht* Berlin, 2013, p. 1368.

those specific to their indigenous identity – in a condition of full equality with all other human beings". The legal standards defining the nature and content of such rights are enshrined in the UNDRIP, which – as is well known – is in principle a declaration of non-binding character. However, although as a whole the UNDRIP "cannot yet be considered as a statement of existing customary international law […] it includes several key provisions which correspond to existing State obligations under customary international law".[17] These obligations concern the areas of self-determination, autonomy or self-government, cultural rights and identity, land rights as well as reparation, redress and remedies.[18] In particular, Conclusion No. 7 of ILA Resolution No. 5/2012 affirms that "States must comply – pursuant to customary and applicable conventional international law – with the obligation to recognise, respect, safeguard, promote and fulfil the rights of indigenous peoples to their traditional lands, territories and resources".

As for the provisions included in the UNDRIP which do not yet correspond to customary international law, they

> "nevertheless express the aspirations of the world's indigenous peoples, as well as of States, in their move to improve existing standards for the safeguarding of indigenous peoples' human rights. States recognised them in a 'declaration' subsumed 'within the framework of the obligations established by the Charter of the United Nations to promote and protect human rights on a non-discriminatory basis' and passed with overwhelming support by the United Nations General Assembly. This genesis leads to an expectation of maximum compliance by States and the other relevant actors. The provisions included in UNDRIP represent the parameters of reference for States to define the scope and content of their existing obligations – pursuant to customary and conventional international law – towards indigenous peoples".[19]

The fact that the UNDRIP represents more than a mere *soft-law* instrument of hortatory character is corroborated not only by the Preamble to the UNDRIP itself – stating that, in adopting the UNDRIP, the U.N. General Assembly was guided "by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter"[20] – but also by the practice of international human rights monitoring bodies. For instance, the Committee on Economic, Social and Cultural Rights has affirmed that proper realization of the right to take part in cultural life established by Article 15.1(a) ICESCR presupposes that "all indigenous peoples […] have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law, *as well as the United Nations Declaration on the Rights of Indigenous Peoples*".[21] In a similar vein, the African Commission on Human and Peoples' Rights has used the UNDRIP as parameter of reference for defining the nature and scope of

[17] ILA Resolution No. 5/2012, n. 3 above, Conclusion No. 2.

[18] See ILA Committee on the Rights of Indigenous Peoples, "The Hague Conference (2010) Interim Report", n. 1 above, p. 43.

[19] See ILA Resolution No. 5/2012, n. 3 above, Conclusion No. 3.

[20] See first recital of the UNDRIP Preamble.

[21] See General Comment No. 21, "Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)", U.N. Doc. E/C.12/GC/21 of 21 December 2009, para. 7 (emphasis added).

indigenous peoples' rights,[22] while the Committee on the Rights of the Child has affirmed the Declaration as international standard on the basis of which States should "adopt a rights-based approach to indigenous children".[23]

In addition to customary international law and the UNDRIP, indigenous peoples' rights are affirmed and protected by ILO Convention 169, which provides in particular for a wide measure of cultural rights, land rights and labour rights for indigenous communities and their members. The problem with ILO Convention 169 is that, at the moment of this writing, it has been ratified by 22 States only, fifteen of which are Latin American countries.[24] Outside such a geographical context, therefore, the impact played by the Convention, so far, has been virtually imperceptible. However, for the purposes of the work of the present Committee, ILO Convention 169 is to be recognized of significant weight especially with regard to the Latin American geographical context, where it has a notable impact.

Other human rights treaty provisions contribute to reinforcing international standards on indigenous peoples' human rights especially thanks to their evolutionary interpretation as provided by competent monitoring bodies. It is the case, for example, of Article 27 ICCPR[25] – interpreted by the Human Rights Committee as implying the existence of an obligation "to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion",[26] as well as to safeguard all different forms in which culture manifests, "including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law".[27] To a similar extent, the Committee on Economic, Social and Cultural Rights has interpreted Article 15 ICESCR as presupposing a State obligation to

> take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples. The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired […] States […] must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they

---

[22] See Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 25 November 2009, available at <https://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf> (accessed 20 May 2016), *passim*.

[23] See General Comment No. 11 (2009), "Indigenous children and their rights under the Convention", U.N. Doc. CRC/C/GC/11 of 12 February 2009, para. 82.

[24] See <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314> (accessed 20 May 2016).

[25] Article 27 ICCPR establishes that "[i]n those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

[26] See General Comment No. 23(50) (art. 27), U.N. Doc. CCPR/C/21/Rev.1/Add.5 of 26 April 1994, para. 6.2.

[27] Ibid., para. 7.

> have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories […] [States should also] respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by [indigenous peoples'] specific rights.[28]

Another relevant example is provided by the practice of the Committee on the Elimination of Racial Discrimination (CERD Committee), which has held that, in order to prevent discrimination against indigenous peoples, States have an obligation to take a number of measures, aimed in particular at

> (a) Recogniz[ing] and respect[ing] indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation; (b) Ensur[ing] that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity; (c) Provid[ing] indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics; (d) Ensur[ing] that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent; (e) Ensur[ing] that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.[29]

Last but not least, the practice of the IACtHR is worth emphasizing, especially as regards the interpretation provided by the Court to Article 21 of the 1969 *American Convention on Human Rights*,[30] considered as covering protection of land rights of indigenous peoples over their ancestral territories.[31][32]

Outside the context of human rights law *stricto sensu*, Article 8(j) of the Convention on Biological Diversity[33] is worth mentioning. According to this provision, in the context of *in-situ* conservation of biological diversity, "[s]ubject to its national legislation, [each State party shall, as far as possible and as appropriate,] respect, preserve and maintain

---

[28] See General Comment No. 21, "Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)", n. 19 above, paras. 36-37 (footnotes omitted).

[29] See General Recommendation No. XXIII: Indigenous Peoples, 18 August 1997, available at <http://www.minoritycentre.org/sites/default/files/cerd_gen_rec_23_indigenous.pdf> (accessed 21 May 2016), para. 4.

[30] *O.A.S. Treaty Series* No. 36. Article 21, concerning the right to property, states at para. 1 that "[e]veryone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society".

[31] Among the many pertinent judgments see *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Series C No. 79, Judgment of 31August 2001; *Case of the Yakye Axa Indigenous Community v. Paraguay*, Series C No. 124, Judgment of 17 June 2005; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Series C No. 146, Judgment of 29 March 2006; *Case of the Saramaka People v. Suriname*, Series C No. 172, Judgment of 28 November 2007; *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, Series C No. 214, Judgment of 24 August 2010; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Series C No. 245, Judgment of 27 June 2012.

[32] For a more comprehensive assessment of the relevant practice, see ILA Committee on the Rights of Indigenous Peoples, "The Hague Conference (2010) Interim Report", n. 1 above, *passim*.

[33] See n. 9 above.

knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices". This provision has been implemented in 2010 through the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity.[34]

As regards the specific human rights standards concerning indigenous peoples – which are to be mainly conceived as *collective* rights – the most important ones, as detailed by ILA Resolution No. 5/2012, are the following:

(a) *right to self-determination*, "conceived as the right [of indigenous peoples] to decide their political status and to determine what their future will be, in compliance with relevant rules of international law and the principles of equality and non-discrimination";[35]
(b) *right to autonomy or self-government*, "which translates into a number of prerogatives necessary in order to secure the preservation and transmission to future generations of their cultural identity and distinctiveness. These prerogatives include, *inter alia*, the right to participate in national decision-making with respect to decisions that may affect them, the right to be consulted with respect to any project that may affect them and the related right that projects significantly impacting their rights and ways of life are not carried out without their prior, free and informed consent, as well as the right to regulate autonomously their internal affairs according to their own customary laws and to establish, maintain and develop their own legal and political institutions";[36]
(c) *right to cultural identity* (in all its elements, including cultural heritage), which must be "safeguarded in a way that is consistent with the perspectives, needs and expectations of the specific indigenous peoples [concerned]",[37] so as to allow them to keep such identity genuine and transmit it to future generations without external interferences;
(d) *right to traditional lands, territories and resources (land rights)*, "which include the right to restitution of the ancestral lands, territories and resources of which they have been deprived in the past. Indigenous peoples' land rights must be secured in order to preserve the spiritual relationship of the community concerned with its ancestral lands, which is an essential prerequisite to allow such a community to retain its cultural identity, practices, customs and institutions";[38]
(e) *right to establish their own educational institutions and media, as well as to provide education to indigenous children in their traditional languages and according to their own traditions*;[39]

---

[34] See n. 10 above.
[35] See ILA Resolution No. 5/2012, n. 3 above, Conclusion No. 4.
[36] Ibid., Conclusion No. 5.
[37] Ibid., Conclusion No. 6.
[38] Ibid., Conclusion No. 7.
[39] Ibid., Conclusion No. 8.

(f) *right to reparation and redress* "for wrongs they have suffered, including rights relating to lands taken or damaged without their free, prior and informed consent. Effective mechanisms for redress – established in conjunction with the peoples concerned – must be available and accessible in favour of indigenous peoples. Reparation must be adequate and effective, and, according to the perspective of the indigenous communities concerned, actually capable of repairing the wrongs they have suffered".[40]

Hence, the rights just listed represent the main standards that States have to comply with *vis-à-vis* indigenous peoples. However, they do not exhaust the list of State obligations existing in the field of indigenous peoples' rights, as others ensue directly or indirectly from existing pertinent instruments and rules, including instruments which may be considered *sui generis*, i.e. "treaties, agreements and other constructive arrangements concluded with States or their successors".[41] With respect to the latter, ILA Resolution No. 5/2012 affirms that "States must cooperate in good faith with indigenous peoples in order to give full recognition and execution to treaties and agreements concluded with indigenous peoples in a manner respecting the spirit and intent of the understanding of the indigenous negotiators as well as the living nature of the solemn undertakings made by all parties".[42] It is important to note that, according to the preferred interpretation, the treaties and agreements in point "retain their original character as international legal agreements, with the attendant consequences of customary international law governing their validity, interpretation and termination".[43]

As final remark, it is worth reiterating that, generally speaking, the rights of indigenous peoples cannot be considered in isolation from each other, "for the reason that – in light of the holistic vision of life of indigenous peoples – [such rights] are all strictly inter-related with each other as building blocks of the unique Circle of Life representing the heart of indigenous peoples' identity, to the extent that 'the change of one of its elements affects the whole'".[44]

---

[40] Ibid., Conclusion No. 10.

[41] See Article 37 UNDRIP.

[42] See Conclusion No. 9.

[43] See ILA Committee on the Rights of Indigenous Peoples, "The Hague Conference (2010) Interim Report", n. 1 above, p. 35.

[44] Ibid., p. 43, quoting the *Indigenous Peoples' Earth Charter*, Kari-Oka Conference, 25-30 May 1992, available at <http://www.dialoguebetweennations.com/IR/english/KariOcaKimberley/KOCharter.html> (accessed 21 May 2016), para. 56.

3. Analysis of Case Studies[45]

LATIN-AMERICA

The Indigenous Territory and Natural Park TIPNIS, Bolivia

(by *Alexandra Tomaselli* and *Rainer Hofmann*, with the contribution of *Ebun Abolarin*)

Bolivia has incorporated UNDRIP into its domestic legislation, with Law No. 3760 of 2007. The Territorio Indígena y Parque Nacional Isiboro-Secure (TIPNIS) is a recognized National Park, a demarcated Indigenous Communitarian Native Land, and home to approximately 60-70 indigenous communities. The construction of a highway that crosses TIPNIS in the middle began in June 2011. The project was approved without any prior consultation, and after two indigenous marches, a contested process of consultation was organized in late 2012. However, although the construction of the highway appeared to be blocked subsequently, the works in the first stretch continued. No compensation or redress mechanism for the affected indigenous communities is currently foreseen. Indigenous lawsuits in domestic courts so far have been declared inadmissible. Therefore, the TIPNIS case appears to be one of the clearest instances of misapplication of the right to consultation and to land of indigenous peoples in one country that apparently would have the best legal framework protecting these specific and all other indigenous peoples' rights. In other words, this is a case in which all the legal guarantees were in place, but they were neither implemented nor respected, translating into a violation of a number of internationally recognized rules protecting the rights of indigenous peoples, including the rights to self-determination, autonomy or self-government, land rights, as well as the specific right according to which projects significantly impacting indigenous peoples' rights and ways of life must not be carried out without their prior, free and informed consent. This is a flagrant violation not only of international law, but also of Bolivian domestic law, by virtue of the fact that – as previously mentioned – the adoption of Law No. 3760 of 2007 has attributed binding force to the whole UNDRIP as law of the country. As a consequence, in December 2015, Deputy Horacio Poppe Inch filed Supreme Decree No. 2298/2015 – which introduced the possibility for the administration to opt out of the consultation procedure with indigenous communities – with action of unconstitutionality before the Constitutional Court for alleged violation of several articles of the Constitution, of Articles 3, 5, 6 and 8 of ILO Convention 169, as well as of Articles 18, 19 and 40 UNDRIP.

National politics played and plays a large role in the road construction via the TIPNIS. Alternative routes would exist – and had been actually suggested from various parts – which would have preserved indigenous peoples' rights without significantly affecting the government's development plans. In particular, the suggestion of constructing a railroad along the Park borders appeared to be very sustainable. This would be highly desirable, given that the construction of the highway without crossing in between an indigenous territory and a natural Park that is so rich in biodiversity would be clearly

[45] Each case study is presented in this section in an edited version based on the original studies written by the authors indicated under the title of each case. The work of editing has been carried out by the rapporteurs of the Committee, Federico Lenzerini and Timo Koivurova. The integral case studies are available on file with the respective authors as well as with the chairs and rapporteurs of the Committee. Some of them are available on the Committee's web page, at http://www.ila-hq.org/en/committees/index.cfm/cid/1048

the best solution. The insistence on crossing the Park sadly suggests that the main reason behind this project is, in reality, to connect the coca fields in the area.

Land and Water Rights in Chile
(by *Alexandra Tomaselli and Rainer Hofmann*, with the contribution of *Federico Lenzerini*)

Chile has not yet granted constitutional recognition to the indigenous peoples that live within its borders. Thus, indigenous peoples in Chile enjoy the rights recognized in domestic legislation and more specifically in the Indigenous Law No.19.253 of 5 October 1993 (*Ley sobre Protección, Fomento y Desarrollo de los Indígenas*, but mainly known as *Ley Indígena*). However, in 2008 Chile ratified ILO Convention 169. This prompted a new debate on indigenous rights and a wave of initiatives aimed at further protecting indigenous peoples. Chile also voted in favour of the UNDRIP when the latter was adopted by the U.N. General Assembly in 2007.

This, however, did not eliminate the problems existing in Chile concerning the implementation of indigenous peoples' rights, particularly land rights. Indeed, indigenous water and land rights are particularly undermined in a country in which watercourses and underground natural resources represent vital aspects of the national economy. In 2009, the U.N. Special Rapporteur James Anaya underlined the problematic construction of hydro-electric plants and other environmentally hazardous projects on indigenous peoples' lands; the absence of general indigenous water rights; and, in a specific section, the issue of Mapuche land occupations followed by police repression. Furthermore, he stressed the need to adopt a procedure for the recognition of traditionally occupied land, an aspect also emphasized during the fifth human rights periodic review of Chile, and formally guaranteed by the Indigenous Law (Article 12.2).[46]

As regards water rights, Article 64 of the above-mentioned Indigenous Law recognizes a special protection for the water rights of the indigenous peoples living in the North. However, in recent times the further desertification of the northern areas of Chile and the problems caused by the indefinite appropriation of water rights have prompted civil society organizations to insistently demand a reform of the Water Code (*Código de Aguas*). The main achievements in 2015 have been the works of the Commission for Hydric Resources and Desertification (*Comisión de Recursos Hídricos*) on the draft laws to reform the Water Code, which, *inter alia*, would establish, if approved, the recognition of the right to water as a human right, the prioritization of the use of water for human consumption, and the introduction of a 30-year limit for water concessions, thus eliminating permanent water rights. Against this background, since 2009 the Chilean Court of Appeals and the Supreme Court started to produce an extremely evolving and interesting jurisprudence regarding indigenous land and water rights, as well as their (related) right to consultation. In late 2009, the Chilean Supreme Court recognized the "ancestral water rights" of the Aymara indigenous community *Chusmiza y Usmagama*, basing its arguments on Articles 13.2 and 15.1 of the ILO Convention 169 (indigenous land as "habitat", which thus includes also the watercourses), also confirming that the reference to the indigenous territories in Article 64 of the Indigenous Law is not limited

[46] See James Anaya, "Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas", Human Rights Council, U.N. Doc. A/HRC/12/34/Add.6 of 5 October 2009.

to registered properties, but also to those lands traditionally used by indigenous peoples. In the same period, in a case concerning the logging of native trees close to a land belonging to a Mapuche indigenous community, the Chilean Supreme Court condemned the logging company *Sociedad Palermo Itda* for damages to Mapuche sacred sites and thus adverse effects to the practice of traditional medicine, on the basis of Articles 13-14 of ILO Convention 169 and other international instruments, including the Convention on Biological Diversity and the Convention on the Elimination of All Forms of Racial Discrimination. In mid-2010, the Court of Appeal of Valdivia found the Environmental National Commission guilty of waste allocation in the area contiguous to Mapuche lands and the consequent destruction of a ceremonial area, mentioning Articles 6.1.a, 6.2 and 7.1 of ILO Convention 169 and Article 25 UNDRIP; in particular, the Court stated that the indigenous peoples concerned should have been duly consulted, in good faith and according to the specific situation with the aim of reaching an agreement or their consent regarding the concerned measure. The Supreme Court upheld this decision in January 2011. In late 2014, the Supreme Court ruled in favour of the Peasant Community Diaguita of Huascoaltinos against the Environmental Evaluation Commission of the third region (Atacama), which had authorized the construction of an open-pit mine of gold and copper onto 2,463 hectares of land (including large parts of indigenous territories) without any (due) consultation with the affected indigenous peoples – in violation of Articles 6, 7 and 15 of ILO Convention 169.

The jurisprudence just examined may surely be framed as a good practice. Irrespective of whether the plaintiffs had directly claimed the application of the ILO Convention 169, which, as mentioned, had prompted an extensive debate within this country, the courts referred either to other provisions of this treaty or to other instruments, including the UNDRIP. Indeed, although relevant domestic law is far from matching the international standards, the Chilean domestic courts *completed* the understanding and the application of the domestic protection of indigenous water and land rights *via* the reference to the international standards. Indeed, the practice of Chilean courts appears to be consistent with the standards set by the UNDRIP, particularly with articles 20 (right of indigenous peoples to be secure in the enjoyment of their own means of subsistence and development), 25 (which explicitly refers to waters), 26 (land rights) and 32.2 (consultation, cooperation, prior free and informed consent with respect to any project affecting their lands or territories and other resources, including water). It may be reasonably argued here that the Chilean case law may potentially positively influence international standardization of the application of indigenous water and land rights, as the evolving jurisprudence developed by Chilean courts may contribute to the fine-tuning of the content and the application of indigenous water and land rights in other parts of the world.

Gas of Camisea in Territories of Indigenous Peoples in Isolation: Gaps in Legislation and Obligations of Peru
(by *Gloria Huamán Rodrígez* and *René Kuppe*)

The Lower Urubamba area in the south-eastern part of the Peruvian Amazon has been inhabited for immemorial times by peoples who live far from any contact with today's dominant society. Those nomad peoples are on the move through vast stretches of ancestral territories in search of resources for their subsistence. In the 1980's, the Peruvian government initiated one of its most ambitious projects called Gas of Camisea, for which it has issued licenses in favour of transnational companies for exploration and

exploitation of this hydrocarbon precisely in territories inhabited by peoples in voluntary isolation. Since 1996 this project has gained huge support by political leaders, and is seen as one of the engines for economic growth in the country. It is said to have a number of advantages, ranging from industrial development to the fact of satisfying the needs of social projects and national energy demand.

During the development of the Camisea project, several groups who used to live in isolation have been forcibly contacted by workers of Camisea and others that took advantage of the lack of clear protection norms – causing serious suffering of chronic diseases and a high death toll. The establishment of a weak territorial reserve – an area where indigenous peoples live voluntarily in isolation in order to use their natural resources – has not changed the serious effects of an invasive industry. Far from recognizing these peoples' right to their ancestral territories, the Peruvian State has approved new exploration and exploitation activities for hydrocarbons in Block 88, which is superimposed to the territorial reserve meant for the Kugapakori, Nahua, Nanti and other peoples living in isolation, producing an imminent danger of extinction for these peoples. In addition, the central government has irregularly given its approval to an expansion of the project which allows the consortium to open frontlines of exploration of new gas fields inside the territorial reserve. Even the adoption of *Law 28736 on the Protection of Indigenous and Original Peoples in situation of isolation or initial contact* in May 2006 has not had any significant impact, as this law has introduced the concept of "indigenous reserves", which have access to special protection only pursuant to official recognition on the basis of an administrative process, and so far the Peruvian state has not established a single indigenous reserve.

The Peruvian state is clearly not fulfilling its international obligations to protect, respect and guarantee the human rights of indigenous peoples living in isolation. In order to comply with existing international standards, the immediate response which should be given by the State in this situation would be to declare the whole areas inhabited by indigenous peoples in isolation since time immemorial as *intangible territories* or *protected territorial reserves*, and to establish buffer zones around the said territories which would prevent third parties from entering, consistent with the *Guidelines for the Protection of Indigenous Peoples in Isolation and Initial Contact in the Amazon Region, the Gran Chaco and the Eastern Region of Paraguay*.[47] The intangibility of this territory is not a particular right of indigenous peoples in isolation, but the most appropriate measure to achieve the ends of the UNDRIP and other relevant international rules as well as to implement a number of general indigenous human rights, like the right to life, cultural survival, and rights to health, food security and use of territories and resources. It is to be noted that Peru ratified ILO Convention 169 in 1994,[48] but has never opened consultation with the affected indigenous peoples during the different steps of the Camisea project. Neither ILO Convention 169 nor the UNDRIP make any specific references to the protection of the rights of indigenous peoples in isolation. However, as a matter of fact, we

[47] Result of the consultations by the UN Office of the High Commissioner for Human Rights in the region: Bolivia, Brazil, Colombia, Ecuador, Paraguay, Peru, and Venezuela, May 2012, available (in Spanish) at <http://acnudh.org/wp-content/uploads/2012/03/Directrices-de-Protecci%C3%B3n-para-los-Pueblos-Ind%C3%ADgenas-en-Aislamiento-y-en-Contacto-Inicial.pdf> (accessed 26 May 2016), para. 53(a).

[48] See n. 22 above.

have to consider how human rights rules and standards protecting indigenous peoples in general are relevant for isolated peoples, especially considering their particular situation of high vulnerability. On the other hand, it is obvious that the right to consultation cannot be easily put into practice when it comes to isolated indigenous groups, as establishing physical contacts with them would endanger their health and undermine their current independent political and social situation. However, their opinion on the issue should be quite explicit, as it is freely expressed through maintaining their isolation, and, as such, it should be respected. This notwithstanding, at present the project Camisea continues to be carried out, even if it is performed in blatant violation of internationally recognized rights of indigenous peoples.

Burlington Resources Inc. v. Ecuador/Kichwa Indigenous People of Sarayaku v. Ecuador

(by *Christina Binder*, with the contribution of *Jane A. Hofbauer*[49])

The case of *Burlington v. Ecuador* represents a unique example of the triangular relationship between investors, States and indigenous communities, and has been investigated both from an investment law and human rights perspective. It thus bears particular relevance in delineating the scope of the rights and obligations of the respective parties in the context of resource development projects/foreign investments which have an impact on indigenous communities. Moreover, it also constitutes an example of the overlapping of different judicial bodies and non-judicial forums regarding a particular set of facts. While in theory this should increase the level of protection offered to the affected (indigenous) communities, difficulties arise due the specific mandates of the respective bodies and their treatment of the absent third party as an "externality" to the proceedings.

Article 57 of the amended 2008 Constitution of Ecuador accords a broad range of rights to indigenous peoples, including, at para. 7, a right to "free, prior and informed consultation within a reasonable period of time, on the plans and programs for prospecting, producing and marketing non-renewable resources located on their lands and which could have an environmental or cultural impact on them". This notwithstanding, disparities continue to exist particularly with regard to the right to free, prior and informed consultation in the context of hydrocarbons, which has been implemented through Executive Decree 1247,[50] understanding the goal of the consultation process to be participation and not consent. A further concern relates to the matter of drafting of said decree, as indigenous communities were not consulted about the law itself, and to the envisioned outcome as "any agreements which may be reached must be based on pre-existing public policy measures".[51]

The facts of the case of Burlington v. Ecuador were investigated by, first, an ICSID arbitral tribunal and, subsequently, the IACtHR. The *Burlington Resources* award by

[49] Senior Researcher, Department of European, International and Comparative Law, University of Wien (Austria).

[50] Reglamenta para la ejecución de la consulta previa libre e informada en los procesos de licitación y asignación de áreas y bloques hidrocarburíferos, 19 July 2012.

[51] CESCR, Concluding observations of the Committee on the third periodic report of Ecuador as approved by the Committee at its forty-ninth session (14-30 November 2012), 13 December 2012, U.N. Doc. E/C.12/ECU/CO/3 of 13 December 2012, para. 9.

the ICSID arbitral tribunal[52] in the end dismissed Burlington Resources' claims that Ecuador had failed to provide full protection and security to its investment against the violent resistance by the affected indigenous groups on procedural grounds, and thus did not assess whether indigenous interests had any role to play on substantive issues. The IACtHR reached a landmark judgment in 2012 with regard to the rights of indigenous peoples in the context of resource exploitation projects.[53] The Court emphasized that, in order for the requirement of effective participation to establish a true dialogue between the parties and be based on mutual trust, it was essential to remember that consultations had to be carried out in good faith, i.e. in "absence of any form of coercion by the State or by agents or third parties that act with its authority or acquiescence."[54] It also pointed out that this meant that practices which attempted to "undermine the social cohesion of the affected communities, either through corruption of community leaders or by establishing parallel leaders, or through negotiations with individual members of the community that are contrary to international standards",[55] were incompatible with good faith requirements. Finally, it reminded the parties that "the obligation to consult is the responsibility of the State; therefore the planning and executing of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties, much less delegating it to the same company that is interested in exploiting the resources in the territory of the community that is the subject of the consultation".[56] The IACtHR concluded that Ecuador violated rights recognized in the American Convention on Human Rights – particularly through violating the rights to consultation, to indigenous communal property and to cultural identity (Article 21 of the Convention), as the project directly affected the territory of the Kichwa – and ILO Convention 169. In addition, the Court recalled several times the UNDRIP as a source of applicable standards in the field, including as instrument "particularly relevant to the recognition of the right to cultural identity of indigenous peoples".[57] In light of its findings, the IACtHR ordered Ecuador to pay $1.4 million compensation for pecuniary and non-pecuniary damages, and consult with the Sarayaku people on the removal of the remaining explosives on the territory of the Sarayaku as well as on any type of investment or development plan with potential repercussions for their territory or affect essential aspects of their worldview or life, integrity or cultural identity. Moreover, Ecuador was ordered to adopt legislative or other measures to give full effect to the right to prior consultation of indigenous peoples as well as make a public acknowledgement of its international responsibility. At the moment of this writing, the implementation by Ecuador of the Court's judgment has only been partial, as the government has only paid compensation and issued an official apology, which is troubling in particular regarding the obligation to ensure with legislative or other measures that the international standard of the right to consultation is put into effect. Furthermore, to date the majority of the explosives have not been removed from the Sarayaku territories.

---

[52] *Burlington Resources Inc. v Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010.

[53] See *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, Series C No. 245, Judgment of 27 June 2012.

[54] Ibid., para. 186.

[55] Ibid.

[56] Ibid., para. 187.

[57] Ibid., para. 215.

The *Sarayaku* proceedings serve as yardsticks for the protection of indigenous rights in several aspects. In particular, the inclusive procedure exemplified in this case is certainly a promising example for future proceedings dealing with indigenous rights. On a substantive level, the IACtHR observations relating to the content of the consultation process, especially its detailing of the good faith requirement and its emphasis on clarifying that the obligation is a direct responsibility of the state which cannot be delegated to private parties interested in resource exploitation activities, are particularly noteworthy. This comes not only as a direct response to the facts at hand but as a general response to the common problems arising in the context of operationalizing the principle of free, prior and informed consultation/consent.

The Decision by the Inter-American Court of Human Rights concerning the Awas Tingni vs. Nicaragua Case (2001): The Implementation Gap
(by *Felipe Gómez Isa*)

In August 2001, the IACtHR issued a landmark and pioneering decision in the field of indigenous peoples' human rights law with the Awas Tingni judgment.[58] As is well-known, the ruling of the IACtHR in this case soon gained the value of precedent in recognizing that the interpretation of the right to property established in Article 21 of the American Convention on Human Rights includes the communal forms of property of ancestral lands common among indigenous communities. However, while the huge significance of the judgment in point is undeniable, its implementation by the government of Nicaragua has been long and tortuous.

As stated in the Court's judgment, the State of Nicaragua had to "adopt the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores".[59] In the specific case of the Awas Tingni community, the Court granted the State 15 months to "carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Awas Tingni Community […] with full participation by the Community and taking into account its customary law, values, customs and mores".[60]

There have been various stages in the implementation of the judgment in various respects. One of the main difficulties has concerned recognition, demarcation and titling of the land rights of the indigenous community. There have been a clear lack of resources and delays in the implementation process. The major progress occurred in December 2008, when – once the work of measuring and marking out the indigenous territory was successfully completed – the community was awarded the title to their ancestral lands and that title was registered. It was the *Comisión Nacional de Demarcación y Titulación (CONADETI)* which, pursuant to Law 445 (2003), issued the Communal Title Deed No. 007-13-12-2008 relating to the AMASAU territory (*Awas Tingni Mayangnina Sauni Umani*) on 13 December 2008.

However, the last stage of the process of demarcation and titling, involving the title clearance in relation to the third parties located within them, has proved particularly

[58] See *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, n. 29 above.
[59] Ibid., para. 164.
[60] Ibid.

problematic. Title clearance was intended to identify and characterise the presence of third parties within indigenous territories in an attempt to reach a solution that was compatible with the exercise of the territorial rights by indigenous peoples, but the title clearance process was hampered by the lack of coordination between the institutions. As a consequence, the absolute lack of title clearance is paving the way to the invasion of the indigenous territories by settlers through violence, displacement and destruction of indigenous property.

It is to be recognized that it is objectively difficult for a country like Nicaragua to properly implement a judgment like the one in discussion, especially when it leads to big changes (like the Awas Tingni judgment actually does). In any event, even if there are serious problems in implementing the judgment in point, it has nevertheless greatly empowered the indigenous community to defend its land rights. The very process leading to the Court's judgment has represented an essential tool for the empowerment of the community. The judgment in itself was of paramount importance for a number of reasons: first, the evolutionary interpretation of the IACtHR in the Awas Tingni case set a *very promising precedent* for the evolution of the right of indigenous peoples to their lands and natural resources in international law, followed by the Court in its subsequent jurisprudence;[61] secondly, it recognized the collective dimension of indigenous peoples' land rights, as well as that "the close ties of indigenous people with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival";[62] thirdly, the Court emphasized that the legal basis of indigenous peoples' land rights is not grounded on the recognition by the State, but on the customary practices of indigenous communities; last but not least, in one stage of the implementation of the judgment – particularly in Recital III of the Communal Title Deed awarding communal title deed in favour of the Awas Tingni – the legal grounds used to argue the relevance for that title to be issued included a reference to the UNDRIP, in particular to the provisions concerning the right of indigenous peoples to their lands, territories and resources. In sum, despite the enormous difficulties that the Awas Tingni have faced in the implementation process of the IACtHR judgment, it must be acknowledged that the Court's decision has paved the way for very progressive developments in terms of indigenous peoples' rights to their lands and territories, and a degree of empowerment for the indigenous peoples themselves in defence of their rights. On the other hand, however, there is a huge gap between, on one side, the formal recognition of indigenous peoples' rights and, on the other, the stark reality still faced every day as part of an unbridled struggle for access to natural resources. In this respect, it is to be noted, among other things, that the Inter-American human rights system should be improved especially through establishing some specific effective mechanisms to favour the implementation process of the IACtHR decisions.

The Maya Communities in Belize

(by *Federico Lenzerini* and *Siegfried Wiessner*)[63]

More than thirty villages belonging to Maya Communities are scattered throughout Southern Belize, connected with each other through gravel roads and forest trails. For

[61] See n. 29 above.

[62] See *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, n. 29 above, para. 149.

[63] The authors gratefully acknowledge Mr. José David Quiñones Villegas, from Colombia, LL.M. University of Siena (Italy), for his valuable help in the research for this case-study.

more than twenty years the Maya in Belize have been fighting for preserving their traditional lands, after the government of Belize, in the mid-1990s, had granted logging concessions and oil exploration licences over parts of their lands in the Toledo District. In particular, in 1994, the government converted almost 42,000 acres of the Maya ancestral territory into government land, establishing the Sarstoon-Temash National Park (STNP), without consulting the community. The government subsequently opened the STNP to oil exploration and drilling by US Capital Energy Belize, Ltd, a wholly owned Belizean subsidiary of the American company US Capital Energy, Inc. Starting from 2004, the Maya Communities achieved a series of judicial victories in front of the Inter-American Commission on Human Rights as well as of various national courts. This notwithstanding, the government of Belize continued to pursue its plans of economic exploitation in the areas where the Maya territories are located. For this reason, the Maya brought their case in front of the Caribbean Court of Justice (CCJ), where the community obtained another landmark victory.

In 2004 the Inter-American Commission on Human Rights found that the government of Belize – by granting logging and oil concessions in the Maya lands and otherwise failing to adequately protect them and to recognize and secure the territorial rights of the Maya people in those lands, as well as by failing to afford the Maya people judicial protection of their rights and interests in the lands – violated a number of provisions of the 1948 *American Declaration of the Rights and Duties of Man*.[64] In particular, the said behaviour violated the right to property enshrined in Article XXIII, the right to equality before the law, to equal protection of the law, and to non-discrimination provided for by Article II, as well as the right to judicial protection enshrined in Article XVIII of the Declaration.[65] The Commission consequently ordered the government of Belize to adopt "in its domestic law, and through fully informed consultations with the Maya people, the legislative, administrative, and any other measures necessary to delimit, demarcate and title or otherwise clarify and protect the territory in which the Maya people have a communal property right, in accordance with their customary land use practices, and without detriment to other indigenous communities"; to carry out "the measures to delimit, demarcate and title or otherwise clarify and protect the corresponding lands of the Maya people without detriment to other indigenous communities"; and to repair "the environmental damage resulting from the logging concessions granted by the State in respect of the territory traditionally occupied and used by the Maya people".[66]

In 2007, in a landmark judgment in the consolidated cases of *Aurelio Cal et al. v. Belize*, the Supreme Court of Belize ordered the government of Belize to officially declare that the claimant Maya villages and their members hold, respectively, "collective and individual rights in the lands and resources that they have used and occupied according to Maya customary practices and that these rights constitute 'property' within the meaning of […] the Belize Constitution", as well as that the boundaries of the said lands are those "established through Maya customary practices". In addition, the Court ordered the government

[64] The text of the Declaration is available at <https://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm> (accessed 26 May 2016).

[65] See Report Nº 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District v. Belize*, 12 October 2004, available at <http://www.law2.arizona.edu/depts/iplp/outreach/maya_belize/documents/BelizeFinalRpt.pdf> (accessed 26 May 2016), para. 192 ff.

[66] Ibid., para. 197.

to demarcate the lands concerned and provide official documentation of Maya property title, as well as to defend the community from external interferences – either by agents of the government itself or third parties – threatening their property rights.[67] The Chief Justice, in elaborating on his finding of a violation of customary international law, stated that the UNDRIP, "embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it". "The United Nations, its bodies and specialized agencies including at the country level, and states, are enjoined to promote respect for and full application of the Declaration's provision and to follow up its effectiveness".[68] The Supreme Court ruled in favour of Maya communities again in 2010,[69] and, in 2014, finally affirmed that the decision of the government of Belize to allow oil drilling and road construction in the STNP was irrational and unreasonable, "that decision having been made without the free, prior and informed consent of the indigenous Maya communities". In addition, it held that the government has an *obligation* under the UNDRIP "to respect the rights of the Indigenous Maya Peoples to their lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired".[70] In the meantime, in 2013, the Court of Appeal affirmed the decision of the Supreme Court that Maya customary land tenure existed in all Maya villages in the Toledo District of southern Belize, as well as that it constituted property within the meaning of the Constitution of Belize. However, the Court of Appeal also held that there had been no violation of any constitutional guarantees by the government and, consequently, that the issue of constitutional relief did not arise.[71] For this reason, the Maya brought their case before the CCJ.

The Caribbean Court released its judgment on 30 October 2015.[72] The Court assessed the issue of damages for breach of the Maya community constitutional rights under three separate heads: (1) protection against arbitrary deprivation of property; (2) right to equality and non-discrimination; and (3) right to protection of the law. The CCJ failed to find a breach of the right to the protection against arbitrary deprivation of property under

---

[67] See Claims 171 and 172 of 2007, *Aurelio Cal et al v. Attorney General of Belize*, 18 October 2007, available at <http://www.law2.arizona.edu/depts/iplp/outreach/maya_belize/documents/ClaimsNos171and172of2007.pdf> (accessed 26 May 2016), para. 136. On this case see S.J. Anaya, "Reparations for Neglect of Indigenous Land Rights at the Intersection of Domestic and International Law – The Maya Cases in the Supreme Court of Belize", in F. Lenzerini (ed.), *Reparations for Indigenous Peoples. International and Comparative Perspectives*, Oxford, 2008, p. 567.

[68] Ibid., para. 132.

[69] See Claim No. 366 of 2008, *The Maya Leaders Alliance et Al. v. The Attorney General of Belize et Al.*, 28 June 2010, available at <http://www.law2.arizona.edu/depts/iplp/outreach/maya_belize/documents/Claim%20366%20of%202008.pdf> (accessed 26 May 2016).

[70] See Claim No. 394 of 2013, *Sarstoon Temash Institute for Indigenous Management et. Al. v. The Attorney General of Belize et Al.*, 3 April 2014, available at <https://www.elaw.org/system/files/bz.claim394of2013.satiim.pdf> (accessed 26 May 2016), para. 19.

[71] See Civil Appeal No. 27 of 2010, *The Attorney General of Belize et Al. v. The Maya Leaders Alliance et Al.*, 25 July 2013, available at <https://www.elaw.org/system/files/civil_appeal_no_27_of_2010_-_attorney_general_of_belize_et_al_and_maya_leaders_alliance_et_al.sma-1.pdf> (accessed 26 May 2016).

[72] See CCJ Appeal No BZCV2014/002, BZ Civil Appeal No. 27 of 2010, *The Maya Leaders Alliance v. The Attorney General of Belize*, 30 October 2015, [2015] CCJ 15 (AJ).

the Constitution of Belize, because the nature of the Appellants' property rights and the entitlement flowing therefrom are yet to be precisely defined. The Court also dismissed the equality and non-discrimination claim, on the basis that there was no evidence of discriminatory treatment of the Appellants based on race or ethnicity. However, the Court held that the Maya community right to the protection of the law had been breached, due to "the failure of the Government of Belize to recognize and protect Maya customary land tenure rights".[73] In this respect, the Court noted that "the right to protection of the law encompasses the international obligations of the State to recognize and protect the rights of indigenous people. A recognized sub-set of the rule of law is the obligation of the State to honour its international commitments".[74] The Court added that "[i]t is beyond dispute that international law recognizes and protects the rights of indigenous peoples",[75] and, referring to the UNDRIP specifically, emphasized that, while it is not binding in itself, it is "relevant to the interpretation of the Constitution of Belize which in its preamble explicitly recognizes that state policies must protect the culture and identity of its indigenous peoples but also must promote respect for international law and treaty obligations".[76] In conclusion, the CCJ resolved that the decision of the Court of Appeal on the issue of damages be reversed, and that the Maya community be awarded moral damages for violations of their right to maintain their customary land tenure. It consequently ordered the Government of Belize to establish a fund of BZ$300,000.00 as a first step towards compliance with its undertaking to protect Maya customary land tenure, as well as to pay 75% of the appellants' costs.

The decision of the CCJ reinforces the recognition of indigenous peoples' rights to their traditional lands under their customary land tenure systems, as well as the right to moral damages, i.e. reparations for violations, serving as key example of the implementation of international collective rights of indigenous peoples in municipal law, in this case on the level of constitutional law.

Indigenous Rights and Extractivism in Argentina
(by *Marzia Rosti*[77])

The second half of the 20th century has represented perhaps the most important, long-awaited moment for the indigenous peoples in Argentina, because the country aligned itself with the policies adopted by the other Latin American countries in relation to indigenous rights during the same period. In particular, new Article 75.17 of the Constitution, introduced in 1994, lists a large catalogue of indigenous rights, including the right to collective ownership of the lands traditionally occupied, participation in managing the natural resources present in those territories and the right to a bilingual and intercultural education. This provision is supplemented by some very significant legislative acts increasing the level of protection of indigenous peoples' rights in the country. Argentina ratified ILO 169 Convention in 2000[78], and the government voted in favour of the UNDRIP on the day of its adoption by the U.N. General Assembly, on 13 September 2007.

---

[73] Ibid., para. 58.
[74] Ibid., para. 52.
[75] Ibid., para. 53.
[76] Ibid., para. 54.
[77] Professor of History of Latin America, University of Milano (Italy).
[78] See n. 22 above.

As just noted, in Argentina land rights of indigenous peoples are constitutionally protected. However, the increase in territorial claims stimulated a number of initiatives at the provincial level to regulate possession of the land, which on their turn led to the development of a case law in the context of which, while the courts sometimes ruled in favour of the indigenous communities, they proved to be quite reluctant to acknowledge that the fact of being indigenous entitled indigenous communities to specific rights. In addition, the profound political, economic and social crisis experienced by the country during 2001-2002 led the government, in order to revive the country, to promote the production and export of agricultural products and the exploitation of natural resources, in particular gas and crude oil, first of all to satisfy the domestic energy requirements. The success of the *modelo extractivista* allowed the penetration of extractive activities into areas of the country which had previously remained excluded or almost excluded from exploitation projects, including traditional territories of indigenous communities, with a resulting increase in tensions, which frequently degenerated into episodes of violence. This led to the evacuation of many indigenous communities from their traditional lands and allowed "extraction industries" to have access into indigenous territories, with the complicity of political institutions, while movements of protest by indigenous peoples were criminalized. On the other hand, however, some of the controversies triggered by this situation have led to the victory of the indigenous communities concerned and to recognition of their land rights by domestic courts. It is the case, for example, of the dispute between the Wenctru Trawel Leufu Community and the Empresa Petrolera Piedra de Aguila, concerning a license granted to the latter to perform exploration activities and to exploit the hydrocarbon resources in the area inhabited by the community. Indeed, in 2011, a local court ordered the operations in the indigenous territory to be suspended. This decision was confirmed on 6 December 2012 by the Tribunal Superior de Justicia di Neuquén, which rejected the appeal submitted by the oil company and by the Fiscalía de Estado and acknowledged the existence of the indigenous settlement and, therefore, the obligation to respect indigenous rights.

In conclusion, it is to be noted that in Argentina, in some cases, the complicity among the national or local institutions and the extraction companies has led to a denial of indigenous peoples' land rights, in violation of both national legislation and pertinent international standards. In other cases, however, national courts have followed the opposite approach, ruling in favour of indigenous rights. This recently happened, for instance, with a judgment by the Corte Suprema de Justicia de la Nación (CSJN), issued on 10 November 2015, which upheld the Recurso Extraordinario Federal submitted by the Las Huaytekas community of Río Negro against the precautionary measure that ordered the evacuation from its territory and recognized the evidentiary value of the "relevamiento técnico-jurídico-catastral", in line with Article 14.2 of ILO Convention 169, establishing that governments "shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession". It is to be hoped that in the near future the attention recently shown by courts with regard to indigenous peoples' land rights will consolidate, as well as that the government will be able to reconcile the objectives of economic growth with its international obligations regarding indigenous peoples.

The Implementation of IACtHR Judgments Concerning Land Rights in Suriname: *Saramaka People V. Suriname* and Subsequent Cases
(by *Anna Meijknecht*, *Bas Rombouts* and *Jacintha Asarfi*[79])

In recent years, the IACtHR has issued two very significant judgments concerning indigenous and tribal peoples' land rights in Suriname.

First, in the leading *Saramaka* case,[80] the IACtHR reaffirmed the right to communal property under Article 21 of the American Convention on Human Rights for tribal peoples, by stating that "the Court`s jurisprudence regarding indigenous people's right to property is also applicable to tribal peoples because both share distinct, social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival".[81] The Court, taking into account Article 32 UNDRIP, significantly added that, "[r]egarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions".[82] The Court concluded that Suriname had violated the property rights of the members of the Saramaka people recognized in Article 21 of the Convention and ordered the respondent government to delimit, demarcate and grant the community collective title over the territory in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people, as well as to ensure the full exercise and enjoyment of their right to communal property through adopting all the necessary legislative, administrative and other measures to this end.[83] Additionally, the Court ordered the State to take measures of satisfaction, such as translating the judgment in Dutch and publishing it in the State's Official Gazette and one daily newspaper as well as financing the broadcasts of several paragraphs in the *Saramaka* language. The material and immaterial damages were also awarded, through, respectively, granting a compensation of US$ 75.000,00 and allocating US$ 600.000,00 for a community development fund.[84]

The second case at issue concerned the Kaliña and Lokono people.[85] In its judgment, released in November 2015, the IACtHR followed the same reasoning of the *Saramaka* judgment, by declaring that the State has to grant the Kaliña and Lokono peoples legal recognition of collective juridical personality, delimit and demarcate the traditional territory of the members of the communities concerned, grant them collective title to that territory and ensure their effective use and enjoyment thereof, as well as create a community development fund to their benefit.[86]

---

[79] PhD Student, Tilburg Law School (The Netherlands).
[80] See *Case of the Saramaka People v. Suriname*, n. 29 above.
[81] Ibid., para. 86.
[82] Ibid., para. 134.
[83] Ibid., para. 194.
[84] Ibid., paras. 195-196.
[85] See *Case of the Kaliña and Lokono Peoples v. Suriname*, Series C No. 309, Judgment of 25 November 2015.
[86] Ibid., paras. 5-11.

Finally, another similar case is at present pending before the Court. It concerns the Kaliña indigenous community of Maho and the Association of Indigenous Village Leaders in Suriname, who filed a complaint to the Inter-American Commission on Human Rights on 16 December 2009, claiming that the government of Suriname has granted concessions and permits to third parties to allow them to exploit the land, territory and natural resources traditionally occupied and used by the community.[87] The petition was declared admissible by the Inter-American Commission on Human Rights on 19 March 2013.

So far, a number of obstacles have hampered the full implementation by Suriname of the *Saramaka* judgment. Considering the innovative character of the Courts' rulings concerning indigenous land rights, it is plausible that their practical implementation on national level takes some time. However, almost ten years have passed since the *Saramaka* judgment and the government of Suriname has still not managed to fully implement any of the substantive parts of the ruling. Among other things, it has been unable to provide the legislative basis for recognising and securing indigenous and tribal rights in Suriname, notwithstanding international expertise offered by the U.N. Special Rapporteur on the Rights of Indigenous Peoples, several detailed monitoring compliance reports by the IACHR, involvement of the CERD Committee and other States and even the submission to the State for its consideration of several draft laws on indigenous and peoples' rights drafted by indigenous and tribal peoples and their organisations. The ongoing lack of full compliance with the Courts' ruling affects the physical and cultural survival of the Saramaka indigenous communities, as well as the environment and natural resources in the areas concerned. Moreover, it undermines the trustworthiness of the State and creates repetitive cases – the case of the *Kaliña and Lokono* people and the *Maho Indigenous Community* case. All three cases reveal a structural problem involving a lack of recognition in domestic law of the juridical personality and right to collective property of indigenous and tribal peoples in Suriname. Furthermore, they reveal the lack of strong compliance mechanisms within the Organization of American States system; indeed, in case of failure to comply with the IACtHR judgments in contentious cases of breach of the American Convention on Human Rights or the Court's order of provisional measures, there are no effective tools to enforce sanctions.

A positive development, though, seems to be a growing alertness within the government that the development of measures necessary to implement the judgments will have to be done in dialogue with the people concerned. This development can be discerned, for instance, by the fact that the State and the Maho Indigenous Community are in the process of a friendly settlement and that the State of Suriname has communicated to the Inter-American Commission that it is in favour of finding a solution for the land rights issues and to hold a dialogue with the Maho Indigenous Community.

The Case of the Hydroelectric Plant of Belo Monte in Brazil
(by *Rafael Soares Leite*)

Belo Monte is a hydroelectric plant, qualified as a mega structure project that has been built in the Xingu River in the Amazon in the state of Pará. The plant was planned as an expansion of Brazilian energy matrix, which is highly dependent on hydropower. Since the very beginning of the construction of the plant, it has been subject to criticism by

[87] Report No. 9/13, Petition 1621-09, Admissibility *Maho Indigenous Community v. Suriname*, 19 March 2013, p. 1.

both environmentalists and traditional communities that live off the surrounding natural resources. Even though the implementation of the dam project is well advanced, its completion is expected in 2019. The environmental impact studies date from 2007, and the granting of the concession occurred in 2010. In terms of development for the country, it is estimated that the plant, with the installed capacity of 11.233,1 megawatts, will be able to supply energy for 60 million people, or approximately 18 million households.

At present, there are many lawsuits being considered that are related to the implementation of the hydroelectric dam. In addition to indigenous disputes and conflicts of an environmental kind, there have recently been allegations of fraud and corruption involving parties that support the government, linking those crimes to the Belo Monte concession. In particular, the failure to implement the necessary conditions for ensuring appropriate protection of the traditional lands of the communities concerned has threatened the very survival of the indigenous peoples affected by the project. Furthermore, a licence has been issued for the Belo Sun gold mining project in close proximity to the Belo Monte dam, in the absence of consultation and the lack of a cumulative assessment of environmental, social and human rights impacts on indigenous peoples.

The case is now under international scrutiny by the Inter-American Commission on Human Rights. On 1 April 2011 the IACHR granted precautionary measures in favor of the indigenous communities of the Xingu River basin, with the purpose of safeguarding the life and personal integrity of those people, affected by the construction of the Belo Monte hydroelectric plant.[88] The Commission suggested many provisional measures to the Brazilian government, including the suspension of works related to Belo Monte. The Brazilian government did not receive well this decision, and reacted by adopting severe diplomatic measures. The case is still pending.

In addition to the Inter-American Commission, the case is under scrutiny by domestic courts. There are many lawsuits related to the Belo Monte hydroelectric dam construction, and one of the most important is registered under n. 2006.39.03.000711-8/PA. In this case, the object of litigation is about the observance of the obligation to consult the affected indigenous communities before the deliberation by the Brazilian state about the concession and construction of the hydroelectric plant. The Federal Public Prosecution Body, as a plaintiff in the case, required the discontinuation of the construction of the plant as long as the indigenous communities are not consulted. It also disputed the legal validity of the Legislative Decree n. 788/2005, which authorized the federal government to implement the water use of Belo Monte in the Xingu river, since it was approved without consulting with the communities and without carrying out environmental impact studies.

Important background for this case is the leading case of the demarcation of *Raposa-Serra do Sol*.[89] Even though the Brazilian Constitution was enacted in 1988, it took almost twenty years for the Supreme Court to pronounce a judgment that would develop relevant standards for the interpretation of indigenous peoples' constitutional rights. The case of the demarcation of Raposa-Serra do Sol gave rise to a controversial decision, in

[88] See <http://www.cidh.oas.org/medidas/2011.port.htm> (accessed 26 May 2016).

[89] Reference by the Supreme Federal Court standards: Pet 3388, Relator(a): Min. Carlos Britto, Tribunal Pleno, 19 March 2009.

so far that, while recognizing the importance of indigenous peoples' rights, the judgment seemed to subordinate such rights to other interests. For example, the Supreme Court held that, in the case of an indigenous land that is also a natural protected area, the federal environmental agency is responsible for the administration of the land.

The Case of the Hydroelectric Plant of São Luiz do Tapajós in Brazil
(by *Rafael Soares Leite*)

The Tapajós hydroelectric project relates to the government's intention to build a dam in a river located in the Tapajós basin, in Brazil. The project is still on paper and the execution has not started yet. When the Munduruku – the indigenous people living in the concerned area – learned about the government's movements, they started mobilizing to ensure that ILO Convention 169 and the Federal Constitution be respected, especially the provisions related to participatory rights.

The hydroelectric plant of the São Luiz do Tapajós is supposed to produce up to 8,000 megawatts with the flooding of a total area of 729 square kilometers after the construction of the reservoir. Besides the legal requirements from the perspective of indigenous peoples' rights, there are also some legal procedures required by environmental law. Mainly, for the construction of the dam, it is also necessary for the project to obtain the environmental permit.

From the indigenous point of view, the flooded area would extend to 17,000 hectares of the indigenous territory Sawré Muybu, attributed to the Munduruku people. It must be noted that this area has not been demarcated yet, an element which distinguishes this case from the one of Belo Monte. The lack of consultation and the absence of demarcation of indigenous lands impacted by the Tapajos dam complex has been noted in the End of Mission Statement of 17 March 2016 by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz, on her visit to Brazil.[90]

What makes the Tapajós case unique is the active participation of the indigenous peoples through two distinct but interrelated instruments: the so called "self-demarcation of land" and the consultation protocol. The self-demarcation of indigenous land Sawré Muybu was proposed by the Munduruku after government delay in the official demarcation. This delay is seen with suspicion by the Munduruku, since the recognized area would be flooded if the hydroelectric plant of São Luiz do Tapajós is implemented. This raises a very important question: what do the Munduruku people expect to achieve with the self-demarcation and how does it impact official decision making about the São Luiz do Tapajós? Another initiative attributed to the Tapajós case is the formulation of a "consultation protocol", determining the terms according to which, how and when the Munduruku should be consulted. This is also of fundamental relevance in understanding the implementation of indigenous peoples' rights, since this was supposedly based on ILO Convention 169 and affects the economic rights of the Munduruku.

[90] See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18498&LangID=E> (accessed 27 May 2016).

Like for the case of the hydroelectric plant of Belo Monte, the leading case of the demarcation of *Raposa-Serra do Sol*[91] represents an important background for the São Luiz do Tapajós case as well.

NORTHERN AMERICA

Glamis Gold Ltd. (Claimant) v United States of America (Respondent), NAFTA/UNCITRAL Award, 8 June 2009

(by *Christina Binder*, with the contribution of *Jane A. Hofbauer*)

The *Glamis Gold* award (2009)[92] is one of the recent investment awards touching upon indigenous rights and may be considered a symbolic example of the clash between investors' rights and cultural heritage protection. This award is particularly concerned with the question how regulatory measures aimed at the protection of cultural indigenous sites can be classified from an investor's perspective, and whether such measures amount to a breach of standards of treatment enshrined in the *North American Free Trade Agreement* (NAFTA).

Glamis Gold, a Canadian mining company, was engaged in gold mining operations from 1988 in southeastern California, in an area of the Californian desert near to Native American lands and areas where the Quechan Indian Nation's tribe has a special cultural concern.[93] The mining site was located within the California Desert Conservation Area (CDCA), an area governed by three principles, i.e. *multiple use*, *sustainable yield* and the *maintenance of environmental quality*.[94] In application of these principles a balance is to be achieved between the competing interests of the investor with "other potential uses for the land and the need to protect federal resources".[95] In this context, the CDCA Plan foresees that cultural resources are to "be given the same consideration as other resource values".[96] The Tribunal addressed Glamis Gold's claims for expropriation under Article 1110 NAFTA and fair and equitable treatment (FET) under Article 1105 NAFTA in turn. In the end, it dismissed both claims. In particular, with respect to the FET issue, the Tribunal noted that a change by the government of a decades-old rule grounded on a danger of a "significant, unavoidable adverse impact to cultural resources and Native American sacred sites"[97] was not contrary to the principle of fair and equitable treatment.

The proceedings were marked by a comparatively strong involvement of the affected community, the Quechan tribe, through the filing of two non-party submissions. In addition, the Quechan tribe was allowed to watch the proceedings from a different location with a separate video feed which was not interrupted when the otherwise restricted discussion on the cultural sites and artefacts was taking place. A strong focus of their submissions focused on the question whether Glamis Gold's investment and the regulatory measures taken in response by the United States, were consistent with indigenous rights, i.e. "wider public international law", which they argued was part of the applicable law

[91] See n. 82 above.
[92] *Glamis Gold Ltd. (Claimant) v United States of America (Respondent)*, NAFTA/UNCITRAL Award, 8 June 2009.
[93] Ibid., para. 10.
[94] Ibid., para. 46.
[95] Ibid., para. 48.
[96] Ibid., para. 50.
[97] Ibid., paras. 760-761.

to be considered by the Tribunal established under the UNCITRAL arbitration rules. At the same time, the award by the NAFTA Tribunal paid surprisingly little attention to the submissions by the Quechan tribe and to the role of indigenous interests in the context of foreign investments proceedings. Not only did it point this out explicitly in the opening passages of the award, but it is also evident in its analysis of the substantive arguments of the parties. Thus, the Tribunal repeatedly emphasized that, in light of the balancing exercise states must conduct when dealing with competing interests, its role was limited to subsidiary determination whether these measures were, e.g., a gross or "manifestly arbitrary" denial of justice. Hence, even though the award was, in result, favorable to the Quechan tribe's rights, indigenous rights and concerns played little to no role for the Tribunal's decision.

Tsilhqot'in Nation v. British Columbia (Canada)
(by *Nicole Schabus*[98] and *René Kuppe*)

Tsilhqot'in Nation v. British Columbia[99] was decided by the Canadian Supreme Court on 26 June 2014. It must be considered as a landmark decision concerning indigenous land and resource rights, within a Common Law legal framework. It is a historic decision in that it resulted in the first affirmation of Aboriginal Title in Canada. The case history goes back to the year 1983, when the Canadian province of British Columbia granted a logging permit in a territory claimed by the indigenous Tsilhqot'in people, living in the Interior of the province of British Columbia. The Tsilhqot'in had resisted the decision of the province through blockades and negotiations, and finally filed an action, seeking a declaration of Aboriginal title based on the constitutional protection for Aboriginal Rights provided under subsection 35 (1) of the Canadian Constitution Act (1982), stating that "(t)he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Aboriginal title is a doctrine developed in Common Law countries by jurisprudence, stating that indigenous tenure by Aboriginal Peoples has persisted the assumption of sovereignty by the British colonial empire, which in itself is a problematic concept. In Canada, one of the sources of Aboriginal title is exclusive occupation at the time of assertion of sovereignty, which for British Columbia has been set for 1846 with the Oregon Boundary Treaty. The Canadian Supreme Court set out the following principles for the proof of Aboriginal title in *Delgamuukw v. British Columbia*: "(i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive".[100]

The full application of the test was to be determined in the Tsilhqot'in case whose claim referred to an area in the core of Tsilhqot'in territory of approximately 4,300 square kilometers. British Columbia Supreme Court trial judge Justice Vickers accepted a territorial concept of Aboriginal Title, but he rejected the arguments by the province of British Columbia and the federal government urging a site specific approach, where only specific

[98] Assistant Professor, Faculty of Law, Thompson Rivers University ne Secwepemcul'ecw (in Secwepemc territory); member of the legal team for the Secwepemc Okanagan intervenors in the *Tsilhqot'in* case before the Supreme Court of Canada.
[99] 2014 *SCC* 44.
[100] [1997] 153 *D.L.R.* (4th), para. 143.

intensively used sites such as villages could be subject to Aboriginal Title, as a "postage stamp approach" that was inconsistent with Canadian constitutional law and for that matter international law. Yet that was the very approach that the British Columbia Court of Appeal adopted relying on the rejected "cultural security approach", suggesting that indigenous peoples could maintain their culture solely through recognition of Aboriginal use rights, such as hunting and fishing, throughout the territory, while declarations of title would be limited to small site specific areas such as villages, preferably fenced areas and extensively and proactively used areas, such as "salt licks and buffalo jumps". This approach was unanimously and soundly rejected by the Supreme Court of Canada, which stated that "[t]here is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title […]".[101] The Supreme Court hence reverted to a territorial concept of Aboriginal Title, arguably going beyond its own previous decisions on that regard. It issued a declaration of Aboriginal Title to a contiguous area of about 1,750 square kilometers that the Tsilhqot'in had historically used and occupied. Aboriginal Rights to hunt, fish and trap had already been accepted in a legally binding manner, for the entire claim area, by courts. The legally binding declaration of Title is actually contained in a map prepared by the trial judge together with a cartographer, using elevations on the plateau, rivers including the spawning grounds for the Chilko salmon run, and other natural features to demarcate the area.

The importance of the Supreme Court of Canada issuing the first declaration of Aboriginal Title in Canadian history cannot be overstated. In previous cases, such as *Delgamuukw*, while upholding the concept of Aboriginal Title, no legal remedy had been granted and the case was sent back to trial. While the Supreme Court in its decision does not explicitly refer to international law, a number of the indigenous interveners made reference to international legal standards, such as the right to self-determination and other specific indigenous peoples' rights. They also included references to Canada's policy of not recognizing indigenous land rights being criticized by international human rights bodies, including by the Inter-American Commission on Human Rights, that Canada lacked effective national remedies in regard to the recognition of indigenous land rights, both in the courts and negotiations, in regard to the Hul'qumi'num Nation,[102] who also intervened in this case before the Supreme Court of Canada. Together, indigenous peoples made it clear that, if they were to be once again denied a remedy, they would take the case before international bodies and this clearly weighed heavily on the Supreme Court of Canada issuing a declaration of title.

The judgment in point also has important implications for a correct understanding of the definition of indigenous rights over land. It strengthens the view that the geographical extent of indigenous land rights must be defined according to traditional patterns of land and resource use, and must not limit indigenous land rights to areas under intense occupation. This should be an important understanding of the land rights articles included in the UNDRIP, Article 26(2) of which states that "[i]ndigenous peoples have the right to own,

[101] See *Tsilhqot'in Nation v. British Columbia*, n. 91 above, para. 42.

[102] See Inter-American Commission on Human Rights, Report No. 105/09, Petition 529-07, Admissibility, 30 October 2009, available at <http://www.cidh.oas.org/annualrep/2009eng/Canada592.07eng.htm> (accessed 12 June 2016), paras. 31-43.

use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired". The Tsilhqot'in decision is an important step to show that "traditional occupation or use" should not be defined by a reference to a western understanding of intense land use, but recognize and protect indigenous patterns of stewardship over and use of lands.

The Onondaga Nation and The Haudenosaunee against The United States
(by *Joseph J. Heath, Esq.*, Onondaga Nation General Counsel)

This case study concerns the Onondaga Nation's Land Rights Action, which was summarily dismissed in the federal courts of the United States and the actual, practical problems which the Nation has experienced in gaining any true justice for loss of human rights. The Onondaga Nation is a sovereign Indigenous nation whose original homelands are situated in what is now central New York State, in the United States. The Nation seeks redress for the violation of the human rights of the Onondaga people to their lands, to equal treatment, and to judicial protection. The Nation and its people have a unique spiritual, cultural and historic relationship with the land, which is embodied in the Gayanashagowa, the Great Law of Peace.

The Haudenosaunee Six Nations, including the Onondaga Nation, entered into three treaties with the United States: the 1784 Treaty of Ft. Stanwix, the 1789 Treaty of Ft. Harmer and the 1794 Treaty of Canandaigua. In these treaties, the United States affirmed the sovereignty of the Nation, promised to protect Nation lands, and guaranteed the Nation the "free use and enjoyment" of its territory. Between 1788 and 1822, the State of New York took approximately 2.5 million acres of Onondaga Nation land in violation of federal law and treaties and in violation of the Nation's own law. Today, despite these treaty and statutory guarantees, the Onondaga Nation is in possession of only a small fraction of its legally-protected, original territory. The land currently acknowledged as Onondaga territory under federal law comprises approximately 6,900 acres. The courts of the United States have failed to provide any remedy for this loss of land. The Nation asserted its case at three levels of the federal judicial system: U.S. District Court, the Court of Appeals and the U.S. Supreme Court. The Nation was denied relief at each stage. The federal courts uniformly ruled that they are powerless to provide any remedy. As a result, the loss of Nation lands at the hands of New York State cannot be redressed in the U.S. judicial system. On 29 March 2005, about three weeks after the filing of the Nation's Complaint, the United States Supreme Court ruled, in *City of Sherrill vs. Oneida Indian Nation*,[103] that the doctrines of "laches, impossibility and acquiescence" precluded the Oneida Nation from asserting immunity from real property taxes on treaty protected, reservation land that had been taken by the State of New York in 1795 but subsequently purchased by the Oneidas in the 1990s. Oral argument on the Defendants' Motion to Dismiss was heard by U.S. District Court Judge Kahn, in Albany, New York, on 11 October 2007. Decision was reserved at that time. On 5 August 2010, the Second Circuit Court of Appeals dismissed another Indian land claim based on violations of the Trade and Intercourse Act.[104] On 22 September 2010, Judge Kahn issued a Memorandum Decision and Order that granted the

[103] 544 U.S. 197 (2005).
[104] *Oneida Indian Nation v. County of Oneida,* 617 F.3d 114 (2d Cir. 2010).

Defendants' motions to dismiss and ordered the dismissal of the Nation's Complaint in its entirety, thereby foreclosing the possibility of any judicial relief for New York State's violations of the treaties and federal law. Oral argument was held before a three-judge panel of the court in New York City on 12 October 2012. One week later, on 19 October 2012, the Court of Appeals issued a two page Summary Order and Judgment affirming the District Court's dismissal of the Nation's complaint.[105] In 2013, the Nation's Land Rights Action was summarily dismissed by the federal courts of the United States. Subsequently, on 15 April 2014, the Nation filed a Petition against the United States before the Inter-American Commission on Human Rights.[106]

The loss of control over and access to their traditional hunting, gathering and fishing areas at the hands of the State of New York has deprived the Onondaga people of food and other materials essential to their health and welfare. As a result, the loss of their lands has significantly degraded the health of the Onondaga people; and the loss of their lands has been profoundly disruptive to the Nation's citizens and their health. The loss of Onondaga original territory has also weakened and in some cases severed the Nation's cultural and spiritual ties to Onondaga sacred sites, such as Onondaga Lake, the glacial, kettle lakes in the region of Tully, New York and many others.

The United States domestic legal system's denial of a remedy for breach of the Nation's land rights and treaties is a violation of the Nation's fundamental human rights protected by the American Declaration on the Rights and Duties of Man, the UNDRIP and other rules of customary international and treaty law. In addition, the illegal dispossession of the Nation's lands was in clear violation of the above mentioned bilateral treaties between the United States and the Haudenosaunee Six Nations, the United States Constitution and federal laws of the United States. There is no international forum that has the jurisdiction to enforce any human rights decision against the United States. Additionally, the Inter-American Commission on Human Rights is so severely underfunded and understaffed that cases take far too long for any adjudication or decision. Once a decision is eventually released by the Commission, the United States can simply ignore it, as it has done in other cases won by Indigenous nations. So, the practical result is that no relief is available for the violation of human rights of Indigenous nations by the United States.

The Onondaga Nation recommends that the United States government recognizes the Nation's land rights and fully comply with relevant international legal standards (especially the UNDRIP), removes the doctrine of discovery from its legal jurisprudence, reaches an agreement with the Nation, through discussion with the Nation's leaders and the Nation's chosen representative, on mechanisms by which the United States can fulfill its treaty obligations to the Nation and remedy the violations of the Nation's rights. To the latter end, the government should establish an independent commission to study the violation of treaties between the United States and Indian nations and the subsequent disruption of Indigenous cultures, economies and governments by the United States, as well as adopt any legislative, administrative or other mechanisms to ensure the protection of the Nation's rights.

---

[105] *Onondaga Nation v. State of New York,* Summary Order, October 19, 2012 (2d Cir.).

[106] See <http://www.onondaganation.org/news/2014/the-onondaga-nation-files-petition-against-united-states-with-inter-american-commission-on-human-rights-41514/> (accessed 27 May 2016).

Fate Control and Human Rights: Local Governance in America's Arctic
(by *Mara Kimmel*)

This case study focuses on land ownership and, more importantly, governance rights of Alaska Native peoples. The extent of sovereign rights to self-government is the result of federal and Alaskan state legislation and the decisions of the court systems, and it is continually evolving. While the Alaska Constitution's text endorses local governance,[107] its practices do not. Alaska's policies of local self-government stand in stark contrast to the lack of authority given to tribal governments. While the urban system of governance is relatively simple, the corresponding rural system is very complex. This "complex non-system" of governance in the rural areas of Alaska creates tremendous obstacles for tribal governments when measured against similarly situated local governments in urban Alaska. The impacts of this disparity are magnified by the unwillingness of the State of Alaska to work with tribal governments. On multiple occasions, for example, the State has litigated against Alaska Native tribes to prevent their exercise of certain aspects of local self-government.[108]

The legislation that aimed to settle aboriginal land claims by Alaska Natives – *Alaska Native Claims Settlement Act* of 1971 (ANCSA) – was rooted in promoting economic opportunities for Alaska Natives and created for profit regional and village corporations to effectuate that goal. One outcome of this land claims settlement, however, was to sever tribal jurisdiction over traditional lands, leading to a situation where they do cannot govern their own territory. The legal solution in ANCSA and other Alaska specific laws and regulations prevents tribal governments from exercising the same sovereign rights over their territory as other indigenous communities, and is thus distinctly different from the self-governance rights other indigenous tribes enjoy in the rest of the United States. To remedy this gap in self-governance, Alaska Natives are attempting to reassert their territorial governance rights via litigation and innovative co-management initiatives. The success of these outcomes has yet to be realized, and depends in large part on the application of legal principles of internal self-governance powers inherent to all indigenous peoples to Alaska Natives.

Two approaches to remedying the loss of governance are advanced: expanding "Indian Country" to support territoriality, and amending federal law to provide for co-management of federal resources by tribes. With respect to the first approach, in May of 2014 the Department of Interior issued a draft regulation allowing Alaskan lands to be returned

---

[107] See Article X, § 1: "The purpose of this article is to provide for maximum local self-government […]".

[108] See, e.g., *Simmonds v. Parks*, 329 P.3d 995 (Alaska 2014) (holding that tribal sovereignty extended to member children, against state objections in the trial court); *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998) (holding that ANCSA extinguished Indian country); *John v. Baker*, 982 P.2d 738 (Alaska 1999) (holding that tribal court and state court exercised concurrent jurisdiction over child custody disputes between tribal members). See also *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), when the U.S. Supreme Court held that lands conveyed under ANCSA are outside the definition of "Indian Country" and cannot be the basis for sustaining territorial sovereignty.

to trust status, recasting them as "Indian country" capable of supporting tribal governance.[109] As for the second approach, it would consist in amending the *Alaska National Interest Lands Conservation Act* (ANILCA), through the *Alaska Native Subsistence Co-Management Demonstration Act* of 2014 bill.[110] This bill proposes a new co-management structure for the Ahtna region in Interior Alaska. It would amend ANILCA to provide for co-management on traditional lands within this specific region, integrating tribal governance and doing away with the dual system of management currently in place.

To a notable extent, however, successful application of self-governance relies on the willingness of the U.S. and Alaska governments to cooperate and acknowledge those rights. In particular, State support should be accorded to rural governments, including tribal governments, to the same degree as in urban communities. Such support would enhance the capacity of tribal governments to adopt policies that promote human development and fate control.

ASIA

From Declaration to Implementation: The experience of the Subanon in the Philippines with the Operationalization of the U.N. Declaration on the Rights of Indigenous Peoples

(by *Cathal M. Doyle*)

In 1997 the Philippines Congress passed the *Indigenous Peoples Rights Act* (IPRA).[111] This landmark law was heavily inspired by the then draft UNDRIP, effectively incorporating the Declaration's key provisions regarding the recognition of indigenous peoples' territorial, cultural and self-determination rights into the national legislative framework. Among other things, the IPRA affirms the right of indigenous peoples "to use their own commonly accepted justice systems, conflict resolution institutions, peace building processes or mechanisms and other customary laws and practices within their respective communities and as may be compatible with the national legal system and with internationally recognized human rights".[112] The IPRA also established a National Commission on Indigenous Peoples (NCIP), responsible for the "formulation and implementation of policies, plans and programs to recognize, protect and promote the rights and well-being of [indigenous peoples with due regard to their beliefs, customs, traditions and institutions] and the recognition of their ancestral domains as well as the rights thereto".[113] The Act affirms that customary law has primacy within ancestral domains in the context of dispute resolution, with the NCIP serving as an appeal mechanism. This requirement is consistent with the UNDRIP's recognition of indigenous peoples' rights to self-determination and autonomy, to maintain and strengthen their political, legal, economic, social

[109] See News Release, "United States Department of the Interior, Secretary Jewell Issues Secretarial Order Affirming American Indian Trust Responsibilities", 20 August 2014, available at <http://www.bia.gov/cs/groups/public/documents/text/idc1-027607.pdf> (accessed 27 May 2016).

[110] See <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=371688> (accessed 27 May 2016).

[111] Available at <http://www.gov.ph/1997/10/29/republic-act-no-8371/> (accessed 27 May 2016).

[112] Ibid., Chapter IV, Section 15.

[113] Ibid., Chapter VII, Sections 38 and 39.

and cultural institutions and to promote, develop and maintain their own juridical systems or customs.[114]

Also in 1997, the CERD Committee issued its General Recommendation No. XXIII on Indigenous Peoples[115] – a document which served to strengthen indigenous peoples' position in negotiations with States on the UNDRIP and would become a key touchstone for State recognition of indigenous peoples' rights. In 1997, the government of the Philippines also submitted a State party report to the CERD Committee, which was to be its last for over twelve years, prompting the Committee to commend its effort in drafting the IPRA, but also to express its concerns in relation to the negative impacts development projects were having on the country's indigenous peoples.[116]

1997 was also the year that the Subanon community located at the foot of Mt Canatuan, on the Zamboanga Peninsula of Mindanao, obtained its Certification of Ancestral Domain Claim (CADC) from the Philippines' Department of the Environment and Natural Resources (DENR), and commenced its engagement with the new procedures for strengthened rights recognition under the UNDRIP-inspired IPRA. This convergence of events offered the promise of a future based on respect for their inherent rights in favour of the Philippines' indigenous peoples, such as the Subanon of Mt Canatuan. At that time the Subanon were involved in a struggle to protect their territories from the encroachment of a junior Canadian mining company, TVI Resources Development Philippines, Inc. (TVIRD). Of particular concern to the Subanon was the company's intent to develop an open pit gold mine thereby, destroying the peak of their sacred mountain, Mt Canatuan. From 2004 on-wards the Subanon adopted an alternative strategy based on two mutually reinforcing rights assertion approaches. The first approach was to invoke their own customary legal system. This resulted in the issuance of two rulings, one against the State in 2004 and the other against the company in 2007, for violations of Subanon customary law. The second approach adopted by the Subanon was to focus on international fora in which to seek remedies for their grievances. In particular, they turned to the CERD Committee for assistance in 2007. This opened a long dialogue between the CERD Committee, the government and the community, as a result of which the Committee requested several times that the Government provide it with information in relation to steps taken to implement its recommendations. On the one hand, the CERD Committee recognized that positive developments had occurred; in particular, the Committee welcomed "the recognition and the protection by the State party of traditional indigenous justice and conflict resolutions mechanisms" and its "statements that it wishes to respect the customary practices […] of the Subanon people",[117] also placing considerable emphasis on the role of Subanon customary law in free, prior and informed consent processes and in relation to ensuring culturally appropriate reparations. On the other hand, however, as of September 2015 the government has not yet responded to CERD Committee's request for

[114] UNDRIP Articles 5 and 34.

[115] See n. 27 above. For an assessment of the background to CERD Committee's drafting of General Recommendation XXIII see C. Doyle C., *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent*, London, 2015, pp. 166-7.

[116] CERD Committee Concluding Observations, Philippines, U.N. Doc. CERD/C/304/Add.34 of 15 October 1997, paras. 9 and 17.

[117] See Concluding Observations, Philippines, U.N. Doc. CERD/C/PHL/CO/20 of 23 September 2009, paras. 7 and 25.

updated information or taken the necessary measures to implement its recommendations in relation to reparations due to the Subanon.

This reality reveals that, to a notable extent, the post-IPRA relationship between indigenous peoples, the Philippine State and mining companies seeking to operate there continues to be dominated by power rather than by law. The failure to implement the law in accordance with its spirit and intent is simply a reflection of the extent of the power imbalances in governance structures at local, national, regional and international levels, all of which act in favour of mining companies to the detriment of indigenous peoples' enjoyment of their rights. This reflects a general situation in the context of which the rights of Philippine indigenous peoples are recognized under the law but not yet fully realized in practice.

AFRICA

Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya

(by *Ebun Abolarin*, with the contribution of *Alexandra Tomaselli*)

The ownership claim of the Endorois to their ancestral lands in the Lake Bogoria area is well known to the neighbouring tribes because the sites were used seasonally for cultural festivities that involves all Endorois form the whole region. Though Kenya has no domestic law or instrument with express mention of the rights of indigenous peoples, the land had been enjoyed without any disturbance for centuries, even under the British colonial administration. However, the ownership and habitation of that territory provided a close link with the land, in which the Endorois practised a sustainable way of life until dispossession through the creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978 by the Government of Kenya. The Endorois were promised compensation of fertile land for 400 families after the creation of the game reserve, and each of the 400 families was to be paid 3,150 Kenyan Shillings as for relocation. However, only 170 families received some money, in 1986. The community claimed justice before Kenyan domestic courts, but it was denied. Therefore, their case was brought before the African Commission on Human and Peoples' Rights. The Commission rendered its decision on 25 November 2009,[118] recognizing the intrinsic guiding value of the UNDRIP's standards and finding that Kenya violated Articles 1 (obligation to respect rights), 8 (freedom of conscience and religion), 14 (right to property), 17 (right to take part in cultural life and to promotion and protection of morals and traditional values), 21 (peoples' rights to freely dispose of their wealth and natural resources) and 22 (peoples' right to their economic, social and cultural development) of the 1981 *African Charter on Human and Peoples' Rights*.[119] Therefore, the Commission recommended the government of Kenya to: recognise rights of ownership to the Endorois and return their ancestral land to the community; ensure unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle to the Endorois community; pay adequate compensation to the community for all the loss suffered; pay royalties to the Endorois from existing

[118] See Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, n. 20 above.
[119] Available at <http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf> (accessed 27 May 2016).

economic activities and ensure that they benefit from employment possibilities within the reserve; grant registration to the Endorois Welfare Committee; engage in dialogue with the community for the effective implementation of these recommendations; report on the implementation of these recommendations within three months from the date of notification.

In order to persuade Kenya to implement its recommendation, in 2013 the Commission adopted a resolution calling on the Republic of Kenya to implement the Endorois decision,[120] urging the government to comply with its obligations under the African Charter, including giving effect to the rights and freedoms guaranteed therein, as well as to inform the Commission of the measures proposed to implement the Endorois decision, and more particularly, the concrete steps taken to engage all the players and stakeholders, including the victims, with a view to giving full effect to the decision. The government of Kenya has so far failed to honour its obligations arising from the Commission's communication, but, in its Combined Periodic Report (CPR) of 2014[121] addressed most of the issues enumerated as violations against the Endorois Community under its 2010 Constitution. In the CPR, Kenya claimed that, in the last few years, it had "made remarkable progress in safeguarding the rights, freedoms and duties of its people [including indigenous peoples and socially disadvantaged persons] as enshrined in the Charter",[122] as well as that all the rights assumed as violated by the Commission in its recommendation are guaranteed and protected by its 2010 Constitution, hence they may be fully enjoyed by the Endorois who are nomadic pastoralist within their traditional lands. With respect in particular to the right to property, Kenya emphasized that Article 40 of the Constitution allows every person the right to acquire and own property, and that compensation is due to persons for land compulsorily acquired by the government; compulsory acquisition has to be only for public use and the Government has to pay promptly and in full.[123] Despite the statements included in the CPR, and the effort of the Government of Kenya in late 2014 to set up a task force dedicated to the implementation of this ruling,[124] so far Kenya has failed to implement the *Endorois* decision as recommended by the African Commission.

AFTRADEMOP and Global Welfare Association (on behalf of the Moko-oh Indigenous Peoples of Cameroon) v. Cameroon
(by *Ebun Abolarin*)

The Association for the Reconstruction and Development of the Moko-oh Peoples of Cameroon (AFTRADEMOP) – an agro-pastoral (minority) people of Upper Moghamo, a clan in Batibo Sub-division of the North-west of Cameroon – and Global Welfare Association on behalf of the Moko-oh indigenous peoples of Cameroon filed a complaint

[120] Resolution 257 of the African Commission on Human and Peoples' Rights, meeting at its 54th Ordinary Session, held in Banjul, The Gambia from 22 October to 5 November 2013, available at <http://www.achpr.org/sessions/54th/resolutions/257/> (accessed 27 May 2016).
[121] CPR – Republic of Kenya, Combined 8th-11th Periodic Report on the African Charter on Human and Peoples' Rights, November 2014, available at <http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya_state_report_eng.pdf> (accessed 27 May 2016).
[122] Ibid., para. 1.
[123] Ibid., para. 100.
[124] Minority Rights Group International (MRG), "Kenyan Task Force formed to implement the 2010 Endorois ruling", 29 September 2014, available at <http://minorityrights.org/2014/09/29/kenyan-task-force-formed-to-implement-the-2010-endorois-ruling/> (accessed 27 May 2016).

to the African Commission on Human and Peoples' Rights on 9 February 2007.[125] Though the Complaint is against the State of Cameroon, the oppression and domination was perpetrated by the Bali-Nyonga, a migrant tribe from Chamba in the North of Cameroon. The Moko-oh alleged that the domination, enslavement and oppression began during the colonial era with the German and British administration, which was compounded by series of raids in 1914, at the beginning of the 1st World War. At that period, the land of the Moko-oh was invaded by the Bali-Nyonga, a local tribe, who chased them out of their land to different parts of the country, while their oil and wine palm plantation were demolished. But in 1928 a delimitation of the boundary between the Bali-Nyonga and the Moko-oh was carried out by the District Officer of the Bamenda Division, which was further inspected and confirmed by the Provincial Resident of the Cameroon Province in Buea in 1929. But the outright objection of the Bali-Nyonga to this officially set boundary prevented the Moko-ohs from returning to their village. This refusal of the Bali-Nyonga to accept the 1928 boundary adjustment led to incessant persecution of the Moko-oh in order to drive them perpetually out of their ancestral land. Thus, the agitation of the Moko-oh to regain their land through all available constituted institutions in Cameroon began. The Complainant's petitions before administrative authorities, seeking redress to repossess its land, was without success, and all Moko-oh community's efforts to regain their land and property have been frustrated by the Cameroonian authorities. The violations alleged by AFTRADEMOP in its complaint concern Articles 3 (equality of all individuals before the law), 4 (right to life and integrity of the person), 5 (right to respect of human dignity), 10 (right to free association), 11 (right to free assembly), 12 (right to freedom of movement and residence), 14, 19 (right to equality of all peoples), 20 (peoples' right to existence and freedom), 21, and 24 (peoples' right to a general satisfactory environment favourable to their development) of the African Charter. The ultimate purpose of the complaint is to persuade Cameroon to return the Moko-oh their traditional territories on the basis of the established pre-independence boundary delimitation of 1928 and recognize them under domestic law, to rehabilitate the Moko-oh villages and allow the resettlement of the community there, as well as to protect the Moko-oh from further discrimination and oppression.

San and Bakgalagadi peoples' land rights and the case of the Central Kalahari Game Reserve in Botswana
(by *Maria Sapignoli*[126], with the contribution of *Robert K. Hitchcock*[127], *René Kuppe* and *Alexandra Tomaselli*)

This case study concerns the eviction of San and Bakgalagadi people, who sued the Government of Botswana and won two cases before domestic Courts in 2006 and 2011. The Central Kalahari Game Reserve in Botswana was established in 1961 to protect the wildlife resources and to guarantee the hunter-gatherer San people access to land, and, thus, their means of livelihood. Over time, the lifestyle of the San people and other

[125] Communication 336/2007 – *AFTRADEMOP and Global Welfare Association (on behalf of the Moko-oh Indigenous Peoples of Cameroon) v. Cameroon*, available at <http://www.achpr.org/files/sessions/13th-eo/comunications/336.07/achpreos13_336_07_eng.pdf> (accessed 27 May 2016).
[126] Max Planck Institute for Social Anthropology, Department of Law and Anthropology, Halle-Saale (Germany).
[127] Department of Anthropology, University of New Mexico, Albuquerque, New Mexico (USA).

residents of the Game Reserve changed. In 1986, the Government decided to relocate all people residing within the Reserve to outside settlements on the grounds that the communities' lifestyles were considered to be no longer consistent with the objectives of the Reserve, as they were allegedly depleting the wildlife and natural resources of the Reserve. The first set of removals took place in 1997. In 2002, the Government ceased provision of basic and essential services to the inhabitants who remained in the Game Reserve, and removed the pipe and capped the borehole that brought water to inhabitants of the Reserve. Hence, 239 San and Bakgalagadi individuals, who had lived in the Reserve, lodged an urgent application with the High Court of Botswana, seeking an order declaring the termination of basic and essential services by the Government unlawful and unconstitutional, and declaring the Government's obligation to restore these services and their access to the lands and resources within the Reserve. In December 2006, the High Court of Botswana, in the case of *Roy Sesana v. the Attorney General*, held that the "[a]pplicants were deprived of [possession of the land, which they lawfully occupied] by the Government forcibly or wrongly and without their consent",[128] and that the applicants have the constitutional and legal rights to hunt in the Reserve. Following the High Court's decision, the government allowed to return to the Reserve only the applicants to the Court case. In addition, the government stated that it is not obligated to provide access to water in the Reserve and that it will not permit the inhabitants to gain access to water through the use of the Mothomelo borehole. Later, on 27 January 2011, the San people won an appeal against the Government in the Botswana Court of Appeal.[129] The Appeal Judges quashed the previous ruling of Justice Walia that denied people access to water on their ancestral land and referred to Kalahari people's plight as "a harrowing story of human suffering and despair caused by a shortage of water in the harsh climatic conditions of the Kalahari Desert".[130] Furthermore, the Government was ordered to pay the costs of the San people's appeal.

The two decisions just described certainly represent positive developments in terms of compliance with the standards set by the UNDRIP. So far, however, the judgements have not been implemented by the government of Botswana. In February 2015 Roy Sesana, first applicant in the 2006 case, met with President Khama. At the end of this meeting the President decided to direct several ministers to go to the central Kalahari and discuss the issues that people in the Central Kalahari Game Reserve were concerned about. Following the visit, the ministers made several promises concerning initiatives aimed at facilitating life in the Reserve (including the commitments of providing a mobile health clinic for the settlements in the reserve, of transporting children living in the Reserve back and forth to school, or to provide pensions to the elderly people qualified to receive them), but, as of March 2016, none of these promises have been acted upon. As a consequence, it cannot be said that at the moment of this writing the applicants have been completely satisfied by the outcome of the two cases, since they still lack hunting rights, access to water in

[128] Roy Sesana et Al. v. the Attorney General, 2006 African Human Rights Law *Reports* 183, para. 55(4).

[129] *Matsipane Mosetlhanyene and Gakenyatsiwe Matsipane v. the Attorney General*, 27 January 2011, available at <www.escr-net.org/sites/default/files/bushmen-water-appeal-judgement-jan-2011.pdf> (accessed 27 May 2016).

[130] Ibid., para. 4.

some communities, and the ability to move in and out of the reserve freely and to stay there as long as they wish.

Realizing Land Rights of the Nuba People in Sudan
(by *Jernej Letnar Černič*)

This case study studies deals with land rights of the Nuba people, which are an indigenous ethnic group living in the area of the Nuba mountains in Southern Kordofan in Sudan. They include a variety of tribes in the Nuba mountains. The land is central to the Nuba peoples' cultural existence, language, customs, identity, and socio-economic survival, and is critical to the community's survival. Customary laws have traditionally regulated land tenure in the Nuba mountains. However, the Sudanese land tenure system has undermined the ancestral land rights of the Nuba people.[131] In particular, the government has seriously disregarded the Nuba peoples' ancestral lands and their individual and collective human rights. The Nuba peoples have been pushed "systematically to the margin of their customarily owned land".[132] Most recently, *The New York Times* reported, on 3 July 2011, that the Sudanese army has "been relentlessly pounding the Nuba Mountains from Russian-made Antonov bombers for weeks […] Hundreds of civilians have been killed, including many children. Bombs have been dropped on huts, on farmers in the field, on girls fetching water together, slicing them in half with buckets in their hands".[133] So far, no case or claim has been brought to enforce Nuba's land rights or their human rights generally speaking, and their current situation constitutes an evident violation of Sudan's international obligations towards indigenous peoples. Therefore, the government of Sudan should be urged to strengthen its national judicial system, as well as to ratify the relevant international treaties – including the 1966 *Optional Protocol to the ICCPR*[134] – so as to ensure access to justice in favour of the Nuba for the violations of their land rights and other human rights of which they are victim.

OCEANIA

Te Urewera: Return and Co-Management of Traditional Lands of the Tuhoe People, Aotearoa New Zealand
(by *Catherine J. Iorns Magallanes*)[135]

Te Urewera National Park was a large park created from ancestral lands of the indigenous Tuhoe people. As part of the New Zealand attempt to provide redress and reparations for historic grievances including such land takings, agreement was recently reached whereby the New Zealand government passed legislation removing the national park status, creating a separate legal personality which holds title to its own lands, and enabling Tuhoe

[131] See G.K. Komey, "The Denied Land Rights of the Indigenous Peoples and Their Endangered Livelihood and Survival: The Case of the Nuba of the Sudan", 31 *Ethnic & Racial Studies*, 2008, 991, pp. 992 and 996.
[132] Ibid., p. 1007.
[133] See J. Gettleman, "Sudanese Struggle to Survive Endless Bombings Aimed to Quell Rebels", *New York Times*, 3 July 2011, available at <http://www.nytimes.com/2011/07/04/world/africa/04sudan.html?ref=sudan> (accessed 30 May 2016).
[134] 999 *UNTS* 171.
[135] This text is an extract from Catherine J. Iorns Magallanes, "Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment", 21 *Widener Law Review* 2, 2015, pp.273-327.

to co-manage the new entity, Te Urewera. The Tuhoe people argue that it is only through the exercise of their traditional relationship with the land and its natural environment that they would be able to exercise their spiritual authority through guardianship. The Crown was unable to agree to transferring ownership of a national park to a Maori tribe, but instead offered Tuhoe the solution of legal personality for the park, whereby no one owned the park but it owned itself. It would remain protected, with public use, akin to a national park, but it would maintain its own separate identity and be governed very differently, with significant Tuhoe input and in a way which better respects Tuhoe cosmology and relationship with the lands. This agreement was finalised in March 2013 and legislation to implement it passed in July 2014.[136] The purpose of the Act reflects various aspects, particularly "to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to — (a) strengthen and maintain the connection between Tūhoe and Te Urewera; and (b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and (c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all".[137] As for the principles governing the implementation of the Act, they focus primarily on different aspects of environmental protection, but are also protective of indigenous relationships with the park, and of public access for the benefit of all New Zealanders.[138]

EUROPE

The Rönnbäcken Case

(by *Maja K. Eriksson*)

The Rönnbäcken case deals with a concession which has been granted to an international corporation (Nickel Mountain AB) to establish three open pit mines (K No. 1-3) to be used for about 27 years within a traditional reindeer herding territory, without asking for and receiving the consent of the Sámi village Vapsten. The members of Vapsten have officially declared that they have no intention whatsoever to offer their consent to the mining project and to the corporation to entry on the territory in question. The refusal to give their consent should have some implications, e.g. that the activities should be discontinued, but the Swedish laws and the ways that authorities interpret them have not granted any protection to the Sámi in the area. Sámi did complain on the basis of the mining code but the government rejected their claim. For this reason, the Sámi made an application comprising an urgent request for interim measures, which is a tool for preventing human rights violations and irreparable damage, to the CERD Committee in September 2013. The claim was presented by the Sámi Council together with a Sámi community (Vapstens sameby). It was based on the assumption of the Vapsten's members (16 persons) that the decision to grant permission for the mine constitutes a violation of the right to property in conjunction with an arguable claim of discrimination, and a violation of the right to effective remedy, in combination with the right to equal treatment

[136] See *Te Urewera Act 2014*, available at <http://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html#DLM6183609> (accessed 27 May 2016).

[137] Ibid., Part 1, Subpart 1, Section 4, "Purpose of this Act".

[138] Ibid., Part 1, Subpart 1, Section 5, "Principles for Implementing this Act".

before tribunals, in breach of, respectively, Articles 5(d)(v), 6 and 5(a) of the Convention on the Elimination of All Forms of Racial Discrimination. At the time of writing, the communication is still pending.

It is to be noted that in Sweden, a dualist country, courts are not used to apply any other international human rights instrument than the 1950 *European Convention on Human Rights*,[139] which is directly applicable law. Unfortunately, so far the European Court of Human Rights has not shown particular sensibility (contrary to other human rights bodies, e.g. the IACtHR) as regards the application of general human rights provisions to indigenous peoples. This explains why there is a clear discrepancy between what international law requires in terms of indigenous peoples and how domestic law has been interpreted and applied in Sweden. Also, domestic law presently in force in Sweden is not supportive of Sámi land rights, and may therefore have severe and adverse impact on reindeer herding. Yet, there are positive recent signs within the Swedish legal court system paying more attention to international law standards related to indigenous peoples.

Case Study of Norway: How Norway's International Law Obligations vis-à-vis the Sámi Indigenous Peoples' Land Rights have been Implemented in Practice
(by Øyvind *Ravna* and *Timo Koivurova*)

This case study concentrates on how land rights of Sámi indigenous people in Norway have been identified and given legal recognition, in particular in the northernmost Finnmark County. Norway was the first country in the world to ratify ILO Convention 169, in 1990,[140] as, and, as required by the Convention, in 2005 enacted the *Finnmark Act*[141] to, *inter alia*, identify and recognize, through specific procedures, indigenous specific Sámi land and water rights within that county. The fact that Norway has ratified and implemented ILO Convention 169 in its domestic law is notable also for the reason that the other countries where Sámi also live (Finland, Sweden or Russia) have not ratified the Convention nor have they tried to establish any procedures to investigate and recognize Sámi land and water rights.

The *Finnmark Act* incorporates ILO Convention 169, which in Article 8(1) establishes that, "in applying national laws and regulations to the peoples concerned, due regard is to be given to their customs or customary laws". To this purpose, the Act is grounded on the assumption that, when establishing special procedures for clarifying land ownership by the Sámi, their customs and legal opinions should be taken into account, basing on applicable national law. With a view of implementing ILO Convention 169 (particularly Articles 14 and 15, on land rights), Norway has transferred the ownership of 95% of the lands and waters of Finnmark county to its residents; they are administered by the so called Finnmark Estate, consisting of 3 members appointed by the Sámi Parliament and 3 by the Finnmark County Council

The main procedural tool established by the *Finnmark Act* is a commission (the Finnmark Commission) mandated to investigate and adjudicate Sámi land and water rights in

[139] *CETS* No. 005.
[140] See n. 22 above.
[141] *Act No. 85 of June 17, 2005 relating to Legal Relations and Management of Land and Natural Resources in the County of Finnmark*, available at <http://www.wipo.int/wipolex/en/details.jsp?id=11129> (accessed 27 May 2016).

Finnmark. In addition, a special tribunal (The Uncultivated Land Tribunal of Finnmark) has the task to settle disputes concerning such rights arising from the investigation of the Commission. These procedures, however, are not reserved to the Sámi, but are open to all Finnmark County residents, circumstance which is being criticized.

In principle, Norway has created a legislative framework (although only for Finnmark) which should be able to process claims of immemorial ownership and use rights of indigenous Sámi. Unfortunately this is not the case. In fact, in the five cases where the Finnmark Commission has so far provided a report, it has not taken appropriately into account Sámi customary law, or oral evidence, and has mostly proceeded from the basis that Norway has by now established legal ownership to these lands. Only in one case, in the small abandoned coastal Sámi village of Gulgofjord, the Commission has found that local people have acquired ownership to an outlying area of 30 square kilometers. However, the case was not of any practical significance, since the Commission concluded that the owners (mostly successors of coastal Sámi living there up to 1970) would need to move back to such abandoned village, a roadless village by the ocean, to acquire the title. In the four other investigation fields, the Commission has not followed what the legislature stipulated in the Finnmark Act, namely, the importance of Sámi use of lands or Sámi customary law. Instead, it has found that governmental activities, rather than the local, informal management of natural resources, are of law-making significance. As a consequence, Norway has received rather hash criticism from the CERD Committee, which has noted, among other things, that "there remain significant gaps in translating the legal recognition into practice, thus resulting in reality in limited recognition and protection of rights over their lands".[142]

The behaviour of the government of Norway is also in contravention of Article 27 ICCPR,[143] incorporated into Norwegian Law by the 1999 *Human Rights Act*,[144] with higher authority than an ordinary Act of the Parliament. Article 27 ICCPR is of particular interest for this case study, especially in light of the interpretation given to it by the Human Rights Committee,[145] which conceives the provision in point as the substantial basis for a minority's culture, including, e.g., a particular way of life associated with the use of land resources. In relation to the Sámi, this means that lands, pastures, waters, and other natural resources of importance for traditional livelihoods enjoy legal protection against interference by the government that could threaten the exercise of Sámi culture and livelihood – both for individuals and communities. In addition, Article 27 ICCPR implies an obligation by the government to identify lands of indigenous peoples, further strengthening Sámi land rights. The Norwegian government supports this interpretation.

---

[142] See Committee on the Elimination of Racial Discrimination, Concluding observations on the twenty-first and twenty-second periodic reports of Norway, U.N. Doc. CERD/C/NOR/CO/21-22 of 28 August 2005, para. 29.

[143] See n. 23 above.

[144] *Act relating to the strengthening of the status of human rights in Norwegian law*, available at <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19990521-030-eng.pdf> (accessed 27 May 2016).

[145] See n. 24 above and corresponding text.

Land and Fishing Rights of Indigenous Peoples in Russia
(by *Federica Prina*[146] and *Alexandra Tomaselli*)

In the Russian Federation, 46 peoples have been legally recognized as "small-in-number indigenous peoples of the North, Siberia and the Far East". Russia has not ratified ILO Convention 169, and abstained from voting for the UNDRIP. Regarding the former, the Russian Parliament held two hearings on its potential ratification in 1994 and in 2006, but both ended with a rejection based on the assumption that the Convention is incompatible with Russian legislation. As to the latter, during its second Universal Periodic Review in 2013, Russia stated that it had no intention to approve or endorse the UNDRIP, affirming that it already complied with the standards enshrined in it. Indigenous peoples are constitutionally recognized in Article 69 of the 1993 Constitution of the Russian Federation, stating that "[t]he Russian Federation shall guarantee the rights of the small-in-number indigenous peoples in accordance with the universally recognized principles and norms of international law and international treaties of the Russian Federation". This article was legally implemented by the adoption of three federal laws, which specifically apply to indigenous peoples, namely the Laws "On Guarantees" (1999), "On *Obshchinas*" (2000), and "On Territories" (2001).[147] Formally, these laws provide indigenous peoples with a number of individual and collective rights, guaranteeing, *inter alia*, the right to freely use land and renewable natural resources in the territories they traditionally occupy, and areas where they engage in traditional economic activities ("On Guarantees", Article 8, para.1). However, problems seem to lie in the effective implementation of the laws or their constant amendment. For instance, Article 11 of the original text of the Law "On Territories" stated that the use of territories of traditional natural use (in Russian: *Territorii Traditsionnogo Prirodopol'zovaniya*, hereinafter TTP) shall be free of charge. However, the Russian government has undermined the right of the indigenous peoples to free land use by amending Article 11 through Federal Law No.118-FZ of 2007. It has also failed to designate such TTP at the federal level. Regarding fishing rights, Article 25 of the Russian Federal Law No.166-FZ of 2004 "On fishery and the protection of biological water resources" foresees an exception clause for indigenous peoples from the requirement of holding a fishing permit, when fishing is carried out to satisfy subsistence needs and follows traditional practices at the level of the indigenous community. This provision is also poorly applied.

At the same time, indigenous peoples have recently successfully litigated to uphold their fishing rights before domestic Russian courts, in order to guarantee the community's livelihood. In some cases, Russian courts have appeared biased and given reasons for concern, showing that the Russian judiciary is not always fully independent, and there have been instances of judges being subjected to pressure from various actors. At the same time, in other cases Russian courts (including the Supreme Court) have provided

[146] School of Social and Political Sciences, University of Glasgow (Scotland).

[147] Respectively, Law No.82-FZ "On Guarantees of the Rights of Small-in-Number Indigenous Peoples of the Russian Federation" ("On Guarantees"), adopted in 1999; Law No.104-FZ "On General Principles of the Organization of *Obshchinas* of Small-in-Number Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation" ("On *Obshchinas*"), adopted in 2000; and Law No.49-FZ "On Territories of Traditional Nature Use of the Small-in-Number Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation" ("On Territories"), adopted in 2001.

some protection to indigenous peoples, ruling on a number of indirect or direct safeguards. First, they have affirmed that settlements of indigenous peoples shall be taken into consideration prior to the elaboration and issuing of documents on fishing grounds used for industrial fishing.[148] Secondly, they have guaranteed a (fairer) procedure in the bids for both hunting and fishing licenses, thereby indirectly underlining how indigenous peoples may be easily excluded from such tenders.[149] Thirdly, they have stressed that indigenous peoples have the right to pursue their traditional lifestyle and economic activity, as well as to access land free of charge.[150] Fourthly, one court of second instance directly referred to the exception clause for indigenous peoples from the requirement of holding a fishing permit, when fishing is carried out to satisfy subsistence needs and follow traditional practices.[151] Finally, the Constitutional Court of the Republic of Sakha (Yakutia), in its ruling of 2014, upheld indigenous peoples' right to priority in the exploitation of wildlife and referred to mechanisms of settlement in cases of land disputes that take into account the culture of indigenous peoples.[152] In these cases, the courts have observed, although by no mean explicitly, the relevant standards contained in the UNDRIP. We may therefore conclude that a few of the standards of the UNDRIP regarding indigenous peoples' land and fishing rights have been (partially) echoed in Russian Federation's domestic jurisprudence, although it is very difficult to establish whether Russian courts may have been aware of such standards. This ultimately supports the argument of the universal value of the UNDRIP.

In practice, sometimes indigenous peoples face many difficulties in bringing their cases to courts, which suggests that many violations of their rights are often ignored; and, when cases are adjudicated by courts, it remains unclear whether the resulting rulings are fully executed. At the same time, however, Russian courts may play a significant role in the protection of indigenous peoples, as shown by the cases just summarily described. Furthermore, the Law "On Guarantees" states at Article 14 that "[indigenous peoples have] the right to judicial defence of their ancestral lands, traditional way of life, economic activity and traditional practices […] In the consideration by courts of cases involving indigenous peoples […] the traditions and customs of these peoples can be taken into account, when they do not contradict federal legislation and the laws of the subjects of the Russian Federation. For the effective judicial protection of the rights of indigenous peoples, authorised representatives of small-in-number peoples can participate in the said judicial defence". Therefore, the members of indigenous communities and their associations are guaranteed by law a special regime of legal protection, with the participation of members of these groups themselves, so as to ensure the fairness of proceedings.

---

[148] See *Obshchina 'Kignach' v. the governor of Kamchatka Krai*, Supreme Court, 2009.

[149] See *Obshchina Saur v. Fishery agency of Amur oblast*, Arbitrazh Court of Appeal, 2011; *Federal anti-monopoly agency of Primorskii Krai v. the administration of Primorskii Krai*, 5thArbitrazh Court of Appeal, 2012.

[150] See *Obshchina Saur v. Fishery agency of Amur oblast* and *Prosecutor of Primorskii Krai v. four individuals belonging to an indigenous people of Primorskii Krai*, General Court of 2nd instance, 2011.

[151] See *Prosecutor of Primorskii Krai v. four individuals belonging to an indigenous people of Primorskii Krai*.

[152] See *MP of the Republic of Sakha V.H. Gubarev on the constitutionality of Point 200 of Order No. 285*.

4. Overall Assessment and Preliminary Conclusion[153]

The analysis of the case studies just presented has drawn an overall picture looking like a double-sided coin.

On the one hand, only a few cases are characterized by blatant violations of international legal standards applicable to indigenous peoples. In most cases, indigenous peoples' rights are actually recognized by States, especially at the level of the legislature and the judiciary. This consideration applies not only as regards States parties to ILO Convention 169, but more generally to the majority of States considered in this report, irrespective of whether or not they have ratified the said convention. This further confirms the status of the main international legal standards concerning the rights of indigenous peoples as principles of customary international law, with respect to which the State behaviour just described attains the role of practice accompanied by *opinio juris*. The fact that in some cases violations take place do not militate in any way against this conclusion. In fact, as noted by the ILA Committee on the Rights of Indigenous Peoples, quoting the ICJ, "'for a rule to be established as customary, the corresponding practice must [not] be in absolutely rigorous conformity with the rule", on the condition that 'instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule'. The fact that the said negative examples are actually treated as violations is demonstrated by the univocal and virtually unanimous condemnation of them by the international community, including U.N. bodies".[154] In fact, in virtually all cases discussed in the previous section, the existence of a State obligation to respect the said standards is unanimously and unquestionably confirmed by international courts and other human rights monitoring bodies. Even when the position of the latter courts and bodies "is based on the prospective violation that the behaviour in point may produce with respect to obligations arising from treaties binding the State concerned, the multilateral treaties pertinent to indigenous peoples' […] rights – taken as a whole – form a thick network of obligations which affect virtually every government in the world".[155]

On the other hand, the dark side of the coin is represented by the rather unsatisfactory degree of practical implementation and effective realization of the rights of indigenous peoples, especially on the executive and administrative level, which characterize a good number of the case studies described in the previous section. One might assert that this is a fate characterizing human rights generally speaking, as at the present stage of evolution of international human rights law the effective degree of implementation of either human rights rules in general or decisions of human rights monitoring bodies in particular is in many ways problematic at the global level. It is true that the phase of the implementation of the existing standards in daily reality is the more complicated one to achieve in practice, as it is influenced by a number of meta-legal factors, including economic,

[153] This Section has been written by Federico Lenzerini, Co-Rapporteur of the Committee. As it is made clear in the title of this section, the conclusions drawn herein are only preliminary and based on the case studies assessed by the Committee so far. These conclusions, therefore, may be subject to revision in the course of the future work of the Committee.

[154] See Final Report, "Sofia Conference (2012)", p. 27, quoting ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, *ICJ Reports*, 1986, p. 14, para. 186.

[155] See ILA Committee on the Rights of Indigenous Peoples, Final Report, "Sofia Conference (2012)", p. 27.

social, cultural and political considerations. The fact remains, however, that the phase of implementation is the most important one to give effectiveness to human rights – i.e. to make it possible that human rights, including indigenous peoples' rights, are actually and fully enjoyed by the intended beneficiaries of the relevant rules. In fact, recognizing and proclaiming human rights on paper is not enough, as they must find realization in the real world. It is true that some lack of implementation does not allow to cast doubts on the actual existence and validity of the relevant standards as rules of international law which States are bound to respect and to which they are obliged to give effectiveness. However, if these standards are not properly implemented, human rights (including indigenous peoples' rights) fail to achieve their paramount purpose, i.e. to ensure their *effective enjoyment* by individuals and communities.

The preliminary conclusion which can be drawn from the work carried out so far by the present Committee is twofold. Indeed, on the one hand, further developments in the field of international law on indigenous peoples are necessary in order to remove and prevent the situations that still exist in the world characterized by blatant violations committed by States in breach of legal standards existing in the field. On the other hand, it is at the same time indispensable to work on the phase of implementation, beginning from promoting a general awareness that such a phase is fundamental for ensuring effective realization of human rights. Too often, in fact, experts, practitioners and even common people celebrate domestic and international judgments adjudicating indigenous peoples' rights as huge victories, but then they lose sight of the phase of implementation, *de facto* leaving some governments free to continue to deny such rights at the political level through not properly implementing the relevant judicial decisions.

5. Future Work of the Committee

In view of the 2018 Biennial Conference of ILA, when the mandate of the Committee will expire, we plan to concentrate on the following activities:

- further examination of already assessed case-studies which at present are still pending;
- selection and study of other cases of interest for our research;
- investigation of the legal, quasi-legal and practical barriers blocking the road from international legal standards to effective protection in a number of areas of the world;
- elaboration of suggestions and recommendations (including, if opportune, suggestions and recommendations addressed to specific States with respect to particular cases) aimed at removing and preventing violations of indigenous peoples' rights by States;
- elaboration of suggestions and recommendations for improving the phase of implementation of domestic and international decisions adjudicating and/or affirming the rights of indigenous peoples;
- identification and selection of *best practices* relating to countries that have, or are attempting to, implement UNDRIP (and other relevant instruments') standards and provisions, and evaluation of how such practices could be applied to other areas, taking into account existing cultural and social differences;
- definition of strategies which might be applied worldwide by legal researchers and activists;

- preparation of suggestions and recommendations for involving the private sector, including national and multinational enterprises, in the elaboration and realization of concrete strategies for making indigenous peoples' rights – especially land rights – effective;
- elaboration of final conclusions based on a wider range of case studies.

IMPLEMENTATION OF THE RIGHTS OF INDIGENOUS PEOPLES

WORKING SESSION

Tuesday, 9 August 2016, 2.00pm – 6.00pm

Chair: Dr Patricia Conlan (Ireland)

The Chair welcomed attendees and gave the floor to the Chair of the Committee to talk briefly about the Committee and its work.

Professor Willem van Genugten (Netherlands) introduced Mr Rafael Soares Leite (Brazil), Professor Siegfried Wiessner (USA), Professor Christina Binder (Austria), Professor Dwight Newman (Canada) and Professor Rainer Hofmann (Germany) as members of the Committee, who were present. Professor van Genugten noted that the first Committee on the Rights of Indigenous People commenced its work with Professor Wiessner (USA) as chair. This operated for six years and sought to clarify the legal status of the 2007 *Declaration on the Rights of Indigenous Peoples* (UNDRIP). UNDRIP was among the most important documents today, with global relevance for the rights of indigenous peoples. The Committee decided to analyse each article in UNDRIP. This was with a view to determining: to what extent the articles reflected customary international law; to what extent they could be used as a source of law; and to what extent they could be used as standards (including in the context of non-judicial dispute settlements). The Committee clearly defined the legal status of UNDRIP. Professor van Genugten noted that, given that declarations are not binding (documents), the division between binding and non-binding was irrelevant. The two ways of reasoning this were:

- several articles of UNDRIP reflected customary international law, and in international law, customary international law was equally as important as treaty law, and
- in UNDRIP, one article stated specifically that countries that voted in favour of UNDRIP were bound by it.

Professor van Genugten elaborated further, by means of an example from a case, on how binding law could be created by various means.

Professor van Genugten noted that, when UNDRIP was initially adopted, there were only four votes against it. Those four States had subsequently explained that their opposing votes no longer applied. UNDRIP could now be seen as one with special status.

Professor van Genugten referred attendees to the current Committee's report, which provided a summary of the work done by the Committee.

Professor van Genugten noted that the next step that a lawyer would follow would be to clarify the standards by posing a key question, enquiring whether or not States lived up to these standards, by asking to what extent the standards were implemented, not only on (policy) paper, but also to what extent, in practice, on the ground. The Committee then decided that the key question of the mandate would be to determine to what extent indigenous peoples worldwide had knowledge of international law, and if so, whether they used legal instruments / quasi legal instruments to solve their problems.

The next step taken by the Committee was to address the question as to whether indigenous peoples had knowledge of international law. The Committee looked at cases

worldwide, with a view to highlighting this perspective. This resulted in the Committee identifying a total of 41 cases globally. The Committee then invited members to begin analysing the cases identified by the Committee. Instead of using a prescriptive approach in their methodology, the Committee allowed the researchers to approach the work in their own way, but at the same time within a specified framework, with the key questions being: did law play a role; what mechanisms had been used; did people have knowledge of law, etc.

The cases that the Committee had completed analysing and the Committee's first interim report was available on the ILA website. The Committee's first interim report assessed the Committee's analyses of the cases done so far. The Committee had completed around 16 of the 41 identified cases. Professor van Genugten noted that there were over 20 cases that were still to be delivered before April 2017. The results from these cases might lead to broader delivery, and the option of drawing broader conclusions regarding the key questions: did indigenous peoples have knowledge of international indigenous law; were they able to work with legal instruments; and were they able to use non-judicial means, while at the same time using legal standards. Professor van Genugten noted that indigenous peoples might have knowledge of legal standards but might not trust the courts in their countries. He further stated that indigenous issues might also be faced with political dimensions. When looking at the rights of indigenous peoples in reality, one should not "dream of" the ideal court, but should face the reality that other fora might be better, or more effective.

Professor van Genugten paid tribute to Dr Federico Lenzerini (Italy) and Professor Timo Koivurova (Finland), who were very active in bringing the report together.

Professor van Genugten noted that the conclusions were preliminary and many more conclusions could be drawn. While the Committee's mandate was due to expire in 2018, the Committee had decided that good work was a priority. Arising from this, as well as the desire of the Committee not to compromise, if need be, the Committee would request an extension to complete its mandate as it would wish (to the desired standard).

The Chair thanked Professor van Genugten for his input and opened the floor to the Committee members who were present.

Professor Christina Binder (Austria) raised a few general remarks on the draft report. It was welcome (and necessary) that the present report builds upon the past ILA report, in the sense of continuity and in order not to question the customary value of international law notwithstanding violations. There was a need for increased regional spread in the case studies (for example with regard to Asia). There was a need for more uniformity in the case studies with regard to facts, institutions involved, the role of international law; factors stimulating or impeding implementation and interests involved. The Committee needed to draw firmer/further conclusions:

- with regard to national/regional particularities (presence of strong Human Rights institutions in Latin America);
- in the identification of factors in favour of or against the recognition of women's rights;
- with regard to the factors in favour of the role of international law and

- in the identification of good/best practices in case of indigenous peoples to guide future implementation/research.

Professor van Genugten responded to Professor Binder with regard to the spread of the global coverage of cases by reiterating that there were still cases from several countries to be delivered. Those countries included: Ecuador, Nicaragua, Mexico, USA, Canada, India, Malaysia, Pakistan, Japan, Cambodia, Kenya, New Zealand and Australia. With regard to the remark on methodology, it was decided to allow researchers to analyse the cases as they deemed appropriate, in case a decision to do otherwise might lead to fewer contributions. The Committee did provide questions for the researchers to follow, to ensure that the mandate was addressed.

The Chair thanked Professor Binder for her contributions and introduced the next Committee member.

Professor Rainer Hofmann (Germany) stated that it was important to repeat the remarks by Professor Binder. Case analyses should reflect the individual style of the researchers and that there was a need to have additional cases analysed in areas such as China, Denmark, Greenland, Finland and Asia. Furthermore, Professor Hofmann noted that there should be a short report on the Bolivia and Chile case analyses. Professor Hofmann stated that the conclusion of the report had still to be organised. Professor Hofmann remarked that completion of the report within the next two years represented an ambitious target. It was his view that the Committee should not reduce the quality of it work in order to have a declaration ready at the next conference in Sydney in 2018.

The Chair thanked Professor Hofmann for his remarks and introduced the next Committee member.

Professor Dwight Newman (Canada) noted that the Committee report had many strengths and summarised the case reports perfectly. The cases being analysed were repeatedly clustering on certain topics. The Committee should determine whether this clustering was a problem, or if it was deliberate. Other sources, such as special rapporteurs, may be useful to supplement his previous point (and determine if the clustering of certain topics was deliberate or a problem). Professor Newman enquired whether the cases being analysed took a particular form that missed political aspects. He also posed the question as to whether there should be room for contestation of claims in underlying reports, as some of them had contestable elements. He concluded his intervention by stating that the Committee should continue searching for cases bearing on the private sector aspirations of the Committee.

Professor van Genugten encouraged Committee members to be critical of the report in their remarks, as it was the purpose of having the open meeting. The Committee had not randomly selected the cases to be analysed; they had been very selective when deciding which cases were to be analysed, and this was defended by the Committee's mandate. While the use of a peer review might be relevant, setting up a scientific peer review might be beyond the Committee's ability.

The Chair thanked Professor Newman for his remarks and introduced the next Committee member.

Mr Rafael Soares Leite (Brazil) concurred with the other Committee members' remarks with regards to the methodological assumptions. Mr Soares Leite noted a methodological consideration of involving scholars and academics from the legal systems related to the cases being analysed by the Committee.

Professor van Genugten noted that one challenge faced by the Committee was finding ILA members from developing countries, especially among indigenous peoples. This was a weakness of the Committee, and one that the Committee was trying to remedy.

The Chair remarked that, in general, the ILA was faced with the challenge of (limited) diversity in its membership. He thanked Mr Soares Leite for his remarks and introduced the next Committee member.

Professor Siegfried Wiessner (USA) commended Professor van Genugten and the CoRapporteurs, especially Professor Lenzerini, on the great work they undertook in addressing the implementation of the international legal standards regarding the rights of indigenous peoples. The starting point for this effort was IL Resolution No 5/2012 on the Rights of Indigenous Peoples with its findings of customary international law rights to culture, traditional lands, and autonomy. It was unanimously adopted by the ILA in Sofia in 2012, and, as such, was evidence of international law according to Article 38(1)(d) of the ICJ Statute. In terms of the legal authority of its resolutions, this special role of the ILA as a scholarly body was shared only by the International Law Institute and the International Law Commission, according to § 103 Reporter's Note 1 of the American Law Institute's Third Restatement of Foreign Relations Law of 1987.

Professor Wiessner noted that this Committee's preliminary conclusions regarding implementation made an important distinction between legislative and judicial bodies on the one hand – often recognising indigenous rights – and executive/administrative decisions on the other, which might appear less inclined to do so. Case studies submitted so far often also commendably included the necessary facts and context of particular problem scenarios. One integrative, problem-oriented approach to such a case study would be the five-step process suggested by the New Haven School of Jurisprudence which included the delimitation of the problem, the conflicting claims, past legal responses to them in light of their conditioning factors, a prediction of future decisions, an appraisal in light of the goal of a world order of human dignity, and the development of recommended solutions. This approach, however, might be overly demanding in various respects. For this reason, Professor Wiessner welcomed the pragmatic approach to fashioning the case studies as suggested by Professor van Genugten.

In light of the need to complete the outstanding case studies, their analysis, and the drawing of conclusions, Professor Wiessner strongly supported the extension of the mandate of this important committee beyond its scheduled end in 2018. The topic of indigenous peoples' rights and their status should be a permanent concern of the ILA.

The Chair thanked Professor Wiessner for his remarks and opened the floor to remarks and questions.

Professor James Nafziger (US) summarised a report by the Committee on Cultural Heritage Law of which he serves as Chair. That report, which dovetailed with the work of the current Committee, was entitled "The Law Pertaining to Cultural Landscapes

Significant to Indigenous Peoples". An example of the dovetailing was that UNDRIP was also a foundation of the report and recommendations of the Committee on Cultural Heritage Law. In this regard, Professor Lenzerini, as a member of both Committees, had served as a liaison in preparing the report. With reference to Professor van Genugten's excellent summary of the current Committee's project, Professor Nafziger asked about the extent of planned case studies from Africa, the continent where the current conference was taking place and whose diverse experiences had been illuminating in the project of his Committee. Its full report on cultural landscapes was scheduled for final review and adoption at the working session of the Committee on Cultural Heritage Law at the current conference, which he encouraged attendees to attend.

A fundamental topic of shared interest between the two Committees was land rights. Insofar as issues might arise in protecting and managing cultural landscapes, they were typically complicated by the engagement of numerous stakeholders. Taking into account this complexity, and picking up on points made by Professors van Genugten and Wiessner concerning the process of implementing UNDRIP, Professor Nafziger suggested a focus in the diverse contexts of the case studies on the relative efficacies of alternative methods of implementation, which could be either judicial or non-judicial. The object would be to determine, whenever possible, what had worked and what had not worked in an effort to assist indigenous peoples and allied institutions to implement their rights and interests, given the limited resources at their disposal.

Ms Risa Schwarts (Canada) commented that it might be interesting to undertake case studies on political actions of States concerning the rights of indigenous peoples such as the Commission in Canada (Truth and Reconciliation and Murdered and Missing Indigenous Women) as well as the Royal Commission launched in Australia concerning the abuse of young indigenous boys in the institutions of the Northern Territory.

Dr Federica Prina mentioned that a challenge in some cases was that domestic law did not correlate with international law. She stated that, when preparing a report on a country, and establishing whether the law made a difference, it was difficult to establish long-term effects of positive judgments and/or progressive legislation. She had observed the link between the judicial environment and the political climate, and that politics influenced the work of the courts and NGOs representing indigenous peoples. There was a contradiction between federal and regional law, and regional legislation and judgments were sometimes more progressive. However, these regional "success stories" had a limited impact and were not reflected at the federal level.

Professor van Genugten referred Dr Prina to pages 25-7 of the report.

Dr Anja-Riitta Ketokoski-Rexed (Finland) discussed land rights and mentioned that the whole cultural approach to indigenous people was in a way shown in the Nordic Sami Convention. It was not yet in force, but was drafted in an effort to induce competition between the Nordic countries to better answer the questions, since this was the only indigenous population in the EU. It might be interesting since there were both Norwegian and Swedish members, and as there was a big difference between Nordic countries. Dr Ketokoski-Rexed moved on to a second point, the cultural part of it, not just with landscapes but the whole UNESCO side of it, cultural diversity and what was conveyed in that. She noted that sustainability was also important. She enquired whether

the Committee used CEDAW reports because women were reported on in CEDAW reports, and were invisible everywhere, and (yet) most visible in land rights. A special focus on women would have to be visible in all case studies with the CEDAW reports and linguistic rights as reference points.

Professor Piers Davies (New Zealand) followed up on a few comments made by other Committee members. There was a need to increase the involvement of indigenous people as members of the Committee and that there were ways to supplement indigenous involvement. An indigenous person might not have the time, or the money, to be on the Committee. They could join in by twinning with Committee members, or by the Committee member workshopping the case study that they were looking at with indigenous people. He informed the Committee that he did that with the report of the Committee on Cultural Heritage Law on cultural landscapes, because the views of the indigenous people in New Zealand were quite different to the views of the non-indigenous people as far as cultural landscapes were concerned. So there were these supplementary ways to get more indigenous people involved in the work of the Committee.

Professor van Genugten queried whether, if twinning was not an option (and he thought that it was a very good idea), it could be an option to ask indigenous scholars to read the case studies made by non-indigenous scholars.

Professor Davies replied that that was the suggestion of a workshop, to call a meeting of indigenous people in the area and present some of the case studies to them for their involvement, and ask them if the case study accurately assessed what they feel about, or whether they thought it was just an academic overview from somebody who did not have an indigenous understanding.

Professor van Genugten stated that Professor Davies touched upon something which made him feel very uneasy too. Not being an indigenous person himself doing this work, mainly with people who did not have an indigenous background, felt sometimes that this was an exercise for indigenous people without indigenous people. He continued by saying that Committee members had tried their very best, in many ways, but clearly there was still a lot more to do. Twinning might be an option, the workshop might be good, and then still travelling had to be done. These were all very good ideas.

The Chair asked Professor van Genugten to give his final remarks.

Professor van Genugten used his final comments to refer back to some aspects which had been touched on during the session. He thought that it had been a good session, picking up some good issues that they could take on board. It would definitely help in improving the work of the Committee. He thanked attendees for their input and stated that what the Committee worked for was “reality on the ground, pragmatism as well as legal means”. He thanked the Co-Reporters for their hard work.

Reporters: Azhar Aziz Ismail Sakoor and Nosipho Mbatha

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

NON STATE ACTORS

Members of the Committee

Professor Math Noortmann (UK): *Chair*
Dr Veronika Bilkova (Czech Republic): *Rapporteur*

Professor Paulo Borba Casella (Brazil)
Alternate: Professor Leonardo Nemer Caldeira Brant
Dr Pauline Collins (Australia)
Dr Aristotle Constantinides (Hellenic)
Dr Emily Crawford (Australia)
Professor Jean d'Aspremont (Belgium)
Mr Cosmin Dinescu (Romania)
Professor Ludmila Galenskaya (Russia)
Professor Noemi Gal-Or (Canada)
Alternate: Professor Robin Hansen
Professor Stephan Hobe (Germany)
Professor Karol Karski (Poland)
Dr Christina Knahr (Austria)
Dr Oluwabunmi Lar (Nigerian)
Professor Franck Latty (France)
Alternate: Dr Sandy Lamalle
Professor Suzannah Linton (UK)
Alternate: Mr Gordon Stuart Glass
Professor Hirokazu Miyano (Japan)
Dr Luke Moffett (Ireland)
Professor Peter Muchlinski (UK) - Nominee of Chair
Dr Janne E Nijman (Netherlands)
Professor Michele Olivier (South Africa)
Dr Martins Paparinskis (UK)
Mr Pravin H Parekh (India)
Professor Ki-Gab Park (Korea)
Professor Manuel Almeida Ribeiro (Portugal)
Dr Yael Ronen (Israel)
Dr Ingrid Rossi (Mexico)
Professor Beate Rudolf (Germany)
Professor Cedric Ryngaert (Belgium)
Professor Shigeki Sakamoto (Japan)
Professor Alfred H A Soons (Netherlands)
Professor Anne van Aaken (Switzerland)
Alternate: Dr Tarcisio Gazzini
Professor Christian Walter (Germany)
Dr Barbara Woodward (USA)

FINAL REPORT

I. WORK OF THE COMMITTEE AND THE FINAL REPORT

1. This is the fourth and final Report of the ILA Committee on Non-State Actors (NSAs). The first section of the Report briefly summarizes the history of the Committee and introduces the structure and purposes of this Final Report.

A) Background of the Final Report

2. The establishment of a Committee on Non-State Actors was discussed at the ILA Conference in Toronto in 2006 and inaugurated in 2008 after the Committee held its first meeting during the ILA conference in Rio de Janeiro in August 2008.[1] At its creation,

[1] See *Preliminary issues for the the ILA Conference in Rio de Janeiro,* 2008 (hereafter Rio Document 2008).

the Committee had 17 members coming predominantly from Europe and East Asia. In the next years, the membership was expanded up to 35 members from four continents. The Chair of the Committee is Professor Math Noortmann from the British Branch. Professor Cedric Ryngaert was the Committee's principal Rapporteur in 2008-2014. He worked closely with Professor Malgosia Fitzmaurice (2008-2010), and Professor Jean d'Aspremont (2012-2014) as co-rapporteurs with drafting assistance from Dr Barbara K. Woodward. Assoc. Professor Veronika Bílková (2015-2016), a Committee member since the beginning, drafted this Final Report. The Committee adopted three reports during the ILA conferences held in the Hague (2010),[2] Sofia (2012)[3] and Washington (2014).[4]

3. The 2010 report had a general focus and sought to identify the aims of the Committee, the scope of its mandate and the approach to be taken. The original intent of the Committee to focus on international security by way of a case study, expressed in the 2008 preliminary document,[5] was abandoned in the aftermath of the first meeting of the Committee, as it was too narrow. The Committee then defined its general purpose more broadly as that of *"examining the position of NSAs in international law in terms of their rights and obligations"*.[6] More specifically, it set itself the following tasks: (1) to map the scope of the field; (2) to determine the actual practice of NSAs and its effects on the functioning of the international legal system; (3) to identify NSA rights and obligations; and finally (4) to synthesize and draw conclusions on how NSAs conceptually fit within international law.

4. The Committee undertook to reproduce these conclusions in a set of general principles in its final report;[7] however, following seven years of deliberations, the Committee has determined that the complexity brought about by the different types of NSA means a set of considerations is more fruitful than principles, and these considerations are provided at the end of the report.

5. The 2012 report analysed the roles NSAs play in actual law-making and their participation in law-making processes. The 2014 report discussed obligations NSAs have under international law and whether they can be held responsible for violations of these obligations or held liable in other circumstances.

6. In addition to the formal Committee meetings at the ILA conferences, Committee members and 'Friends of the Committee' participated in a number of seminars on NSA-related issues. From 2009-2012 these meetings were supported by Professor Ryngaert's Non-State Actors in International Law project and facilitated by the Leuven Centre for Global Governance Studies at Leuven University (Belgium) established by Professor Jan Wouters. In 2011, the Committee held a seminar on NSAs and human security organized by Oxford Brookes University (UK). In 2013, it held a conference on theoretical

[2] ILA Committee on Non-State Actors, *Non-State Actors In International Law: Aims, Approach And Scope of Project And Legal Issues,* The Hague, 2010 (hereafter The Hague Report 2010).
[3] ILA Committee on Non-State Actors, *Non-State Actors In International Law: Law-Making and Participation Rights,* Sofia, 2012 (hereafter Sofia report 2012).
[4] ILA Committee on Non-State Actors, *3rd Report,* Washington, 2014 (hereafter Washington Report 2014).
[5] Rio Document 2008, p. 1.
[6] The Hague Report 2010, pp. 1-2.
[7] See The Hague Report 2010, p. 2.

and empirical issues relating to the responsibilities of NSAs organized by the Institute for Transborder Studies at Kwantlen Polytechnic University in Vancouver (Canada). In 2015, the Committee held a working meeting addressing the scope and content of the final report; the meeting was hosted by the Institute of International Relations in Prague (Czech Republic).

7. The meetings in Leuven, Oxford and Vancouver resulted in a number of publications on NSAs, including several books, such as *Global Civil Society in International Lawmaking and Global Governance*: *Theory and Practice* (2010),[8] *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law* (2011),[9] *Human Security and International Law: the Challenge of Non-State Actors* (2013),[10] *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place. Theoretical Considerations and Empirical Findings* (2015),[11] or *Non-State Actors in International Law* (2015).[12]

B) Context for and Structure of the Final Report

8. International law has traditionally been construed as inter-State law.[13] When Bentham coined the term in 1789, he defined international law as a body of legal rules, norms and standards that apply between sovereign States.[14] Two hundred years later, in 1998 Schachter described international law in a similar way, as *"a system of discrete autonomous entities based on their defined territories, each exercising plenary authority over persons and things in that territory"*.[15] This system was formal[16] and rather homogeneous in that all its constitutive units were virtually identical and they operated under uniform rules on norm-creation, monitoring compliance and law enforcement. The extent of their capacities was not specified or was considered as unlimited. That also allowed for a rather clear separation between international law on the one hand and national law(s) on the other.

---

[8] WOODWARD, Barbara K., *Global Civil Society in International Lawmaking and Global Governance: Theory and Practice*, Martinus Nijhoff, 2010.

[9] D´ASPREMONT, Jean (ed.), *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law,* London: Routledge, 2011.

[10] RYNGAERT, Cedric, NOORTMANN, Math (eds), *Human Security and International Law: the Challenge of Non-State Actors,* Intersentia, 2013.

[11] GAL-OR, Noemi, RYNGAERT, Cedric, NOORTMANN, Math (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place. Theoretical Considerations and Empirical Findings,* Brill, 2015.

[12] NOORTMANN, Math, REINISCH, August, RYNGAERT, Cedric (eds), *Non-State Actors in International Law,* Oxford and Portland: Hart, 2015.

[13] For an alternative view, see D´ASPREMONT, Jean, Cognitive Conflicts and the Making of International Law: From Empirical Concord to Conceptual Discord in Legal Scholarship, *Vanderbilt Journal of Transnational Law,* Vol. 46, 2013, pp. 1119-1147. The author shows that that the system of international law has always been plural and that the Westphalian/State-centric account is to a large extent a construction.

[14] For more details, see JANIS, M. W., Jeremy Bentham and the Fashioning of "International Law", *American Journal of International Law,* Vol. 78, 1984, pp. 405-418.

[15] SCHACHTER, Oscar, The Decline of the Nation-State and its Implications for International Law, *Columbia Journal of Transnational Law,* Vol. 36, 1998, p. 7.

[16] KENNEDY, David, The Disenchantment of the Logically Formal Legal Rationality, *Hastings Law Journal,* Vol. 55, 2004, pp. 1031-1076.

9. The international legal system has never been a closed regime in terms of its participants. It has always recognised such *sui generis* entities as the Holy See and the Sovereign Order of Malta. Gradually, it also opened up to accommodate other "non-state" actors such as international organizations (IGOs) (e.g., UN), certain civil society organizations (e.g., the ICRC), armed opposition groups (AOGs) (e.g., PLO) and individuals (mostly in the areas of international human rights law and international criminal law). The increasing pluralization *ratione personae* on the international scene has disrupted the original unity and homogeneity of the State centric system and upset the borders between international, national and arguably transnational law.

10. The globalization process has further weakened the factual power of the State. Internally, large scale privatization has occurred, and States have transferred many of their fundamental competences to NSAs. Externally, NSAs are no longer confined within the territory of a single State but actively operate across national borders. This applies both to the actors of "civil society" (non-governmental organizations, transnational corporations, etc.) and of "uncivil society" (terrorist groups, mafias, organized crimes groups, etc.) as well as to those in between the two categories (AOGs). As a result, States now have less control, let alone a monopoly, over developments both within their own territory and at the international level.

11. It is generally considered that the ascension of NSAs is not yet adequately reflected in international law nor led to another wave of pluralization *ratione personae* of this law. Although, as Math Noortmann puts it, *"the process of globalization and the proliferation of actors on the global scene makes the differentiation between states and other non-state actors obscure and obsolete",*[17] this erosion of the borders between the two types of actors does not seem to have had a transformative and visible impact on the way we conceptualize international law. Thus, though factually interconnected, States and NSAs remain normatively separated at the international level.

12. Taking this traditional account as the starting point, this report first verifies whether it is factually correct and then discusses some alternative approaches.

13. Section II proposes a working definition of NSAs, ponders whether it is appropriate to use this term and provides several typologies of NSAs.

14. Section III sums up the conclusions of the mapping exercise and of the empirical/comparative studies, which were presented in the previous reports of the Committee. It also analyses how international law responds to these changes and discusses to what extent this law addresses the gap between international practice and the doctrine of international law, if such a gap exists at all.

15. Section III applies the traditional State-centric approach to international law. This approach, albeit dominant in the doctrine, is not the only one that can be applied with respect to NSAs. Section IV maps alternative approaches which portray the role of NSAs within the system of international law differently. Furthermore, it considers whether the ascension of non-state actors could bring about more radical changes of international law and if so, what implications these changes would have both for NSAs and for the existing international legal order as such.

[17] NOORTMAN, Math: Globalization, Global Governance and Non-State Actors: Researching beyond the State, *International Law Forum,* Vol. 4, 2002, p. 38.

II. CONCEPT OF NON-STATE ACTORS

16. This section of the Final Report introduces a working definition of the term NSAs. It also discusses the appropriateness of the use of the term and outlines the most common classifications of these actors encountered in scholarly literature

A) Who Are Non-State Actors?

17. In 2008, the Committee opted for a negative definition of NSAs that encompassed *"all actors who are not State"*.[18]

18. In the 2010 Report, the Committee adopted a more elaborate working definition of NSAs based on three elements.

a) First, NSAs are not *"bodies comprised of and governed or controlled by States or groups of States"*.[19] This excludes not only IGOs and less formal groups of states (G7), but also federal components of States and territorial entities such as Kosovo and East Timor while under international administration.
b) Secondly, NSAs are actors that *"actually perform functions in the international arena that have real or potential effects on international law"*.[20] The range of such functions is not predetermined, because different NSAs accomplish different functions at the international level.
c) Thirdly, NSAs are legally recognized and organised entities. The legal recognition can take place in national or international law. This excludes individuals and some entities lacking organization and/or legal recognition such as terrorist organizations and mafias.

19. For the purposes of this report, NSAs are therefore defined as *legally recognized and organised entities that are not comprised of nor governed or controlled by States nor groups of States and that actually perform functions in the international arena that have real or potential effects on international law.* It is a working, operational definition which might not, and which does not aspire to, be shared by all scholars.

20. The 2010 Report lists actors expressly excluded from and expressly included in the working definition.

a) Actors excluded are IGOs comprised solely of State members, federal components of a State, pseudo-States, individuals, illegal and illegitimate organized bodies (mafia), and illegal groups not organized in any recognized manner (Al-Qaeda, pirate groups).
b) Actors included are non-governmental organizations (NGOs) with some form of recognized international status; multinational enterprises (MNEs); organized AOGs; *sui generis* entities (e.g., ICRC, the Holy See); and organized indigenous peoples´ groups.

21. There is no generally accepted definition of the term "NSAs" in international law. The term is not even (yet) a legal term of art. Since international law has been conceptualized as a system of rules regulating relationships between States, NSAs in the broadest

[18] Rio Document 2008, p. 2.
[19] The Hague Report 2010, p. 6.
[20] *Ibid.*

understanding of the term – that is all entities that are not States – have for a long time had no formal place in it. Those NSAs which have gradually managed to challenge the State-centric orientation of international law have done so as specific entities (IOGs, etc.), not as members of a larger group of non-state actors. Thus, while several international treaties address and sometimes define particular rights and obligations of specific NSAs to participate within their realms,[21] there is no international instrument addressing rights and obligations of NSAs generally.

22. Recently, however, references to NSAs have appeared in certain acts adopted at the international level, and some of these have sought to define NSAs.

23. An example of this is UN Security Council Resolution 1540 (2004),[22] on *Non-Proliferation of Weapons of Mass Destruction.* The Resolution expresses grave concern at *"the threat of terrorism and the risk that non-State actors /.../ may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery"* (par. 8, Preamble) and imposes on States the obligation to refrain from providing any form of support to NSAs that attempt to acquire or use such weapons and to prohibit NSAs from acquiring or using such weapons in their national law. The resolution contains a footnote defining NSA as an *"individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution".*

24. Similarly, the European Commission (EC) uses the concept of NSAs in its framework of international cooperation and development. It defines the term by means of four elements: NSAs gather the main structures of organised society outside government and public administration; are independent of the State; often are the result of grass-roots initiatives seeking to bring social changes; and are active in different fields (poverty reduction, emergency, human rights, environment, etc.).[23]

25. In another document on development policy, the EC defines NSAs as *"a range of organisations that bring together the principal, existing or emerging, structures of the society outside the government and public administration. NSAs are created voluntarily by citizens, their aim being to promote an issue or an interest, either general or specific. They are independent of the state and can be profit or non-profit-making organisations. The following are examples of NSAs: Non-Governmental Organisations/Community Based Organisations (NGO/CBO) and their representative platforms in different sectors, social partners (trade unions, employers associations), private sector associations and business organisations, associations of churches and confessional movements, universities, cultural associations, media".*[24]

---

[21] For instance, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations states that an international organization *"means an intergovernmental organization"* (Article 2(i)). The definition solely apples for the purpose of the Convention.

[22] UN Doc. S/RES/1540 (2004), *Non-Proliferation of Weapons of Mass Destruction,* 28 April 2004.

[23] EC, International Cooperation and Development – https://ec.europa.eu/europeaid/civil-society_en (7 November 2015).

[24] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee*, Participation of Non-State Actors in EC Development Policy* (Brussels, 07.11.2002, COM(2002) 598 final), p. 5.

26. The official definitions are meant to apply in a specific context and do not aspire to be used for more general purposes.

27. Some scholars have proposed more general definitions of NSAs. In recent decades, the number of books and articles discussing NSAs by international lawyers[25] and experts from other disciplines (international relations, political science, security studies)[26] has increased sharply, and a legal journal devoted to NSAs emerged.[27] It is interesting to note that many authors speak about NSAs without offering any definition of the term or just enumerating the types of entities that, in their view, fall under this category.[28] Other authors simply use the negative definition of NSAs.[29]

28. A minority of commentators suggests a definition of the term. Pearlman and Cunningham define a NSA as *"an organized political actor not directly connected to the state but pursuing aims that affect vital state interests"*.[30] Arts refers to *"all those actors that are not (representatives) of state, yet that operate at the international level and are potentially relevant to international relations"*.[31] Josselin and Wallace, while acknowledging that *"the universe of non-state actors is /.../ necessarily diverse"*,[32] identify three characteristic features of NSAs: large or entire autonomy from central government funding or control; operation as or participation in networks which extend across the boundaries of two or more States; and acting in ways which affect political outcomes.[33]

29. The various definitions, though similar to a certain extent, are not identical. In fact, the only elements that remain constant are an independence from States and the relevance, operation or impact at the international level. Thus, in the broadest understanding, NSAs are defined as entities other than States that operate at the international level. Other elements – relating e.g. to the internal organization or the membership criterion – are

---

[25] See ALSTON, Philippe (ed.), *Non-State Actors and Human Rights,* Oxford University Press, 2005; CLAPHAM, Andrew, *Human Rights Obligations of Non-State Actors,* Oxford University Press, 2006; D´ASPREMONT, Jean (ed.), *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law,* London: Routledge, 2011; NOORTMANN, Math, REINISCH, August, RYNGAERT, Cedric (eds), *Non-State Actors in International Law,* Oxford and Portland: Hart, 2015.

[26] See, for instance, ARTS, Bas, NOORTMANN, Math, REINALDA, Bob (eds), *Non-State Actors in International Relations,* Ashgate, 2001.

[27] *Non-State Actors and International Law* (Brill) (From 2006, now merged with *International Law FORUM du droit international* to form a new journal, *International Community Law Review*)

[28] See HIGGOT, Richard A., UNDERHILL, Geoffrey, R. D., BIELER, Andreas (eds), *Non-State Actors and Authority in the Global System,* London and New York: Routledge, 2000. See also OLIVIER, Michèle, Exploring Approaches to Accommodating Non-State Actors within Traditional International Law, *Human Rights and International Legal Discourse,* Vol. 4, No. 1, 2010, pp. 15-31

[29] See SANDS, Philippe, Le droit international, le praticien et les acteurs non étatiques, in GHERARI, Habib, SZUREK, Sandra (eds), *L'émergence de la société civile internationale: vers la privatisation du droit international?*, Pedone, 2003, p. 87.

[30] PEARLMAN, Wendy, CUNNINGHAM Kathleen Galagher, Nonstate Actors, Fragmentation, and Conflict Processes, *Journal of Conflict Resolution,* Vol. 56, No. 1, 2012, p. 3.

[31] ARTS, Bas, Non-State Actors in Global Governance: Three Faces of Power*,* Max Planck Project Group on Common Goods, Bonn, *Working Paper No. 4,* 2003, p. 5.

[32] JOSSELIN, Daphné, WALLACE, William (eds), *Non-State Actors in World Politics,* Palgrave, 2001, p. 2.

[33] *Ibid.,* pp. 1-20.

present only in some definitions. The definition used in this report, as we saw above, adds three additional elements, namely the organized character, legal recognition in national or international law and the fact that a NSA is not comprised of and governed or controlled by States. As such, the definition is rather narrow.

B) The Term "Non-State Actor"

30. The very term "non-state actor" betrays the bias that exists within international law and international relations. The category is construed by its opposition to, and difference from, the State. Not being a State is the crucial unifying feature of the identity of all non-state entities, strong enough to prevail over any potential differences among them.

31. Alston has explained that, *"these negative euphemistic terms /.../ have been intentionally adopted in order to reinforce the assumption that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve"*.[34] Similarly, Sébastien Jodoin has stressed that *"international law remains a law for states made by them and made for them. It remains so through its focus on the interiority of the state at the expense of the exteriority of the Other"*.[35]

32. Adhering to the NSAs label thus means implicitly embracing and endorsing the vision of international relations and international law in which the State *"remains the starting point and the frame of reference"*.[36] At the same time, abandoning the label prematurely could produce confusion, as it is long-established in the doctrine. Consequently, the Committee has decided to retain the term with the caveats that it presumes and pre-structures a particular reality and that *"it is not a legal term but a descriptive concept seeking to reflect as closely as possible the contours of the reality"*.[37]

C) Need to Classify Non-State Actors?

33. NSAs are a very heterogeneous group, particularly in the broadest understanding of the term. Some scholars have thus proposed classifying NSAs into various categories.

34. Most proposals concentrate on the type of the NSA and its relationship to States. For instance, Gustaaf Geeraerts has noted that *"an initial classification of non-state actors distinguishes between two major types of international organizations: international governmental organizations (IGOs) and international non-governmental organizations (INGOs)"*.[38] He views this classification as simplistic and outdated and suggests replacing the second category with that of transnational organizations (TNOs). This would include *"those networks, associations or interactions which cut across national societies, creating*

---

[34] ALSTON, Philip, *op. cit.,* p. 3.

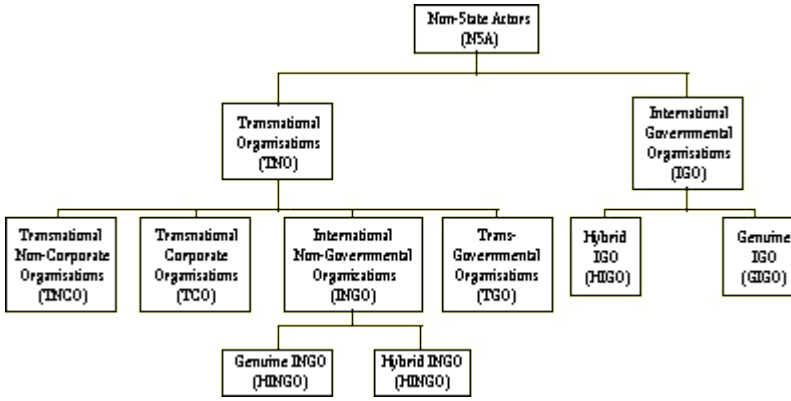
[35] JODOIN, Sébastien, International Law and Alterity: The State and the Other, *Leiden Journal of International Law,* Vol. 21, 2008, pp. 1-28.

[36] *Ibid.,* p. 2.

[37] KOLB, Robert, L'application du droit international, notamment humanitaire, dans les conflits auxquels prennent part des entités non-étatiques, in: *Commentaire article part article de de la Résolution de l'Institut de droit international,* Paris: Pedone, 2003, p. 18 (the quote relates to the term non-state entity as used in the Resolution of the IDI, yet it can easily be applied to the term NSAs more generally).

[38] GEERAERTS, Gustaaf, Analyzing Non-State Actors in World Politics, *Pole Paper Series,* Vol. 1, No. 4, 1995, online at http://poli.vub.ac.be/publi/pole-papers/pole0104.htm (3 June 2015).

linkages between individuals, groups, organizations and communities within different nation-states".[39] Thus, TNOs include international NGOs (e.g. Amnesty International), transgovernmental organizations (e.g. International Union of Local Authorities), transnational corporate organizations (e.g. General Motors) and transnational non-cooperate organizations (e.g. churches or transnational terrorist networks). Geeraerts´ classification appears as Figure 3, *Typology of Non-State Actors in World Politics*.[40]



35. Although the type is the most common criterion of classification, occasionally other criteria are used. For instance, some authors focus on the predominant means NSAs use in their activities to achieve their goals. The most basic classification based on this criterion is that between violent and other, non-violent NSAs. Violent NSAs include either all organized entities that resort to violent means (military force, criminal methods etc.) or, more narrowly, organizations that *"use illegal violence (i.e. force not officially approved of by the state)".*[41] They typically encompass entities such as terrorist groups, militias, paramilitary forces, criminal groups and, occasionally, insurgents (AOGs).[42]

36. The classification based on means corresponds to a large extent to that between "good" and "bad" (or legitimate and illegitimate) NSAs that is often, albeit implicitly, present in scholarly literature. Commentators frequently qualify violent NSAs as *"illegitimate vis-à-vis the classical state system in part because the essence of being a state is having a monopoly on the legitimate use of violence".*[43] Yet, the category of "bad" NSAs sometimes includes non-violent actors as well, for instance corporations.[44] Typical

---

[39] *Ibid.*

[40] *Ibid.*

[41] CHAUDHRY, Ranjeev, Violent Non-State Actors: Contours, Challenges and Consequences, *CLAWS Journal,* 2013, p. 167.

[42] See also WILLIAMS, Phil, Violent Non-State Actors and International and National Security, *International Relations and Security Network,* Zurich, 2008.

[43] *Ibid.,* p. 6.

[44] See, e.g., HOLMES, Leslie, Good Guys, Bad Guys: Transnational Corporations, Rational Choice Theory and Power Crime, *Crime, Law and Social Change,* Vol. 51, 2009, pp. 387-397.

"good" NSAs are most NGOs, churches or transnational public interest networks.[45] This classification, inspired by the positive reputation that various NSAs have in the areas of human rights and humanitarian aid activities, fails to reflect the plurality of roles that most NSAs play. It is also subjective and arbitrary, and it would be difficult to rely on it.

37. Finally, NSAs are often classified – or rather grouped together – based upon the function they have in international relations and/or upon the substantive area of international law where they have the largest impact. Thus, for instance, authors writing about the law of the sea would have a particular interest in pirate groups, while those researching international humanitarian law would focus on AOGs or the ICRC and other humanitarian NGOs. Of course, many NSAs are not exclusively active in one field only; so the groups have large overlaps. Yet, with the increasing fragmentation of international law and the growing specialization of international lawyers, the division of actors along functional lines has gained increasing relevance.

38. Similarly, as with the definition of non-state actors and the very term used to denote them, the classification also serves as a template which not only helps describe the complex reality but also, in a certain way, forms and re-forms this reality. Characterizing some NSAs as good and others as bad conventionally suggests the need for a differentiated treatment of such entities under international law. Ranking some NSAs among the violent ones usually entails questioning their legitimacy. For these reasons, the current report does not embrace any of the classifications described above. Nor does it seek to propose a new classification of NSAs.

III. NON-STATE ACTORS AND INTERNATIONAL LAW

39. This section of the Final Report describes the role NSAs have acquired at the international level over the past decades. It draws largely on the mapping exercise and empirical/comparative studies presented in the previous reports of the Committee.[46] The section first considers the activities of NSAs in the spheres of norm-creation at the international level. Secondly, it examines the roles NSAs have played in monitoring compliance with international law and in dispute-settlement. Finally, it reviews the scope of rights and duties NSAs now have under international law. Prefacing this overview is a brief discussion of the origins of the evolving changes in the factual and legal status of NSAs at the international level. The overview is followed by an outline of two ways that international law has used in its attempt to accommodate NSAs. Finally, the section considers whether further conceptual changes are needed to address the gap between international practice and the traditional State-centric approach to international law.

A) The Rise of Non-State Actors Internationally

40. NSAs are far from a new phenomenon on the international scene. They have always been present, influencing the course of international relations as well as the formation and application of international law. With globalization and increasing privatisation of key government domains, the role of NSAs has become even more prominent in recent

[45] See, e.g., MURDIE, Amanda, STAPLEY, Craig S., Why Target the "Good Guys"? The Determinants of Terrorism Against NGOs, *International Interactions,* Vol. 40, No. 1, 2013, pp. 79-102.
[46] See The Hague Report 2010, Sofia Report 2012 and Washington Report 2014.

decades. It is thus time to consider whether the status these actors have traditionally had (or rather have not had) under international law remains appropriate.

41. Andrew Clapham has identified four forces, or phenomena, which help to explain the rise of NSAs in the international legal arena and which, in his view, are important for understanding why discussing obligations of NSAs and their legal status in increasingly relevant.[47] Although the analysis relates to the sphere of human rights, it can be used more broadly. The four forces are:

a) Globalization of the world economy which has *"highlighted the power of large corporations and their limited accountability in law for human rights abuses"*;[48]
b) Privatization of sectors that in the past were controlled and administered exclusively by States, such as health, education, prisons or communications. Privatization has strengthened the roles of NSAs in spheres that States have vacated, giving rise to questions relating to the legal status of NSAs and the possibility that States could free themselves from legal obligations by simply withdrawing from particular spheres of activities;
c) Fragmentation of States which means internal contestation of their power and monopoly over violence by NSAs, for instance AOGs fighting against the central government in non-international armed conflicts;
d) Feminization of international law and international relations, which questions and disrupts the classical barrier between the private and public (internal and external) spheres both within societies and States and among them.

42. Amplifying how NSAs have acquired international legal obligations, Raffaa Ben Achour and Salim Laghmani have identified six different roles NSAs have played in modern international relations.[49] They are beneficiaries of the decisions by States and international organizations, partners in the realization of certain projects, advisors with respect to policy decisions, lobby groups that influence these decisions, watchdogs monitoring what States do, and, occasionally, enemies of States.

43. Nevertheless, the two authors remain sceptical about how this factual role of NSAs has translated into legal norms. On the one hand, they admit that NSAs have contributed to the formulation of new legal norms and to the implementation of existing ones (monitoring of the compliance, naming and shaming etc.). On the other, they stress that *"non-state actors have an influence but, from the strictly legal point of view, they are never decisive. Their influence is certain from the perspective of political science but uncertain from the perspective of law"*.[50]

---

[47] CLAPHAM, Andrew, *Human Rights Obligations, op. cit.*, pp. 3-19.

[48] *Ibid.,* p. 3.

[49] BEN ACHOUR, Rafaâ, LAGHMANI, Salim (eds), *Acteurs non étatiques et droit international: VIIe Rencontre internationale de la Faculté des sciences juridiques, politiques et sociales de Tunis*, Pedone: Paris, 2007.

[50] *Ibid.,* p. 16 (the original French text: "*Les acteurs non-étatiques sont influents, mais, d'un point de vue strictement juridique, ils ne sont jamais décisifs. Leur influence est certaine dans une perspective de science politique, mais incertaine dans une perspective juridique.*").

44. The following subsections verify whether this quotation correctly reflects the international practice relating to norm-creation, monitoring of compliance with international law, dispute-settlement, and to the scope of substantive rights and duties.

B) Non-State Actors and International Norm-Creation

45. As the 2010 Report reveals in some detail,[51] today NSAs are actively involved in various processes that result in the creation of hard or soft international legal norms by other actors. Moreover, as documented at length in the 2012 Report,[52] NSAs themselves engage in norm-creation.

46. Article 38(1) of the Statute of the International Court of Justice (ICJ) contains the list of sources of public international law which has traditionally been considered as exhaustive. These sources are divided into primary sources (treaties, international custom and, arguably, general principles of law recognized by civilized nations) and subsidiary sources (judicial decisions and the teachings of the most highly qualified publicists of the various nations). Only the primary sources are formal sources of international law, i.e. they *"provide the legal authority for a substantive statement about conduct making it a rule of law, binding upon States"*.[53] Subsidiary sources help establish and confirm the content and correct interpretation of primary sources.

47. NSAs actively engage in processes resulting in the conclusion of ***international treaties.***[54]

48. First of all, they may play a role in the drafting of treaties adopted by other actors, typically States and international organizations. In some instances, this role is informal: NSAs influence law-making processes through informal channels and arrangements. For instance, NGOs had important roles in the processes leading to the conclusion of the 1997 ***Ottawa Treaty on the Anti-Personal Mines***, the 1998 Rome Statute of the International Criminal Court, and the 2003 United Nation Convention Against Corruption. NSAs – particularly NGOs – may also form coalitions that, though not an official participant in the negotiations, can have a significant impact upon its course and outcome.

49. In addition to NGOs, other NSAs may become informally involved in the conclusion of an international treaty, particularly when the treaty relates to their activities. Thus, private military and security companies (PMSCs), a specialised type of MNEs, are following and seeking to influence the outcome of the *UN Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security*

---

[51] The Hague Report 2010, pp. 8-13. See also Sofia Report 2012, pp. 4-26.

[52] Sofia Report 2012, pp. 4-6.

[53] The Hague Report 2010, p. 8.

[54] The 1969 Vienna Convention on the Law of Treaties defines a treaty as *"an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (Article 2(1)).* The customary definition is broader and encompasses also agreements concluded between other subjects of international law and instruments in other than written form.

companies, which has been tasked with the elaboration of a treaty on State obligations relating to the activities of PMSCs.[55]

50. Some NSAs engage in treaty-making processes on the basis of a more formal mandate. For instance, the International Committee of the Red Cross (ICRC) has, under its Statute approved by State Parties to the Geneva Conventions, the task to *"work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof"* (Article 4(g)). This provision is traditionally interpreted as implying the right, if not the obligation, of the ICRC to submit drafts of new instruments of international humanitarian law to be adopted by States and to participate actively in all phases of the negotiation process.

51. In other instances, NSAs enjoy a formal position (a consultative or observer status), which while not directly entitling them to take an active part in the conclusion of treaties, permits them to have a specific participatory role in the process. This is for instance the case of those NGOs accredited as consultants or observers with the UN under Article 71 of the UN Charter and under many other IGO constitutive agreements.

52. Also, NGOs and other NSAs are competent to make contributions to the formulations of rules binding on the State parties of various Multilateral Environmental Agreements (MEAs) through special 'autonomous institutional arrangements' that empower plenary Conferences or Meetings of the Parties to formulate and adopt rules without a new instrument requiring ratification.[56] Accreditation provides NGOs with the possibility of participating, albeit generally indirectly, in treaty-making processes taking place within the UN or other such IGOs and in MEA processes. Some IGOs, such as the International Maritime Organization, and MEAs provide NGOs with particularly strong participatory rights, including the right to contribute to their treaty and rule-making processes.

53. In addition to participating in the treaty-making processes resulting in the conclusion of a treaty between States and/or IGOs, NSAs may also, albeit more exceptionally, conclude treaties themselves. It is generally accepted that at least some of the *sui generis* entities, namely the Holy See and the Sovereign Order of Malta, have the capacity to conclude treaties.[57] Moreover, some other NSAs – e.g. AOGs and transnational corporations – enter written agreements or contracts with States or other NSAs (special agreements under Common Article 3 of the 1949 Geneva Conventions,[58] State contracts between

---

[55] See UN Doc. A/HRC/30/47, *Report of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies on its fourth session,* 9 July 2015.

[56] See CHURCHILL, Robin R. ULFSTEIN, Geir, Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law, *American Journal of International Law,* Vol. 94, 2002, p. 623.

[57] See RYNGAERT, Cedric, The Legal Status of the Holy See, *Göttingen Journal of International Law,* Vol. 3, 2011, pp. 827-857; KARSKI, Karl, The International Legal Status of the Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and of Malta, *International Community Law Review*, Vol. 14, 2012, pp. 19-32.

[58] See ZEGVELD, Liesbeth, *Accountability of Armed Opposition Groups in International Law,* Cambridge University Press, 2002, pp. 49-51; and ROBERTS Anthea, SIVAKUMARAN,

States and companies[59]). The nature of these acts remains unclear: while some qualify them as international treaties, others speak about hybrid treaties or about acts that are governed by national and not international law.[60]

54. NSAs therefore assume various roles in the processes resulting in the conclusion of treaties. It is less clear what role they play in the formation of ***international custom.***

55. Article 38(1) of the ICJ Statute defines international custom as *"evidence of a general practice accepted as law"* (al. b)) without specifying whose practice (*usus longaevus*) and acceptation (*opinio juris*) should count. In the opinion of some scholars, this means that *"practices may emanate from state and non-state actors"*.[61] In its 2000 final report, the ILA Committee on the Formation of Customary (General) International Law also noted that a rule of customary international law is one *"which is created and sustained by the constant and uniform practice of States and* other subjects *of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future"* (emphasis added).[62]

56. This view, however, is not uniformly shared. In his 2014 report, the ILC Special rapporteur on identification of customary international law Michael Wood suggested that *"the better view /.../ is that, while individuals and non-governmental organizations can indeed "play important roles in the promotion of international law and in its observance" (for example, by encouraging State practice by bringing international law claims in national courts or by being relevant when assessing such practice), their actions are not "practice" for purposes of the formation or evidencing of customary international law"*.[63] Similarly, the ICRC in its 2005 Study on Customary International Humanitarian Law notes that the practice of AOGs as a NSA does not constitute State practice and *"while such practice may contain evidence of the acceptance of certain rules in noninternational armed conflicts, its legal significance is unclear"*.[64] At the same time, the ICRC has not shied away from invoking its own practice as evidence of the existence of certain rules of customary international humanitarian law.[65]

57. Whereas the formal role of NSAs in the formation of international custom – including custom binding upon themselves – remains controversial, it is evident that NSAs can contribute to the formation of custom indirectly. Thus, NSAs may induce States to

---

Sandesh, Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law, *Yale Journal of International Law,* Vol. 37, 2012, pp. 107-152.

[59] See MANIRUZZAMAN, A. F. M., State Contracts in Contemporary International Law: Monist versus Dualist Controversies, *European Journal of International Law,* Vol. 12, 2001, pp. 309-328.

[60] For more details, see Sofia Report 2012, p. 4.

[61] BOHOSLAVSKY, Juan Pablo, LI, Yuefen, SUDREAU, Marie, Emerging customary international law in sovereign debt governance?, *Capital Markets Law Journal*, Vol. 9, No.1, 2013, p. 63.

[62] ILA Committee on the Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law,* London, 2000, p. 8.

[63] UN Doc. A/CN.4/672, *Second report on identification of customary international law by Michael Wood, Special Rapporteur,* 22 May 2014, pp. 32-33.

[64] HENCKAERTS, Jean-Marie, DOSWALD-BECK, Louise (Eds), *Customary International Humanitarian Law*, *Volume I: Rules,* Cambridge: ICRC/Cambridge University Press, 2005, p. xlii.

[65] *Ibid.*

behave in a particular way and/or to take a particular position with respect to a certain issue.[66]

58. The third source of international law consists of ***general principles of law*** (recognized by civilized nations). For some scholars, general principles of law constitute the third primary source on a par with treaties and custom. For others, it is just a means for filling in gaps in international law and saving courts from having to declare *non liquet.* In both cases, general principles are defined as principles stemming from domestic legal orders that are commonly shared and can be applied at the international level (such as *nemo iudex in causa,* principles of *res judicata* etc.).[67]

59. NSAs may have some influence on the formation of general principles of law. On the one hand, they may pressure States to introduce certain legal institutions into their domestic legal orders and see to it that these institutions are spread enough to be eligible candidates for general principles of law. On the other hand, NSAs may also help select which of the legal principles shared by various legal cultures will be brought to the international level. They may, for instance, provide international courts with evidence of the general nature of a certain principle. In both cases, the NSAs role will only be indirect.

60. Norm-creation at the international level is not necessarily limited to the conclusion of treaties, emergence of customary rules and establishment of general principles of law. In a broader sense, it further encompasses the adoption of unilateral legal acts and, possibly, the formation of soft-law standards.

61. The legal status of ***unilateral legal acts*** is uncertain. Whereas, it is generally accepted that certain unilateral legal acts issued by States[68] or by IGOs have binding effect, it is far less clear whether NSAs have the capacity to bind themselves (or someone else) in a similar way. Some authors believe that *"there is no reason not to extend the binding nature of unilateral acts to other actors* /than States/ *whose international legal personality is functionally necessary for the international community to function adequately"*.[69] This view however is not uniformly accepted.

62. NSAs themselves are quite active in adopting unilateral (legal) acts. Typical examples include unilateral declarations by AOGs, codes of conduct adopted by MNEs or ethical codes issued by NGOs. The acts differ very substantively in their content and purposes. Some are meant to bind the author of the act, others simply and solely sum up certain moral or political principles. In case of the former category, the concept of 'legitimate expectations' has been suggested as an argument in favor of the binding nature of such unilateral acts.[70] So far, however, this concept has not been universally accepted and

---

[66] See ICJ, *Whaling in the Antarctic (Australia v. Japan),* Judgment, 31 March 2014.

[67] See GAIA, Giorgio, General Principles of Law, in WOLFRUM, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law,* Vol. IV, Oxford University Press, 2012, pp. 370-378.

[68] ICJ, *Nuclear Tests,* Australia v. France, 20 December 1974, par. 43-46. See also KASSOTI, Eva, *The Juridical Nature of Unilateral Acts of States in International Law,* Leiden and Boston: Brill/ Nijhoff, 2015.

[69] RYNGAERT, Cedric, Non-state actors in international humanitarian law, in D´ASPREMONT, Jean (ed.), *Participants in the International Legal, op. cit.,* p. 290.

[70] See RYNGAERT, Cedric, Human Rights Obligations of Armed Groups, *Revue belge de droit international,* Vol. 41, No. 1-2, 2008, pp. 355-381.

the legal status of unilateral acts of NSAs – or, in fact, their capacity to produce unilateral legal acts – remains controversial.[71]

63. At the same time, NSAs can contribute to the formation of unilateral legal acts adopted by States or IGOs. Similarly, as in previous cases, their role here is mostly indirect and informal. Thus, for instance, NGOs or MNEs may induce States to recognize a certain entity or to protest against certain acts.

64. The role of NSAs in this area is similar to that they may have with respect to ***soft law***. The term lends itself to different interpretations.[72] Yet, it is mostly used to encompass, at least, non-binding political declarations containing normative provisions (the UN General Assembly Declarations) and/or vague provisions of international treaties not entailing rights or obligations.[73] NSAs may contribute to the formulation of soft-law instruments in the ways described above.[74] Moreover, some of the instruments that NSAs themselves adopt, if qualified as non-binding, could potentially be deemed part of *soft law.*

C) Non-State Actors and Monitoring of Compliance with International Law and Dispute-Settlement

65. As a decentralised, horizontal system, current international law is not subject to any central ***monitoring*** agency. States and IGOs may follow what other States and IGOs, or even NSAs, do. Yet, their capacities are not unlimited and they may also lack political will to pay attention to certain instances of non-compliance with international law (for instance those committed by close allies or by failed or weak States).

66. NSAs therefore have an important role to play in monitoring compliance with international law, sometimes alongside States and IGOs, sometimes even instead of them. When doing so, they may obviously also have their own biases and/or pursue their own agendas. Monitoring by NSAs – for instance by NGOs – is thus not necessarily more objective and impartial than that provided by other actors. Yet, the plurality of sources of information is in itself a value, as it may help to reach a more objective and impartial view of the situation.

67. Some NSAs have been endowed with a formal mandate to monitor compliance with international law. This is the case of the ICRC, which is mandated to *"to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take*

---

[71] See MASTORODIMOS, Konstantinos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework,* Ashgate, 2015.

[72] DUPLESSIS, Isabelle, Le vertige et la soft law : réactions doctrinales en droit international, *Revue québécoise de droit international,* hors-série, 2007, pp. 245-267.

[73] See, e.g., CHINKIN, Christine M., The Challenge of Soft Law: Development and Change in International Law, *International and Comparative Law Quarterly,* Vol. 38, Issue 4, 1989, pp. 850-866; ABBOTT, Kenneth W., SNIDAL, Duncan, Hard and Soft Law in International Governance, *International Organization,* Vol. 54, No. 3, 2000, pp. 421–456.

[74] See BOISSON DE CHAZOURNES, Laurence, MALJEAN-DUBOIS, Sandrine, Normes 'parajuridiques', système concurrent ou complémentaire – Le rôle des ONG internationales et de la soft law, in FEUILLET-LE MINTIER, Brigitte (Dir), *Normativité et biomédecine*, Paris: Economica, 2003, pp. 213-223.

cognizance of any complaints based on alleged breaches of that law" (Article 4(1)(c) of the ICRC Statute). Another example is the 1973 Convention on International Trade in Endangered Species in which its secretariat has entered into agreements with two NGOs (the World Conservation Monitoring Centre and the Trade Records Analysis of Fauna and Flora) to submit particular information and monitoring information.[75]

68. More generally, NGOs are approaching such a position in some areas, for instance in international environmental law and international human rights law. There are formal NGOs monitoring roles in several human rights Committees (e.g., the Committee on the Rights of the Child).[76] In addition, NGOs may submit shadow reports to any of the UN Committees, which on a regular basis check the level of implementation of UN human rights treaties by States. The views of NGOs are also summed up in one of the three reports on which the members of the UN Human Rights Council base their review of all States' human rights record under the Universal Periodic Review (UPR).[77]

69. Monitoring by NSAs is not limited to the acts of States and IGOs but may focus on acts of other NSAs as well. The ICRC, for instance, monitors the behaviour of all parties to a conflict including AOGs and PMSCs.[78] The Geneva Call, a Geneva based NGO, concentrates primarily on AOGs.[79] In the same vein, some NGOs such as the International Commission of Jurists have specific programs on "violations of human rights" committed by MNEs or PMSCs.[80]

70. NSAs have also gradually managed to assert themselves in various capacities in the area of ***dispute-settlement***.[81]

71. In some instances, they have the right to initiate cases by submitting complaints on their own behalf or on behalf of victims (e.g. the European Court of Human Rights). Where this is the case, NSAs are generally provided with a *locus standi* and become full parties to the proceedings. This is so especially in the areas in which NSAs have been attributed rights and duties under international law or where it is considered in the public interest to let them directly intervene in the proceedings (typically in the human rights sphere).

72. In other instances, NSAs are not direct participants in the proceedings. They might however enjoy certain procedural rights, for instance that of filing an *amicus curie* brief

[75] WOODWARD, Barbara K., Non-State Actor Responsibilities: Obligations, Monitoring and Compliance, in GAL-OR, Noemi, RYNGAERT, Cedric, NOORTMAN, Math (eds), *Responsibilities of the Non-State Actor, op. cit.,* pp. 29-54.

[76] See *Ibid.,* Appendix L, pp. 464-467.

[77] See the website of the UPR at http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx (4 June 2015).

[78] See KOH, Harold Hongju, Separating Myth from Reality about Corporate Responsibility Litigation, *Journal of International Economic Law*, Vol. 7, No. 2, 2004, pp. 263-274.

[79] See the website of the Geneva Call at http://www.genevacall.org/ (4 June 2015). See also BONGARD, Pasca, SOMER, Jonathan, Monitoring armed non-state actor compliance with humanitarian norms: a look at international mechanisms and the Geneva Call Deed of Commitment, *International Review of the Red Cross,* Vol. 93, No. 883, 2011, pp. 673-706; and WOODWARD, Barbara K., *Global Civil Society op. cit.,* p. 231

[80] See the webpage of the ICJ at http://www.icj.org/themes/business-and-human-rights/ (4 June 2015).

[81] For more details, see The Hague Report 2010, pp. 14-17.

and offering opinions as experts. In 2004, the ICJ adopted Practice Direction XII permitting international NGOs to submit written statements and/or documents on their own initiative to the Registrar to be held in a designated location in the Peace Palace. Under the WTO dispute settlement mechanism, the panels may allow *"any party to the dispute to attach the briefs by /NGOs/, or any portions thereof, to its own submissions"*.[82]

73. NSAs may also serve as direct agents of dispute-settlement. For instance, the Crisis Management Initiative, a Finish NGO founded by the former president of Finland Martti Ahtisaari, helped negotiate the peace agreement between the Government of Indonesia and the Free Aceh Movement in 2005.[83]

D) Substantive Rights and Duties of Non-State Actors

74. The previous two sections demonstrated roles that NSAs have today in norm-creation, monitoring of compliance with international law and dispute-settlement. All these areas relate to the functioning of the international legal system. In addition, NSAs also possess substantive rights and duties, and the violations of international law by NSAs can probably in some instance entail their legal responsibility.

75. The question of substantive rights and duties is closely linked to that of ***legal personality*** of NSAs. It is now largely accepted that States are not the only legal persons under international law. As the ICJ held in the 1949 *Reparations for Injuries* case, *"the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States"*.[84] Few authors deny that in addition to States, IGOs are legal persons under international law.[85] Claiming that NSAs are legal persons is more complicated due to the diversity of NSAs.[86]

---

[82] *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, 98-0000, Report of Appellate Body of 12 Oct. 1998, amended 6 Nov. 1998, WT/DS58/AB/R, p. 39. See also BOISSON DE CHAZOURNES, Laurence, La procédure consultative de la Cour internationale de justice et la promotion de la règle de droit: remarques sur les conditions d'accès et de participation, in DUPUY, Pierre-Marie, FASSBENDER, Bardo, SHAW, Malcolm N., SOMMERMANN, Karl-Peter (eds), *Völkerrecht als Wertordnung – Common Values in International Law, Essays in Honour of Christian Tomuschat,* Kehl: Engel Verlag, 2006, pp. 479-493. *United States–Import Prohibition of Certain Shrimp and Shrimp Products, op. cit.*, par. 110.

[83] Aceh rebels sign peace agreement, *BBC,* 15 August 2005.

[84] ICJ, *Reparation for Injuries,* Advisory Opinion, 11 April 1949, p. 8.

[85] See AMERASINGHE, C. F., *Principles of the International Law of International Organizations*, Cambridge University Press, 2005; KLEIN, Pierre, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Bruylant, 1997; BECKER, P. H. F, *The Legal Position of Intergovernmental Organisations. A Functional Necessity – Analysis of their Legal Status and Immunities,* Kluwer, 1994; RAMA-MONTALDO, Manuel, International Legal Personality and Implied Powers of International Organizations, *British Yearbook of International Law,* XLIV, 1970, pp. 111-135.

[86] See CLAPHAM, Andrew, *Human Rights Obligations, op. cit.*, pp. 68-69. See also THÜRER, Daniel, The Emergence of NGOs and Transnational Enterprises in International Law and the Changing Role of the State, in HOFFMAN, Rainer, GEISSLER, Nils (eds), *Non-State Actors as*

76. There is consensus that some NSAs enjoy aspects of legal personality under international law. This is the case of the ICRC,[87] the Holy See[88] or AOGs.[89] The legal status of other NSAs, including NGOs and MNEs, is more controversial.[90]

77. The uncertainties surrounding the very concept of legal personality add to the complexity.[91] It is for instance not fully clear whether actors must become subjects of international law in order to be able to acquire rights and duties under this law and if so, how the status is actually gained (*a priori* approach) or whether they become subjects of international law by acquiring concrete rights and duties (*a posteriori* approach).[92]

78. NSAs have acquired an extensive set of ***rights and duties.*** The extent differs depending on the actual type of NSA. Some NSAs are in a position similar to that of States. For example, the Holy See, which is a party to many multilateral treaties as well as a series of bilateral treaties (concordats) with certain States, has generally gained rights and assumed obligations. Other NSAs have a more limited extent of rights and duties which usually remain restricted to a particular area of international law.

79. AOGs are considered to be bound by primary rules of international humanitarian law applicable in non-international armed conflicts (Common Article 3 to the four Geneva Conventions, Additional Protocol II, customary rules etc.).[93] It is less clear whether they are bound by other rules of international law, for instance by human rights standards.[94] Since the late 1990s, the Security Council and other organs of the UN have repeatedly called upon various AOGs to abide by human rights obligations, respect human rights and put an end to human rights violations.[95] It has been suggested that the acts by the

---

New Subjects of International Law. From the Traditional State Order towards the Law of the Global Community, Duncker & Humblot, 1999, pp. 37-58.

[87] See STEENBERGHE, Raphael Van, Non-state actors from the perspective of the International Committee of the Red Cross, in D´ASPREMONT, Jean (ed.), *Participants in the International Legal, op. cit.,* pp. 204-232.

[88] See RYNGAERT, Cedric, The Legal Status of the Holy See, *Goettingen Journal of International Law,* Vol. 3, No. 3, 2011, pp. 829-859.

[89] See RYNGAERT, Cedric, Non-state actors in international humanitarian law, in D´ASPREMONT, Jean (ed.), *Participants in the International Legal, op. cit.,* pp. 284-294.

[90] See KAMMINGA, Menno T., ZIA-ZARIFI, Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law,* Brill, 2000; and DE BRABANDERE, Eric, Non-state Actors, State-Centrism and Human Rights Obligations, *Leiden Journal of International Law,* Vol. 22, No. 1, 2009, pp. 191-209.

[91] On the concept, see NIJMAN, Janne E*., The Concept of International Legal Personality. An Inquiry into the History and Theory of International Law,* The Hague: T. M. C. Asser Press, 2004; and PORTMANN, Roland, *Legal Personality in International Law,* Cambridge University Press, 2010.

[92] See also The Hague Report 2010, pp. 19-23.

[93] BÍLKOVÁ Veronika, Treat Them as They Deserve!? Three Approaches to Armed Opposition Groups under Current International Law*, Human Rights and International Legal Discourse,* Vol. 4, No. 1, 2010, pp. 111-126.

[94] See SIVAKUMARAN, Sandesh, Binding Armed Opposition Groups, *International and Comparative Law Quarterly,* Vol. 55, No. 2, 2006, pp. 369-394.

[95] See CONSTANTINIDES, Aristotelis, Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council, *Human Rights and International Legal Discourse,* Vol. 4, 2010, pp. 89-110.

UN bodies could themselves establish human rights obligations for AOGs.[96] This view however is not generally accepted.[97]

80. MNEs are subjects of domestic law, but their status under international law remains disputed. There is some support for the view that MNEs have an obligation to refrain from committing crimes under international law. This view has its roots in the post-WWII criminal trials, which however focused on individuals and not companies, and in some national practice (the US Alien Tort Claims Act), which again is rather inconclusive. It has also been suggested that corporations might have obligations stemming from human rights law[98] but, again, there is no consensus reached on this.[99]

81. NGOs are also primarily subjects of domestic law, although there have been attempts to harmonize the regulation among States, at least at the regional level (e.g., 1986 *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations*).[100] NGOs seem to have obligations, but it is not clear how much these qualify as international legally binding obligations properly so called. Such obligations stem from treaties (international labour law), arrangements within international organizations (ECOSOC), autonomous institutional arrangements (multilateral environmental agreements), and other agreements (CITES, etc.).

82. It is thus well-established that NSAs have some substantive rights and duties under current international law. It is less clear, however, whether the violation of the obligations they have entails international ***responsibility*** (or liability/accountability).

83. In practice, emphasis is often placed on mechanisms of indirect responsibility. Indirect responsibility arises in connection with activities of NSAs that would constitute an international wrongful act if committed or omitted by other actors – typically States, IGOs and individuals – which are somehow linked to NSAs. Thus, for instance, a violation of international humanitarian law committed by an AOG can give rise to the responsibility of the State exercising effective control over such a group, or to individual criminal responsibility of persons acting on behalf of the group.[101] At the same time, NSAs may be held accountable at the domestic level – within civil or criminal procedure. This however can be difficult and is not always successfully achieved.[102]

---

[96] *Ibid.*

[97] See KU, Julian, The Curious Case of Corporate Liability Under The Alien Tort Statute: A Flawed System of Judicial Lawmaking, *Virginia Journal of International Law,* Vol. 51, 2011, pp. 353-396.

[98] UN Doc. A/HRC/RES/17/4, *Guiding Principles on Business and Human Rights,* 6 July 2011.

[99] See COLLINS, Pauline, Enforcement of International Law Obligations concerning Private Military Security Corporations, *University of Tasmania Law Review,* Vol. 33, No. 1, 2014, pp. 28-55.

[100] See WIEDERKEHR, Marie-Odile, La convention européenne sur la reconnaissance de la personnalité juridique des organisations internationales non gouvernementales du 24 avril 1986, *Annuaire français de droit international,* Vol. XXXIII, 1987, pp. 749-761.

[101] See also BÍLKOVÁ, Veronika, Establishing Direct Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law?, in GAL-OR, Noemi, RYNGAERT, Cedric, NOORTMANN, Math (eds), *Responsibilities of the Non-State Actor, op. cit.,* pp. 263-284.

[102] COLLINS, Pauline, International Corporate Criminal Liability for Private Military and Security Companies - A Possibility?, in GAL-OR, Noemi, RYNGAERT, Cedric, NOORTMAN, Math (eds), *Responsibilities of the Non-State Actor, op. cit.,* pp. 177-202.

84. Direct responsibility of NSAs is more controversial. Some instruments seem to indicate that such responsibility is conceivable. For instance, the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UNBPG) state that where *"a person, a legal person, or other entity is found liable for reparation for a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim"* (Principle 15). The ILA Committee on Reparations for Victims of Armed Conflict also noted that AOGs can be held responsible to provide reparations where they commit violations of international humanitarian law.[103] Yet, the international practice is scarce and does not allow us to make any general conclusions.

E) Non-State Actors and Contemporary International Law

85. The previous subsections have demonstrated that NSAs assume many important roles at the international scene. They have also revealed that these roles are not, as it is sometimes believed, fully ignored by international law. In fact, so far, there have been two moves to accommodate non-state actors: the formal incorporation of NSAs within the international legal system and informal integration of NSAs into this system. The border between these two strategies is not strict.

86. ***The formal incorporation of NSAs*** into international law consists of the conferral upon these actors of formal legal personality and/or of concrete rights and duties. We saw above that some NSAs have a well-established position under current international law. The Holy See is a legal person with the capacity to conclude treaties or to send its official representatives to States. The ICRC is recognized as a legal person under international humanitarian law. AOGs are deemed to be bound by primary norms of IHL applicable in non-international armed conflicts.

87. Other NSAs, including NGOs and MNEs, only have a limited set of rights and/or duties, established usually within particular treaty regimes (for instance the regime of the European Convention on Human Rights). It is unclear whether it turns them into legal persons under international law. This confirms that legal personality is not an all-or-nothing institution and that the line between legal persons and non-persons is not as strict as generally assumed; some entities find themselves in a grey zone between the two areas. This is the result of the evolution of international legal personality as a legal technique, of the evolution of international law *ratione materiae* and *personae*, and the lack of rationalisation in the theory of international law.[104]

88. The formal incorporation of certain NSAs into the international law system does not place them on the same level as States. The inequality pertains not only to the extent and content of the legal personality but also, more importantly, to the fact that NSAs have very limited, if any, input in determining what this extent and content will be.

89. Thus, having lost a part of their factual power at the international level, States seek to keep at least the normative power over other actors. They want to continue to serve

[103] ILA Committee on Reparations for Victims of Armed Conflicts, The Hague Report, 2010, pp. 12-13.

[104] LAMALLE, Sandy, L'évolution conceptuelle dans le langage juridique international ou la traduction d'une nouvelle littéralité, *Sémiotica*, Issue 201, 2014, pp. 145-165.

as gate-keepers who decide which actors, and under what conditions, may enter into the exclusive club of legal persons under international law. This is problematic on many accounts including the growing gap between the theory of international law and the practice of international relations, the controversial legitimacy of the State monopoly over norm-creation[105] and the lack of incentives for some NSAs to abide by State-created rules. Consequently, commentators have proposed various alternatives to the State-centred view of international law that occasionally endow NSAs with an improved position. Some of these alternatives will be examined in section IV of this report.

90. ***The informal integration of NSAs*** in the international legal system relates to the situation in which NSAs are not granted a formal position within this system but their factual role is nevertheless acknowledged by other, informal means. There are various ways in which the participation of NSAs, mostly NGOs, in norm-creation processes is given a certain established basis without the conferral of formal rights and duties to such actors. These include simple recognition of the possibility of interaction with NSAs (Article 71 of the UN Charter) or sharing of information with NSAs (Ospar Convention). Similarly, judicial and quasi-judicial fora have benefited from the expertise of NSAs, again mainly NGOs, without the formalisation of their position (e.g., NGOs serving as expert witnesses in the ICJ etc.).

91. The informal integration of NSAs further relativizes the importance of legal personality and the distinction between those who have acquired it and those who have not. At the same time, for lawyers trained in the traditional positivist approach, it might be somewhat difficult to follow how the law-making and law-enforcement mechanisms actually work. This explains the dissatisfaction with the unclear role of NSAs that authors express as well as the proposals to change the current legal regulation and enhance the legal status of NSAs. Some of these proposals will be discussed in the next section.

92. The current state of affairs is certainly not definitive or unchangeable. Even under the traditional State-centric paradigm of international law, NSAs could have their legal status ***further strengthened*** through the two moves mentioned above – formal incorporation and informal integration. Some NSAs, which today are solely the object of informal integration, could be formally incorporated into the system.

93. In the area of *law-making,* certain NSAs already have the power to conclude international treaties. This power could be extended to other entities, for instance NGOs and MNEs. Moreover, the capacity of NSAs to make binding unilateral commitments could be generally recognized (for instance, the Deeds of Commitments signed by AOGs could be deemed binding upon them). Finally, NSAs could gain a more active role in the creation of customary international law, with their practice and opinion being considered as relevant as that of States (at least with respect to customary rules that bind these NSAs).

94. In the area of *compliance monitoring,* some NSAs, such as the ICRC, have a well-established and generally recognized position. This position could be opened to other actors. For instance, the practice of NGOs submitting their reports to human rights or environmental bodies could be formalised. NGOs would have a right to submit the report and/or the international body would be required to consult them.

---

[105] See RYNGAERT, Cedric: Imposing International Duties On Non-State Actors And The Legitimacy Of International Law, *Leuven Working Paper No. 42,* March 2010.

95. In the area of *dispute settlement*, NSAs could have a more active role to play in mechanisms and procedures that are currently *"geared towards States, with rights of* locus standi *typically reserved for States"*.[106] For instance, NGOs and other NSAs could acquire a formal right to present expert opinions and *amici curie* to the ICJ and to other international judicial and quasi-judicial bodies.

96. In the area of *primary rights and duties*, NSAs already recognized as persons under international law could have their rights and duties extended, while other NSAs could finally have their legal personality confirmed. Thus, for instance, AOGs could have obligations stemming not only from international humanitarian law but also from human rights law.[107] NGOs and MNEs, in turn, could acquire clear rights and/or duties under human rights law and/or international criminal law.

97. In the area of *responsibility*, the possibility of strengthening the legal status of some NSAs (AOGs, MNEs) discussed above may emerge at least in some areas of international law (human rights law, international humanitarian law, international criminal law etc.).[108]

98. It thus seems that the position of NSAs under international law ***could*** be further strengthened in the ways described above. The question however is whether this ***should*** be done and, if so, which NSAs should be included and under what conditions, and which, if any, should on the contrary remain outside the system.

99. Formal incorporation, and partly also informal integration of NSAs is not merely a technical operation; it affords these actors opportunities to provide input in important issues. In so doing, it also enhances their legitimacy: those admitted to the club gain certain membership rights and become part of a shared, normative culture. Conferring such a position on some NSAs, for instance PMSCs, might cause controversy.

100. Moreover, strengthening the international legal status of NSAs means further blurring the line between national and international law. Operating in the territory of one or several States, NSAs are subject to such State'(s') legal order. If, in addition, they are subject to international law, the relationship with the State becomes more complex. Special rules would be required to solve, or avoid, conflicts between several legal orders (for instance national legal orders of several States, international law and rules created by NSAs). Thus, the legal status of NSAs under international law is not merely a question for international law; it has important domestic implications as well.

101. Most of the changes described above would not constitute a radical departure from the traditional paradigm of international law. The legal status of NSAs would be strengthened but the degree to which this would destabilise the State-centric system

---

[106] The Hague Report 2010, p. 14.

[107] See CLAPHAM, Andrew, *Human Rights Obligations of Non-State Actors,* Oxford University Press, 2006.

[108] See BÍLKOVÁ, Veronika, Establishing Direct Responsibility, *op. cit*.,; VAN AAKEN, Anne, Markets as an Accountability Mechanism in International Law?, in GAL-OR, Noemi, RYNGAERT, Cedric, NOORTMANN, Math (eds), *Responsibilities of the Non-State Actor, op. cit.,* pp. 154-176; COLLINS, Pauline, International Corporate Criminal Liability for Private Military and Security Companies - A Possibility?, in *Ibid.,* pp. 177-202; or DE ALMEIDA RIBEIRO, Manuel, Responsibility of Private Entities in International Environmental Law: Transport of Oil by Sea and Nuclear Energy Production, in *Ibid.,* pp. 217-234.

would probably be limited. Yet, it is exactly this State-centric system that some authors find problematic.[109] Other scholars suggest that the system does not exist in the first place and that the traditional paradigm of international law is not the only (and the most correct) one through which to read and interpret international law. The next section presents alternatives to the traditional paradigm and examines some of the practical consequences that the adoption of such alternative views could have for international law and for the position of NSAs.[110]

IV. ALTERNATIVE APPROACHES TO NON-STATE ACTORS

102. The previous section discussed the role of NSAs from the traditional, positivist perspective. While still dominant at the international level, this theoretical perspective is far from exclusive. A number of alternative approaches exist that conceptualize international law differently. Consequently, they also differ in their views of the role of NSAs. This report focuses on those approaches that have dealt with the position of NSAs in more detail: global legal pluralism, transnational law approach, constitutionalism, the policy-oriented approach, and interdisciplinary IL/IR approach.

103. The main purpose of this section is to demonstrate that the role assigned to NSAs under international law is not objectively determined. Rather, it reflects the particular theoretical position that one embraces with respect to (international) law.[111] In this regard, we are all "prisoners of the theory", which provides us with lenses through which we contemplate and assess the (international) reality. The theory determines which factors and actors are deemed relevant and what position is attributed to them. It then largely depends on the persuasive force of the supporters of the theory whether, and to what extent, they gather the support of the relevant epistemic community.[112]

A) Global Legal Pluralism[113]

104. The theory of legal pluralism starts from the premise that people are part of multiple groups and feel that they are bound by the norms of these groups. Besides the familiar groups, such as States and political affiliations, people can have affiliations that are not part of an "official" State-based system, such as subnational ethnic groups, religious institutions and trade organizations. These communities may exert tremendous power over

---

[109] See CLAPHAM, Andrew, *Human Rights Obligations of Non-State Actors,* Oxford University Press, 2006.

[110] See also OLIVIER, Michele: Exploring Approaches to Accommodating Non-State Actors within Traditional International Law, *Human Rights and International Discourse,* Vol. 4, 2010, pp. 15-31.

[111] Fitzmaurice elucidated how choice of theoretical approach and understandings about sources of international law affect content. In his view, *"direct relationship between certain differences of approach to international law, certain controversies as to its basic character, on the one hand, and on the other, divergencies of view regarding sources of international law, formal and informal, are capable of influencing their content, or the view taken or suggested as to the content of the law because of the absence of any legislator, legislature or statute law"*. FITZMAURICE, Gerald, Some Problems Regarding the Formal Sources of International Law, in *Symbolae Verzilj,* The Hague: Martinus Nijhoff, 1958, pp. 156-160.

[112] See KOSKENNIEMI, Martti, *From Apology to Utopia. The Structure of International Legal Argument,* Cambridge: Cambridge University Press, 2006.

[113] This section is based on TJEN-A-KWOEI, Alberto, RYNGAERT, Cedric, *Background Paper on Global Legal Pluralism and NSA,* 21 September 2015.

the actions of people.[114] Thus, the key insight of legal pluralism is *"a recognition that multiple orders exist and a focus on the dialectical interaction between and among these normative orders".*[115] Legal pluralists empirically study which statements of authority tend to be treated as binding in actual practice and who treats them as such.[116]

105. The theory of global legal pluralism has emerged more recently, primarily as a reaction to the globalization process. Whereas some see it as a mere adaptation of legal pluralism to the new global context, others believe it constitutes a new paradigm.[117] Global legal pluralism is interested in the coexistence of different legal systems stemming from different sources. It also studies the relationship between various actors participating in the creation and/or implementation and application of such legal systems.

106. The theory of global legal pluralism is in itself ***pluralist.*** Its supporters are interested in different aspects of global developments. Teubner, for instance, argues that 'global law' constitutes a new legal order stemming from intersections between multiple actors in many spheres of activities. To understand this law, it is necessary to make a turn from groups to discourses and communicative networks.[118] Snyder defines global legal pluralism as the totality of episodic conjunctions of multiple sites which are strategically determined and situationally specific. Pluralism in his view has two main aspects: the structural aspect involving a variety of institutions, norms and dispute resolution processes, and the relational aspect, concerning the relations between sites.[119] Berman, in his turn sees global legal pluralism as a normative project aimed at striking a middle ground between strict territorialism and open-ended universalism.[120]

107. The theory of global legal pluralism has been used to explain certain developments within ***international law.*** For instance, it has been applied to the process of fragmentation.[121] Burke-White identifies seven trends in international law, out of which three suggest fragmentation and four suggest *"new forms of interaction between national and international actors and the development of an international legal pluralism".*[122] The three trends that point towards fragmentation are the diversification of international tribunals, the growth and potential conflict of legal norms, and the increased access by NSAs

---

[114] BERMAN, Paul Schiff, Global Legal Pluralism, *Southern California Law Review,* Vol. 80, 2007, pp. 1169-1170.

[115] *Ibid.,* p. 1171.

[116] BERMAN, Paul Schiff, From International Law to Law and Globalization, *Columbia Journal of Transnational Law,* Vol. 43, 2005, p. 510.

[117] MICHAELS, Ralph, Global Legal Pluralism, *Duke Law School Faculty Scholarship Series* paper 185, 2009; and MICHAELS, Ralph, Global Legal Pluralism, *Annual Review of Law and Social Science,* Vol. 5, 2009, pp. 243-262.

[118] TEUBNER, Gunther, Global Bukowina: Legal Pluralism in the World Society, in TEUBNER, Gunther (ed.), *Global Law Without a State,* Darthmouth: Brookfield, 1997, pp. 3-28

[119] SNYDER, Francis, Governing Economic Globalisation: Global Legal Pluralism and European Law, *European Law Journal,* Vol. 5, No. 4, 1999, pp. 334-374.

[120] See BERMAN, Paul Schiff, Global Legal Pluralism, 2007, *op. cit.*

[121] UN Doc. A/CN.4/L.682, *Fragmentation of International Law: Difficulties Arising From the Diversification And Expansion of International Law. Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi,* 13 April 2006.

[122] BURKE-WHITE, William W., International Legal Pluralism, *Michigan Journal of International Law,* Vol. 25, 2004, pp. 965.

to the international legal adjudication fora. The four trends that suggest the development of a pluralist legal system are the application of a common body of law by international tribunals, inter-judicial dialogue, the blending of procedures and traditions, and the hybridization of international law enforcement.

108. The theory of global legal pluralism postulates the existence of multiple orders that interact with each other. Law is created through the interaction of these orders. In such a system, there is room for ***NSAs*** as the system does not dictate what types of actors create, implement and enforce the law or are bound by its rules. Global legal pluralism uses the concept of NSAs, favouring however the term "communities". Some communities predate the creation of their normative space (ethnic communities), others emerge together with this space (various social network). In this way, the actors become inseparable from their normative practice or, even, may be constituted by these practices. The production of rules (norm-creation) is therefore the decisive element which allows us to determine which actors (communities) matter under global (international) law and which do not.

109. Berman notes that *"a more pluralist account of international law also recognizes the wide variety of non-state actors engaged in the establishment of norms that operate internationally and transnationally".*[123] He adds that there are several ways in which NSAs could establish such norms. The first is that of NSAs acting as direct lawmaking bodies. In this case NSAs create their own norms of self-regulation, separated from norms created by States or IGOs.[124] Another possibility is that NSAs are delegated lawmaking authority by official legal actors, or that official legal actors recognize the efficacy of non-state norms. In these cases NSAs also create norms that have the effect of law, but instead of creating for the purpose of self-regulation, States and other formal lawmaking entities recognize and take over these norms because of their efficiency, or because they delegated a non-governmental body to create standardizing norms in a specific field. A third way is that of international conventions empowering private parties to develop international norms.[125] This conception still posits the central role of the State but it does not condition the validity of legal norms produced by NSAs on the consent of the State.

110. Teubner also recognizes the capacity of NSAs to establish their own norms. Yet, unlike Berman, he does not see such norms as part of a comprehensive system of international law but, rather, as a nucleus of a new system of global law which has so far been developing at the periphery of the legal systems.[126] His view primarily applies to international economic law. The same is true for Snyder, who is more reluctant to assign NSAs (MNEs) a formal norm-making role within international or global law.[127]

111. Thus, global legal pluralists see NSAs as relevant players in the construction and application of international/global law. Their position is determined primarily by their normative actions that do not require any formal approval by States. They simply have to be efficient enough to produce consequences within the relevant community. Normative

---

[123] BERMAN, Paul Schiff, A Pluralist Approach to International Law, *Yale Journal of International Law,* Vol. 32, 2007, pp. 312.

[124] See also CAFFAGI, Fabrizio (ed.), *The Enforcement of Transnational Regulation. Ensuring Compliance in a Global World,* Edward Elgar, 2012.

[125] BERMAN, Paul Schiff, A Pluralist Approach, *op. cit.,* pp. 312-315.

[126] TEUBNER, Gunther, Global Bukowina, *op. cit.*

[127] SNYDER, Francis, Governing Economic Globalisation, *op. cit.*

systems produced by various actors (communities) interact, though the rules for such interactions are not made very clear in the global legal pluralism literature. It is solely possible to note that often, priority is conceded to the norms established by States (at the national or international level). NSAs are thus still defined by their other-than-State character and the norms they produce remain at the periphery.

B) Transnational Law Approach

112. Transnational Law approach emerged in the 1950s, as a reaction to the growing displeasure with the positivist mainstream in international law. While the first usage of the term is disputed, "transnational law" is conventionally associated with the US scholar Phillip C. Jessup. Jessup defined transnational law as *"all law which regulates actions or events that transcend national boundaries".*[128] Such actions and events involve not only States but also IGOs, individuals, and various NSAs. Yet, the positions of these actors differ substantially under international law according to Jessup – whereas States and, to a certain extent, IGOs, are subjects of the law and its norm-makers, NSAs remain objects of the law or, as a maximum, norm-takers.[129]

113. In 1972, a collection of essays entitled *Transnational Law in a Changing Society* was published in honour of P. C. Jessup.[130] While putting emphasis on the pluralistic nature of the international society, the authors showed scepticism as to the strengthening of the status of actors other than States in international law. For instance, in his chapter on MNEs, Wilfred Jenks wrote: *"/N/o international status for multinational corporations can be created in the foreseeable future by a mandatory decision and the status would become a significant reality only insofar as corporations sought it and governments recognize it".*[131] The quote suggests that those writing about transnational law did not do enough to conceptualize this law, distinguish it from national and international law, and to consider the role of various actors within it.

114. In the 1990s, the concept of transnational law/relations, as conceived during the Cold War, attracted criticism. In his book on NSAs published in 1995, Thomas Risse-Kappen wrote that *"the original concept of transnational relations was ill-defined. It encompassed everything in world politics except state to state relations".*[132] The alternative definition, Risse-Kappen proffered, conceptualized transnational relations as *"regular interactions across national boundaries when at least one actor is a non-state agent or does not operate on behalf of a national government or an international organization".*[133] NSAs have an important role to play in transnational relations, because as the author stresses *"we cannot explain state behaviour in crucial issue-areas without taking the*

---

[128] JESSUP, Phillip C., *Transnational Law,* New Haven: Yale University Press, 1956, p. 156.

[129] See also NOORTMANN, Math, Understanding Non-State Actors in the Contemporary World Society: Transcending the International, Mainstreaming the Transnational, or Bringing the Participants Back In?, in NOORTMANN, Math, RYNGAERT, Cedric (eds), *Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers,* Ashgate, 2010, pp. 153-170.

[130] FRIEDMANN, Wolfgang, HENKIN, Luis, LISSITZYN, Oliver (eds), *Transnational Law in a Changing Society: essays in honor of Philip C. Jessup,* New York: Columbia University Press, 1972.

[131] JENKS, Wilfred, Multinational entities in the law of nations*,* in *Ibid.,* p. 73.

[132] RISSE-KAPPEN, Thomas (ed.), *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions,* Cambridge University Press, 1995, pp. 7-8.

[133] *Ibid.,* p. 3.

cross-boundary activities of non-state actors into account".[134] Thus, analysing the activities of NSAs and assessing the impact they have on transnational relations is one of the main tasks of scholars of international relations. What this would mean for (international) law however is unclear, as the book does not pay much attention to law.

115. It is different in the work of contemporary legal scholars writing about transnational law or, more typically, transnational legal process. This is the case of Harold Koh, who combines the elements of policy-oriented approach (so-called New New Haven School) with those of transnational law. For Koh, transnational legal process is *"the theory and practice of how public and private actors /.../ interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law"*.[135] Transnational law breaks down the distinction between public and private and international and national – NSAs, traditionally relegated to the national and private sphere but more and more present in the international and public sphere is one of the main agents of change in this area. What concrete changes this should bring for the position of NSAs in international law, and for international law as such, remain however yet to be determined by transnational law scholars.

C) Constitutionalism

116. Constitutionalism[136] is often presented as an opposite to (global legal) pluralism.[137] It stresses unity instead of plurality, common values instead of separate normative orders, hierarchy instead of coordination. It, however, shares with pluralism the rejection of the classical State-centric theory of international law.[138] That would suggest that it should be open to NSAs. Yet, in reality, *"the impact of new participants in the international legal system is ambivalent from a constitutionalist perspective"*.[139]

117. Although stressing unity, constitutionalists are not uniform in their approach. Yet, the aim most of them seem to share is *"to constrain free state will with regard to both the conduct of international relations and the design of domestic constitutional orders"*. [140] One of the main tools bringing about such constraints is international law, which limits

---

[134] *Ibid.,* p. 280.

[135] KOH, Harold H., Transnational Legal Process, *Nebraska Law Review,* Vol. 75, 1996, pp. 183-184.

[136] PETERS, Anne, KLABBERS, Jan, ULFSTEIN, Geir, *Constitutionalization of International Law,* Oxford: Oxford University Press, 2009.

[137] Krisch, for instance, speaks about the contest between constitutionalism and pluralism. See KRISCH, Nico, The Case for Pluralism in Postnational Law, *LSE Working Paper* 12, 2009, p. 2. See also KRISCH, Nico, The Case for Pluralism in Postnational Law, in DE BÚRCA, Grainne, WEILER, Joseph H.H. (eds), *The Worlds of European Constitutionalism,* Cambridge: Cambridge University Press, 2012, pp. 203-261.

[138] Certain authors express doubts as to whether constitutionalism is an alternative of positivism or just a strand within it. For instance, Kleinlein notes that *"as a contribution to international legal scholarship, international or global constitutionalism is not so much a public international legal theory of its own, but a particular doctrinal approach within the positivist mainstream of public international legal scholarship"*. KLEINLEIN, Thomas, Non-state actors from an international constitutionalist perspective, in D´ASPREMONT, Jean (ed.), *Participants in the International Legal System, op. cit.,* p. 43.

[139] *Ibid.,* p. 41.

[140] *Ibid.,* pp. 41-42.

freedom of States internationally and domestically. For constitutionalists, international law is not comprised of consent-centred instruments whose content is fully determined by States. Rather, international law *"increasingly focuses on the realization of community interests and the promotion of global public goods"*. [141] To achieve these goals, international law itself is construed as a hierarchical system with certain higher norms placed at the top of the normative pyramid. Concepts such as *jus cogens* or *erga omnes* obligations are conventionally referred to in this context, expressing those community interests and global public goods that the international community is to pursue.

118. So far, the theory of constitutionalism has not paid much attention to ***NSAs.*** This is partly due to the fact that, as Kleinlein notes, *"subjects doctrine does not play prominent role in constitutionalists´ studies, which are, in general, rather focused on sources doctrine"*.[142] Another factor is that constitutionalists largely concentrate on two specific actors (beyond States) – IGOs and individuals, both of which fall outside the definition of NSAs adopted in this report. Whereas IGOs are seen as crucial actors in the creation and application of international law, individuals constitute the main and in the final stage the only real addressee of legal norms. *"In a constitutionalized world order, natural persons are the primary international legal persons and the primary members of the global constitutional community."*[143]

119. Anne Peters is the principal scholar who has analysed the legal position of NSAs from the constitutionalist standpoint.[144] Starting from the assumption that *"there is a global constitutional community which is made up by individuals, states, international organizations, NGOs, and business actors",*[145] she discusses not only the three "usual suspects" (States, IGOs, individuals) but pays attention to two NSAs as well: NGOs and MNEs. Peters first recognizes the factual relevance of these actors. NGOs *"*de facto play an increasingly important role in the international legal process".[146] MNEs *"form part of the global constitutional community and are embedded in an economic constitutional framework. Transnational commercial activities have been a crucial factor for the development of international law"*.[147]

120. Peters asserts that *"the constitutionalist approach allows the reframing of the doctrinal debate on the international legal personality"*.[148] The statement relates specifically to NGOs but there is no reason why it should not apply to other NSAs as well. In Peters´view, the question is not, whether NSAs are subjects of international law but *"which precise fundamental rights and obligations they possess and should possess in a constitutionalized world order"*.[149] She opts for a functionalist approach claiming that

---

[141] *Ibid.,* p. 42.
[142] *Ibid.,* p. 44.
[143] PETERS, Anne, Membership in Global Constitutional Community, *EJILTalk,* 20 July 2010.
[144] PETERS, Anne, Membership in Global Constitutional Community, in PETERS, Anne, KLABBERS, Jan, ULFSTEIN, Geir, *Constitutionalization of International Law, op. cit.,* pp. 153-262.
[145] PETERS, Anne, Membership in Global Constitutional Community, *EJILTalk,* 20 July 2010.
[146] PETERS, Anne, Membership in Global Constitutional Community, in PETERS, Anne, KLABBERS, Jan, ULFSTEIN, Geir, *Constitutionalization of International Law, op. cit.,* p. 219.
[147] *Ibid.,* p. 240.
[148] *Ibid.,* p. 219.
[149] *Ibid.,* p. 219.

NSAs should hold rights and obligations that reflect their functions. She then provides an overview of functions that NGOs and MNEs assume at the international level and of rights and obligations they have under current international law because of these functions. The overview is not radically dissimilar to that provided in the previous section of this report (and, in more detail, in the reports adopted by this Committee in 2010-2014). The reframing of the doctrinal debate is therefore, if it occurs at all, rather moderate.

121. Moreover, the relationship of constitutionalists to NSAs is difficult, even ***ambiguous***. On the one hand, NSAs assume important functions in promoting community interests and global public goods as well as in advocating for the rights of individuals. Thus, their rise is perceived as *"a step towards inclusiveness and empowerment of entities other than states"*.[150] On the other hand, the rise of NSAs, particularly when entities other than NGOs and MNEs are included in the analysis, may be viewed as problematic, because it *"threatens the overall coherence of the international order from a normative point of view"*.[151] The pluralization of actors endowed not only with right and duties but also, potentially, with the capacity to establish, apply and enforce legal rules could place the normative unity of international law constitutionalists strive for in jeopardy.

D) Policy-Oriented Approach

122. The policy-oriented approach constitutes a more radical departure from the traditional approach to international law than global legal pluralism and constitutionalism. The term is not used in a completely uniform way. In the narrow sense, it usually refers to the New Haven School of international law.

123. The New Haven School arose from the Yale Law School in the United States. Representatives include Myres S. McDougal and Harold Lasswell in the first generation and a host of other scholars in the next generation, including W. Michael Reisman, Richard Falk, Harald Koh, and Rosalyn Higgins. Their understanding is encapsulated by the view that law is *"not just a set of rules governing the behaviour of social actors, but a process of authoritative decisions"*.[152] The supporters of this approach are practice-oriented: they seek to provide decision-makers with legal advice that would be both scientifically sound and politically relevant. The analysis proceeds in five steps (labelled as the praxis of intellectual tasks) encompassing: goal formulation, trend description, factor analysis, projection of future decisions, and the invention of alternatives.[153]

124. The New Haven School stresses the value of human dignity that international law should strive to protect. In a public order of human dignity, all individuals should have access to the things they cherish, that is, power, wealth, enlightenment, skill, well-being, affection, respect and rectitude. Borrowing from social sciences, the New Haven School analyses social processes rather than merely rules, that are described through six aspects:

---

[150] KLEINLEIN, Thomas, Non-state actors from an international constitutionalist perspective, *op. cit.,* p. 44.

[151] *Ibid.,* p. 45.

[152] BACHAND, Rémi, Non-state actors in North American legal scholarship. Four lessons for the progressive and critical international laywer, in D´ASPREMONT, Jean (ed.), *Participants in the International Legal System, op. cit.,* p. 99.

[153] See REISMAN, W. Michael, WIESSNER, Siegfried, WILLARD, Andrew R., The New Haven School: A Brief Introduction, *Yale Journal of International Law,* Vol. 32, 2007, p. 576.

(1) those who engage in it (participants), (2) the factors that motivate them (perspective), (3) the situation in which they interact (situations), (4) the resources upon which they draw (bases of power), (5) the ways they manipulate those resources (strategies), and (6) the aggregate outcomes of the process of interaction (outcomes).[154]

125. The New Haven School rejects the concept of (formal) legal personality, replacing it with that of participation. As Higgins put it: *"It is not particularly helpful, either intellectually or operationally, to rely on the subject-object dichotomy that runs through so much of the writings. It is more helpful and closer to perceived reality to return to the view of international law as a particular decision making. Within that process (which is a dynamic and not a static one) there is a variety of* participants*, making claims across state lines, with the object of maximizing various values".*[155]

126. The participants in global decision making include *"those formally endowed with decision competence /.../ and all those other actors who, though not endowed with formal competence, may nonetheless play important roles in influencing decision outcomes".* [156] The scope is thus not restricted to States or IGOs, but includes various NSAs as well, with particular attention being again paid to NGOs.[157] The circle of such NSAs is potentially open-ended and there is no *a priori* condition, accept for the factual participation in the decision process, that would limit this circle to certain NSAs or to those meeting a specific definition. Thus, whether NSAs are organized or not, whether they have a link to States or not, whether they are considered legitimate or not, and whether they enjoy formal legal recognition, is irrelevant. What matters is merely their factual power. Thus, the list of participants includes such diverse entities as individual human beings, States, IGOs, transnational political parties, civilizations, folk cultures, mafia and terrorists, etc.[158]

127. Unlike the traditional approach, global legal pluralism and constitutionalism, the New Haven School does not presuppose hierarchy among actors and does not place the State at the centre of the international legal order. That is another reason why it does not need the concept of the NSA. Absent a single paradigmatic participant, it does not make much sense to introduce a State/non-State dichotomy. This general position is however not always followed in concrete analyses. For instance, when discussing the use of force, a field in which NSAs have notably asserted themselves in recent years, the distinction between States and other actors is as clearly made by New Haven scholars as by scholars belonging to the other approaches.[159] This shows how deeply rooted the distinction

---

[154] *Ibid.,* pp. 578-581.

[155] HIGGINS, Rosalyn, *Problems and Process: International Law and How We Use It.* Oxford: Clarendon Press, 1994, p. 50.

[156] REISMAN, W. Michael, WIESSNER, Siegfried, WILLARD, Andrew R., The New Haven School, *ibid.,* p. 578.

[157] See WIESSNER, Siegfried, Legitimacy and Accountability of NGOs: A Policy-Oriented Perspective, in HEERE, W. P. (ed.), *From Government To Governance – 2003 Hague Joint Conference On Contemporary Issues of International Law,* T. M.C. Asser Press, 2004, pp. 95-101.

[158] See MC DOUGAL, Myres S., REISMAN, W. Michael, WILLARD, Andrew R., The World Community: A Planetary Social Process, *University of California Davis Law Review,* Vol. 21, 1988, pp. 816-833.

[159] See, for instance, REISMAN, W. Michael, International Legal Responses to Terrorism, *Houston Journal of International Law,* Vol. 22, No. 3, 1999, pp. 4-62.

between States and NSAs is in positive international law and also in the minds of most international legal scholars.

E) Interdisciplinary IL/IR Approach

128. In recent years, interdisciplinary approaches have become popular in social sciences. This is also true in international law (IL) where they usually seek to combine international law and theories of international relations (IR). More exactly, it looks at international law from the perspective of various theories of international relations. Despite the scepticism of influential authors,[160] this approach has gained many supporters in both IL and IR camps.[161] What unites them is the social sciences methodology used to analyse international law. What divides them is the concrete IR theory they apply.

129. Noortmann has suggested that despite its internal plurality, the interdisciplinary approach could help *"understand and explain the role and position of all participants in the constitutive process of order and justice at the world level".*[162] He concedes that both IL and IR have so far primarily engaged in the study of political and legal relations *"by the states for the states and of the states".*[163] Yet, he asserts that the lack of inclusiveness and the hegemonic position of the State that have traditionally characterized IL and IR could be overcome by means of three potential solutions.

130. The first is the elaboration of the concept of transnationalism. Recalling Jessup's distinction between internationalism and transnationalism, Noortmann rejects a division of the world into several spheres of interaction based on participants and suggests replacing it with one based on an understanding of the structure and process of the world. Thus, for instance, NGOs should not be pigeon-holed in the sphere of national or transnational law, provided their activities have an impact on the international scene as well.

131. The second solution calls for revisiting and overhauling the concept of participants as suggested by the policy-oriented approach. Noortmann supports the New Haven School's approach whereby *"international law is in theory stripped of its state-oriented biases, and the practices and opinions of non-state actors are assessed in a similar way to those of states".* [164]

132. The third solution is to design a new sociology of IL and IR where they are understood within a social context that is construed to include not only States, as was traditionally the case, but also NSAs. *"An interdisciplinary approach to non-state participants and non-state participation would acknowledge the opinions and practices of these participants as a variable in the process of understanding the world beyond the state".* [165]

---

[160] KLABBERS, Jan, The Bridge Crack'd: A Critical Look at Interdisciplinary Relations, *International Relations,* Vol. 23, No. 1, 2009, pp. 119-125.

[161] See DUNOFF, Jeffrey L., POLACK, Marc A. (eds)*, Interdisciplinary Perspectives on International Law and International Relations. The State of the Art,* Cambridge University Press, 2013.

[162] NOORTMANN, Math, Towards an interdisciplinary approach to non-state participation in the formation in global law and order, in D´ASPREMONT, Jean (ed.), *Participants in the International Legal System, op. cit.,* p. 77.

[163] *Ibid.,* p. 76.

[164] *Ibid.*.

[165] *Ibid.,* p. 79.

133. Noortmann thus calls for a new approach not only to NSAs but to international law more generally. This approach, inspired by the New Haven School and Jessup´s theory of transnationalism, would take into account the dynamic and flexible nature of international relations. It would expand the research focus beyond the State while at the same time not framing the debate about actors in terms of legal personality as traditionally conceived. It would also look in more detail at institutions and legal frameworks rather than merely legal rules and would abandon preconceived categorisations such as State/non-State and national/international /transnational.[166]

F) The Role of Non-State Actors Under Alternative Approaches to International Law

134. Although most alternative approaches to international law may reject the State-centric, consent-based perspective of international law,[167] they have few other traits in common. They differ in their definition of international law, its functions, and its relevant actors. They also disagree about whether these actors should be defined solely based on factual reality (i.e., anyone having an impact upon international relations is a valid "participant") or whether there should still be some formal selection system and requirements (e.g., relevant actors must have particular characteristics or a certain normative position).

135. Despite their diversity, alternative approaches are valuable in that they show the non-automatic nature of many of the concepts that mainstream international lawyers tend to assume. This opens the door for possible reconceptualization particularly when it comes to the role of NSAs. While it may be premature to draw some expedient suggestions as to this role from the alternative accounts, it is at least possible to raise certain questions that the rise of NSAs render interesting, relevant and in some cases even urgent.

136. The first question is whether the ***category of NSAs*** is theoretically sound and practically useful and whether it can work as a general category at all.[168] Under the traditional paradigm of international law, States occupy the position of normative supremacy within the legal system. Anyone else is then defined through its opposition to, or difference from, States.

137. This position does not recognize the plurality of NSAs. It is already common not to construe the category of NSAs as one encompassing all actors except States. Entities that have gained special prominence internationally (IGOs) or that are simply seen as distinct from the others (individuals), are often excluded from the definition of NSAs. This is also the case in this report. With the rise in importance of other entities, the trend to break up the general category and "name" the concrete "NSAs" will grow, especially if this rise is accompanied by a decline of factual power and normative centrality of the State. From that perspective, the concept of "NSAs" may sooner or later become

[166] See NOORTMANN, Math, Globalisation, Global Governance and Non-State Actors: Researching beyond the State, *International Law FORUM de Droit International,* Vol. 4, No. 36, 2002.

[167] Some alternative theories remain largely focused on States. This is, for instance, the case of TWAIL (Third World Approaches to International Law). See MUTUA, Makau, ANGHIE, Antony, What Is TWAIL?, *Proceedings of the Annual Meeting (American Society of International Law),* Vol. 94, 2000, pp. 31-40.

[168] See GAL-OR, Noemi, Observations on the Desirability of an Enhanced International Legal Status of the Non-State Actor, in NOORTMANN, Math, RYNGAERT, Cedric (eds), *Non-State Actor Dynamics op. cit.,* pp. 125-149.

obsolete. The dichotomous classification between States and non-States might then be replaced by a more pluralistic conception. Such a conception would make it possible to take into account the particular features of each actor and would not force these actors into a one-size-fits-all mould.

138. The second question relates to ***the concept of legal personality.*** This concept has been used in IL theory to apply to inter-State relations as a way to organize actors by drawing a line between those whose acts matter and those who remain outside the legal system. It can also, however, become a straitjacket that renders this system quite inflexible. The situation is further complicated by the lack of consensus over what legal personality really means and what has to be done for an actor to acquire it. Whereas, some scholars suggest that the way out of this pitfall is simply to rethink the concept of legal personality, others argue that the concept itself is unviable and should be eliminated. Still others propose replacing it with the more flexible concept of 'participants' that would take the factual role of various entities in global decision-making process as its starting point.[169]

139. While such proposal may seem *prima facie* appealing, clearly much more must be done to establish what it would mean for the system of international law in general. Those in favour have usually offered merely a very general description of their new vision of international law,[170] while maintaining the traditional legal analysis when discussing concrete legal problems.[171] Thus, the reformulation proposal probably raises even more questions than it answers. Would the position of participants be determined simply by their factual power (along the "might means right" maxim)? How would the line between law and politics be drawn if preserved at all? Which rules would be considered as making part of international law? How would that law differ from domestic law, or would it just be merged into some kind of global law? The choice between the legal person and the participant perspectives cannot be made unless, and before, these issues are addressed.

140. In addition, it is necessary to consider the evolution of the use of the concept of international legal personality in international law (principally in the context of IGOs) and the legal distinctions created in its wake (i.e., varying capacities, rights and obligations according to each institution), as techniques of international legal theory. The reformulation/ reconsideration of the concept would then need to include the technical evolution of the concept as a scientific tool for determining the extent of capacities, rights and obligations of each actor; the diversification and multiplication of actors; the plurality of legal systems and traditions; and the rethinking of the international system beyond the traditional State-centered approach.[172]

---

[169] See NIJMAN, Janne E., *The Concept of International Legal Personality, op. cit.;* and PORTMANN, Roland, *Legal Personality, op. cit.*

[170] See KOH, Harald Kongju: Why Transnational Law Matters?, *Penn State International Law Review,* Vol. 24, 2006, pp. 745-753.

[171] See, for instance, WIESSNER, Siegfried, WILLARD, Andrew R., Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity, in RATNER, Steven S., SLAUGHTER, Anne-Marie (eds), *The Methods of International Law,* Buffalo and New York: ASIL, 2006, pp. 47-78.

[172] LAMALLE, Sandy, Multilevel Translation Analysis of a Key Legal Concept: Persona Juris and Legal Pluralism, in CHENG, Le, SIN, King Kui, WAGNER, Anne (eds), *The Ashgate Handbook of Legal Translation*, Ashgate, 2014, pp. 299-312.

141. The third question is that of the ***position of NSAs*** and the status of "laws" they produce. Global legal pluralism would consider the normative orders created by non-state entities as independent legal orders along, though probably not on par with, classical international law produced by States. Constitutionalists would seek to integrate them into a uniform system of international law striving towards certain common goals. Supporters of policy-oriented and interdisciplinary approaches would, most probably, simply assess the international impact of NSA acts. None of the approaches is very clear about the relationship between such normative orders/acts. Thus, as before, the alternative theoretical approaches are more explicit on what they reject than on what they wish to embrace.

V. CONCLUDING REMARKS

142. This report has analysed the role of NSAs in contemporary international law. Despite the increase in books and articles on NSAs in recent years, the topic remains under-theorised. Gal-Or rightly notes that there is *"an urgent doctrinal /.../ need for an integrated and comprehensive assessment of the status of the NSA in international law"*.[173] This final report, together with the previous reports adopted by the Committee in 2010-2014, responds to this need by offering an overview of the actual practice of NSAs in terms of their rights and obligations and their effect on the functioning of the international legal system. It demonstrates that this practice is rich and diverse, negating the traditional view that only States make international law and other actors do not have much to say in the matter.

143. NSAs play an important role in international practice that differs depending upon the particular actor and the area of activity. International law has not completely ignored this development. Through the procedures of formal incorporation and informal integration, it has taken account of the rise of NSAs. Its response, however, has not been comprehensive or systematic but, rather, incremental and on a case-by-case basis. Some NSAs have acquired formal legal personality, albeit a limited one, but others have not. Some take part in norm-creation and/or dispute settlement; others do not. Some have rights and duties, others do not. There is probably not a single legal characteristic that all NSAs share. From that perspective, the concept of NSAs has a very limited use as an analytical category. It tells us what certain entities are not but not what they are. In fact, the concept can hardly do that due to the heterogeneity of NSAs.

144. When assessing the position of NSAs, the current report has examined not only the traditional State-centric theoretical perspective but it has also applied several alternative approaches to international law (global legal pluralism, transnational law approach, constitutionalism, policy-oriented approach, interdisciplinary IL/IR approach). This report does not aspire to select one of those approaches as the most appropriate and to promote its use with respect to NSAs or within international law more broadly. As has become apparent, this is in fact quite difficult, if not impossible. Members of the Committee do not share the same theoretical and methodological preferences. Moreover, none of the approaches scrutinized in this report is truly a "winner", i.e. none has offered a truly comprehensive account of the legal consequences of the rise of NSAs. All seem to be lagging behind the reality on the ground.

---

[173] GAL-OR, Noemi, Observations on the Desirability, *op. cit.,* p. 125.

145. In its 2010 Report, the Committee undertook to produce a set of general principles in its final report.[174] This, however, has turned out to be difficult. Such principles would be either mere generalities or they would need to focus on specific NSAs rather than the whole category of NSAs. Moreover, the questions that arise in connection with NSAs do not relate to these entities only. Rather, they bring us back to the very foundations and ontology of international law and reveal that these foundations are not as firm and unshakable as they have seemed.[175] Reopening the debate about the foundations of international law and considering again certain fundamental concepts (international legal personality, sources of international law, etc.) may therefore be a necessary precondition to further understand where we stand and where we should stand with respect to NSAs.

[174] See The Hague Report 2010, p. 2.

[175] See also CARTY, Anthony, Critical International Law: Recent Trends in the Theory of International Law, *European Journal of International Law,* Vol. 2, 1991, pp. 66-96; KENNEDY, David, *International Legal Structures*, Baden-Baden, 1987; FALK, Richard A., *Revitalizing International Law*, Ames: Iowa State University Press, 1989; O'CONNELL, Mary Ellen, New International Legal Process, *American Journal of International Law,* 1999, pp. 334-351.

COMMITTEE ON NON STATE ACTORS

WORKING SESSION

Tuesday, 9 August 2016, 2.00pm

Chair: Professor Stephan Hobe (Germany)

The Chair opened the session by noting that the Committee had been established in 2010. A resolution and final report was now proposed for adoption. The Chair introduced the panel, composed of Professor Math Noortmann (who would be presenting on the current status of the Committee) and Veronika Bílková, who would be presenting the final report. The report was very forward looking and went beyond the day to day business of international law. The Report posed very fundamental questions such as whether a Non-State Actor (NSA) could be defined, and how they were involved in international law. The Chair expressed the opinion that this depended on the perception of international law that one took, before giving the floor to the Chair of the Committee, Professor Noortmann.

Professor Math Noortmann (UK) introduced himself and said that this would be the last meeting of the Committee. At this session, the Committee would present its final report and draft resolution.

Discussions on a Committee on non-State actors started 10 years earlier. At the beginning of the discussions, it was thought that the Committee could start off with a policyoriented perspective; however, it became clear that this would be too hard for 99% of the constituency of the ILA, and it was therefore necessary to start from scratch. When the Committee was inaugurated in 2010 in Rio de Janeiro, it had to first determine what it was actually talking about – what kind of approaches were there, what was a non-State actor, what methodologies would be used. A first report was drawn up for the conference in The Hague in 2010, which outlined the approach and methodology of the Committee, and how it would move from one step to the next. It was already decided in Rio de Janeiro that there would be three substantial reports. The first would be an empirical one, sculpting and mapping what kinds of non-State actors were out there. The second report was a fairly broad overview of what was out there. The third report would consider the statuses of non-State actors once it was determined where to place them. Professor Noortmann emphasised that this was once again a mapping and sculpting exercise, which was very broad. International lawyers had a problem in that they only worked with States, so the Committee had to come up with a working definition.

Reading the reports of the Committee in combination provided a decent overview of what was out there. Professor Noortmann noted that sometimes, one had to wonder whether this was the right approach. Non-State actors had become a very prominent label, but there were suggestions that "participants" would be more inclusive. There was, however, a theoretical and conceptual problem if we were to agree that international law was a law between nations. Professor Noortmann therefore raised the intellectual question as to what happened when a non-State actor entered into a contract with a State actor. It was not international law, so how were these agreements to be qualified? They definitely did not fall within the scope of the the Vienna Convention on the Law of Treaties. The more the Westphalia "container" was opened, increasingly the more questions were posed. Professor Noortmann suggested that one could say that the Westphalia container should be kept as it was, and that the international lawyer would only look at States and the

interaction between them. However, an international lawyer would say that s/he dealt with interactions between States as well as non-State actors. The many different perspectives and debates were interesting, but Professor Noortmann warned that one should avoid the mistake of trying to put everything new into the Westphalia container. In 1648, when the Westphalia system was established, the legal system was not designed for situations encountered today.

Professor Noortmann concluded his presentation by expressing disappointment that many involved in the Committee and the report were not present, but commended the Committee members on being extremely committed and productive.

The Chair applauded the work of the Committee and said that it broke ground in the area of non-State actors.

Dr Veronika Bílková emphasised that the report was a collective effort, and that the Committee had been very successful. The fourth and final report built on what had been done previously. It was divided into two parts, corresponding with the two ambitions that the Committee had set for itself. The first part was empirical in nature, and mapped the landscape of how non-State actors were affected by international law and how international law affects them. The second part was theoretical in nature, dealing with whether general conclusions could be made of non-State actors, how the concept of non-State actors interacted with other general concepts in international law, and whether the view that the Committee took of non-State actors was influenced and shaped by general theoretical perspectives that it took in international law.

Dr Bílková pointed out that it was difficult to reach a definition of "non-State actors". This was a debated issue, so the Committee adopted a working definition for the purpose of its work and the final report. It was not a general definition. The definition, stated in the report, was that nonState actors were:

> legally recognized and organised entities that are not comprised of nor governed or controlled by States nor groups of States and that actually perform functions in the international arena that have real or potential effects on international law.

Dr Bílková acknowledged that this was a long definition and therefore broke it down into elements. The first element was that a non-State actor was an entity that was somehow organised (ie, a collective) and legally recognised, either at a domestic or international level. It therefore excluded individuals, as well as illegitimate and illegal entities. The second element was that nonState actors excluded international governmental organisations that were comprised solely of States. The third element was functional – for an entity to count as a non-State actor, it had to perform some function at the international level.

The Committee arrived at the following list of non-State actors based on this definition: non-governmental organisations, multinational enterprises, organised armed opposition groups, sui generis entities (eg, ICRC, the Holy See), and organised indigenous peoples' groups. Dr Bílková recognised that some attendees might have problems with this definition, just as some of the members of the Committee did, but while it might not be a terrific definition, in the end there were two reasons to opt for this specific definition. The first reason was based on the nature of entities; the entities that were included had something

more in common than just not being States. The second reason was pragmatic; there was quite a lot, both in terms of positive international law and in terms of scholarship, being done about individuals, IGOs and terrorist groups. Therefore, the Committee was concerned that, if it included these entities, it would be encroaching on the work done by others, at the same time as being hijacked by the massive amount of research on these entities.

Dr Bílková moved on to the empirical part of the report. The analysis offered in the report was quite detailed. The Committee decided to map, through this practical exercise, three specific areas of international law, namely international norm creation, monitoring compliance with international law and in dispute settlement, the scope of substantive rights and duties of non-State actors and the consequences of non-compliance. The Committee came to specific conclusions regarding each area and Dr Bílková proceeded to give a general overview of these conclusions. First, the Committee found that the engagement of non-State actors with international law in all the above mentioned areas was actually quite rich. The picture that textbooks offered was usually quite black and white. In reality, it was much more of a grey scale. Second, this engagement had very few general interests that could be applied to everyone and everywhere. The specific types of engagement depended on the type of non-State actor and the relevant area of international law. Third, international law as a system and international lawyers as a community had so far not been able to react to development in any coherent way; the responses had been very ad hoc.

Finally, the Committee concluded that, despite the ad hoc nature of responses, there seemed to be two main ways in which international law had so far dealt with non-State actors: the formal incorporation of non-State actors within the international legal system and the informal integration of non-State actors into this system. A discussion on this can be found in the report. The formal incorporation of non-State actors into international law consisted of the conferral upon these actors of formal legal personality and/or of concrete rights and duties. This could be seen with entities that were similar to States, such as the Holy See and the ICRC. This way was not, however, uniform; the degree to which such entities had been granted legal personality was quite diverse. The informal integration of non-State actors in the international legal system related to the situation in which non-State actors were not granted a formal position within this system, but their factual role was nevertheless acknowledged by other, informal means. This way granted some influence to non-State actors without granting them with legal personality.

Dr Bílková explained that the second part of the report was theoretical, and indicated that what the Committee wanted to do here was to show that there was no obvious automatic approach to take towards non-State actors. We were prisoners of theory; what we thought about non-State actors and how we interpreted empirical data depended on the theoretical position that we adopted. The report focused on five approaches, namely global legal pluralism, the transnational law approach, constitutionalism, the policyoriented approach, and the interdisciplinary IL/IR approach. The report tried to show how these approaches of international law conceptualised the role of non-State actors. Dr Bílková added two caveats. First, the Committee did not claim that these positions were the only ones that might have something to say about non-State actors; they were simply chosen because their scholars had written the most about non-State actors. Second, the Committee did

not claim that these approaches had a monolithic view on non-State actors. Furthermore, the Committee wanted to show that each position had strengths and limitations, and that no single approach could account for the richness of the empirical data from the first part of the report.

Dr Bílková summed up the general conclusions of the Committee after 8-10 years. Before doing so, she noted that, in the beginning, the Committee had ambitious plans to create general principles, but this turned out to be impossible. If general principles were to be set, then they must be extremely general, which would be useless with no content. Alternatively, creating very specific principles which would only be applicable in specific cases to specific entities did not correspond with the mandate of the Committee. Accordingly, the Committee decided on a set of reflections or questions for further studies. These were not recommendations.

The first reflection was whether the categories of non-State actors was theoretically sound and practically useful, and if not, whether it would be better to concentrate on specific non-State actors. The Committee did not suggest that the concept had never been useful, but it had possibly become obsolete. The question was, however, left open in the report. Dr Bílková did recommend that new ILA Committees be formed to deal with specific non-State actors.

The second reflection was that certain legal categories always came back when you dealt with non-State actors. Dr Bílková opted to use the concept of international legal personality to illustrate this second reflection. This concept was supposed to be very crucial for non-State actors because it should determine which non-State actors counted and which ones did not. We took it for granted that this concept was useful for this area of law, but it was actually an unclear and very fluid concept. It was unclear whether an entity was subject of rights and obligations first and then legal personality, or vice versa. The Committee found that the concept of legal personality was in fact not useful for this area of law. If it was to be used, it needed to be revisited. Dr Bílková once again suggested that a new Committee be established to deal with this topic specifically.

The final reflection concerned the relationship between international and domestic law regarding non-State actors. Again, it was suggested that a new Committee be established.

Dr Bílková concluded by inviting attendees to read the report, and to make any comments on it. The report was very open and there was space to accommodate many ideas.

The Chair thanked Dr Bílková for her excellent presentation and noted that the report made it clear the fundamental questions that were at stake.

Professor Hans-Joachim Heintze (Germany) expressed the view that the approach whereby every entity that was not a State was a non-State actor or vice versa was incorrect. It was unclear what a State was. Traditional international law did recognise actors other than States. People were the most important non-State actors and had rights and duties under international law. Transnational corporations were also recognised as non-State actors. Therefore, he liked the Committee's approach in recognising that not all entities that were not States were non-State actors, but felt that the Committee did not deal enough with this issue.

Dr Hilly Moodrick-Even Khen (Israel) thanked the panel for the presentation. Dividing non-State actors was an excellent idea because there were more differences than similarities, and the different entities were involved in different branches. By focusing on different entities such as armed groups, one could more closely examine them, and create guidelines for the international community that would be binding on these non-State actors.

Mr Samuel Matsiko (Uganda) pointed out that, at the beginning of her presentation, Dr Bílková spoke about organisations. From an international criminal law perspective, crimes against humanity must be pursuant to an organisation or policy. In his dissenting judgment in the Ruto and Sang Case (*The Prosecutor v. William Samoei Ruto and and Joshua Arap Sang*), Judge HansPeter Kaul noted that non-State actors had to be State-like. This had been an emerging debate in academia and he was sure that this was important for the Committee and its report.

Dr Bílková thanked attendees for their interventions. In response to Mr Matsiko, she said that, for the purposes of the report, the Committee looked at the collective element rather than specific organisations, but specifically wanted to move away from idea of "State-like". For an entity to qualify as a non-State actor, it was not necessary to be State-like.

In response to Dr Moodrick-Even Khen, Dr Bílková stated that the Committee had done a lot of research on armed groups. On a general level, the problem was to stay general as that was the mandate and not to focus on specific groups. In practice, however, there was specificity. The Committee only came across specific examples.

In response to Professor Heitze, Dr Bílková explained the Committee's approach that the dichotomy between non-State actors and States made sense as long as you had many States but only a few non-State actors. Once you had few States and many non-State actors that were not similar, it did not make sense to maintain the distinction.

Professor Noortmann emphasised that it was clear in certain cases that certain entities were not States, but there was a category of "others". What was interesting was that non-State actors did have rights and obligations under international law, but non-State actors had no say in the international law system which was imposed on them. For example, the Landmine Treaty was negotiated and signed by States. The treaty was then taken to Geneva, where an NGO was created called Geneva Call, which in turn presented the treaty to armed groups for them to sign. There were then two documents that were exactly the same; one was an international treaty, the other was not. Therefore, the question was whether there was a legal relationship between the "original" and the "copy". Professor Noortmann said that he was not suggesting that international law was obsolete, but that there was more going on that we needed to understand.

The Chair added that there were not just rights but also obligations under international law for non-State actors which might complicate the matter.

Mr Dipak Bhattacharyya (India) pointed out that the panel had made a distinction between State and non-State actors, and that part of the definition of non-State actors was that they must be legally recognised by States. There was a peculiar metamorphosis in India, where non-State actors in a previous regime became the State actor through parliamentary election and some State actors became non-State actors. The concepts of

State and non-State actor were therefore not constant. Conflict situations between non-State actors and State actors at this juncture of international law was very important. He queried why international law did not just stick to State actors; what is the aspiration in classifying certain actors as non-State actors and giving justification for their existence?

Mr George Anthony Long (US) found the definition of non-State actors to be too narrow such that it excluded certain groups that should be included. The definition required entities to be "legally recognised and organised". What exactly did this mean? For example, the US recognised that AlQaeda was a group and acknowledged that it was organised. Moreover, AlQaeda had an impact in the international arena on humanitarian law, so why were they excluded from the definition?

The Chair thanked Mr Long for this interesting contribution.

Ms Martha Bradley (South Africa) expressed her curiosity at the discussion of legal personality, and referred to the statement in the final report that different non-State actors might have differing legal personality. She asked the panel where on the scale of legal personality the Committee classified armed opposition groups and how the Committee dealy with the treaty obligations in terms of common Article 3 of the Geneva Conventions as applicable to these groups.

Dr Bílková responded to Mr Bhattacharyya by stating that the Committee obviously did not pretend that the categories were clear. The category of non-State actors had not been introduced or invented by the Committee. It had been out there for centuries and the Committee was just trying to make sense of it.

In response to Mr Long, Dr Bílková recognised that the definition was a most difficult aspect, and the Committee had expected questions on it. She agreed that the element of legal recognition might be confusing. As she was not present when the Committee discussed this element of the definition, she proposed to leave it to Professor Noortmann to explain. What Dr Bílková believed legal recognition to mean was not about being granted formal recognition but that it should not be completely illegitimate. In other words, it should be an entity with which a State would be willing to talk. That was why groups such as AlQaeda and the mafia were excluded, but armed opposition groups were included.

In response to Ms Bradley, Dr Bílková noted that the legal personality of armed oppostion groups was a very good question, and that the Committee had actually not done enough on international legal personality. That was why it was suggested that a new Committee be established to deal with this aspect in detail. The Committee did not set a formal scale regarding legal personality. The Committee did a lot of work on armed opposition groups, and the general consensus seemed to have been that that such groups did have some rights and duties under international humanitarian law, both under common Articles 2 and 3 of the Geneva Conventions but also under custom.

Professor Noortmann pointed out that there were many different perspectives within the Committee that reflected the various questions asked from the floor. He cited an author who said that legal personality was nonsensical from a practical and intellectual point of view. It was an internationalised fiction which was relevant when you wanted organisations to co-operate. Professor Noortmann emphasised that the question was therefore

always what it would add if a group, such as AlQaeda, had legal personality. It must be kept in mind that organisations were not put on trial in international law; only individuals were put on trial. On the whole, it was not useful to say that every person who took up arms was a non-State actor.

Dr Ioana Cismas (US) shared the concern with the definition, specifically the third element that nonState actors be legally recognised and organised entities. What the definition was saying was that a non-State actor was an actor that a State recognised as a non-State actor. This was a very State-centric view. She further commented that, in her opinion, international legal personality said nothing about the exact rights and obligations of States or non-State actors, but did offer a philosophical underpinning for a system of rights and obligations.

Professor André Thomashausen asked whether private military companies could be or were included as non-State actors.

Professor Noortmann responded to Dr Cismas by saying that the idea that a non-State actor was an actor that a State recognised as such was absurd and went against the grain of the Committee. There were non-State actors out there regardless of whether States recognised them. This should possibly be addressed in the report. He agreed with Dr Cismas's analysis of international legal personality and would understand it if the ILA no longer found the concept to be functional.

In response to Professor Thomashausen, Professor Noortmann noted that private military companies were companies, and as such were no different to companies like Nike. However, these companies fell out of some national enforcement and were also excluded from international criminal law. There was still no clarity about what to do with these companies. In an ideal world, there would be international law that would be enforced by all States in their national law and all non-State actors would be equally accountable.

Dr Bílková confirmed that private military companies fell within the definition of non-State actors. She agreed with concerns about nonState actors being legally recognised by States as the concept was misleading. The Committee should consider redrafting the report in this regard and introduce the concept of "legitimate". But she was not sure whether the trap could be escaped completely as States must play some role. But their role could be minimised to give the concept of non-State actors some independence.

Professor Noortmann added that there had been a discussion about the title of the Committee, ie, whether it would be "non-State actors *in* international law" or "non-State actors *and* international law". In the end, the latter title was chosen, which reflected more of a social legal approach as to how nonState actors were formed and how they were affected.

Mr Long raised the issue of piracy, which had been historically recognised as an international event. It must be recognised that pirates had a certain status in international law so they had to be included somehow. In terms of the clarification that "legally recognised" meant "not illegitimate", he asked by which standard we would determine that a group was illegitimate.

Ms Genny Ngende opined that it was unwise to categorise all corporations as non-State actors and lacking legal personality or legal status since the human rights encroachments

of a State-owned enterprise could be attributed to the State in regional human rights systems. She therefore asked whether this broad generalisation did not perpetuate human rights abuses.

Professor Noortmann recognised that who decided who was legitimate and who was not was a bit problematic. The term "legitimate" was often used for political purposes to negatively denote an entity. He suggested that academics should avoid political labels and try to come up with their own labels.

Professor Noortmann noted that under certain circumstances the acts of corporations could be attributed to States, which went into State responsibility. In the Netherlands, for example, corporations could be held criminally accountable but in international law this was not the case. International law was not equipped to bring non-State actors to trial or to hold them accountable.

Mr Bhattacharyya again queried what one gained by labelling them as non-State actors.

Professor Noortmann reiterated that, in an ideal world, we would just be dealing with States and States would be dealing with all other entities. But we were not living in an ideal world, and therefore the had to accommodate non-State actors. The problem would not be solved by just looking at States.

Dr Bílková added that we could ignore everything and just concentrate on States in international law, but that was difficult as States did not ignore non-State actors domestically. It was not the Committee's theoretical ambition to create non-State actors as it was already a reality. The definition did not try to label specific entities. The Committee used the general categories without looking at their specific content. One could discuss the definition again and again but the definition was not so important as it just provided context for the Committee. The question was what would be the added value of including groups such as AlQaeda and pirates. It would possibly lead to more research, but there was already so much research out there and the Committee could not add anything substantially new. Including these groups could possibly change the Committee's conclusions, but a broader definition would not change the general conclusions.

The Chair thanked the panel and attendees, and gave the floor to Professor Noortmann to introduce the resolution.

Professor Noortmann drew attendees' attention to the fact that the resolution specifically stated that it did not contain general recommendations or guidelines. The conclusions drawn were:

1. the group of non-State actors was growing and they were very diverse
2. there were distinctive but similar practices of these organisations depending on the legal regime that they were in and the way they acted
3. there was some significance to legal status.

The resolution asked the steering committee to recognise what the Committee had done and suggested that the Committee be dissolved. The Committee had achieved its mandate and was in favour of establishing new committees with more focused mandates. The resolution did not suggest a specific list of possibilities for new committees as the

Committee wanted to leave it up to the ILA members to make suggestions to the Director of Studies. Basically, the resolution was clear and short.

Dr Pauline Collins (Australia) suggested that, in light of the discussion on the definition of non-State actors, the word "broad" be deleted from the phrase "the Committee has adopted a *broad* working definition of non-state actors" in paragraph 5. She further suggested that the phrase "an applied typology of non-State actors and" be removed from the 6th paragraph so that the paragraph reads: "Recognising a corresponding need for a differentiated examination of the status, rights and/or duties of specific types of non-State actors under international law".

Professor Noortmann agreed that the word "broad" should possibly be removed from because many would agree that the definition was actually narrow. The reason "applied typology" was included was to indicate that it should be more of a practical exercise and not just an academic one; therefore, he did not agree that paragraph 6 should be changed.

Dr Bílková added that the word "broad" was included to establish a causal link between the first and second part of the paragraph 5. It made it clear that no specific guidelines were laid down. Without the inclusion of the word "broad" the sentence was meaningless.

Dr Collins responded that it was a matter of interpretation. While she accepted Dr Bílková's point regarding the word "broad", she believed that some people would say that it was actually a narrow definition.

Ms Oonagh Fitzgerald (Canada) thanked the panel for the interesting discussion. She noted that it did make sense to dissolve the Committee. However, she queried whether the initial mandate of the Committee asked the wrong question given the significant issues that remained unanswered. She queried whether the Committee should have focused in the first place on a specific topic, and suggested that the question posed was too broad for it to be useful.

Professor Noortmann clarified that, from the beginning, the Committee had purposefully adopted a broad mandate. It was intended to be an academic exercise that would sculpt and map the position of non-State actors. The Committee now had two options: the first being to ask for an extension to concentrate on one topic; the second to dissolve after 10 years and to create a new committee which allowed for new members with new and different perspectives.

Dr Bílková went back to paragraph 5 of the resolution and suggested that it be split into two paragraphs. The first part starting with "Noting that the Committee defines non-State actors as…" and including the actual definition. The second part would then start with "[a]cknowledging that it is not possible to draw general or particular conclusions…". She concluded by asking whether this would be satisfactory to members.

Professor Noortmann responded to Dr Bílková's suggestion that it would be a strategic decision. It was agreed that this was just a working definition and it would get a life of its own when added to an ILA resolution. Therefore, he voted against adding the definition into the resolution.

Dr Cisma expressed the opinion that, while it might just be a working definition, it would go beyond the lifetime of the report and be an important definition in the field of

international law. In her view, it would be more honest for the Committee to exclude the element of the definition (referred to in her earlier intervention) and just say that it was excluding individuals and any other groups because they did not want to work on them. It was for the Committee to set its own mandate and it did not need to set up criteria to justify any exclusion.

Professor Noortmann reiterated his preference for the definition not to be included in the resolution. The report might have broader implications than the definition adopted.

Dr Bílková said that she understood Dr Cisma's points, but she had two issues with it. First, the definition already appeared in the first report of the Committee; therefore, any attempts to change it would have to be negotiated again with Committee members. Second, there were some criteria on which the Committee based the definition and it was not simply written to exclude certain entities just because the Committee did not like them.

Regarding paragraph 5 of the resolution, Dr Bílková accepted Professor Noortmann's argument about not adding the definition into the resolution and therefore suggested that the first part of the fifth paragraph of the resolution be deleted and just read as: "Acknowledging the fact that it is not possible to draw general or particular conclusions…".

Professor Noortmann felt that paragraph 5 of the resolution should remain unamended. By including the idea that it was a working definition explained that general guidelines could not be adopted.

Professor Danil Vinnitskiy drew the panel's attention to a contradiction between paragraph 38 and 143 of the final report and paragraph 6 of the resolution. It might be necessary to mention that it was necessary to take additional steps in the report as well as the resolution.

Professor Noortmann pointed out that the rules of ILA prohibited references to the report in the resolution. There was a footnote which listed the publications used which was also available.

Dr Bílková acknowledged that paragraph 38 of the report eschewed new classifications while paragraph 6 of the resolution stated that there was a need for an applied typology. This was, however, an issue of wording rather than of substance. It was misleading and should possibly be revisited.

Professor Ludmila Galenskaya (Russia) stated that it was evident that the report must have some concrete conclusion which should be included in the resolution. As an example, she proposed to add in the conclusion of the report and in the resolution that all non-State actors were obliged to fulfil the provisions of the general principles of international law.

Professor Noortmann responded that the Committee members were divided on whether or not all non-State actors had all the duties and responsibilities under international law. Therefore, they could not come to the conclusion that Professor Galenskaya recommended.

Dr Bílková thanked Professor Galenskaya for her suggestion, which had been received previously and which Dr Bílková had attempted to reflect in the report. There might

be consensus that non-State actors should respect the obligations that they have under international law, but such a general statement did not add any value as it did not say anything about the contents of such obligations or whether they differed from one non-State actor to the next.

Mr Long pointed out that there were State actors and then there were actors other than States which were classified as non-State actors but this classification does not include all actors that were not States.

The Chair asked Mr Long whether he had a proposal.

Mr Long suggested that paragraph 3 of the resolution could state "actors other than States" rather than "non-State actors" and then state that the Committee decided to focus on non-State actors as a sub-category of actors other than States.

Professor Noortmann expressed a wish that Mr Long had been on the Committee to begin with. Unfortunately, the Committee had already passed the stage of labelling and it would be strange if the Committee's title was non-State actors and international law and the resolution introduced the concept of actors other than States. He agreed that the terminology might not be correct but it could no longer be changed at this point.

Dr Bílková agreed that the resolution could not introduce a new concept but it could be included in the definition in the report.

Mr Bhattacharyya noted that the resolution was interim in nature and that not all Committee members were present to clarify its meaning. The resolution should be accepted as a interim resolution with a few changes as suggested, and then a final resolution could be adopted later.

The Chair agreed and said that that would be his suggestion as well. The resolution as it stood was an important one and summed up the work of the Committee over the last 8-10 years. The Chair asked whether there were any substantive feelings of change, of which there were none. There was consensus among attendees on the adoption of the resolution before the Chair closed the meeting.

Reporters: Clea Strydom and Ernest Yaw Ako

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

NUCLEAR WEAPONS, NON-PROLIFERATION AND CONTEMPORARY INTERNATIONAL LAW

Members of the Committee:

Professor Jonathan L Black-Branch (UK)*: Chair*
Dr Dieter Fleck (Germany): *Rapporteur*

Professor Anguel Anastassov (Bulgaria)
Ms Emily Arnberg (Australia)
Professor Masahiko Asada (Japan)
Alternate: Professor Akira Mayama
Associate Professor Sascha-Dominik Bachmann (UK)
Professor Seung Hwan Choi (Korea)
Professor Suh-Yong Chung (Korea)
Associate Professor Alberto Costi (New Zealand)
Ms Kate Deere (Australia)
Dr A J J de Hoogh (Netherlands)
M Pierre-Emmanuel Dupont (France)
Dr James Fry (Hong Kong)
Dr Francis Grimal (UK)
Mr Ulf Haeussler (Germany)
Professor Larry Johnson (U.S.)
Professor Thilo Marauhn (Germany)
Dr Sarah McCosker (Australia)
Professor Tereza Cristina Nascimento Franca (Brazil)
Mr Andreas Persbo (Sweden)
Alternate: Mr Dirk Roland Haupt
Dr Daniel Rietiker (Switzerland)
Professor Marco Roscini (Italy)
Professor Robbie Sabel (Israel)
Ambassador Henrik Salander (Sweden)
Dr Vasilka Sancin (Slovenia)
Dr Aurel Sari (UK)
Ms Lisa Tabassi (Austria)
Professor Gabriella Venturini (Italy)

THIRD REPORT

Legal Issues of Verification of Nuclear Non-Proliferation Commitments

Introduction

1. Mandated 'to consider competing legal approaches to non-proliferation and regulating nuclear weapons within the contemporary context', the Committee is amidst a process of assessing the three pillars of the 1968 Nuclear Non-Proliferation Treaty (NPT)[1] – i.e. non-proliferation of nuclear weapons; the right to develop research, production and use of nuclear energy for peaceful purposes; and nuclear disarmament – with a special focus on controversial issues and existing interdependencies between those pillars. A Preliminary Report on key elements of the practice regarding nuclear energy, non-proliferation and the regulation of nuclear weapons was presented at the Sofia Conference 2012. The *Second Report*, which was discussed at the Washington Conference 2014,[2]

[1] Treaty on the Non-Proliferation of Nuclear Weapons (1 July 1968) 729 *UNTS* 161.

[2] ILA Committee on Nuclear Weapons, Non-Proliferation and Contemporary International Law, Second Report: Legal Aspects of Nuclear Disarmament (Washington D.C. 2014), http://www.ila-hq.org/en/committees/index.cfm/cid/1025.

has concluded that steps towards fulfilling nuclear disarmament obligations and providing appropriate access to peaceful uses of nuclear energy may substantially influence compliance with nuclear non-proliferation obligations. It has underlined that effective non-proliferation may not only support developments towards nuclear disarmament, but also help to improve security and safety of peaceful uses. The Committee will have to keep this in mind when developing 'options for future legal cooperation in this field', which is expected under the Committee Mandate.

A first set of draft elements of the envisaged ILA *Declaration on Legal Issues of Nuclear Weapons, Non-Proliferation and Peaceful Uses of Nuclear Energy* was included in the Second Report. It comprises not only existing principles and rules, but also desirable new rules. This list has been expanded as shown in the *Annex* to this Report, but there are gaps still to be filled. A comprehensive Commentary of all principles and rules will accompany the final Declaration.

2. The present *Third Report* of the Committee is devoted to *Legal Issues of Verification of Nuclear Non-Proliferation Commitments*. It looks at verification in a wider context, comprising also general legal aspects of compliance control, dispute settlement, and enforcement, thus reflecting legal controversies in literature[3] and State practice. A research project, conducted in November 2014 by the Rapporteur in cooperation with the Institute of International Peace and Security Law at the University of Cologne and kindly sponsored by the *Fritz Thyssen Stiftung für Wissenschaftsförderung* was of particular support for raising contentious issues, reviewing arguments and counter-arguments, and exploring possibilities for consensus solutions. The results of this research project have been published in the new book series, edited by the Chairman and the Rapporteur of the Committee.[4]

3. This Report is divided into six parts. The first four parts analyse legal issues related to different (but to some extent interrelated) nuclear verification regimes and their associated organisations. *Part I* is devoted to legal aspects of the verification practice of the International Atomic Energy Agency (IAEA). It focuses on recent controversies related to the Agency's mandate to verify both the non-diversion of nuclear material from declared activities (i.e correctness) and the absence of undeclared nuclear activities in the State (i.e. completeness). *Parts II, III and IV* discuss special regulations applicable to the European Atomic Energy Community (EURATOM), the Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials (ABACC), and the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) respectively, and explore some overlaps with, and synergy effects for, the work of the IAEA. *Part V* evaluates interdependencies between legal obligations and best practices as an essential element of the nuclear non-proliferation regime. Finally, the way ahead for the work of the Committee will be discussed and first conclusions are drawn by summarizing relevant findings, identifying

[3] See e.g. Oliver Meier and Christopher Daase (Eds), *Arms Control in the 21st Century. Between coercion and cooperation* (London: Taylor and Francis 2012); Oliver Meier (Ed), *Technology Transfers and Non-Proliferation. Between Control and Cooperation*, Routledge Global Security Studies (New York: Routledge 2013); Geir Ulfstein (Ed), *Making Treaties Work. Human Rights, Environment and Arms Control* (CUP 2007), 243-272.

[4] Jonathan L. Black-Branch and Dieter Fleck (Eds), *Nuclear Non-Proliferation in International Law*: *Vol. I* with Foreword by Mohamed ElBaradei. *Vol. II Verification and Compliance* (Berlin/Heidelberg: Springer/Asser Press, 2014 and 2015).

open issues, developing recommendations, and recording draft elements of the envisaged ILA Declaration (*Part VI* and *Annex*).[5]

4. *Terms and Conditions of Verification*. The rules of Articles 31-32 of the Vienna Convention on the Law of Treaties between States (VCLT)[6] and the identical Articles 31-32 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO)[7] will guide our analysis. In the absence of treaty definitions relevant terms will be used according to their ordinary meaning and common understanding. General UN terminology and principles are particularly relevant in this context.[8] It may be recalled that there is wide consensus on the following understanding:

> Verification is a process which establishes whether the States parties are complying with their obligations under an agreement. The process includes: collection of information relevant to obligations under arms limitation and disarmament agreements; analysis of the information; and reaching a judgement as to whether the specific terms of an agreement are being met. The context in which verification takes place is that of the sovereign right of States to conclude and their obligation to implement arms limitation and disarmament agreements. Verification is conducted by the parties to an agreement, or by an organization at their request.[9]

The *P5 Glossary of Key Nuclear Terms*, recently promulgated by China on behalf of the five nuclear-weapon States Parties to the NPT, describes 'design information verification (DIV)' as follows:

> Activities carried out by the IAEA at a facility to verify the correctness and completeness of the design information provided by the State. An initial DIV is performed on a newly built facility to confirm that the as-built facility is as declared. A DIV is performed periodically on existing facilities to confirm the continued validity of the design information and of the safeguards approach. The IAEA's authority for performing a DIV is a continuing right throughout all phases of a facility's life cycle until the facility has been decommissioned for safeguards purposes.[10]

To the extent these UN and P5 documents do not fall within one of the elements set out in Article 31 VCLT [Art. 31 VCLTIO], recourse to them is possible under Article 32 VCLT [Art. 32 VCLTIO].

---

[5] Special gratitude may be expressed to Committee members and friends, in particular to Anguel Anastassov, Masahiko Asada, Tom Coppen, Sonia Drobysz, Dirk Roland Haupt, André de Hoogh, Larry Johnson, Wolfgang Kilb, David A. Koplow, Maurizio Martellini, Tariq Rauf, Daniel Rietiker, Laura Rockwood, Michael D. Rosenthal, Carlton Stoiber, and Gabriella Venturini, for critical comments on earlier drafts of this Report.

[6] Vienna Convention on the Law of Treaties (23 May 1969) 1155 *UNTS* 331, in force since 27 January 1980.

[7] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986), not yet in force.

[8] See United Nations Department for Disarmament Affairs, *Study on the Role of the United Nations in the Field of Verification*, New York 1991, http://www.un.org/disarmament/HomePage/ODAPublications/DisarmamentStudySeries/PDF/SS-20.pdf.

[9] Ibid, para. 12.

[10] *P5 Glossary of Key Nuclear Terms*, http://www.china-un.org/eng/chinaandun/disarmament_armscontrol/npt/P020150429800995728299.pdf, p. 135.

While verification is cooperative in nature in that it presupposes first and foremost the cooperation of the State Party concerned, its activities in certain circumstances may go beyond what is specifically agreed by the States involved in a given situation and should comprise generic, anticipatory and complementary work to ensure any collection of evidence that appears to be relevant for the application of a legal norm. Parties have to consider this general principle in implementing their obligations.

5. *Effectiveness.* Particular attention shall be given to the question whether the verification process serves its purpose in effectively assessing all relevant facts and establishing compliance with the obligations undertaken under existing treaty law and potentially evolving customary law. Not only legal obligations but also best practices are to be considered in this context. While there will be a need to come up with metrics of verification, there is some uncertainty with respect of applicable standards. What are the measurements of the different concepts? How can they be objectified? How can they be put into context?

As the goal of verification is to build confidence in parties' good faith compliance, and to support effective enforcement mechanisms in a case of violation, the criteria that the information-gathering process should meet will include requirements to produce information that is detailed, complete, timely, authentic, and confined to treaty-related matters. The relevant standard for this is not the same as the tests for what might be admissible evidence in a court of law, and no burden of proof rule would apply for cooperative efforts to maintain or restore confidence.[11] But specific practices have developed over time that may be considered as being unique for a successful implementation of arms control agreements. *Parts I – V* undertake to give distinct answers to these questions.

Part I: The International Atomic Energy Agency

6. *The IAEA Safeguards System*. Created in response to U.S. President Eisenhower's 1953 'Atoms for Peace' initiative,[12] the IAEA was already operative several years before the NPT was adopted: its Statute was negotiated within less than three years and entered into force in 1957.[13] As stated in Article II, the Agency shall seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world; it shall ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose. As spelled out in Article III.A.5, the Agency is authorized

> [t]o establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information made available by the Agency or

[11] See Michael Bothe, 'Verification of Facts', in Rüdiger Wolfrum (Ed), *Max-Planck-Encyclopedia of Public International Law,* 10 vols (OUP 2012), para 62, online edition www.mpepil.com (*MPEPIL*).

[12] See Address by Mr. Dwight D. Eisenhower, President of the United States of America, to the 470th Plenary Meeting of the United Nations General Assembly, https://www.iaea.org/about/history/atoms-for-peace-speech. The idea of an international organisation in charge of the control of atomic energy dates back from before 1953 though; see UNGA A/RES/1(I)(1946), Acheson Lilienthal Report (16 March 1946), http://www.learnworld.com/ZNW/LWText.Acheson-Lilienthal.html, Baruch Plan (1946), http://www.atomicarchive.com/Docs/Deterrence/BaruchPlan.shtml.

[13] Statute of the International Atomic Energy Agency – IAEA Statute – (26 October 1956, amended 1963, 1973, 1989, and 1999), https://www.iaea.org/about/about-statute.

> at its request or under its supervision or control are not used in such a way as to further any military purpose; and to apply safeguards, at the request of the parties, to any bilateral or multilateral arrangement, or at the request of a State, to any of that State's activities in the field of atomic energy.

It is for this purpose that the IAEA safeguards system has been developed as a central part of the Agency's professional activities, in addition to the assistance, services and supplies provided to Member States.[14] The IAEA had served as a forum for exchange during NPT negotiations and the size and composition of the IAEA Board of Governors was adapted to accommodate for the Agency's role and functions envisaged in the NPT.[15]

In line with the obligation of non-nuclear-weapon States Parties to the NPT to conclude safeguards agreements with the IAEA (Art. III.1 NPT), the IAEA developed INFCIRC/153 (Corr.), which serves as the basis of Comprehensive Safeguards Agreements (CSAs).[16] The Board of Governors of the IAEA has confirmed on numerous occasions, since as early as 1992, that paragraph 2 of INFCIRC/153 (Corr.)

> The Agreement should provide for the Agency's right and obligation to ensure that safeguards will be applied, in accordance with the terms of the Agreement, *on all source or special fissionable material in all peaceful nuclear activities* within the territory of the State, under its jurisdiction or carried out under its control anywhere, for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear explosive devices. (*emphasis added*)

authorizes and requires the Agency to seek to verify both the non-diversion of nuclear material from declared activities (i.e. correctness) and the absence of undeclared nuclear activities in the State (i.e. completeness of national reports).[17] Clear reporting obligations apply even in case of the use of nuclear material in a non-proscribed military activity, i.e.

---

[14] Laura Rockwood, 'The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the IAEA Safeguards Agreements', in Geir Ulfstein (ed), *Making Treaties Work. Human Rights, Environment and Arms Control* (CUP 2007) 301-323; see also Rockwood, *Legal Framework for IAEA Safeguards* (Vienna: IAEA, 2013).

[15] Mohamed I. Shaker, *The Nuclear Nonproliferation Treaty: Origin and Implementation 1959-1979*, 3 vols (London/Rome/New York: Oceana, 1980), Vol. 1, 67, 362-368.

[16] IAEA, The Structure and Content of Agreements Between the Agency and States required in connection with the Treaty on the Non-Proliferation of Nuclear Weapons, INFCIRC/153 (Corr.) (June 1972).

[17] IAEA Report GOV/2013/6 (21 February 2013), n 61, http://www.iaea.org/Publications/Documents/Board/2013/gov2013-6.pdf. The correctness and completeness argument has also been discussed in other contexts, see e.g. document GC (39)/17, Strengthening the Effectiveness and improving the Efficiency of the Safeguards System, Report by the Director General to the General Conference, 22 August 1995, https://www.iaea.org/About/Policy/GC/GC39/GC39Documents/English/gc39-17_en.pdf., para. 5: 'The problem of undeclared activities was highlighted in Iraq, but was not unknown. Indeed, the need for the safeguards system to provide assurances regarding both the correctness and the completeness of a State's nuclear material declarations was considered by the drafters of the INFCIRC/153 (Corr.), the basis for comprehensive safeguards agreements. The scope of INFCIRC/153 was not limited to the nuclear material actually declared by the State; it also includes that which should be declared. However, the system such as it had developed up to the Iraqi case, had limited capability to deal with completeness. This was the result of practical, rather than legal, considerations.'

for non-explosive military purposes (nuclear naval propulsion and space propulsion).[18] The same applies for material containing uranium or thorium which has not reached the stage of the nuclear fuel cycle where it is suitable for fuel fabrication or isotopic enrichment and is directly or indirectly exported to a non-nuclear-weapon State as well as when it is imported to the State.[19]

The IAEA has developed the State-level approach as a method of safeguards implementation which resulted from the Agency's work to strengthen the effectiveness and efficiency of the safeguards system.[20] Controversies on whether the IAEA has acted beyond its legal powers by affirming its authority to verify the completeness of States' declarations in conducting verification activities,[21] have increased general interest in developing

[18] See paragraph 14 of INFCIRC/153/Corr., stating *inter alia*: 'The Agreement should provide that if the State intends to exercise its discretion to use *nuclear material* which is required to be safeguarded thereunder in a nuclear activity which does not require the application of safeguards under the Agreement, the following procedures will apply: (a) The State shall inform the Agency of the activity, making it clear: (i) That the use of the *nuclear material* in a non-proscribed military activity will not be in conflict with an undertaking the State may have given and in respect of which Agency safeguards apply, that the *nuclear material* will be used only in a peaceful nuclear activity; and (ii) That during the period of non-application of safeguards the *nuclear material* will not be used for the production of nuclear weapons or other nuclear explosive devices'.

[19] See paragraph 34 of INFCIRC/153/Corr., stating: 'The Agreement should provide that: (a) When any material containing uranium or thorium which has not reached the stage of the nuclear fuel cycle described in sub- paragraph (c) below is directly or indirectly exported to a non-nuclear-weapon State, the State shall inform the Agency of its quantity, composition and destination, unless the material is exported for specifically non-nuclear purposes; (b) When any material containing uranium or thorium which has not reached the stage of the nuclear fuel cycle described in sub-paragraph (c) below is imported, the State shall inform the Agency of its quantity and composition, unless the material is imported for specifically non- nuclear purposes; and (c) When any *nuclear material* of a composition and purity suitable for fuel fabrication or for being isotopically enriched leaves the plant or the process stage in which it has been produced, or when such *nuclear material,* or any other *nuclear material* produced at a later stage in the nuclear fuel cycle, is imported into the State, the *nuclear material* shall become subject to the other safeguards procedures specified in the Agreement.'

[20] See IAEA reports on the State-Level Concept (SLC): Document GOV/2013/38, https://armscontrollaw.files.wordpress.com/2012/06/state-level-safeguards-concept-report-august-2013.pdf: 12. The term 'State-Level Concept' was first introduced to the Board of Governors in the Safeguards Implementation Report (SIR) for 2004 to describe safeguards implementation that is based on State-level approaches developed using safeguards objectives common to all States with CSAs and taking State-specific factors into account.21 As the SIR for 2004 noted, the State-level concept was being implemented for States with integrated safeguards and would be extended to all other States with CSAs; Document GOV/2014/41, https://armscontrollaw.files.wordpress.com/2014/09/iaea-state-level-safeguards-document-august-2014.pdf: The SLC refers to the general notion of implementing safeguards in a manner that considers a State's nuclear and nuclear-related activities and capabilities as a whole, within the scope of the State's safeguards agreement. See also Laura Rockwood, 'The IAEA's state-level concept and the law of unintended consequences', in *Arms Control Today* (September 2014), https://www.armscontrol.org/act/2014_09/Features/: 'So entered into the lexicon of safeguards the state-level concept, simply another way of referring to the agency's practice, well established by then, of evaluating all safeguards-relevant information about a state as a whole and, where possible, tailoring safeguards to fit the state concerned.'

[21] See the three rounds of discussion between Daniel H. Joyner, Christopher A. Ford and Andreas Persbo, *Bulletin of the Atomic Scientists*, October, November and December 2012, http://thebulletin.org/iran-and-bomb-legal-standards-iaea-0.

an unequivocal confirmation by treaty law that States undertake to inform about, and accept inspector access to, all aspects of nuclear fuel cycle within their territories, and that the Agency has the authority to verify the completeness of their declarations.

Given the practical limitations of verifying completeness under INFCIRC/153 safeguards agreements, the Model Additional Protocol (AP) to the agreements concluded between States and the Agency for the application of safeguards was developed to strengthen the IAEA's ability to do so.[22] The Security Council called upon all non-nuclear-weapon States Parties to the NPT to sign, ratify and implement the AP.[23] Yet in a sizable number of States this still remains to be done. Hence continued attention is necessary for ways and means of contributing to the universal acceptance of the AP.[24]

7. *A Gap Between Mandate and Authority?* The question whether paragraph 2 of IAEA document INFCIRC/153 (Corr.),[25] and, indeed, the full text of that document in the light of subsequent agreements and practice is to be read as implying that the IAEA is authorized to verify the absence of 'undeclared' nuclear activities in the State subject to safeguards under CSAs, i.e. the 'completeness' of the declarations made by the State on the extent of its nuclear activities, has been discussed in-depth at the 2014 Cologne conference.[26]

a) On the one hand one participant has stated that while a textual approach, examining the context, object and purpose of CSAs and taking recourse to the *travaux préparatoires,* gives some weight to the 'completeness' argument so that it could be assumed that this embodies a correct interpretation of the disputed provision, this position was in turn weakened by the consideration of other relevant elements: at the time of the entry into force of the NPT and of the negotiation of the INFCIRC/153 safeguards system – at least until the 1990s – there was no shared understanding on the now disputed interpretation of para. 2 of INFCIRC/153; the various decisions of the IAEA Board of Governors between 1992-95 that are often invoked as supporting the 'completeness' argument did not in fact embody a common unequivocal endorsement by the Board; disagreements on interpretation have persisted to date, with a few States expressing reservations on the 'completeness' argument; subsequent agreement or subsequent practice that would confirm the 'completeness' argument could not be identified; hence an authority of the IAEA to verify the 'completeness' of declarations of States could only derive, practically and also legally, from the application of an Additional Protocol.[27]

---

[22] IAEA, Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards, INFCIRC/540 (Corr.) (September 1997).

[23] SC Res 1887 (2009), paras. 15 b and 19.

[24] See *Conclusion of Additional Protocols: Status as of 31 December 2014*, http://www.iaea.org/safeguards/documents/AP_status_list.pdf; https://www.iaea.org/safeguards/documents/sir_table.pdf; Masahiko Asada, 'The NPT and the IAEA Additional Protocol', in Black-Branch/Fleck (eds), op.cit. Vol. II (above, n 4), Chapter 5.

[25] See above (n 16 and accompanying text).

[26] See above (para. 2); Black-Branch/Fleck (eds), op.cit. Vol. II (above, n 4), Chapters 2 (Tariq Rauf), 3 (Pierre-Emmanuel Dupont), 4 (Laura Rockwood and Larry Johnson), 5 (Masahiko Asada), 8 (Gerald Kirchner and Stefan Oeter), and 11 (Barry Kellman).

[27] Pierre-Emmanuel Dupont, 'Interpretation of Nuclear Safeguards Commitments: the role of subsequent agreement and practice', op.cit., Chapter 3.

b) On the other hand, however, several participants contested those arguments and underlined that even without an Additional Protocol the IAEA is fully authorised to verify the completeness of States' declarations: A plain reading in good faith in accordance with the ordinary meaning to be given to the terms of the NPT, the IAEA Statute and the respective safeguards agreements in their context and in the light of their object and purpose clearly demonstrate the right and obligation of the Agency to verify the nondiversion of the declared nuclear material and the absence of undeclared nuclear material and activities; this has been supported by the context of these agreements in the light of their object and purpose and the circumstances of their conclusion; the negotiation history further confirms this interpretation and so do subsequent agreements and the practice of the Parties to those agreements, as reflected in the documents adopted by the States Parties to the NPT in their quinquennial review conferences, the decisions of the IAEA policymaking organs and the consistent practice of the IAEA at least since the early 1980s.[28]

The IAEA Board of Governors has no authority to opine as a formal matter on compliance with the NPT as the IAEA is not a party to it, yet the Board has confirmed that a failure to declare nuclear material (and/or facilities) under a CSA constitutes non-compliance with a CSA (see e.g. Iraq, Romania, Iran, Libya, Syria). While until the early 1990s the implementation of safeguards under CSAs largely, although not exclusively, focused on the verification of nuclear material and facilities declared by the State concerned, the discovery in 1991 of Iraq's clandestine nuclear programme made it clear that more should, and could, be done by the IAEA with a view to providing assurances not just of the nondiversion of declared nuclear material, but of the absence of undeclared nuclear material and activities in such States.

To interpret INFCIRC/153, and the agreements concluded on the basis of that document, in such a way as to preclude IAEA verification of the correctness and completeness of States' declarations under such agreements would defeat the very object and purpose of the NPT (which is to prevent the proliferation of nuclear weapons, as provided in its Article III.1) and the object and purpose of the safeguards agreements (which is to verify compliance of States Parties with their obligations; ensure the timely detection of any diversion of nuclear material to nuclear weapons and other nuclear explosive devices; and deter any such diversion through the risk of timely detection).[29] While it would make no sense to interpret the NPT as requiring anything other than verification that a State has in fact placed all nuclear material under safeguards, it would be incorrect to assert, on any basis, that a State's failure to declare nuclear material does not constitute a violation of its safeguards agreements. It was also underlined that the IAEA must base its activities on the evaluation of all available information on the State according to its three safeguards objectives[30] common to all States with CSAs: (1) to detect undeclared nuclear material and activities anywhere in the State; (2) to detect undeclared production or processing of nuclear material at facilities and locations outside facilities (LOFs) where nuclear material is customarily used; and (3) to detect diversion of declared nuclear material at facilities

[28] See Laura Rockwood and Larry Johnson, 'Verification of Correctness and Completeness in the Implementation of IAEA Safeguards: the law and practice', op.cit., Chapter 4.

[29] Id.

[30] See, 'The Safeguards System of the International Atomic Energy Agency', https://www.iaea.org/safeguards/safeguards-in-practice.

and LOFs.[31] Furthermore it has been stressed that the very purpose of any CSA was to assure others that a State's declaration of nuclear material stocks is both correct and complete.[32]

In this context an important observation is that since the question of State non-compliance with safeguards obligations is not a trial, no burden-of-proof rule applies here. The IAEA, collecting and evaluating facts with objectivity and great diligence, may be in the position to conclude that nuclear material remained in peaceful activities, or it may not be in a position to draw this conclusion. No State has the legal authority to review an IAEA determination that it lacks sufficient information to verify compliance, although it may provide counter-arguments and seek dispute settlement.[33]

At the 2015 NPT Review Conference there was consensus on this issue,[34] irrespective of the fact that no final document was adopted for reasons unrelated to IAEA safeguards.

c) A clear distinction should be made between the authority of the IAEA to examine the correctness and completeness of declarations made by States and the ability of assuring the non-diversion of nuclear material from declared activities. The former is fully covered by the mandate of the Agency as stated in the Statute, implemented in its safeguards agreements, and confirmed by practice; the latter depends on the cooperation by the State concerned. States must cooperate to secure verification by the IAEA. This applies not only to the Agency's obligation and authority to investigate activities at facilities and other locations with nuclear material declared to the Agency, but also to extend investigations, where necessary, to undeclared locations: If the IAEA has an obligation to seek completeness and correctness at declared facilities, that obligation also extends to undeclared locations.

Rights and obligations specifically agreed in CSAs and APs may facilitate that cooperation, but they are in no way conditioning the mandate of the Agency which otherwise could become hostage of agreements with a particular State to the detriment of other States. The purpose of the APs which are supplementing the CSAs is

---

[31] Tariq Rauf, 'The General Framework of IAEA Safeguards', op.cit., Chapter 2.

[32] Gerald Kirchner and Stefan Oeter, 'Technical Limits of Verification and Their Implications for Treaty Design', op.cit., Chapter 8.

[33] Barry Kellman, 'Enforcing Nuclear Non-Proliferation – The Role of Verification', op.cit., Chapter 11; see also Peter Friend, 'Urenco's Views On International Safeguards Inspection', 8th International Conference on Facility Operations – Safeguards Interface (Portland, OR, 30 March – 4 April 2008), http://web.mit.edu/stgs/pdfs/Friend%20-%20Urenco%27s%20Views%20on%20International%20Safeguards%20Inspection.pdf, at p. 9.

[34] See Draft Final Document NPT/CONF.2015/R.3 (21 May 2015), para. 19: 'The Conference reaffirms that the implementation of comprehensive safeguards agreements pursuant to article III, paragraph 1, of the Treaty should be designed to provide for verification by IAEA of the correctness and completeness of a State's declarations so that there is a credible assurance of the non-diversion of nuclear material from declared activities and of the absence of undeclared nuclear material and activities.' See also para. 24: 'The Conference stresses the importance of the IAEA exercising fully its mandate and its authority in accordance with its Statute to provide assurances about the non-diversion of declared nuclear material and the absence of undeclared nuclear material and activities in accordance with respective comprehensive safeguards agreements and, where relevant, additional protocols.'

to establish terms and conditions for cooperation,[35] not to re-define the verification mandate as such. Cooperation in the implementation of safeguards might be difficult to measure: It is a legal obligation and applicable terms and conditions generally derive from agreements providing complete and comprehensive declarations on time, facilitating inspectors' access, etc.; but cooperation is also about a positive good faith attitude towards the implementation of safeguards, which might go beyond strictly applying legal obligations.

It should be considered in this context that the Board of Governors of the IAEA and the Secretariat are, as organs of an international organization, competent to interpret the applicable institutional legal framework and thereby develop it. Hence the introduction of the State-Level Concept merely underlines the fact that the IAEA has a broad institutional mandate to implement new safeguards practices.[36]

d) As the verification process should provide meaningful information about a State's compliance or non-compliance with treaty obligations, taking into account the possibility of concealment methods, relevant activities will include reporting by a State; on-site inspection measurement data and observations; taking of samples; measurement from installed instrumentation (on-site or networks); outputs of surveillance devices; satellite imagery; publicly available information; and third party information. This includes national technical means and cyber applications independently examined and assessed by the Agency. Such information must be reviewed and analysed by the Agency in a timely fashion; any anomalies or inconsistences must be investigated and, if possible, resolved, to draw unbiased, technically sound, conclusions.

To meet these requirements the verification system should fulfil certain minimum standards: (1) the *system design* should provide for a timely, high confidence capability to detect all plausible means of evading treaty obligations and all means of concealing evasion. (2) The *information* collected for this purpose should be 'meaningful' in that it is necessary and sufficient for the performance of the mandate and its use should be transparent to Member States. All such information should be authenticated. (3) Appropriate procedures should ensure professional *data analysis*, internal consistency, data authentication, and transparency to Member States. (4) *Questions and inconsistencies* should be investigated. (5) *Results* should be evaluated and interpreted in a technically sound manner.

8. *Consequences for IAEA Practice*. In accordance with its mandate, the IAEA has in continuing practice conceptualized safeguards implementation at the State level.[37] The Agency was able to conclude in its last Annual Report that of the 118 States that had both a CSA under INFCIRC/153 and an AP under INFCIRC/540, in 65 States (and Taiwan, China) *all* nuclear material remained in peaceful activities; for the remaining 53 States the Secretariat found no indication of the diversion of declared nuclear material from peaceful nuclear activities, but evaluations regarding the absence of undeclared nuclear

[35] As stated in the Draft Final Document NPT/CONF.2015/R.3 (n 34), para. 20, this is to provide, in an effective and efficient manner, 'increased confidence about the absence of undeclared nuclear material and activities in a State as a whole'.

[36] See Tom Coppen, 'Developing IAEA Safeguards: An Institutional Perspective on the State-level Concept', 20(2) *JCSL* (2015), 169-193 at 190.

[37] See above (n 20 and accompanying text).

material and activities for each of these States remain on-going; for the 54 States with a CSA but no AP in force the Agency concluded only that *declared* nuclear material remained in peaceful activities.[38] Yet it is free to conduct monitoring activities also beyond verification measures that are regulated in safeguards agreements. For this purpose, e.g. open source information, including satellite imagery and all forms of information may be used, as explained above (para. 7 d) and will be further discussed below (para. 20).

9. *The Situation in Iran.* One of the most severe, and still ongoing challenges for IAEA safeguards is the situation in the Islamic Republic of Iran. This State had been found to be in non-compliance with nuclear non-proliferation obligations over several years[39] and therefore had become a target of Security Council sanctions,[40] which did not lead to a settlement. A cooperative solution could be reached in negotiations between the E3/EU+3 (China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the High Representative of the European Union for Foreign Affairs and Security Policy) and Iran.[41] Unanimously endorsed by the Security Council,[42] this solution requires adherence by Iran to the safeguards regime associated with the Additional Protocol between Iran and the IAEA for the purpose of the implementation of Article III.1 and III.4 NPT, thus allowing IAEA inspectors access also to undeclared facilities and establishing procedures for verifying the absence of undeclared nuclear material and activities.

---

[38] IAEA, Annual Report for 2014, https://www.iaea.org/sites/default/files/gc59-7_en.pdf, 14-15. See also Mohamed ElBaradei, 'Preventing Nuclear Catastrophe: Where Do We Go from Here?', in R Falk and D Krieger (Eds), *At the Nuclear Precipice. Catastrophe or Transformation?* (New York: Palgrave Macmillan, 2008), at 211. As stated by Director General Yukiya Amano at the 2015 NPT Review Conference, http://www.un.org/en/conf/npt/2015/statements/pdf/IAEA_en.pdf, further States have adopted an AP, bringing the total to 125. This development is relevant in the light of the current examination undertaken in the ILC on subsequent agreements and subsequent practice in relation to interpretation of treaties (Special Rapporteur Georg Nolte), http://legal.un.org/ilc/guide/1_11.shtml.

[39] See IAEA Report GOV/2013/40 (28 August 2013), http://www.iaea.org/Publications/Documents/Board/2013/gov2013-40.pdf.

[40] SC Res 1696 (2006), 1737 (2006). 1747 (2007), 1803 (2008), 1835 (2008), 1887 (2009), 1929 (2011), 1984 (2011), 2049 (2012).

[41] See Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif and, Joint Comprehensive Plan of Action (JCPOA) with

- Annex I Nuclear related commitments
- Annex II Sanctions related commitments
- Annex II Attachments
- Annex III Civil nuclear cooperation
- Annex IV - Joint Commission
- Annex V Implementation Plan

Vienna, 14 July 2015, http://eeas.europa.eu/statements-eeas/2015/150714_01_en.htm; Joint Statement by the IAEA Director General Yukiya Amano and the Vice-President of the Islamic Republic of Iran, President of the Atomic Energy Organization of Iran, Ali Akbar Salehi and Road-map for the clarification of past and present outstanding issues regarding Iran's nuclear program, Vienna, 14 July 2015, https://www.iaea.org/newscenter/pressreleases/iaea-director-generals-statement-and-road-map-clarification-past-present-outstanding-issues-regarding-irans-nuclear-program.

[42] SC Res 2231 (2015).

While EU, US, and UN sanctions were lifted on Implementation Day (16 January 2016), following the verification by the IAEA that Iran has taken the actions specified in paragraphs 15.1–15.11 of Annex V of the Joint Comprehensive Plan of Action (JCPOA),[43] much work remains to be done by the seven States which have undertaken a special responsibility in the Joint Commission under the JCPOA and will be assisted by the IAEA. Iran's commitment to provisionally apply the Additional Protocol to its Comprehensive Safeguards Agreement and proceed with its ratification, and to fully implement the modified Code 3.1 of the Subsidiary Arrangements to its Safeguards Agreement (JCPOA, para. 13, in accordance with Annex I, para. 64) will be a relevant factor for preparing the Broader Conclusion that all nuclear material in Iran remains in peaceful activities (JCPOA, para. 34 iv), the actions to be taken by the EU and the US to terminate, or modify to effectuate the termination of, the remaining last tier of sanctions (Annex V, paras. 20 and 21),[44] and the final decision that the Security Council would no longer be seized of the Iran nuclear issue (Annex V, para. 24). The 'snap-back mechanism', introduced in the JCPOA, paras. 37-38, and confirmed by the Security Council acting under Article 41 of the UN Charter (SC Res 2231 (2015), paras. 11-13), ensures that previous sanctions re-apply in case of significant non-performance of commitments under the JCPOA.

10. *Other Safeguards Systems*. While the NPT and treaties on nuclear-weapons-free zones[45] require the exclusive use of IAEA safeguards from their States parties, special and supplementary safeguards systems exist to ensure nuclear non-proliferation for the 28 Member States of the European Atomic Energy Community – EURATOM – (see

[43] Verification and Monitoring in the Islamic Republic of Iran in light of United Nations Security Council Resolution 2231 (2015), Report by the Director General (GOV/INF/2016/1, 16 January 2016). See also Tripartite Joint Statement of Intent Concerning the Arak Heavy Water Reactor Research Reactor Modernization Project under the Joint Comprehensive Plan of Action (18 October 2015), http://energy.gov/articles/joint-statement-intent-concerning-arak-heavy-water-reactor-research-reactor-modernization; Official Document among E3/EU+3 and Iran for Collaboration in Furtherance of the Project for Modernization of the Reactor at Arak (November 2015), http://www.tehrantimes.com/index_View.asp?code=251036. The contractual framework for the modernization of the nuclear reactor at Arak, yet to be concluded between the China Atomic Energy Agency (CAEA) and the Department of Energy of the United States of America (DOE) on behalf of the E3/EU+3 Working Group, and the Atomic Energy Organization of Iran (AEOI) should further support implementation of the Accord.

[44] Under a general reference to the JCPOA, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) introduced national sanctions on 17 January 2016, targeting 11 entities and individuals involved in procurement on behalf of Iran's ballistic missile program, https://www.treasury.gov/press-center/press-releases/Pages/jl0322.aspx.

[45] Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean – Treaty of Tlatelolco – (14 February 1967), 634 *UNTS* 326; South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) and Protocols thereto (6 August 1985), 1676 *UNTS* 326; Treaty on the South-East Asia Nuclear Weapon Free Zone – Treaty of Bangkok – (15 December 1995), 1981 *UNTS* 129; African Nuclear-Weapon-Free Zone Treaty – Treaty of Pelindaba – (11 April 1996), 35 *ILM* 698; Treaty on a Nuclear-Weapon-Free Zone in Central Asia – Semipalatinsk Treaty – (8 September 2006). See also Declaration by Mongolia of its nuclear-weapon-free status (25 September 1992), and the Law of Mongolia on its Nuclear-Weapon-Free Status which entered into force on 3 February 2000, http://www.nti.org/treaties-and-regimes/nuclear-weapon-free-status-mongolia/, *and was* recognized by UNGA Res 55/33 S (20 November 2000).

below, *Part II*) and for the two States cooperating with the Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials – ABACC – (see below, *Part III*). Nuclear-test-ban verification, for which the IAEA is not mandated, is conducted by a special organization under the Comprehensive Nuclear Test Ban Treaty – CTBT – (see below, *Part IV*).

Part II: The European Atomic Energy Community

11. *Status and Functioning of EURATOM.* Regardless of whether the 28 EU Member States have opted for nuclear power, the European Commission as the main executive body ensures that civil nuclear material is not diverted from its intended and declared use. In its almost sixty years of existence, the safeguards system established by the European Atomic Energy Community (EAEC or EURATOM)[46] has been recognised as an important contributor to fulfilling the global task of non-proliferation and ensuring within Europe that nuclear power is used for peaceful purposes only. While not all cases of non-conformity with necessary standards could be prevented (e.g. at Sellafield),[47] EURATOM contributes to global safeguards and thus to an effective non-proliferation system.[48]

12. *Implementing Powers and Sanctions.* As the legal owner of special fissile materials, EURATOM has wide-ranging powers to pursue Member States in infringement procedures and to impose sanctions on nuclear operators breaching their safeguards obligations. Hence, the IAEA's safeguards system is successfully supplemented by a European safeguards system. The internationally recognised track record of the European regional system allows the IAEA to make increased use of EURATOM safeguards.[49]

Part III: The Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials

13. *Status and Functioning of ABACC.* Following a period of confidence-building and nuclear cooperation, Brazil and Argentina have created the Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials (ABACC)[50] as a binational organization responsible for verifying the peaceful use of nuclear materials that could be used, either

---

[46] Treaty establishing the European Atomic Energy Community (25 March 1957), OJ C 327 of 26 October 2012, 1 et seq. (consolidated version).

[47] In the Sellafield (BNFL) pond B30 case, following a Commission Directive, the obligation to submit a comprehensive plan to bring several infringements to an end was imposed on the United Kingdom, see Wolfgang Kilb, 'The Nuclear Safeguards System of the European Atomic Energy Community (Euratom)' in: Christian Raetzke (ed.): *Nuclear Law in the EU and Beyond (Atomrecht in Deutschland, der EU und weltweit), Proceedings of the AIDN/INLA Regional Conference 2013 in Leipzig* (Baden-Baden: Nomos 2014), 97–111, at 107.

[48] Comp. 'Nuclear Safeguards Conclusions' in: *Report on the Implementation of Euratom Safeguards in 2013,* 2-3, http://ec.europa.eu/energy/nuclear/safeguards/doc/201405_euratom_safeguards_2013_report.pdf.

[49] See Wolfgang Kilb, 'The Nuclear Safeguards Regime of EURATOM: A regional cornerstone of the verification of non-proliferation obligations in the European Union', in Black-Branch/Fleck (Eds), op.cit., Vol. II, Chapter 7.

[50] Agência Brasileiro-Argentina de Contabilidade e Controle de Materiais Nucleares/ Agencia Brasileño-Argentina de Contabilidad y Control de Materiales Nucleares (ABACC).

directly or indirectly, for the manufacture of nuclear weapons.[51] The Common System of Accounting and Control of Nuclear Materials (SCCC), which has been applied by ABACC for almost 25 years, includes about 110 inspections per year in approximately 70 nuclear facilities in the two countries.

14. *International Cooperation.* ABACC participates in international cooperation with the IAEA, the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL),[52] EURATOM, and with States.

Part IV: The Comprehensive Nuclear-Test-Ban Treaty Organization

15. *The Status of the Preparatory Commission*. The Comprehensive Nuclear-Test-Ban Treaty (CTBT),[53] which seeks to prohibit any nuclear test explosion in any environment, including underground, was part of a carefully balanced diplomatic deal struck in 1995 that made an indefinite extension of the NPT possible. As the timespan for entry into force of the CTBT was envisaged to last only a few years, States Signatories simultaneously established a Preparatory Commission, which is an international organization of its own right, separate from the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) proper.[54] While the Treaty's entry into force, close to twenty years after its opening for signature, still depends on ratification by another eight Annex 2 States under Article XIV,[55] the Preparatory Commission continues to play its useful role.

16. *The CTBT Verification Regime*. Since 1996 the Commission has worked tirelessly to prepare for the Treaty's entry into force, in particular by building up an elaborately designed universal verification regime that includes 321 monitoring stations and 16 laboratories in about 90 States worldwide.[56] This verification regime is now largely complete and of proven effectiveness and robustness. It allows for the use of necessary modern technological equipment for seismic, infrasound, hydroacoustic and radionuclide activities in line with internationally accepted standards of verification.[57] Thus, the lack of

[51] Agreement on the Exclusively Peaceful Use of Nuclear Energy – Guadalajara Agreement – (18 July 1991); Agreement between the Republic of Argentina, the Federative Republic of Brazil, the Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials (ABACC) and the International Atomic Energy Agency for the Application of Safeguards (13 December 1991); Cooperation Agreement between the International Atomic Energy Agency and the Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials (25 May 1998), INFCIRC/25/Add. 7.

[52] Created as a specialized regional body for articulating common positions and joint actions on nuclear disarmament to implement the Treaty of Tlatelolco.

[53] Comprehensive Nuclear-Test-Ban Treaty (CTBT), adopted by General Assembly Resolution 50/245 (10 September 1996), 35 *ILM* 1439, http://www.ctbto.org/fileadmin/content/treaty/treaty_text.pdf.

[54] Resolution establishing the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization, CTBT/MSS/RES/1 (17 October 1996), adopted on 19 November 1996, http://www.ctbto.org/fileadmin/user_upload/legal/CTBT-MSS-RES-1-e.pdf; see Gabriella Venturini, 'Test-Bans and the Comprehensive Test Ban Treaty Organisation', op.cit. (n. 4), Vol. I, Chapter 6.

[55] See http://www.ctbto.org/the-treaty/status-of-signature-and-ratification/. See Second Report of the Committee (above, n 2), para. 10.

[56] See https://www.ctbto.org/the-treaty/developments-after-1996/1996-97-creating-a-ctbto-preparatory-commission/page-1-1996-97-creating-the-ctbto/.

[57] See, e.g. 16 Principles of Verification developed by the United Nations Disarmament Commission and endorsed by General Assembly Resolution 43/81 B (1988), see above (n 8), paras. 22-23; Sabine

entry into force of the CTBT notwithstanding, the requirements of its Article IV 1, stipulating that '[a]t entry into force of this Treaty, the verification regime shall be capable of meeting the verification requirements of this Treaty', are already met.

17. *The Legal Status of CTBT Verification*. While formal verification measures regarding compliance with obligations under the CTBT still depend on the Treaty's entry into force, effective activities which are serving very similar purposes are conducted by the Preparatory Commission, based on a shared interest of participating States. Means for securing these activities in future need to be explored. A lasting solution will not only depend on the Treaty's entry into force, as even after entry into force there may be disputes with a State affected by certain verification activities on the proper conduct or the assessment of such activities. Irrespective of whether such State will be party to the Treaty or not, there will be hardly any successful dispute settlement except by international cooperation. The entry into force of the Treaty might facilitate, but would not legally replace such cooperation. Further efforts to ensure cooperation by affected States with the Preparatory Commission remain necessary.

Part V: Interrelationships between Legal Obligations and Best Practice

18. *The Nature of Verification*. As explained above (para. 4), a common feature of verification activities is that their implementation provides evidence or at least credible assurances, as a confidence-building measure, to ascertain that the country which has voluntarily 'invited' the verification activities under an existing agreement is abiding by its obligations.[58] For this purpose the evaluation of national reporting needs to be supplemented by surveillance activities based on on-site inspections and data publicly accessible or on information that may be made available by third parties.

19. *A Fair Balance between Cooperation and Control*. While the verification process is cooperative in nature, to be credible it must lead to final determinations on compliance or non-compliance with existing obligations. It may be left open here, whether making such determination is technical in nature or rather part of a judicial or political task. International organizations involved in the verification process are bound to act within their mandate. As far as the IAEA is concerned, it is fully mandated under its Statute (Art. XII C) to determine whether a State is in compliance with its obligations under the existing Agency safeguards system.[59] There are checks and balances against possible

---

Bauer and Cormac O'Reilly, 'The Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO): current and future role in the verification regime of the Nuclear-Test-Ban Treaty', op.cit., Vol. II, Chapter 6

[58] See above (n 8), para 129.

[59] What may be questionable under general scholarly considerations – a determination on compliance with an agreement to be taken by only one of its parties – is here the convincing result of a carefully crafted regulation, to ensure a treaty-specific correction function. See Odette Jankowitsch-Prevor, 'The Normative Role of the International Atomic Energy Agency, Legal Basis and Legal Sources', in OECD Nuclear Energy Agency (NEA), *International Nuclear Law: History, Evolution and Outlook* (2010), 13, at 20-21, who rightly observes that '[i]t is an unusual trilateral legal construct in that a multilateral treaty – the NPT – contains a binding obligation for some of its parties, the non-nuclear weapon states (NNWS) to conclude a bilateral agreement (safeguards) with an intergovernmental organisation (IAEA) for the purpose of allowing verification of fulfilment of their individual obligations under the NPT'. See also the Advisory Opinion on *Namibia*, ICJ

misuse: Any alleged non-compliance determined by the staff of inspectors shall be reported by the Director General to the Board of Governors who will make an informed decision about possible non-compliance and, if it makes such a finding, submit a report to the Security Council, leaving it to the latter to take appropriate action as provided in the Charter (see Art. XII C IAEA Statute).[60]

If a Member State has persistently violated its obligations under the IAEA Statute or a safeguards agreement, it may be suspended from the exercise of the privileges and rights of membership (Art. XIX). INFCIRC/153 provides that any dispute arising out of the interpretation or application of the safeguards agreements should be submitted to an arbitral tribunal,[61] but no recourse to arbitration has been made as yet in the implementation of safeguards.[62] Generally speaking, disputes concerning the interpretation or application of the IAEA Statute may become subject to jurisdiction by the ICJ,[63] but it is rather unlikely that the relevant conditions would ever be met in practice. Thus appropriate solutions will be necessary, irrespective of the technical, judicial or political character of the decision that is disputed.

20. *New Information Technologies*. NPT safeguards agreements state that the IAEA 'shall take full account of technological developments in the field of safeguards'. This is essential in order to enhance the effectiveness and efficiency of safeguards as well as to attract to the staff of the IAEA the most capable technology specialists. With the help of Member States, the IAEA has taken advantage of new technology. Examples include the routine use of up-to-date digital technologies for camera surveillance, measurements,

---

Reports 1971, 49-50, paras. 101-103, in which the Court addressed aspects related to the unilateral determination of material breach by the GA. For further reference see Eric Myjer and Jonathan Herbach, 'Violation of non-proliferation treaties and related verification treaties', in Daniel H. Joyner and Marco Roscini (Eds), *Non-proliferation Law as a Special Regime. A contribution to fragmentation theory in international law* (Cambridge University Press, 2012), 119-150. The IAEA, mandated by its Member States to conclude safeguards agreements following internationally approved standards, is in any case the most competent authority for making this determination.

[60] Action taken by the Security Council, as prescribed under the UN Charter (Chapters VI and VII), is fundamentally different from making a determination on non-compliance with existing obligations. The latter remains within the domain of the IAEA, which verifies compliance with the relevant safeguards agreement, not with the NPT as such. Art. 60 VCLTIO notwithstanding, suspension or termination of a safeguards agreement would hardly be in the interest of the IAEA or its Member States.

[61] INFCIRC/153, para. 22, provides for arbitration on disputes arising out of interpretation or implementation of a safeguards agreement, except for disputes on findings of the Board made in relation to the diversion of special fissionable or other materials subject to safeguards. For an assessment of standard dispute settlement clauses including certain variations in some safeguards agreements with the IAEA see James Fry, *Legal Resolution of Nuclear Non-Proliferation Disputes* (Cambridge University Press, 2013), at 268-285.

[62] Laura Rockwood, *Legal Framework for IAEA Safeguards* (Vienna: IAEA, 2013), 25.

[63] Art. XVII IAEA Statute: 'Settlement of disputes. (A) Any question or dispute concerning the interpretation or application of this Statute which is not settled by negotiation shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement. (B) The General Conference and the Board of Governors are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the Agency's activities.'

remote data transmission, and data analysis. The IAEA also makes routine use of environmental sampling and satellite photography. For sample analysis, the IAEA has its own, independent measurement capabilities, for example, to do particle analysis. However, the number of samples has led the Agency to rely on a network of analytical laboratories in Member States.

In the case of satellite imagery, the IAEA has in-house image analysts. However, it is completely unrealistic to imagine that the IAEA would ever be provided with the resources needed to obtain an independent means to gather satellite images.[64] One alternative is to take advantage of imagery provided by Governments, if made available, On the other hand, high-resolution imagery is available from commercial vendors at increasingly attractive prices. Incorporating new technologies is a technical challenge, especially given the extremely rapid changes in information technology. Both entail additional responsibilities for international organizations such as the IAEA and the CTBTO, to ensure unbiased use of technological opportunities under applicable verification principles. Any such information must be carefully scrutinised by those responsible for conducting the verification process. A fair chance must be given to affected States for challenging any decision and insisting that agreed mechanisms and procedures for review and evaluation would be used.

21. *Synergies between Non-Proliferation, Transfer Controls, Safety and Security.* Verification measures taken by international organizations must be accompanied by international cooperation with States and private institutions to ensure nuclear safety and security, considering that cooperation on and control of dual-use technology transfers must be a complementary (and not conflicting) part of effective non-proliferation.[65] End-user certificates and early warning lists may be essential tools to ensure nuclear non-proliferation in an effective manner. Peer review processes, which may not be fully based on agreed obligations, are necessary (voluntary) elements of efforts to ensure nuclear safety. To ensure nuclear security intense cooperation is indispensable.

22. *Evolving Customary Rules.* An inventory of relevant rules and best practice of States, international organizations and regional organizations could make the process of evolving customary law more obvious. Such inventory might show that the effectiveness of the law of nuclear non-proliferation, nuclear safety and nuclear security will not depend alone on the question whether relevant rules are legally binding. With respect to nuclear safety any such inventory should also include recognized principles of international environmental law, such as the prevention principle, the principle of sustainable development, the principle of common but differentiated responsibilities, and the precautionary principle.[66]

23. *The Need for Dispute Settlement*. Issues of compliance and enforcement have repeatedly been controversial, a situation that underlines the importance of cooperative

[64] See above (n 8), para 274.

[65] See Oliver Meier, above (note 1), 253.

[66] See Ved P. Nanda, 'International Environmental Norms Applicable to Nuclear Activities, With Particular Focus on Decisions of International Tribunals and International Settlements', 35/1 Denver Journal of International Law and Policy (2008), 47-65; Anguel Anastassov, 'The Sovereign Right to Peaceful Use of Nuclear Energy and International Environmental Law' op.cit., (n. 4), Vol. I, Chapter 7.

dispute settlement that should be regularised in conformity with appropriate principles and rules.[67] For peaceful dispute settlement a great variety of means and procedures is available. States and international organizations including the IAEA, the Preparatory Commission for the CTBTO, EURATOM, and ABACC have gained unique experience with verification procedures that may best be characterised as cooperative.[68] The Roles of the UN Secretary-General (Article 99 of the UN Charter), the General Assembly (Article 11) and the Security Council (Article 26) could complement each other in reaching non-coercive (cooperative) solutions that may be more effective and longer-lasting than any coercive measure. In this context the role of States should not be underestimated: more international exchange and deepened cooperation between States remain essential to ensure compliance with non-proliferation obligations. Not only those States directly involved in a dispute are called to cooperate in its settlement, as non-compliance with non-proliferation obligations could affect much wider regions even beyond neighbouring States.

To ensure compliance with existing rules and best practice, incentives may be more effective and more important than enforcement measures, considering that, none of the cases reported to the Security Council so far have been brought to a final solution by sanctions under Chapter VII of the Charter, but had to be solved by agreement.[69] Incentives, including good faith cooperation with States wanting to exercise their inalienable right to develop nuclear energy for peaceful purposes in accordance with Article IV of the NPT, should be developed in international cooperation. This might lead to a prioritisation of lawful means available and it may entail the development of new legal principles and rules.

24. *Countermeasures in Case of Non-Compliance*. Countermeasures against non-compliance with the NPT and other relevant obligations remain an open option for States and international organizations, even if implementing activities by the IAEA and States are regulated in rather specific form and Security Council sanctions may come into place. The availability of the right to take countermeasures does not have to be stated in a treaty.[70] Countermeasures may be necessary to ensure compliance with existing non-proliferation obligations. The applicable conditions are now strictly defined.[71] As essential

[67] See Art. 2(3) and Chapter VI of the UN Charter; 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (A/RES/25/2625, 24 October 1970).

[68] The Treaty of Pelindaba (see above, n 45) has a unique arrangement for addressing complaints about compliance and settling disputes. As described in its Annex IV, it calls for complaints to be resolved bilaterally; failing that the issue may be brought to the African Commission on Nuclear Energy. If the issue remains unresolved the Commission, if it considers it warranted, can request an inspection by the IAEA. The Commission may also establish its own inspection mechanism.

[69] Resolute action by the Security Council and an full compliance by States with their obligations under SC Res 1540 (2004) remains essential for any nuclear dispute settlement; but as experienced in all relevant cases so far the final solution is one of States; see Dieter Fleck, 'Disputes on Nuclear Proliferation: Means and Methods for their Settlement', op.cit. (n. 4), Vol. II, Chapter 17. 389-412.

[70] See the Namibia Advisory Opinion, *ICJ Reports* 1971, 47, para. 96, in which the ICJ held that the silence of a treaty cannot be interpreted to exclude the invocation of a right (to invoke a material breach as a ground for termination) originating outside of the treaty in general international law.

[71] Articles on Responsibility of States for Internationally Wrongful Acts – ARSIWA – (2001) UN Doc. A/56/10, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, http://legal.

obligations under the NPT do have an *erga omnes* character, it appears that the range of States eligible for taking countermeasures is barely limited.[72] Gaps in the relevant legal framework highlight the need for legal developments in this special domain of law in order to promote international cooperation to ensure compliance with existing obligations.[73] It may be useful to explore the relation between countermeasures taken by States or groups of States on the one hand and actions taken by international organizations such as the UN or the IAEA on the other. Could any tension between these two areas of activities be solved under a *lex specialis* rule? Or should diplomatic initiatives by States and institutional frameworks be accepted as complementary? Are countermeasures against non-compliance with safeguards obligations acceptable? Could the General Conference of the IAEA, based on Article V.D of the IAEA Statute, recommend collective measures to States Parties that would resemble enforcement measures – as the OPCW Conference may do under Article XII.3 of the Chemical Weapons Convention?[74] The IAEA framework does not preclude such actions which may be in line with the broader context of verification and be seen as supplementing traditionally accepted uses of national technical means.[75] Should there be more attention for the potential of cooperative unilateral incentives (political initiatives, civil cooperation) that the IAEA cannot provide? When does non-compliance with safeguards obligations amount to non-compliance with NPT obligations?

Part VI: The Way Ahead

25. A *Fourth Report* of the Committee shall be devoted to legal aspects of the use of nuclear energy for peaceful purposes. This issue remains a highly contested area of international cooperation with important legal rules still underdeveloped.[76] Not only the content of the right to develop research, production and use of nuclear energy for peaceful purposes, but also the relation between this right and the obligation to ensure security and safety of nuclear plants and materials, as well as the overall importance of this right as part of the NPT's three pillars are subject to significant controversies. The Fourth Report may draw from the research project, conducted in November 2015 by the Rapporteur in cooperation with the *Walther Schücking Institute of International*

---

un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, Arts. 22, and 49 to 54; Draft Articles on the Responsibility of International Organizations (DARIO), UN Doc A/66/10, para. 87, *Yearbook of the International Law Commission, 2011*, vol. II, Part Two, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf, Arts. 22, and 51 to 57.

[72] See Art. 48 ARSIWA. Art. 54 ARSIWA introduces some ambiguity in this respect, because it reserves the question of lawful measures by States other than injured States (those under Art. 42 ARSIWA) and has deliberately refrained from using the word 'countermeasure' there. It may also be noted that the range of States entitled to take countermeasures is limited to Parties to the NPT, unless non-compliance of obligations under customary law would be at stake.

[73] See Jonathan Black-Branch, 'Countermeasures to Ensure Compliance with Nuclear Non-Proliferation Obligations', op.cit. (n. 4), Vol. II, Chapter 16.

[74] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC), 13 January 1993, 1974 *UNTS* 45.

[75] I am grateful to Tom Coppen for this observation.

[76] See Trevor Findlay, *Nuclear Energy and Global Governance. Ensuring safety, security and non–proliferation* (Routledge 2012).

Law at the University of Kiel and again sponsored by the *Fritz Thyssen Stiftung*.[77] To broaden international consensus on this important third pillar of the NPT, contentious issues remain to be explored. These include nuclear safety and security, radioactive waste removal, damage control and reparation.

26. *Open Issues*. To accomplish the Committee's mandate and deliver recommendations, legal issues need to be identified according to their relevance for the overall objective of nuclear non-proliferation. The focus of the Committee continues to be on questions relevant for international cooperation and legal controversies that need to be solved to ensure implementation of the NPT with respect to all of its three pillars, while paying due attention to cooperation with non-Parties in these important fields.

27. A *Declaration on Legal Issues of Nuclear Weapons, Non-Proliferation and Peaceful Uses of Nuclear Energy* will be presented as the final step of the Committee's work. It will be based on the efforts made so far, address relevant issues of existing international law, best practice and desirable new rules. The Declaration will be accompanied by a commentary. Draft elements of the Declaration are attached as *Annex* to this Report.

[77] The outcome is again being published in the new book series: Jonathan L. Black-Branch and Dieter Fleck (Eds), *Nuclear Non-Proliferation in International Law, Vol. III Legal Aspects of the Use of Nuclear Energy for Peaceful Purposes* (Berlin/Heidelberg: Springer/Asser Press, forthcoming in Autumn 2016).

ANNEX
Tentative Conclusions and Recommendations

The following draft elements of the forthcoming *ILA Declaration on Legal Issues of Nuclear Weapons, Non-Proliferation and Peaceful Uses of Nuclear Energy* are listed here in a still tentative and non-exhaustive manner. The recommendations made in the Second Report are incorporated. Issues yet to be dealt with in the Fourth Report are presented in plain letters:

A. Nuclear Non-Proliferation

(A 1) To effectively ensure non-proliferation of nuclear weapons or other nuclear explosive devices both legally and politically binding commitments are necessary.

(A 2) While the NPT and treaties on nuclear-weapons-free zones require the application of IAEA safeguards by their States parties, special and supplementary safeguards systems are in effect to ensure nuclear non-proliferation for the 28 Member States of the European Atomic Energy Community (EURATOM) and for the two States cooperating under the Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials (ABACC).

(A 3) The IAEA is fully authorised to examine the correctness and completeness of declarations made by States.[78] Rights and obligations specifically agreed in Comprehensive Safeguards Agreements and Additional Protocols may facilitate that cooperation, but they are not limiting the mandate of the Agency as confirmed in its Statute agreement by its Governing Bodies, and consistent practice.

(A 4) To appropriately address dual-use problems, weapons-usable nuclear material should be limited and international control of uranium enrichment and reprocessing of spent fuel should be strengthened. For this purpose relevant measures need to be harmonised, while assuring fuel supply for peaceful purposes and preventing unbalanced or discriminating interference with international trade.[79]

(A 5) Nuclear-test-ban verification, for which the IAEA is not mandated, is conducted by a special organization under the Comprehensive Nuclear Test Ban Treaty (CTBT). While the entry into force of the CTBT still depends on ratification by another eight States, one of the Treaty requirements, stipulating that at entry into force of the Treaty, the verification regime shall be capable of meeting the verification requirements of this Treaty, is already met. Verification activities conducted by the Preparatory Commission are based on a shared interest of participating States.[80]

---

[78] Before the non-diversion of nuclear material from declared activities can be assured, the cooperation by these States is essential.

[79] Cooperation and control on dual-use technology transfers are complementary (and not conflicting) elements of effective non-proliferation.

[80] Even after the Treaty's entry into force there may be disputes with a State affected by certain verification activities on the proper conduct or the assessment of such activities. Irrespective of whether such State will be party to the Treaty or not, there will be hardly any successful dispute settlement except by international cooperation.

(A 6) There is a continuing need for a universal nuclear security regime. Existing legally binding instruments (such as CPPNM[81], ICSANT[82]) need to be universalised. Existing mechanisms, such as the Nuclear Security Summits, the Global Initiative to Combat Global Terrorism (GICNT),[83] the World Institute of Nuclear Security (WINS),[84] or the Nuclear Energy Agency of the OECD (NEA)[85] need to strengthened and made more transparent.[86]

B. The Use of Nuclear Energy for Peaceful Purposes

(B 1) The right to develop research, production and use of nuclear energy for peaceful purposes without discrimination entails the responsibility to ensure nuclear safety, nuclear security and radioactive waste management.[87]

(B 2) The right to peaceful use of nuclear energy is conditioned by an obligation to accept verification and control of full compliance with non-proliferation goals and the obligations under Security Council Resolution 1540 (2004).

C. Nuclear Disarmament

(C 1) The obligations recognised in Article VI NPT have three objectives:

- **the cessation of the nuclear arms race at an early date,**
- **nuclear disarmament, and**
- **general and complete disarmament.**

Each of these objectives requires negotiations to be pursued in good faith and implementation measures under strict and effective international control.

(C 2) Article VI is far from conditioning nuclear disarmament on the achievement of general and complete disarmament. Rather, it requires States to take effective steps to end the nuclear arms race and to enhance international security at lower levels of armament.

(C 3) To reach these objectives the Parties must pursue negotiations in good faith on effective measures. This obligation goes beyond a mere obligation of conduct in that it includes an obligation to achieve a precise result.

---

[81] Convention on the Physical Protection of Nuclear Material – CPPNM – (1 November 1979), 1456 *UNTS* 125, entered into force on 8 February 1987, amended on 8 July 2005 (amendment entered into force on April 8, 2016), INFCIRC/274/Rev 1, http://www.iaea.org/Publications/Documents/Conventions/cppnm.html, http://www.iaea.org/About/Policy/GC/GC49/Documents/gc49inf-6.pdf

[82] International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention – ICSANT – (13 April 2005), 2445 *UNTS* 89, http://untreaty.un.org/cod/avl/ha/icsant/icsant.html.

[83] See http://www.gicnt.org.

[84] See https://www.wins.org.

[85] See https://www.oecd-nea.org.

[86] See also below, C 13. Synergy effects between non-proliferation controls and measures to ensure nuclear safety and security should be used. It also needs to be recognized in an environment of increasing terrorist activity that ensuring nuclear safety and nuclear security must be treated together.

[87] See OECD Nuclear Energy Agency (NEA), *International Nuclear Law: History, Evolution and Outlook* (2010), including the following contributions: Carlton Stoiber on Nuclear Security (pp 219-242), Laura Rockwood on IAEA Safeguards (pp 243-270), Quentin Michel on Control of Nuclear Trade (pp 271-306), Odette Jankowitsch on Transport of Nuclear Materials (pp 187-218).

(C 4) Subsequent practice during the last four decades has not weakened the aforementioned legal obligations, but confirmed a growing need for a legal instrument that will prohibit the use of nuclear weapons and lead to their elimination, even if that process takes time.

(C 5) Until such time as stricter legal rules may be adopted, States having nuclear weapons are under a legal obligation to strictly limit their relevant strategies to ensure that such weapons are means of last resort in an extreme circumstance of self-defence in which the very survival of the State would be at stake.

(C 6) States modernising their nuclear arsenals should exercise transparency as to the purpose and effects for nuclear safety and consequences for nuclear deterrence in accordance with existing obligations under international humanitarian law.

(C 7) The aforementioned legal obligations are valid *erga omnes*, as they affect the international community as a whole rather than a particular State or group of States. They are not limited to States party to the NPT, as they are part of customary international law or at least evolving custom.

(C 8) States Parties to the NPT must cooperate with one another as well as with non-Parties to implement these obligations.

(C 9) A development towards mutually verifiable nuclear disarmament requires

- **confidence-building measures and consequences for military doctrines, force structures and alert levels;**
- **joint action on interim steps including a comprehensive nuclear test ban and the termination of the production of fissile material for weapons;**
- **cooperative approaches to anti-ballistic missile defence; and**
- **further limitations to military uses of outer space.**

(C 10) Negative security assurances by nuclear-weapon States are to be reviewed and further developed, including by the establishment of nuclear-weapon-free zones.

(C 11) A repository of information on measures taken by States in furtherance of nuclear disarmament and non-proliferation should be established. It should include information on the role of remaining nuclear weapons and their alert status.

(C 12) National headquarters of nuclear-weapon States should be enabled to exchange liaison officers with appropriate working conditions as a confidence-building measure.

(C 13) The challenge of nuclear terrorism requires cooperative responses by States implementing their non-proliferation obligations and ensuring law enforcement and criminal prosecution.[88]

[88] See also above, A 6.

D. Compliance with and Enforcement of Nuclear Non-Proliferation Commitments

(D 1) Extensive international exchange and deepened cooperation is essential to ensure compliance with non-proliferation obligations.

(D 2) Nuclear disarmament, deterrence, confidence-building, non-proliferation, nuclear security, and even the safe use of nuclear energy for peaceful purposes are interconnected. This remains essential for any convincing approach to effectively control nuclear armament. In the same sense nuclear safety, security and non-proliferation, albeit subject to different legal regimes, are directly linked to each other.[89]

(D 3) In the event of withdrawal from the NPT States Parties are bound to fully comply with their obligations under Article X.1 NPT.

(D 4) Whilst measures taken by the Security Council under Chapter VII of the UN Charter to ensure compliance with arms control and disarmament obligations have often proven less than effective, it is for States to seek viable solutions in exploratory talks and negotiations, pursue long-term settlements that should endure daily pressure, and co-operate towards this end.[90]

(D 5) States are obliged to cooperate in the settlement of any dispute related to nuclear non-proliferation, the use of nuclear energy for peaceful purposes, or nuclear disarmament.

(D 6) Not only those States directly involved in a nuclear dispute are called to cooperate in this context, as non-compliance with pertinent obligations could affect much wider regions even beyond neighbouring States.

(D 7) Measures by the Security Council including measures under Chapter VI of the UN Charter may help to ensure nuclear non-proliferation, support strict and effective export controls and provide transparent procedures for pertinent activities.

(D 8) Recommendations by the General Assembly with regard to principles of cooperation in the maintenance of peace and security and principles governing disarmament and the regulation of armaments may add to transparency in nuclear-non-proliferation.

(D 9) Reporting activities by the Secretary-General and the exercise of his right of initiative may be essential for nuclear non-proliferation measures taken by the General Assembly, the Security Council and by States.

(D 10) To ensure compliance with existing rules and best practice, incentives may be more effective and more important than enforcement measures. Incentives should be developed in international cooperation.[91]

---

[89] If these issues were dealt with separately, neither the cessation of the nuclear arms race nor substantive nuclear disarmament could be achieved and neither safety nor security of the use of nuclear energy could be ensured in an effective manner.

[90] The Commentary will address specific cases and also discuss whether the pertinent obligations stem from treaties like the NPT or from Chapter VII decisions and whether this makes any difference.

[91] This might lead to a prioritisation of lawful means available and may entail the development of new legal principles and rules.

(D 11) Procedures and objectives of verification are to be continuously scrutinised. Cooperative action is to be taken to reach nuclear balance at lower levels, ensure non-proliferation of nuclear weapons and nuclear explosive devices, and abolish chemical and biological weapons.

(D 12) Incentives for compliance are relevant at all stages of dispute settlement and different forms of cooperation will be required at those different stages.

(D 13) The lack of judicial control of acts performed on behalf of the United Nations remains an important issue for further legal development in this field.

(D 14) Countermeasures must be in conformity with existing legal standards.[92]

(D 15) Retorsions, i.e., acts or omissions below the level of countermeasures (such as export limitations, traffic controls, travel restrictions and criminal prosecution to ensure compliance with non-proliferation obligations)**, deserve more attention in current discussions on compliance with arms control obligations.**

(D 16) It should be recognised that there are fundamental obligations under the NPT of an *erga omnes* character. All States should cooperate in ensuring compliance with those obligations.

(D 17) States and international organizations should consider the relationship between countermeasures and the peaceful settlement of disputes.

(D 18) States should legislate and pursue criminal prosecution to ensure compliance with non-proliferation obligations.[93]

[92] States and international organizations should acknowledge the legal limits of countermeasures and especially that countermeasures are a last resort after trying peaceful dialogue. They should recognise that countermeasures are not meant to punish a State, but are aimed at bringing about compliance with an international obligation, temporary in nature and to be withdrawn when the act in question ceases.

[93] It will need to be spelled out in the Commentary what are the non-proliferation obligations in question, especially if they attach individual criminal responsibility for non-compliance by a State of treaty obligations. See Carlton Stoiber, Abdelmadjid Cherf, Wolfram Tonhauser, Maria De Lourdes Vez Carmona, *Handbook on Nuclear Law* (Vienna: IAEA, 2010, http://www-pub.iaea.org/MTCD/publications/PDF/Pub1456_web.pdf). Part V of the Handbook specifically deals with Non-Proliferation and Physical Protection (Chapter 12 on Safeguards, Chapter 13 on Export and Import Controls and Chapter 14 on Physical Protection). The Handbook is being updated, with a revision recently completed for publication in 2016.

COMMITTEE ON NUCLEAR WEAPONS, NONPROLIFERATION AND CONTEMPORARY INTERNATIONAL LAW

WORKING SESSION

Wednesday, 10 August 2016, 9.00am

Chair: Professor MaryEllen O'Connell (US)

The Chair introduced herself as a member of the American Branch and a member of the Use of Force Committee. She stated that she was happy to chair the present session in support of her good friend and colleague – and Rapporteur of the Committee – Dr Dieter Fleck (Germany). She indicated that Dr Fleck would provide a brief presentation and that she looked forward to the group discussing the report that Dr Fleck would present in detail.

Before giving the floor to Dr Fleck, the Chair added that there would be another discussion on arms control later in the afternoon. Dr Christof Heyns, Professor Noam Lubell, and she would be discussing new weapons technology in the form of drones and other kinds of weapons under the intriguing title of *Killer Robots*. She invited attendees to join that session.

Dr Dieter Fleck (Germany) highlighted that the difference between the size of the very familiar group and the overall topic of nuclear non-proliferation could not be wider. Over the past couple of years, they had been working on a specific mandate for the Committee, which was to consider competing legal approaches to nuclear non-proliferation and regulating nuclear weapons within the contemporary context and to ultimately present options for future legal cooperation in this field. The normal ambition of the ILA was to arrive at a declaration with commentary, which could be adopted and accepted by consensus at a future conference and should reflect the worldwide opinion. To cover this broad expectation and ambition, and to bring together those interested in international law from around the world, from legal and mediation practice, from the judiciary, academia, business, governmental and non-governmental organisations, to foster the understanding of international law both generally and among young people, was obviously facing problems in terms of conference participation. Joint efforts and new initiatives were necessary to cope with this situation, to increase activities within the ILA and beyond, and to ensure adequate participation at ILA conferences. Dr Fleck underlined that the Committee should try to stick to this large ambition and the result for the day's exercise would be disseminated via the internet to try to reach a wider group of experts around the world. For that purpose, he appreciated the presence of Ms Mothepa Shadung from the Institute for Security Studies in Pretoria and Ms Lolah Nkosi from the Gauteng Provincial Government, who were interested in the subject and had volunteered to draft the session report.

Dr Fleck noted that the critical issues were yet to be solved. Nuclear proliferation to States and non-State actors entailed severe security risks. The safety of nuclear energy was not fully under control in any continent in the world. Problems of radioactive waste disposal still needed to be solved without current convincing prospects. Perhaps the next generation would be more successful in solving these enormous problems for the next million years. "Global Zero" for nuclear weapons, although a widely-shared goal that had been supported by President Obama in several of his speeches, was not in sight. Controversies and existing interdependencies between the different issues relating to

the Nuclear Non-Proliferation Treaty (NPT) required an in-depth evaluation. This was definitely the goal of the Committee – to try to look at not only one but all three different pillars of the NPT in context.

Dr Fleck referred to the Committee, which had fewer than 30 people nominated by the national branches. He welcomed the presence of some Committee members and conveyed the greetings of the Chair of the Committee, Professor Jonathan Black-Branch (UK), who was not able to attend the Conference due to his acceptance of a new position as Dean of the Law School at the University of Manitoba in Canada.

To cope with the present challenge, the Committee was engaging in extensive studies within and beyond the ILA framework. The Chair of the Committee had hosted a series of roundtable meetings in London conducted under Chatham House Rule. Dr Fleck had organised research projects based on international calls for papers resulting in two conferences in Cologne, where they had a very fruitful exchange resulting in a series of publications. The next volume would be published in about 3 months in the series edited by the TMC Asser Institute and Springer (entitled *Nuclear Non-Proliferation in International Law*).

A positive aspect of the lack of sponsoring and the absence of interested organisations and economic groups in the Committee's activities was that it was working in complete independence from political and economic decision-makers. This attitude had characterised the work of the Committee from the outset.

Dr Fleck introduced the Committee's third report entitled "Legal Issues of Verification of Nuclear Non-Proliferation Commitments". This report followd the second report of the Washington conference entitled "Legal Aspects of Nuclear Disarmament". A fourth report devoted to legal aspects of the use of nuclear energy for peaceful purposes would be submitted at the Sydney conference in 2018. Based on the comprehensive work covering all the pillars of the NPT, an ILA declaration with commentary should be possible on legal issues of nuclear weapons, non-proliferation and peaceful uses of nuclear energy, which would be proposed for adoption at the Tokyo conference in 2020.

Verification of nuclear non-proliferation commitments, like all other main obligations stemming from the NPT, was a politically and legally contested issue. The aim of the Committee report, therefore, was to provide an objective account of existing controversies and to provide a reliable legal evaluation.

The third report was divided into six parts. It evaluated terms and conditions of agreed verification measures in accordance with Arts 31-32 of the Vienna Convention on the Law of Treaties (VCLT) and the identical Arts 31-32 of the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (VCLTIO).

The first four parts of the report analysed legal issues relating to different (but to some extent interrelated) nuclear verification regimes and their associated organisations. The first, and most important, part was devoted to legal aspects of the verification practice of the International Atomic Energy Agency (IAEA). It focused on recent controversies, which were also represented by members of the Committee taking different views on the subject, relating to the IAEA's mandate to verify both the non-diversion of nuclear

material from declared activities (ie, the *correctness* of national reports) and the absence of undeclared nuclear activities in the State (ie, the *completeness* of national reports). Dr Fleck highlighted that there were two Committee members who took a position denying the IAEA's mandate as far as completeness was concerned. Dr Fleck welcomed different opinions and had invited for an in-depth discussion of all different aspects in the Research Conference in Cologne, where there was a very fruitful exchange, the outcome of which was reflected in the third report and published in volume II of the book series.

It was concluded that a clear distinction should be made between the authority of the IAEA to examine the correctness and completeness of the declarations made by States and the ability and obligation of States to assure the non-diversion of nuclear material from declared activities. In view of the controversy among Committee members, Dr Fleck was delighted to say that all Committee members supported the third report. It was thus an excellent exercise to exchange different views and to use this opportunity to develop one's thinking in the presence of counterarguments.

The second, third and fourth parts of the report discussed special regulations applicable to the European Atomic Energy Community (EURATOM), the Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials (ABACC), and the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) respectively, and explored some overlap with, and synergy effects for, the work of the IAEA. The safeguards systems established by EURATOM and ABACC were characterised in the report as supplementing the work of the IAEA and contributing to international cooperation at the global level. While the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT) was still not yet in force, the Preparatory Commission, based on a shared interest of participating States, was already capable of meeting the verification requirements of the CTBT.

The fifth part of the report evaluated interdependencies between legal obligations and best practices as an essential element of the nuclear non-proliferation regime. Finally, the way ahead for the work of the Committee was discussed and first conclusions drawn by summarising relevant findings, identifying open issues, developing recommendations, and recording draft elements of the envisaged ILA declaration (Part VI and Annex).

The report discussed the situation in Iran for which a cooperative solution could be reached in negotiations between the E3/EU+3 (China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the High Representative of the European Union for Foreign Affairs and Security Policy) and Iran. This outcome was unanimously endorsed by the UN Security Council and still required much work for its implementation. It was agreed that it was not the time to look for any loopholes in the accord but to concentrate on its implementation and evaluation. There would be two interesting contributions on Iran in the forthcoming volume III of the book series, one written by a legal advisor of one of the negotiating teams of the EU+3 and another one written by a physicist from Italy who gathered experience in cooperating with colleagues from Iran.

In summary, Dr Fleck highlighted that the verification system, which was currently in place, provided a fair balance between cooperation and control, incorporating new information technologies and involving international organisations, States, and non-State

actors to ensure best practices for implementing legal obligations and addressing new challenges for nuclear safety and security.

In Dr Fleck's opinion, an inventory of relevant customary law and best practice of States, international organisations and regional organisations should be established. This could make the process of evolving customary law more obvious. This was an observation based on the fact that not everything was regulated in treaty law. Some of the more important treaties like the CTBT were not yet in force. In this area, cooperation between States and non-State actors was still more important than written rules and regulations. Such a study should be intriguing for PhD students but also challenging for international organisations to prepare. This demonstrated that the effectiveness of the law of nuclear non-proliferation, safety and security would not depend alone on the question as to whether the relevant tools were legally binding. With respect to nuclear safety, any such inventory should include recognised principles of international environmental law, which would also be addressed in the forthcoming volume III of the book series.

As for dispute settlements and countermeasures in case of non-compliance, incentives for compliance might be more important and effective than enforcement measures. Dr Fleck added that this was a difficult statement of his in the presence of a friend and colleague, Dr Michael Rosenthal, who had made an excellent presentation the day before under the title "Nuclear Security Under International Law: Problems and Prospects". Dr Fleck still believed that none of the cases reported to the UN Security Council had so far been brought to a final settlement by sanctions alone. Sanctions under Chapter VII of the UN Charter might become necessary. Yet disputes had to be solved by agreement in cooperation, as provided for in the UN Charter.

Dr Fleck drew attention to the draft elements of the envisaged declaration (annexed to the third report).

Those parts of the draft elements appearing in bold text were already fairly well discussed and supported in many meetings of the Committee, including the 2014 Washington conference. All draft elements still needing some consideration appeared in plain text, which included the section entitled "The Use of Nuclear Energy for Peaceful Purposes", required further discussion. Dr Fleck invited participants to comment on these, particularly on section A (Nuclear Non-Proliferation) and section D (Compliance with, and Enforcement of Nuclear Non-Proliferation Commitments). He welcomed critical opinions and advice to prepare a well-informed declaration with commentary, which could then be adopted at the later ILA conference.

The Chair asked Dr Fleck to clarify the following:

1. whether the complete Annex of the third report would be the final product for submission in 2020;
2. whether the fourth report under preparation would add to the incomplete section B (on the use of nuclear energy for peaceful purposes);
3. whether the reports prepared thus far had supported his proposal in sections A, C and D.

Dr Fleck confirmed the tentative character of the draft conclusions and recommendations. The footnotes would be used at a later stage as elements for the commentary to be

written. He added that the Committee was seeking new publications, especially of the OECD and the IAEA, and that the Committee remained open to criticism even on the bold text, thus exercising transparency in its work. The Committee was interested in comprising all the different opinions as was done in former controversial debates including on "completeness and correctness".

The Chair returned to Dr Fleck's comment that no case brought to the UN Security Council had been resolved by sanctions alone. Bearing in mind people's familiarity with the Iran case, she asked whether there were any other pending cases of nuclear proliferation on the Security Council's agenda – for example India, Pakistan and Israel.

Dr Fleck noted that he was not aware of any preparations of pertinent new resolutions of the Security Council but invited Dr Rosenthal to give a perspective from his practice in the 1540 Committee, as non-proliferation and the verification of proliferation are constant activities and require cooperation with States. These may be lacking from time to time and Security Council sanctions under Chapter VII of the UN Charter may have to be considered if necessary.

Dr Michael Rosenthal noted that he did not have a definitive answer to the question on the UN Security Council but the Board of Governors of the IAEA found that Syria was in violation of its States Party agreement.

Professor Vasilka Sancin (Slovenia) thanked Dr Fleck for the diligent work on all the reports. Commenting on the relationship between treaty and customary law, she noted that she was not convinced by the paragraphs relating to customary law in the report. For example, the report read in paragraph 5 that "[p]articular attention shall be given to the question whether the verification process serves its purpose in effectively assessing all relevant facts and establishing compliance with the obligations undertaken under existing treaty law and customary law". However, in her opinion, there was no further explanation of customary law in terms of the verification process. She thus asked for clarity in that regard.

Professor Sancin also drew attention to the reference in paragraph 22 to "[a]n inventory of relevant customary law and best practice of States…". She asked what exactly "relevant customary law" in the verification process was.

In the context of countermeasures against non-compliance, she asked what exactly was meant by countermeasures "taken by international organizations".

Dr Fleck responded that the Committee was not clear about the extent of customary law in the progressively developing area of State practice and practice of international organisations. He highlighted a good proposal made to consider the prohibition of nuclear tests as a prohibition under customary law, despite the fact that the CTBT was not yet in force. He added that he was still very careful about this, but he appreciated the idea and learned that the Preparatory Commission in Vienna was as careful and as reluctant to support the idea of customary law in this respect as they were working for the full application and adoption as treaty law. What happens, however, if this Treaty did not enter into force in the coming years? Then the question of whether there was customary law was open. This was the reason for including a sentence to the effect that "[n]ot only legal obligations but also best practices are to be considered in this context". This was thus a reluctant

statement, which was pinpointing the fact that there might be evolving customary law and the hope for the evolution of customary law in this respect. However, one must remain clear and realistic, and acknowledge the fact that this area of international law was not all about bright-line rules but all about international cooperation.

Professor Sancin fully agreed with Dr Fleck that there were important practices of States that should be taken into account. She proposed that the words "existing treaty law and customary law" in paragraph 5 be replaced with "existing treaty law and evolving/possible customary law".

Dr Fleck noted Professor Sancin's proposal and suggested that it could be phrased as "potentially evolving customary law".

As for countermeasures, Dr Fleck suggested that it would be necessary to observe the written principles in this respect. He noted that he would be hesitant to refer to treaty law because the Articles on State Responsibility for Wrongful Acts (ARSIWA) and Responsibility of International Organisations (DARIO) were not adopted as treaty law. However, the more that lawyers were discussing this, the more that they referred to customary law.

Dr Fleck argued that countermeasures were in the first place relevant for States. Regarding countermeasures to be taken by the IAEA, he referred to practice as the Agency might exclude non-complying States from certain rights under its statute.

Professor Sancin questioned whether there truly were countermeasures or sanctions/measures taken by specific international organisations.

Dr Fleck found difficulties in using the word "sanction" as it was not used in the UN Charter, which referred instead to "measures" to be taken by the Security Council based on strict voting procedures and relying on the effectiveness of these measures under Art 25 of the UN Charter. States were always referring to sanctions and States exercised sanctions even after they concluded agreements (eg, the accord with Iran). There was a practice by the European Union (EU) and other international organisations to exercise these measures and refer to them as sanctions. Sanctions, in Dr Fleck's opinion, had to comply with international legal principles, which were widely reflected in ARSIWA and DARIO.

The Chair highlighted that Dr Fleck's use of the term "countermeasures" was correct – it could include denial of access to privileges. It is within the right of treaty groups to decide which States get access to privileges. This is different from the sanction type that Dr Fleck was discussing.

The Chair argued that countermeasures was the right term because it was more of an umbrella term. She proposed the inclusion of a footnote to define this as countermeasures – currently used more synonymously with sanction. One must bear in mind that denials of access to privileges were not included. She recommended citing a general reference to the fact that "countermeasure" was the broader term. It appeared that ARSIWA was more in the sense of sanctions referred to by Dr Fleck and not retorsions, because it did refer to the need to have a prior violation. This might be the root of the confusion. The manner in which ARSIWA used countermeasures was different from the manner

in which Dr Fleck discussed it. The Chair's recommendation to Dr Fleck was to drop "counter" on paragraph 24. When discussing measures that could only be taken when in response to a prior violation of the treaty or of a Security Council authorisation, the term "countermeasures" could instead be used.

Another recommendation in relation to paragraph 24 was to be cautious about the use of *erga omnes*. The *East Timor* case suggested that one could not take countermeasures even in *erga omnes* situations. One could only take retorsions if not a directly affected State or organisation. If a party to the NPT is in non-compliance, then sanctions under the terms of the NPT would be proper. This statement is distinguishable from the statement that the "essential obligations of the NPT have *erga omnes* character." It is contested whether every State would have the right to take a countermeasure. Note the controversy over the US and EU's unilateral practices of taking countermeasures to enforce the NPT outside the Security Council enforcement of such provisions.

The Chair noted that there were serious limitations on sanction-type countermeasures within the *erga omnes* concept. Most of the provisions of ARSIWA were not rules of customary international law; they were general principles - *erga omnes*, for example, was a general principle in the sense of the third category in Art 38 of the ICJ Statute. The Chair considered the working and use of countermeasures as enforcement mechanisms to be general principles and not rules of customary international law.

Dr Fleck returned to the issue of paragraph 24, which he noted was the result of a lengthy debate among Committee members and friends of the Committee. In Volume II of the book series, the Committee Chair, Professor Black-Branch, volunteered to write a chapter on the issue. From Dr Fleck's perspective, the word "measure" was not as precise because the word would also be appropriate in a form of cooperation where everybody complied or tried to comply with an obligation. However, the issue at hand was lack of compliance. Dr Fleck was also hesitant to draw on existing jurisprudence, adding that it was the NPT that was at stake here. The statement made in the Report was that "essential obligations under the NPT do have an *erga omnes* character, it appears that the range of States eligible for taking countermeasures is barely limited." This statement was the result of a controversial debate. It was reflected in Volume II and Dr Fleck believed that, as vague as it was, paragraph 24 should stand in the third Report as it was pinpointing the seriousness of the problem.

The Chair suggested that, to be precise, the term *erga omnes* should be removed. She argued that an alternative wording could be that the parties to the NPT had a Treaty right to bring countermeasures in the case of violations. The best statement of the meaning of *erga omnes* and the best description of the type of measures that States might take in response to *erga omnes* violations was found in the *East Timor* case. In that case, there was a clear limitation on any State that was not directly injured bringing a countermeasure.

Dr Fleck suggested that the issue required further debate. With reference to *erga omnes* principles, in the context of the *East Timor* and *Barcelona Traction* cases, the issue at hand was that the rights of States were affected and a breach of the NPT might affect the rights of all States. Dr Fleck was of the opinion that the problem should not be diminished. Indeed, one must be careful in the use of words. Countermeasures could comprise measures that were lawful and measures that are nor lawful *per se* but justified, even

considering that the ILC made that distinction. Dr Fleck noted that the Committee had not arrived at a final solution; that would be done at a later stage. He recommended that everyone should start further developing his or her ideas in order to reach acceptable results in the draft Declaration.

Mr Ulf Haeussler (Germany) made a suggestion in relation to the report and the next ILA conference. He mentioned that the discussion illustrated that further work might help in developing a clear understanding of the different perspectives contributing to the compromise reflected in paragraph 24. The results of this work should be presented at the 2018 conference, and they should also address the systematic questions underpinning the system of enforcement mechanisms within and beyond the framework of the NPT and associated inspection and verification.

Dr Fleck emphasised that the issue needs to be further developed in the anticipated fourth report. What could be achieved in the meantime would be to gather further critical arguments.

The Chair noted that she was happy to share and be as helpful as possible.

Professor Seung Hwan Choi (Korea) mentioned that he fully supported the third report. He introduced the current situation on the Korean Peninsula, characterised by the development of nuclear weapons by North Korea. There had been four nuclear weapons tests by North Korea, and more than 10 ballistic missile launches by the time of the conference. As a response to the rising nuclear missile threats from North Korea, on 8 July 2016, South Korea declared the deployment of the Terminal High Altitude Area Defense (THAAD) antimissile system in South Korean territory. While this deployment was a legitimate act of self-defence, THAAD could seriously undermine peace and security in Southeast Asia. He expressed himself in favour of a formal declaration that South Korea and the USA would deploy THAAD until North Korea gave up nuclear weapons.

Dr Fleck thanked Professor Choi for his statement. He noted that the fourth report, which would deal with safety, security and peaceful uses of nuclear energy, could be used to discuss in greater detail the arguments made by Professor Choi and those made by other participants. The issue should be included in the Annex, sections A and D. As previously explained, the text of the Annex was essentially a tentative draft open to more argument before being submitted for adoption by a future ILA conference.

Professor Marco Pedrazzi (Italy) questioned whether, in relation to page 24 of the report, obligations under the NTP could be referred to not only as obligations having an "*erga omnes* character" but as integral obligations under ARSIWA, the violation of which directly affected the rights of all other states.

The Chair highlighted that there was no doubt that the problem of nuclear proliferation was a concern to every State and it was very appropriate to remind the world of everybody's interest of this in paragraph 24. There were many other issues that were described as of interest to everyone, such as concerns of health and armed conflict. However, the statement in the *East Timor* case noted that there were many issues such as human rights and arms control that affected everyone in world but not in the direct manner that would permit a countermeasure violating the rights of another State in response to that first State's violation of a rule.

The Chair added that there were a number of alternative actions that States could take in the traditional category of retorsions (eg, diplomatic protests, and denial of benefits) but the restrictive category of countermeasures was for those States (as in the trade area) that had had their access to markets in another country directly restricted. She added that this was part of the critique of the US and EU taking unilateral sanctions in the case of Iran based on what *erga omnes* required.

In the Chair's opinion, there was nothing directly in ARSIWA to support a widening view of which States could take countermeasures.

Dr Fleck observed that this was a challenging point in international law. This might be observed, for example, in the difference between the breach of human rights obligations and the breach of nuclear non-proliferation obligations.

Dr Fleck made a technical remark in relation to an important sentence in paragraph 24 of the report. It stated that "it may be useful to explore the relation between countermeasures taken by States or groups of States on the one hand and actions taken by international organizations such as the UN or the IAEA on the other". It was followed by a list of questions without any attempt to provide any answers. According to Dr Fleck, it was evident that the topic required further exploration and Dr Fleck committed himself, as the rapporteur, to make it an important part of the fourth report.

Mr Haeussler advised caution in developing the countermeasures regime or enforcement mechanisms as they should not be too closely linked to the NTP, given the possibility to denounce this treaty. At the same time, the "natural reflex" to such denunciation, that was the execution of custom, might likewise involve a challenge. If an evasion from the NPT regime and its obligations were to be responded to by an evasion into custom, this kind of action might jeopardise the legitimacy of custom so extended, and subsequently affect the binding force of international law as such.

Dr Rosenthal mentioned, in relation to paragraph 24 of the report, that termination of nuclear cooperation (for example a trade agreement) was requested in the event of non-compliance with a safeguards agreement. This comment was based on the fairness of taking countermeasures as a last resort by the affected States if there was non-compliance with the NPT and violation of other obligations, as stated in footnote 92 of the report.

Dr Fleck maintained that this was exactly the debate on reprisals versus retorsions with other measures in international cooperation. He expressed that he could not, as a lawyer, imagine the result of a situation where international cooperation would no longer be possible in view of the potential use of nuclear missiles.

Dr Rosenthal, in the context of paragraph 24 and footnote 92, argued that in event of violation of an NPT safeguards agreement, termination of nuclear cooperation was a first, rather than a last, resort for others. He cited examples of termination of nuclear cooperation carried out by the US, Germany and France.

Professor Sancin suggested that it was necessary to distinguish between the legal obligations of States under the NPT (in the case where one State was not respecting its obligations) and countermeasures, which could take various forms outside the NPT regime in response to the illegal behaviour of the wrongdoing State.

The Chair noted that Professor Sancin's statement expressed very clearly what the confusion was. The US, for example, terminated trade agreements or banking privileges and it might only do so if it had a right to take a countermeasure. It could certainly deny access to information, cooperation and engineering resources at any time it wanted to. This was the kind of retorsion that was indicated in comments made in the session and was always permissible, but one had be very careful and precise with regard to the category qualifying as countermeasures because of the implications to a much wider group of legal obligations that came into play.

The issue of countermeasures should be clarified in the report, and it might be decided that, in the nuclear proliferation regime, there was more scope for taking countermeasures. This was a point of utmost importance and paragraph 24 would require further development.

Dr Rosenthal stated that Article I of the NPT obligated nuclearweapon States not to cooperate in the event of a violation of the NPT. It was explicit in the NPT that nuclear-weapon States could not assist non-nuclear-weapon States in doing certain things. The NPT did not explicitly forbid non-nuclear-weapon States from assisting others to develop nuclear weapons.

Professor Sancin highlighted that it was important to distinguish between assistance as a legal obligation not to cooperate and countermeasures. The issue was whether non-nuclear-weapon States had a legal obligation not to cooperate or assist other States. She thus agreed with Dr Rosenthal that this was implicit, at least in the framework of the entire NPT.

Dr Fleck remarked that if Article I of the NPT was an obligation to cooperate, it did not apply to non-parties. The problem under discussion was one concerning non-parties to the NPT, such as North Korea, India, Pakistan, and Israel. This was more complicated as seen in the recent jurisprudence on *erga omnes* obligations and countermeasures since one was not operating here in the human rights area but in an even more important area for the survival of mankind. This might affect parties and non-parties to particular treaties. Dr Fleck argued that it was a particular question for how directly States might be affected.

The Chair expressed that the discussion was very helpful in clarifying the particular categories of measures that were addressed. She then asked whether the nuclear proliferation area entitled a wider group of parties to actually take countermeasures. This, for the Chair, required further investigation.

Dr Fleck suggested that there was not a need to change the text of the present report, although it did not cover all aspects that should be reflected in the draft declaration. He concluded that it was decided that paragraph 5 of the third report be amended and the issues discussed in paragraph 24 be further developed in the fourth Report to be delivered at the next conference.

The Chair, in closing, expressed gratitude to attendees who raised questions and made comments. She added that everyone in the international community looked forward to the fourth report and wished Dr Fleck and Committee members well in their work in the years ahead.

Reporters: Mothepa Shadung and Lolah Nkosi

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

COMMITTEE ON INTERNATIONAL MONETARY LAW

Members of the Committee:

Sir William Blair (UK): *Chair*
Mr Thomas Baxter, Jr (USA): *Vice-Chair*
Mr Antonio Sainz de Vicuna y Barroso (Spain): *Vice-Chair*
Mr David Gross (USA): *Secretary*

Dr Georges Affaki (France)
Dr Adesegun Akin-Olugbade (HQ, Nigeria)
Dr Mohammed Alsheaibi (HQ, Saudi Arabia)
Mr Javier Arrigunaga (Mexico)
Mr Lee Buchheit (USA)
Professor Dominique G Carreau (France)
Mr Luis Urrutia Corral – Nominee of the Chair
Mr Cristiano Cozer (Brazil)
Sir Ross Cranston (UK)
Mr Julio Ernesto Curutchet (Argentina)
Mr Diego Devos (HQ, Switzerland)
Dr Klaus Peter Follak (Germany)
Mr James H Freis, Jr (USA)
H.E. Jonathan Fried (Canada)
Mr Stefan M Gannon (Hong Kong)
Professor Benjamin Geva (Canada)
Professor Francois Gianviti (France)
Professor Mario Giovanoli (Switzerland)
Professor Christos Gortsos (Greece)
Professor Christos Hadjiemmanuil (HQ, Greece)
Mr Sean Hagan (USA)
Dr Eva Hupkes (Germany)
Mr Marcus Jewett, QC (Canada)
Professor Hideki Kanda (Japan)
Mr Bernd Krauskopf (Germany)
Professor Takashi Kubota (Japan)
Professor Rosa Lastra (Spain)
Dr Li Bo (HQ, People's Republic of China)
Professor Cynthia Lichtenstein (USA)
Mr Liu Xiangmin (HQ, People's Republic of China)
Professor Jean-Victor Louis (Belgium)
Dr Manuel Monteagudo Valdez (HQ, Peru)
Mr Ernest Patrikis (USA)
Dr Charles Proctor (UK)
Professor Engela Schlemmer (South Africa)
Professor Rene Smits (Netherlands)
Professor Kazuaki Sono (Japan)
Mr Gopala Krishnan K Sundaram (HQ, Malaysia)
Mr John L Taylor (Australia)
Professor Luc Thevenoz (Switzerland)
Mr Luis Urrutia Corral (Mexico)
Professor Syue-ming Yu (Chinese (Taiwan))
Professor Franz Zehetner (Austria)
Professor Chiara Zilioli (Italy)

Observers:

Ms Ana María Carrasquilla (HQ, Colombia)
Professor Agasha Mugasha (HQ, Uganda)

Introduction

Since the last Conference of the ILA, held in Washington, DC, USA, in April 2014, the Committee (generally known by its acronym, MOCOMILA) has held four meetings: in Vienna, Austria (19-20 September 2014), Beijing, China (9-10 April 2015), Berlin, Germany (4-5 September 2015), and Athens, Greece (3-4 June 2016). The Vienna meeting was held at the Oesterreichische Nationalbank (OeNB) and focused on two themes: Eurozone Developments (including the SSM) and legal implications of sanctions (with particular regard to Ukraine). It included talks by Mr Ewald Nowotny and Mr Claus Raidl, the Governor and President of the OeNB. That meeting was the last for our valued colleague, Mr Bertold Wahlig, and we wish him all best wishes. The Beijing conference, hosted by the People's Bank of China (PBOC), also focused on two issues: the proper place of the contemporary central bank and the international role of RMB. It featured talks by Mr Zhou Xiaochuan, Governor of the PBOC, and Dr Ma Jun, Chief Economist of the Research Bureau of the PBOC. Our Berlin conference was also very special for the committee, as it was our 100th meeting. The meeting, hosted by the Deutsche Bundesbank at the historic Berlin-Brandenburg Academy of Sciences and Humanities, included a retrospective on the work of the committee since its founding. It then focused on issues surrounding payment and settlement. The meeting included talks by Mr Jochen Metzger and Mr Olaf Christmann, the head of the payment system department and director in the legal department at the Deutsche Bundesbank. The Athens meeting was organized under the auspices of the Hellenic Bank Association and of the Bank of Greece and was held at the premises of the European Public Law Organization (EPLO). It featured presentations by Professor Louka Katseli, Chairwoman of the National Bank of Greece and the Hellenic Bank Association, Professor Spyridon Flogaitis, Director of the EPLO, and Professor John Mourmouras, Deputy Governor of the Bank of Greece.

The subjects of the foregoing meetings and other topics discussed by the Committee are reflected in the following sections of this report.

I. An Early History of MOCOMILA (by Mr L Buchheit)

II. Ethics in Finance: A Progress Report (by Mr T Baxter)

III. Decided cases in London and New York (by Sir Ross Cranston)

IV. The Operation of the European Banking Union: Institutional Developments (July 2014 – March 2016) (by Professor C Gortsos)

V. Payments Recent Developments: Virtual Currencies (by Professor B Geva)

VI. The East African Community Monetary Union (by Professor A Mugasha)

VII. Crowdfunding in International and National Regulatory Frameworks (by Dr K P Follak)

This report reflects the views of the individual members and not necessarily those of any institutions with which they are affiliated.

At our meeting in Beijing, MOCOMILA endorsed and confirmed the statement contained in its report to the Berlin meeting of the ILA in 2004, as accepted by the ILA before and since. This states MOCOMILA's policy as follows:

"The Committee has recently endorsed its longstanding membership policy. In addition to the ILA's general policy for renewing Committee mandates and membership every four years, there are essentially three elements to the practice of MOCOMILA. First, the Committee should consist of a group of experts in monetary law with a balance of representation from institutions (central banks and international financial institutions), academia and private practice of law. Second, members must be in a position to actively participate in the work of the Committee, including through participation in the Committee's twice yearly annual meetings (not necessarily every time, but regularly) and in contributions to its seminars and publications. Third, consistent with its established practice, the Committee will invite prospective new members first to attend Committee meetings as Observers in order to determine whether each such person is in a position to contribute to the work of the Committee; only afterwards would nomination to membership by the ILA Executive Committee be sought."

I. An Early History of MOCOMILA

The International Law Association was founded in October 1873. Its original name, "The Association for the Reform and Codification of the Law of Nations," was changed to the International Law Association in 1895. The Monetary Law Committee of the ILA was established by the Executive Council of the ILA in 1951. The original rapporteur was F.A. Mann and the President was Max Gutzwiller.

The records show that on at least four occasions the ILA discussed issues of monetary law before MOCOMILA was formed in 1951.

The 31st Conference of the ILA in 1922 (held, appropriately enough, in Buenos Aires) discussed the Negotiation of External Loans with Foreign Governments. After a lengthy presentation by Charles Cheney Hyde, the Chairman of the meeting endorsed the opinion of the British representative that loans to foreign governments – because they were not then enforceable in legal proceedings – were "not a matter for our International Law Association at all." Although the minutes of this meeting endeavor to lay a soft blanket over the points of disagreement, it is clear that some participants had a strong negative reaction to the view that loans to foreign governments were not a fit subject for lawyers to discuss. They reminded their colleagues of the pernicious consequences that can follow from the non-payment of such loans, and of the views of the Argentine jurist, Dr Luis Drago, on the use of force to compel payment of foreign loans.[1]

In 1926, at the 34th Conference in Vienna, one of the topics was "Rules Relating to the Rate of Exchange."

At the 38th Conference in Budapest in 1934, the ILA considered "Payments in Gold and in Foreign Currencies" (this was one year after the U.S. Congress, as a matter of public policy, abrogated the gold clause in obligations subject to U.S. jurisdiction). At both the 39th and 40th Conferences (1936 and 1938), Gold Clause issues were also discussed.

To give you some idea of priorities, however, over this same period the ILA considered matters of divorce law at five separate Conferences.

---

[1] *See* Luis Drago, *State Loans in Their Relation to International Policy*, 1 *American Journal of Int'l Law* 692 (1907) (warning of the danger of allowing public debts to be collected *manu militari*).

At its 45th Conference in Lucerne in 1952, the ILA instructed the International Monetary Law Committee, "to submit to the I.L.A. a statement of principles relating to such questions of Monetary Law as the Committee may select and for this purpose to keep in close touch with international and national authorities dealing with monetary administration and with the local branches of the Association."

Representatives of the IMF and the Bank for International Settlements have regularly attended Committee meetings, starting with the Committee's first meeting 64 years ago.

At that first meeting of MOCOMILA, Dr. Mann announced that "our task is to harmonize international monetary law." He encouraged MOCOMILA to aim high – seeking nothing less than a "comprehensive scheme for international legislation on monetary matters."

In its first report to the ILA, MOCOMILA said that it had resolved "to devote its attention primarily to practical questions rather than matters of academic interest." It therefore designated the following topics "with a view to developing principles recommended for general acceptance":

(i) the conflict of laws relating to exchange controls;
(ii) the law of protective clauses (gold clauses, index clauses, etc.) "with special reference to their efficacy in the event of legislative interferences";
(iii) the determination of the money of account with special reference to certain types of contracts such as insurance, sale, agency and negotiable instruments;
(iv) international investments and their protection by international monetary law;
(v) the enforcement of foreign currency obligations; and
(vi) international cooperation in monetary matters.

In this same initial report, MOCOMILA opined that the "branch of monetary law which is most urgently in need of international clarification is the conflict of laws relating to exchange controls."

Much of the Committee's attention – and much of its scorn – was directed at Article VIII(2)(b) of the IMF Articles of Agreement,[2] a provision that the Committee found "so obscure that it cannot afford any authoritative guidance to the solution of our problem."

Dr. Mann led the discussion of Article VIII(2)(b). He urged the Committee to treat the Bretton Woods Agreements as a *fait accompli* and to accord them a degree of "respect, goodwill and loyalty" commensurate with a multilateral treaty of great magnitude. It was now an "inescapable fact," he said, that some exchange controls – sanctioned by the IMF – had "become respectable." "Much of our old learning," he therefore concluded, "has become obsolete."

---

[2] Article VIII(2)(b) reads as follows:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

Not every member of the Committee was as prepared as Dr. Mann to go gentle into the good night of Bretton Woods. One member, Mr. Eder (nationality not clear from the record), "expressed almost total disagreement" with Dr. Mann's reports on Article VIII(2)(b). Based on his personal experience, Mr. Eder regarded exchange controls as simple theft; a violation of the "plighted faith of governments great and small." About Bretton Woods, Mr. Eder had this to say:

> [I]f we are to be faithful to the high standards of our profession, we must condemn [the Bretton Woods Agreement]. The International Monetary Fund was foredoomed to failure, as was pointed out by many at the time of its drafting and signature. It is being more or less openly violated by several governments. The latest report of the Fund is a confession of failure. The fundamental vice of the Bretton Woods Agreement, from a lawyer's standpoint, is that it purports to legalize devaluation of economics.

Exchange controls, and in particular the implications of Article VIII(2)(b), occupied the attention of the Committee well into the 1960s.

President Nixon took the United States off the gold standard in August 1971. Unmoored from gold, commercial parties looked for ways to "maintain value in real terms" in international payments. This subject preoccupied the Committee's attention during the 1970s. MOCOMILA meetings in the 1970s considered the use of "value clauses," Special Drawing Rights as a unit of account in international conventions, European Currency Units (ECU) and "real value" (compensatory purchasing power) clauses.

The global sovereign debt crisis that started in August 1982 with Mexico's default set much of the agenda for the Committee's meetings in the 1980s.

In the early decades of the Committee's existence, perhaps guided by the person or spirit of Dr. Mann, MOCOMILA saw its task as attempting to harmonize international monetary law. This led to the promulgation of draft conventions and statements of principles by the Committee to a far greater extent than is attempted by the 21st century MOCOMILA.

The Committee has, however, always shown a degree of topicality in the issues it discusses. Exchange controls in the 1950s and 60s. Monetary rules in the absence of the gold standard in the 1970s. Sovereign debt crises in the 1980s. And the development of the euro in the 1990s.

II. Ethics in Finance: A Progress Report

A. Introduction

There is a new focus on ethics in finance in the aftermath of the financial crisis. This development arises out of increasing public hostility toward the financial services industry, hostility that is rooted in a loss of trust. This loss of trust appears to result from a series of different incidents where bankers have engaged in significant misconduct.

The manipulation of the LIBOR rate to advantage certain financial institutions' proprietary positions is one. This was then followed by a different scheme, where bankers traded ahead of their customers in foreign exchange markets, in a technique that is called "front running." This technique generates profit by exploiting a customer's confidential trading information. The fact that the foreign exchange misconduct closely followed the LIBOR misconduct contributed to a widespread perception about standards.

There have been unsettling incidents involving traditional banking businesses. Here, there were disturbing examples of bankers "robo-signing" foreclosure papers, and ignoring customer rights and protections that depended on an intelligent and careful review of what was said in those papers. Further, there were real consequences to this behavior – families were displaced from their homes. Wholesale residential mortgage operations also saw abuses, although they were different in kind from the robo-signing that was done in retail residential mortgage foreclosures. In the wholesale space, bankers were packaging up loans that did not meet the represented underwriting criteria. The loans wer passed to securitizers, who used this "product" to back securities being sold to buyers. These buyers thought they were getting securities backed by good loans, which they were not. The crisis showed a different reality. With respect to both the retail and the wholesale practices, bankers allowed themselves to be portrayed as untrustworthy people who would engage in misconduct for money.

Popular post-crisis movies like *The Big Short* depicted bankers as predators, who would exploit any and every profit opportunity without regard to the impact on the customer. This depiction no doubt contributed to an overall loss of trust in banks. An earlier genre of popular movie, with *It's a Wonderful Life* being the best example, depicted the banker of an earlier time as a person deeply invested in the community who put the customer's interest ahead of his own. Both may have an element of caricature, but in the post-crisis era, the banker became a villain.

B. The New Focus on Culture

Since the crisis, some financial industry supervisors observed the new reality and called for reform.[3] They lamented that the industry had lost the trust of the people it served, and looked for things to do to restore trust. After considering a range of ideas, supervisors started thinking about cultural change as a necessary method to restore trust.

At the outset, many industry participants and industry apologists expressed skepticism about the effort to transform culture. Some attacked the concept as vague and ephemeral, and contrasted it to "harder" supervisory concepts like capital and liquidity. Others considered the idea as lacking in substance. Others studied the literature and came to appreciate that there was substance to what was being described as an ethical culture, and

[3] *See* Christine Lagarde, "Economic Inclusion and Financial Integrity," Address to the Conference on Inclusive Capitalism, May 27, 2014, *available at* https://www.imf.org/external/np/speeches/2014/052714.htm ("Trust is the lifeblood of the modern business economy… . To restore trust, we need a shift toward greater integrity and accountability. We need a stronger and systematic ethical dimension."); Mark Carney, "Rebuilding Trust in Global Banking," Speech at 7th Annual Thomas d'Aquino Lecture on Leadership, Ontario, Feb. 25, 2013, *available at* http://www.bankofcanada.ca/2013/02/rebuilding-trust-global-banking ("The real economy relies on the financial system. And the financial system depends on trust. Indeed, trust is imbedded in the language of finance. The word credit is derived from the Latin, *credere*, which means 'to have trust in.'"); William C. Dudley, "Enhancing Financial Stability by Improving Culture in the Financial Services Industry," Remarks at the Workshop on Reforming Culture and Behavior in the Financial Services Industry, Oct. 20, 2014, *available at* https://www.newyorkfed.org/newsevents/speeches/2014/dud141020a.html ("Unless the financial industry can rebuild the public trust, it cannot effectively perform its essential functions. For this reason alone, the industry must do much better.").

culture could meaningfully affect behavior.[4] These commentators focused on intellectual leaders like Professor Onora O'Neil, who describe qualities like honesty, competence and reliability. These individual characteristics comprise the foundation of trustworthiness – a predicate to trust.[5]

Further, a number of financial institution leaders began to appreciate that culture lies at the root of recent scandals.[6] These firms now understand that placing an emphasis on personal qualities like honesty, competence and reliability can translate into changed banker behavior. Leaders began incorporating such characteristics into their training programs and performance systems, and have started to see the benefits.

C. Translating Ethical Concepts into Real World Behavior

One prominent illustration of this has come in the United Kingdom, which has emphasized individual accountability through the new Senior Managers and Certification Regimes and through new, enforceable conduct rules.[7] Under these rules, a banker "must act with integrity" and "with due skill, care, and diligence." Further, bankers must be "open and cooperative" with regulators. To accompany these general principles, there is specific guidance as to what a banker should *not* do. For example, it would offend the integrity principle if a banker were to mislead a client about the risks of an investment.[8] With respect to the principle requiring competence, there is specific guidance that putting a customer into an unsuitable investment would fail the competency test.[9] It is not surprising that there is also guidance to the effect that a failure to supply a regulator with requested documents would violate the principle that a banker be "open and cooperative."[10]

---

[4] *See Supervision of Behavior and Culture: Foundations, Practice & Future Developments* (Mirea Raaijmakers, ed. 2015). *See also* Dan Awrey, William Blair, and David Kershaw, *Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?* 38 *Del. J. Corp. L.* 191 (2013) (summarizing academic literature).

[5] *See generally* Onora O'Neal, *A Question of Trust* 15-17, 23-24, and 43-47 (2002) (distinguishing trust from trustworthiness). *See also* Onora O'Neill, "What we don't understand about trust," TED Talk (June 2013), *available at* https://www.ted.com/talks/onora_o_neill_what_we_don_t_understand_about_trust?language=en ("And I think that [assessing trustworthiness] requires us to look at three things. Are they competent? Are they honest? Are they reliable? And if we find that a person is competent in the relevant matters, and reliable and honest, we'll have a pretty good reason to trust them, because they'll be trustworthy.").

[6] *See* Federal Advisory Council and Board of Governors, Record of Meeting, May 8, 2015, *available at* http://www.federalreserve.gov/aboutthefed/fac-20150512.pdf ("Regulators and the banking industry have worked extensively to restore financial stability through a series of mechanisms and rules that establish appropriate levels of capital, liquidity, and leverage… . As often as not, however, the challenges faced in recent years have been behavioral and cultural; post-crisis episodes such as LIBOR and foreign exchange manipulation provide hard evidence that there remains work to be done.").

[7] *See* Financial Conduct Authority, "Strengthening accountability in banking: Final rules (CP 15/22)," July 2015, App'x A ("Code of Conduct Sourcebook") at §§ 4.1-4.2, *available at* https://www.fca.org.uk/news/cp15-22-strengthening-accountability-in-banking-final-rules.

[8] *Id.* at § 4.1.1(3)(a).

[9] *Id.* at § 4.1.3(2).

[10] *Id.* at § 4.1.11(2)(c).

The official sector within the United Kingdom is not alone. From within the industry on both sides of the Atlantic, there have been some notable developments. In the area of performance management, many financial institutions have introduced ethical components into their formalized appraisal systems. It has become common practice to see concepts like honesty, competence and reliability appear in the appraisal process. The appraisal process has become more qualitative, in sharp contrast to past practice where quantitative measures, like an employee's contribution to profit and loss, was the principal determinant of good performance. This is in line with the Group of Thirty's ambitious challenge to the industry to place quantitative and qualitative components on equal footing—that is, 50-50 parity between "how results are achieved" and "what is achieved."[11]

This change with respect to the appraisal process has a direct connection to compensation, because most compensation systems in the financial services industry are performance based. The appraisal is the measure of performance. Therefore, the introduction of cultural scoring now can have a direct impact on the level of an individual's compensation.

Discipline is another visible component of a material change in practice. At the Federal Reserve Bank of New York's most recent culture conference, one financial institution senior executive related anecdotal evidence of a marked change in practice in an unforgettable fashion. "In the past," he explained, an employee who engaged in significant misconduct would be "escorted secretly to the back door, his jacket would be pulled up over his head, and he would exit the bank anonymously, never to be seen or heard from again."[12] The bank population would not know what happened to the person, or why. The executive explained that the current situation was dramatically different. He said that "today, the same individual would be discharged, his conduct would be transparent to the bank population, and he would leave through the front door, escorted by security personnel with their boots to his back." By making examples of bankers who do not meet the bank's ethical standards, financial companies accomplish three distinct objectives. First, they send a most powerful message to the employee population about conduct that is impermissible. Second, they deter employees from making bad choices. Third, they send a powerful message to all stakeholders that will help to restore trust.

The fact that senior executives of financial institutions are speaking about ethical issues is noteworthy. Even more important is that they are "walking the talk" about such matters, meaning they are taking affirmative actions that show their words have meaning. Disciplining malefactors is one example. In many different financial institutions, there are disciplinary committees considering how the organization should act to influence culture, and these committees are reporting up to the "C" suite. Some have also created "ethical champions" within the organization, typically a responsible senior officer who is the "guardian of the corporation's integrity."[13]

---

[11] Group of Thirty, *Banking Conduct and Culture: A Call for Sustained and Comprehensive Reform* 62 (July 2015).

[12] *See* Federal Reserve Bank of New York, *Summary of Reforming Culture and Behavior in the Financial Services Industry: Workshop on Progress and Challenges* 8 (November 2015), *available at* https://www.newyorkfed.org/medialibrary/media/newsevents/events/banking/2015/culture_workshop_summary_2015.pdf.

[13] Thomas C. Baxter, Jr., "Reflections on the New Compliance Landscape," Remarks at the "New Compliance Landscape: Increasing Roles-Increasing Risks" Conference, New York City, July 24,

D. Momentum for the Movement to Restore Trust

As noted above, considerable skepticism greeted the initial call for reform of the industry's ethical culture. Over the last two years, this skepticism has abated. In its place we see the beginning of a reform movement.

Several months ago, the Group of Thirty published its report on ethical culture.[14] This highly respected body of financial industry leaders affirmed the need to restore trust and applauded the effort to accomplish the goal through culture. The Financial Stability Board has also picked up the trend. It published influential guidance on risk culture in April 2014[15] and sponsored a conference on culture in May of 2016. The Basel Committee picked up the theme of culture in its July 2015 Corporate Governance Principles.[16] The European Systemic Risk Board also addressed culture in its June 2015 Report on Misconduct Risk.[17] The Bank of England and other UK authorities sponsored the Fair and Effective Markets Review.[18] De Nederlandsche Bank has pioneered new approaches to group conduct by boards and senior management committees.[19] And, recently, the Financial Industry Regulatory Authority ("FINRA") announced it would pilot an examination of some of its members to probe the progress that securities firms are making with respect to culture.[20]

The real test, of course, is the impact on public trust, which is closely correlated to a real change in the conduct of bankers. When the public starts to see a change in banker behavior, with a commensurate effect on trustworthiness in the financial community, this will be significant progress. At this point, we may not have not seen substantial evidence that banker behavior and industry perception have changed. But the "green shoots" that are the first sign of spring are observable, and many are hopeful that the corner has been turned in restoring trust.

E. Future Steps Forward

In the near term, there are some other initiatives that might materially impact the ethical culture of the financial services industry.

One of the steps being discussed in the United States concerns a database containing the names of bankers who have been discharged because of misconduct.[21] The database

2014, *available at* http://www.newyorkfed.org/newsevents/speeches/2014/bax072314.html (citing E. Norman Veasey and Christine DiGuglielmo, *Indispensable Counsel: The Chief Legal Officer in the New Reality* (Oxford Univ. Press 2012)).

[14] *See supra* n.11.

[15] Financial Stability Board, *Guidance on Supervisory Interaction with Financial Institutions on Risk Culture: A Framework for Assessing Risk Culture* (April 2014), *available at* http://www.fsb.org/wp-content/uploads/140407.pdf?page_moved=1.

[16] Basel Committee on Banking Supervision, *Corporate Governance Principles for Banks* (July 2015), *available at* http://www.bis.org/bcbs/publ/d328.pdf.

[17] European Systemic Risk Board, *Report on Misconduct Risk in the Banking Sector* (June 2015), *available at* https://www.esrb.europa.eu/pub/pdf/other/150625_report_misconduct_risk.en.pdf.

[18] Fair and Effective Markets Review, *Final Report* (June 2015), *available at* http://www.bankofengland.co.uk/markets/Documents/femrjun15.pdf.

[19] *See supra* n.4.

[20] *See* FINRA, 2016 Regulatory and Examination Priorities Letter (January 2016), *available at* http://www.finra.org/industry/2016-regulatory-and-examination-priorities-letter.

[21] *See* Dudley, *supra* n. 3.

would be supported by Federal statutory law that would require financial institutions to report to the database. It would also immunize reporters from civil liability for misreporting, while at the same time containing due process protections for anyone who is adversely affected by a false report. The law would also require financial institutions to make a proper inquiry of the database before finalizing a hire for a significant position. The database is intended to solve the "rolling bad apples" problem, where a banker is discharged by one financial institution for misconduct, and goes on to commit the same misconduct at a successor employer. Because of a fear of civil liability, financial institutions respond to inquiries about former employees with their "names, ranks and dates of service." They do not reveal that such former personnel have engaged in bad acts. Consequently, employers make employment decisions on the basis of imperfect information about a candidate's prior conduct. The database would help employers make decisions that are better informed. Presumably, this additional information would have the salutary effect of stopping the bad apple from rolling.

A different step has been taken in the United Kingdom. There, employers must now report any actual or suspected misconduct by current or former employees to a central regulatory database.[22] Only the official sector will have access to this database. The new regulatory scheme also imposes a bank-to-bank inquiry and reporting requirement.[23] A supervised firm must check the industry references of prospective managers, material risk takers, or customer advisors. An institution must, upon receipt of an inquiry, relay any conclusions it has made as to whether a former employee violated any law, regulation, or conduct rule. In addition, the Banking Standards Board has commenced operation, and it promises to reset the bar for good conduct in the financial services industry within the United Kingdom. The Board will obtain much needed agreement as to what is better practice for financial professionals, and then this will become the standard for operating in the United Kingdom.

In the Netherlands, De Nederlandsche Bank is exploring several highly advanced examination protocols directed at culture. In addition, bankers are expected to execute a pledge where they will individually commit to certain conduct standards. We may soon be able to look to the Netherlands to see whether the ethical culture in Netherlands' financial institutions has been affected by these efforts to address culture.

F. Conclusion

There have been significant reforms of the financial services industry in the post-crisis period. Traditional measures addressing the capital and liquidity of individual institutions have materially improved the safety and soundness of the industry. The new focus on ethical culture has the promise of restoring a loss of trust in the industry. The effort to build a sound ethical culture in industry participants has the potential to get at the root cause of the loss of trust, and that root cause is the bad behavior of bankers. We look forward with anticipation and hope to see this change realized.

III. Decided cases in London and New York

The Global Financial Crisis was the catalyst for a considerable volume of litigation. Some of this has revolved around the insolvency of financial institutions such as Lehman.

[22] *See* FCA CP14/13, PRA CP14/14 (July 2014).
[23] *See* FCA CP 15/31, PRA CP 36/15 (Oct. 2015).

But in the leading financial centres of London and New York some has involved claims for losses suffered in the crisis. Claims have been brought by financial institutions, corporations and investors in an attempt to find deep pockets for compensation. Both England and New York are common law jurisdictions and both share a similar judicial philosophy to resolving financial disputes. The following is concerned with claims advanced at common law, rather than under the securities laws.

One of the most extraordinary of these claims was against the New York Fed in relation to its rescue of AIG. Although he failed with his private law claims for breach of fiduciary duties by the New York Fed (*Starr International Company Inc* v *Federal Reserve Bank of New York*, 742 F.3d 37 (2d Cir. 2014)), the major shareholder in AIG has had some success in the US Court of Federal Claims. In a judgment in early July 2015 the court held that although there was no entitlement to damages, the New York Fed had exceeded its mandate with the rescue. The government is appealing.

Indeed most private law claims have failed in both England and New York. There is a strong ethos of freedom of contract in commercial dealings, with the courts assuming that the parties can look after their own interests. If one side misrepresents a matter, the other side is assumed to be able to spot it or to take the trouble to uncover the real position. As a result of a case litigated over the Russian financial crisis in the late 1990s (*Peekay Intermark Ltd* v *Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep. 511), England has a doctrine of contractual estoppel. A contract can set out a basis of contracting, which can well fly in the face of the facts, but which the parties are estopped from denying. Thus the contract terms can acknowledge that the contract contains the entire agreement between the parties, that there have been no other representations than those set out in the contract, and that the parties have not relied on any other representations in entering into the contract.

Titan Steel Wheels Ltd v *Royal Bank of Scotland plc* [2010] EWHC 211 (Comm); [2012] 1 C.L.C. 191 is an example of how contractual estoppel was applied post crisis. It concerned derivatives the bank provided in June and September 2007, which turned sour. The company (a substantial European manufacturer) claimed that it should have been advised not to enter the transactions and that the advice it received was wrong. The judge held that if the bank had chosen to give advice it would have avoided any responsibility since the terms of the contract relieved it not only from any obligation to give advice but provided that any statements were not to be treated as advice, nor could they be relied upon by Titan, whether or not they did constitute advice.

An exceptional case in the English courts where an investor was able to establish a misrepresentation about an investment in a bond issued by AIG, which turned bad in the crisis, was *Rubenstein* v *HSBC Bank plc* [2012] EWCA Civ 1184; [2013] 1 All E.R. (Comm) 915, but that was really a consumer case.

There is a resonance with the English approach to misrepresentation and the duty to advise in contract doctrine in New York law. Thus under New York law sophisticated parties will be expected to protect themselves from misrepresentation and are permitted to do so by contractual provisions. Indeed, failure to take such steps means that, as a matter of law, they cannot establish the justifiable reliance which the doctrine of fraud demands. This was restated by the majority of the New York Supreme Court, Appellate Division, in *ACA Financial Guaranty Corp.* v *Goldman Sachs*, 106 A.D.3d 494, 967 N.Y.S.2d 1

(2013). (An appeal from that decision was dismissed by New York's highest court, the Court of Appeals: 22 N.Y.3d 909, 998 N.E.2d 392, 975 N.Y.S.2d 729.) There the plaintiff bond insurance company alleged that Goldman Sachs fraudulently induced it to issue a financial guarantee for a portion of an investment by misrepresenting that a non-party hedge fund was taking a long position in the investment, whereas it was actually a short seller. The court held (over a strong dissent) that the lower court had been in error in denying Goldman Sachs' motion to dismiss the causes of action.

HSH Nordbank AG v *UBS AG*, 95 A.D.3d 185, 941 N.Y.S.2d 59 (2012) was an action in fraud on what was essentially a credit-default-swap transaction. On appeal the Appellate Division of the New York State Supreme Court held that one reason the plaintiff bank could not sustain the action was that the contractual documentation contained a series of disclaimers that it was not relying on any representations made to it.

Negligence as a basis of action against financial institutions for losses suffered has not fared well in either England or New York. The advantage if it can be established is that it enables claims against parties who have no contract with the financial institution; the disadvantage is that both English and New York law restrict liability. In *Torre Asset Funding Ltd* v *Royal Bank of Scotland Plc* [2013] EWHC 2670 (Ch) a property investment company collapsed with the onset of the crisis. It had been funded through a number of interrelated agreements. The bank was the agent bank at the mezzanine level and Torre one of the funders at that level. With the collapse Torre was left empty handed and unsuccessfully advanced various claims against the bank, including one in negligent misstatement.

New York law limits negligent misrepresentation to situations involving actual privity of contract between the parties or a relationship so close as to approach that of privity. *Anschutz Corp* v *Merrill Lynch & Co,* 690 F.3d 98 (2d Cir. 2012), was a case where a number of claims were advanced under federal and state law regarding offerings of securities. Separate but related allegations in negligent misrepresentation failed against the credit rating agencies, Moody's and Standard & Poor's, for the ratings they had given the securities.

Onerous obligations flow if a fiduciary relationship (a relationship of trust and confidence) can be established in English and New York law. The essence of a fiduciary relationship is that the fiduciary must subordinate its own interests to those of its principal. Outside the historical categories where fiduciary relationships have been held to exist (trustee-beneficiary, agent-principal, director-corporation, etc.), English courts are generally hostile to the infiltration of the fiduciary concept into the commercial context and accept that parties can exclude the fiduciary concept by contract. Fiduciary law has got no further in the context of financial dealings. As with English law, parties under New York law are able to contract out of any possible fiduciary duties: *Bank of America, N.A. v. Bear Stearns Asset Management*, 969 F. Supp. 2d 339 (S.D.N.Y. 2013).

IV. The Operation of the European Banking Union: Institutional Developments (July 2014-March 2016)

A. General Overview

(a) The Creation of a European Banking Union ('EBU') was tabled at the Euro Area Summit of 29 June 2012, amidst the current fiscal crisis in the euro area, which became

manifest in 2010. The establishment of the EBU is aimed at creating a 'Europeanised bank safety net' consisting of three 'main' pillars:

- a Single Supervisory Mechanism exclusively for the banking sector (*i.e.*, not for the other two sectors of the financial system, insurance and securities) and mainly for credit institutions legally incorporated in euro area Member States, with regard to their micro-prudential supervision (see below under B),
- a Single Resolution Mechanism for unviable credit institutions (also mainly incorporated in euro area Member States), and a Single Resolution Fund to cover any resulting funding gaps, provided that a decision is made on the resolution of such credit institutions (see below under C), and
- a single deposit guarantee scheme and a single deposit guarantee fund (see below under D).

The most significant institutional developments towards establishing the EBU took place in the course of 2013 and 2014, in an exceptionally short timeframe under enormous political pressure (reflecting the widespread loss of public trust in the financial system, at least in some Member States). With the exception of the creation of a single deposit guarantee scheme, on which there are current developments, all the other main components of the EBU, *which apply mainly (but not exclusively) to the euro area Member States*, are in place.

(b) The new EU institutional framework on the EBU is coupled with a 'single rulebook,' adopted by the European Parliament and the EcoFin Council and further detailed by the European Commission and European Banking Authority ('EBA'). It is mainly a child of the recent (2007-2009) international financial crisis, is *applicable across all EU Member States* as part of the single market for financial services, is based on a 'total harmonisation approach,' and contains substantive rules on:

- the prudential regulation and supervision of credit institutions, in accordance with the provisions of the Capital Requirements Regulation ('CRR') and the fully amended version of the Capital Requirements Directive ('CRD IV'),
- their recovery and resolution, in accordance with the provisions of the Bank Recovery and resolution Directive ('BRRD') of the same institutions, and
- the guarantee of bank deposits, in accordance with the provisions of the Deposit Guarantee Directive ('DGSD') of the same institutions.

(c) The full Europeanisation of the 'bank safety net' presupposes nevertheless further institutional elements. Two of them are already in place:

(i) With the creation of the European Systemic Risk Board ('ESRB'), established under Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 "on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board" as part of the European System of Financial Supervision ('ESFS'), the macro-prudential oversight of the European financial system became the first – and single until 2014 – component of the Europeanised 'bank safety net.'

(ii) The second is the provision of direct public financial assistance to credit institutions by the European Stability Mechanism ('ESM') under the 'Direct

Recapitalisation Instrument' ('DRI'). This instrument entered fully into operation on 8 December 2014, after the requisite national procedures were completed by the euro area Member States, by means of a unanimous Resolution of the ESM Board of Governors. On the same day, the ESM Board of Directors adopted a Guideline on the modalities, including, *inter alia*, the eligibility criteria for the requesting ESM Member and the institution concerned, and the allocation of specific tasks to the Managing Director of the ESM, the Commission, the European Central Bank ('ECB') and, where appropriate, the International Monetary Fund, for providing financial assistance in the form of DRI.

There are, however, two additional elements that have not yet been addressed:

(i) The first is the provision of last resort lending to solvent but illiquid 'significant' credit institutions, directly supervised by the ECB in accordance with the SSMR, also directly by the ECB. Currently, this function is still considered to be a task for the national central banks – members of the Eurosystem. Indeed, 'Emergency Liquidity Assistance' ('ELA') is provided, according to the ECB Governing Council, by the national central banks of the Member States whose currency is the euro, against collateral not eligible for the ECB's monetary policy operations. The ECB Governing Council is allowed to prohibit this, if it is deemed in conflict with the ECB objectives and tasks according to Article 14.4 of the Statute of the ESCB and the ECB.

(ii) The second aspect is the Europeanisation of the regime for the winding-up of insolvent credit institutions, which is governed by Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 "on the reorganisation and winding-up of credit institutions" (as in force after its amendment by Article 117 BRRD). Under this legal act, credit institutions' winding-up proceedings are national and will remain so at least for the foreseeable future, since the discussions on setting up the EBU did not touch upon the prospect of amending this regime.

B. The Single Supervisory Mechanism

1. The Legal Framework

(a) The Single Supervisory Mechanism ('SSM') is based on Council Regulation (EU) No 1024/2013 of 15 October 2013 "conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions" (the 'SSMR'). The institutional framework pertaining to the SSM, which became operative on 4 November 2014, is further specified in:

- several ECB legal acts on the detailed operational arrangements for the implementation its tasks under the SSMR, including Regulation (EU) No 468/2014 of 16 April 2014 "establishing the framework for cooperation within the SSM between the ECB and national competent authorities and with national designated authorities ('SSM Framework Regulation'),"
- an Interinstitutional Agreement between the European Parliament and the ECB of October 2013 "on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the SSM,"

- a Memorandum of Understanding between the Council and the ECB of December 2013 "on the cooperation on procedures related to the SSM," and
- Regulation (EU) No 1022/2013 of the European Parliament and the Council, which amended the Regulation governing the operation of the EBA in order to clarify the relationship between the ECB and the EBA, to prescribe the new tasks and powers of the EBA, and to introduce amendments to the EBA's governance.

2. The Comprehensive Assessment

In view of the assumption of its tasks, the ECB was given the power to ask national competent authorities to provide it, from 3 November 2013, with all relevant information necessary to carry out a 'Comprehensive Assessment,' including a balance-sheet assessment, of the credit institutions of the participating Member States. The ECB, in collaboration with the national competent authorities and supported by the private company *Oliver Wyman Consultants*, conducted since January 2014 the Comprehensive Assessment of the credit institutions and supervised groups to be directly supervised by it, consisting of three (3) components:

- a 'Supervisory Risk Assessment' to review, quantitatively and qualitatively, key risks, including liquidity, leverage and funding,
- an 'Asset Quality Review' to enhance the transparency of bank exposures by reviewing the quality of banks' assets, including the adequacy of asset and collateral valuation and related provisions, and
- a 'stress test,' in collaboration with EBA, to examine the resilience of banks' balance sheet to stress scenarios.

The results of this exercise were published on 26 October 2014 and are contained in the ECB's "Aggregate Report on the Comprehensive Assessment."

3. The Operation of the SSM

(a) The SSMR is based on four (4) main elements:

- conferring specific tasks *on the ECB* for the micro-prudential supervision of certain types of financial firms, in transfer from national competent (supervisory) authorities, *and* establishing the SSM in relation to the *exercise* of these specific tasks,
- specifying the financial firms with regard to which these specific tasks should be conferred on the ECB,
- incorporating the Single Supervisory Mechanism in the ESFS without, in principle, touching upon the tasks of its components, and
- creating 'Chinese walls' within the ECB to ensure the effective separation of its monetary policy and other tasks from its (new) supervisory tasks.

(b) The SSMR confers on the ECB specific tasks *"concerning policies relating to the prudential supervision of credit institutions"* (a phrase taken over *verbatim* from Article 127(6) TFEU), with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the EU and each Member State, which is the main objective of the ECB under the SSMR, and to preventing regulatory arbitrage, fully taking into account and caring for the unity and integrity of the internal

market (a duty with which it was assigned). Obviously, this ECB objective is different from the primary objective of the European System of Central Banks under the TFEU, i.e., maintaining price stability. The eventuality of conflicts of interest arising from concurrently pursuing these two objectives was the reason behind the introduction of 'Chinese walls,' separating the monetary and supervisory functions of the ECB in accordance with Article 25 SSMR.

(c) The SSMR applies mainly to 'participating Member States,' which are defined as meaning both the Member States whose currency is the euro *and* the Member States with a derogation having established a 'close cooperation' under Article 7 SSMR.

(d) The assignment to the ECB of specific tasks in relation to the micro-prudential supervision of financial firms exclusively covers credit institutions, 'financial holding companies,' in the context of the conduct of consolidated supervision of banking groups, and 'mixed financial holding companies,' in the context of the conduct of supplementary supervision on financial conglomerates including credit institutions, to the extent that they are incorporated in euro area Member States ('supervised entities'). In addition, Article 6 SSMR established, *in principle*, a 'two-tier system' with regard to the distribution of powers within the SSM, distinguishing between 'significant' and 'less significant' supervised entities, the former being directly supervised, as to the specific tasks conferred upon it, by the ECB, and the latter being supervised by the national competent authorities within the SSM.

C. The Single Resolution Mechanism and the Single Resolution Fund

1. The Single Resolution Mechanism

(a) The Single Resolution Mechanism ('SRM') was established by virtue of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 "establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (...)" ('SRMR'). The adoption of this Regulation, which entered into force on 19 August 2014, was a necessary complement to the SSMR, as it would be a paradox if credit institutions were directly supervised (by the ECB) at the European level, but, in the event of a need for resolution (upon proposal of the ECB), the relevant decision were to be made at national level. In this context, of particular importance are also:

- the Interinstitutional Agreement between the European Parliament and the Single Resolution Board of 16 December 2015 "on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism," and
- the Memorandum of Understanding between the Single Resolution Board and the ECB of 22 December 2015 "in respect of cooperation and information exchange."

(b) The objective of the SRMR is the establishment of *uniform rules and a uniform procedure* for the resolution of the specific categories of entities which are established in the participating Member States. These uniform rules and this uniform procedure must be applied by the Single Resolution Board ('Board'), together with the Council, the

Commission and the national resolution authorities within the framework of the SRM. The involvement of the Council and the Commission is a by-product of the fact that the Board is an agency and does not have a legal anchor in the TFEU.

(c) The Board, established by the SRMR and operational by 1 January 2015, is responsible for the effective and consistent functioning of the SRM, like the ECB for the SSM. In principle, it is also responsible for drawing up the resolution plans and adopting all resolution decisions relating to credit institutions established in participating Member States, as well as to 'significant' and 'cross-border' groups. On the other hand, national resolution authorities must perform, and are responsible for, specific tasks with regard to other credit institutions and groups, without prejudice to the responsibilities of the Board for the tasks conferred on it by the SRMR.

2. The Single Resolution Fund

(a) The SRM is supported by the Single Resolution Fund ('SRF'). The use of the SRF was contingent upon the entry into force of the Intergovernmental Agreement signed by twenty-six (26) EU Member States "on the transfer and mutualisation of contributions to the Single Resolution Fund" ('SRF Agreement' or 'IGA'). This Agreement, which entered into force on 1 January 2016 and to which Sweden and the United Kingdom are not Contracting Parties, provides for the transfer of the funds raised at national level towards the SRF, and the progressive merger of the different funds raised at national level (by the national resolution funds) to be allocated to the SRF's national compartments.

(b) The Board, which is the owner of the SRF, may use it only for the purpose of ensuring the efficient application of the resolution tools and exercise of the resolution powers, and in accordance with the resolution objectives and the principles governing resolution. Neither the EU budget nor the national budgets may, under any circumstances, be held liable for expenses or losses of the SRF.

(c) In principle, the SRF is being financed by credit institutions' *ex-ante* contributions. By the end of the transitional period of eight (8) years from 1 January 2016 the 'available financial means' of the SRF must reach at least 1% of the amount of covered deposits of all credit institutions authorised in the participating Member States ('target level'). During the transitional period, contributions to the SRF must be spread out in time evenly until the target level is reached, with due account to the business cycle's phase and the impact that pro-cyclical contributions may have on the financial position of contributing institutions.

(d) On 17 June 2016 the Council of the EU in its released Conclusions on a roadmap to complete the Banking Union took note of the intention of Member States to start work in September 2016 if and when all participating Member States have fully transposed the BRRD. In this context the Council would also take stock of the bridge financing arrangements, noting that participating Member States are committed to sign the Loan Facility Agreement to the SRF in case of possible funding shortfalls by the time. They also reaffirmed the need to have the common backstop fully operational at the latest by the end of the transitional period and that it may be decided that the backstop may become operational ahead of the transition period in line with certain risk reduction measures such as implementing the Total Loss Absorbing Capacity standard and further harmonisation of options and national discretions currently set out in the CRR/CRDIV.

D. The European Deposit Insurance Scheme and the European Deposit Insurance Fund

(a) Until 2015, the prospect of establishing a European deposit guarantee scheme, as the third main component of the EBU, has only been discussed in terms of principles and 'high-level politics.' Deposit guarantee schemes ('DGSs') remain national, even though their merger or the establishment of cross-border DGSs is not ruled out.

(b) The prospective of creating a 'European Deposit Insurance Scheme' was laid down boldly in the "Five Presidents' Report" of 22 June 2015 entitled: "Completing Europe's Economic and Monetary Union," within the framework of the proposals on the creation of an (EU) 'Financial Union.' Then, on 24 November 2015, the Commission submitted a proposal for a Regulation of the European Parliament and of the Council "amending Regulation EU No 806/2014 in order to establish a European Deposit Insurance Scheme." This scheme (the 'EDIS') is planned to be introduced gradually, in three (3) stages under strict safeguards, and will be built on the existing system, composed of national DGSs, while individual depositors will continue to enjoy the same level of protection (100,000 euros). A European Deposit Insurance Fund (the 'EDIF') will also be created from the outset. It will be financed directly by risk-adjusted credit institutions' contributions. The EDIF's management would be entrusted to the SRB.

(c) According to the proposal, the three phases in the evolution of the EDIS are as follows:

(i) Phase 1: re-insurance: during the first three-years phase (2007-2009), the 're-insurance approach' will apply, whereby a national DGS will have access to EDIS funds only when all its own resources are exhausted, and if it fully complies with the DGS Directive 2014/49/EU. EDIS funds would provide additional funds to a national DGS only up to a certain level. National DGSs can access the EDIS only when justified, since EDIS funds will only be available, if the relevant rules in the DGSD have been fully applied by the Member State concerned. Use of EDIS funds will be closely monitored, and any EDIS funds found to have been received inappropriately by a national DGS will have to be fully reimbursed.

(ii) Phase 2: co-insurance: in 2020, the EDIS will become a progressively mutualised system ('co-insurance'), still subject to appropriate limits and safeguards against abuse. During this phase, a national DGS will not be required to exhaust its own funds before accessing EDIS funds. The EDIS will be available to contribute a share of the costs from the moment when the DGS is activated and depositors need to be reimbursed, leading to a higher degree of "risk-sharing between national DGSs through the EDIS." The share to be contributed by the EDIS will start at a level of 20% and gradually increase to 100% over a four (4) year period.

(iii) Phase 3: full insurance: the EDIS will fully insure national DGSs as of 2024. This is the same year when the SRF and the requirements of the DGS Directive will be fully phased-in.

(d) On 17 June 2016 the Council of the EU in its released Conclusions on a roadmap to complete the Banking Union listed as a key step that the Council will continue

constructive work on EDIS at technical level; further, that negotiations at political level will start as soon as sufficient further progress has been made on the measures on risk reduction. It was also taken note of the intention of Member States to have recourse to an Intergovernmental Agreement (IGA) when political negotiations on EDIS start.

V. Payments Recent Developments: Virtual Currencies

Recent developments in payment and settlement systems have occurred particularly in prepaid cards, mobile payments, and securities settlement. On the regulatory side the highlights are the US Federal Reserve Faster Payments Initiative and the EU Payment Services Directive (PSD)-2. However, the emergence of virtual currencies may have overshadowed all other developments and is the subject of this review.

Originally, virtual currency was narrowly defined to cover either "in-game only" schemes or schemes facilitating only the purchase of virtual goods and services.[24] It was contrasted with digital currency that could be used for the purchase of goods and services in the real economy.[25] Or else, the latter category was limited to cryptocurrencies, discussed further below. In a broad sense, both virtual currencies and cryptocurrencies were considered as types of digital currencies.[26] In this sense, a digital currency or digital money was understood to be an Internet-based medium of exchange distinct from physical (such as banknotes and coins) that exhibits properties similar to physical currencies, but allows for instantaneous transactions and borderless transfer-of-ownership.[27]

Using digital currencies to both narrowly mean cryptocurrencies as well as broadly to cover both virtual currencies and cryptocurrencies has been confusing and led to a new taxonomy. Thus, in a 2012 Report on virtual currency schemes, the ECB provided the following definition: a virtual currency is a type of unregulated digital money which is issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community.[28]

The Report went on to classify virtual currency schemes as: (i) closed; (ii) having unidirectional flow; and (iii) having bidirectional flow. In principle:

- *Closed* schemes have no link with the real economy and are "in-game only" schemes. Having paid a subscription fee, a user earns the virtual money based on his or her online performance.
- Under a *unidirectional-flow scheme* the virtual currency can be purchased with fiat currency but cannot be exchanged back to fiat currency. The virtual currency may be used to purchase virtual goods and services and possibly, depending on the terms of the scheme, also goods and services in the real economy.

[24] *See, e.g.,*. Danny Bradbury, "Is Bitcoin a Digital Currency or a Virtual One?" (Published March 19, 2014), *available at* http://www.coindesk.com/bitcoin-digital-currency-virtual-one/. *See also*: https://www.quora.com/What-is-the-difference-between-a-cryptocurrency-a-digital-currency-and-a-virtual-currency.

[25] *See, e.g.,* https://en.wikipedia.org/wiki/Virtual_currency.

[26] https://en.wikipedia.org/wiki/Digital_currency.

[27] Digital currency - Wikipedia, the free encyclopedia, https://en.wikipedia.org/wiki/Digital_currency.

[28] European Central bank/Eurosystem, *Virtual Currency Schemes*, October 2012, at 6, *available at* https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf.

- Finally, in a *scheme with a bidirectional flow*, a user can buy and sell the virtual currency for fiat currency and may use the virtual currency to transact for goods and services in both the virtual world and the real world.

In a subsequent report published in February 2015,[29] the ECB questioned whether virtual currency is 'money' and yet recognized that virtual currency may be regulated. Accordingly it revised its definition to say that a virtual currency is: a digital representation of value, not issued by a central bank, credit institution [i.e., 'bank'] or e-money institution, which, in some circumstances, can be used as an alternative to money.[30]

Along the same lines, and while acknowledging "the fast evolving nature of the industry" so that "a universal definition has yet to emerge," an IMF study nevertheless went on to define virtual currencies to be: digital representations of value issued by private developers and denominated in their own unit of account.[31]

Under this taxonomy, besides virtual currency, the other category of digital currency is e-money, loaded on a store-value product,[32] or even bank money that can be accessed through a digital device.[33] However, to the extent that e-money is denominated in the unit of account of an official currency, and is redeemable at par[34] in banknotes and coins of this currency, whether directly or indirectly via bank money, no good purpose is served by treating e-money as a sub-category of a broad category which covers side by side with it virtual currency. The same certainly applies to bank money accessible by means of a digital device. By reference to fiat currency and bank money, instead of highlighting the distinctive nature of virtual money, this taxonomy blurs it.

A similar difficulty also arises in connection with the category of a centralized virtual-currency scheme. Arguably, as long as it is denominated in the unit of account of an official currency, and is redeemable at par[35] in banknotes and coins of this currency, whether directly or indirectly via bank money, it is a type of e-money. Indeed, a centralized system of alternative currency,[36] unlinked to an official currency, may

[29] European Central bank/Eurosystem, *Virtual Currency Schemes- a Further Analysis*, February 2015, *available at* https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemesen.pdf.

[30] *Id.*, at 25.

[31] IMF Staff Discussion note *Virtual Currencies and Beyond: Initial Considerations*, January 2016, at 7, *available at* https://www.imf.org/external/pubs/ft/sdn/2016/sdn1603.pdf.

[32] IMF Report, *id.*, at 8, and 2012 ECB Report, *supra*, note 28 at 16.

[33] *See, e.g.,* https://www.quora.com/What-is-the-difference-between-a-cryptocurrency-a-digital-currency-and-a-virtual-currency.

[34] Though possibly subject to a transaction fee.

[35] Though possibly subject to a transaction fee.

[36] An alternative currency (or private currency) is any currency used as an alternative to the dominant national or multinational currency systems. They are created by an individual, corporation, or organization, they can be created by national, state, or local governments, or they can arise naturally as people begin to use a certain commodity as a currency. Mutual credit is a form of alternative currency, and thus any form of lending that does not go through the banking system can be considered a form of alternative currency. When used in combination with or when designed to work in combination with national or multinational fiat currencies they can be referred to as complementary currency. Most complementary currencies are also local currencies and are limited to a certain region. Barters are another type of alternative currency. These are actually exchange systems, which only trade items; thus without the use of any currency whatsoever. Finally, LETS

exist.[37] An alternative currency which can be used only over the Internet may truly be characterized as virtual currency albeit in the broad sense of the term.[38] At the same time, particularly in relation to the payment and settlement mechanism, in the narrow and yet principal sense, virtual currency schemes are decentralized.[39]

FinCEN is quoted to say that decentralized digital currency is one: "(1) that has no central repository and no single administrator, and (2) that persons may obtain by their own computing or manufacturing effort."[40]

Decentralized virtual currency schemes use encryption techniques, particularly public-key cryptography,[41] to regulate the generation of units of currency and verify payments.[42] The underlying currency is thus called cryptocurrency, which is a digital asset with verifiable mathematical properties that can be transferred directly between users on a distributed ledger without relying on a centralized protocol operator. Both its creation and transfer are premised on 'smart contracts' of which terms are recorded in a computer rather than legal language.

A distributed ledger is an asset database that can be shared across a network of multiple sites, geographies or institutions. Its underlying technology is the blockchain, which is: a type of a database that takes a number of records and puts them in a block … Each block is then chained to the next block, using a cryptographic signature. This allows blockchains to be used like a ledger, which can be shared and corroborated by anyone with the appropriate permissions.[43]

Accuracy of the ledger is corroborated by consensus.

Participants in a cryptocurrency network hold their keys in digital wallets. A payer accesses his or her digital coins stored in the blockchain using his or her private key and

(Local Exchange Trading Systems) is a special form of barter which trades points for items, under which for example, one point stands for one worker-hour of work: https://en.wikipedia.org/wiki/Alternative_currency.

[37] Airmiles points fit into this category. Contrary to the 2012 ECB Report, *supra* note 28 at 15, I thus disagree with the classification of frequent-flier programmes as virtual currency schemes.

[38] Facebook Credits, discussed in the 2012 ECB Report *supra* note 28 at 13 is a good example.

[39] In this context, 'decentralized' is used as the opposite of 'centralized.' In fact, as explained below, the operation of a 'decentralized' virtual currency scheme is premised on the operation of a 'distributed' ledger. For the difference among 'centralized,' 'decentralized,' and 'distributed,' *see, e.g.,* http://www2.cffn.ca/usha/part-iii-article-by-pramod-dhakal/129-the-law-of-rule-centralized-decentralized-and-distributed-systems.

[40] https://bitcoinmagazine.com/articles/fincen-bitcoin-users-not-regulated-exchanges-are-1363675774.

[41] Public-key cryptography, or asymmetric cryptography, is any cryptographic system that uses two kinds of keys: *public keys* may be disseminated widely, while *private keys* are known only to the owner. In a public-key encryption system, any person can encrypt a message using the public key (better imagined as a lock) of the receiver and leave it on a public server or transmit it on a public network. Such a message can be decrypted only with the receiver's private key. *See* https://en.wikipedia.org/wiki/Public-key_cryptography.

[42] https://www.google.ca/search?q=crypto+currency&sourceid=ie7&rls=com.microsoft:en-CA:IE-Address&ie=&oe=&gfe_rd=cr&ei=hf3iVpLqJIfdswSny6OAAg&gws_rd=ssl.

[43] UK Government Office for Science, *Distributed Ledger Technology: beyond the block chain* (2016) at 17.

sends payment to the payee using the latter's public key. The payee receives payment using his or her private key and the payer's public key. For virtual currencies, specialized trading platforms function as marketplaces while exchanges offer trading services.[44]

The emergence and rise of virtual currencies has raised significant legal and regulatory questions. An overarching one is whether a virtual currency is 'money' or 'currency.' In the absence of both physical existence and official status it is not 'currency'; however, is it widely used to exchange value in transactions so as to function as a medium of exchange, storage of value and unit of account and is thus 'money'?[45] This is a matter of importance for both private and public laws. A virtual currency is, however, certainly a means of payment so as to be of interest to central banks in relation to the stability of prices, the financial system, and the payment system. Central banks are also concerned with the lack of legal basis and the risk to their reputation.[46] A more detailed list of regulatory concerns covers in addition to financial stability and monetary policy matters items such as financial integrity, consumer protection, taxation, exchange controls and capital flow management.[47] Underlying many of the concerns are both the fluctuating value of each virtual currency and the absence of central governance authority. And of course there are the 'usual' payment system issues of transparency and fairness of terms and fees, hacking, finality of payment, and the allocation of losses caused by fraud, error or insolvency. In a federal state there may also be an issue as to the appropriate level of government to address each issue.

In the United States, regulatory measures have been taken by individual states.[48] A draft of the Regulation of Virtual Currency Business Act is currently emerging as a project of the National Conference of Commissioners on Uniform State Laws (NCCUSL).[49] Broadly speaking, the project covers licensing; examinations, reports, and records; permissible investments; and enforcement. Subject to some refinements and express exclusions, Section 103(24) of the present draft defines "virtual currency" as "any digital unit of value that is used as a medium of exchange or that substitutes in transaction for money but that is not money." "Money" is defined in Section 103(8) by reference to its issue or designation by a government body.

Sooner or later regulatory and legislative measures will have to take place to accommodate the quickening pace in which virtual currencies evolve.

---

[44] Voluminous information on the mechanics of a cryptocurrency payment is available in the reports and studies cited above as well as in a Report of the Standing Senate Committee on Banking, Trade and Commerce (Canada), *Digital Currency: You Can't Flip This Coin!* (June, 2015).

[45] Both 'currency' and 'money,' together with other relevant terms, are defined in the 2015 ECB Report, *supra* note 29 at 33.

[46] The 2012 ECB Report, *supra* note 28 at 22-46. Further discussion including a summary of national responses is available in the 2015 ECB Report, *supra* note 29 at 26 – 33.

[47] *See, e.g.*, IMF Report *supra* note 31 at 24-34.

[48] *See, e.g.*, New York State, Department of Financial Services, New York Codes, Rules and Regulations Title 23. Department of Financial Services, Chapter I, Regulations of the Superintendent of Financial Services Part 200. Virtual Currencies http://www.dfs.ny.gov/legal/regulations/adoptions/dfsp200t.pdf.

[49] The most recent Draft is that of the Drafting Committee Meeting of February 19-21, 2016, *available at* http://www.uniformlaws.org/shared/docs/regulation%20of%20virtual%20currencies/2016feb_RVCBA_Mtg%20Draft.pdf. For a review, *see, e.g.*, http://www.sidley.com/news/2016-02-26_banking_and_financial_services_update.

VI. The East African Community Monetary Union

A. Background

The East African Community (EAC) is comprised of the Republics of Uganda, Kenya, Tanzania, Rwanda, Burundi and South Sudan.[50] The Treaty that established the EAC anticipated other states joining the community in the future subject to meeting key criteria such as geographical proximity, the maintenance of a market driven economy and subscribing to the principles of democracy and the rule of law.[51] The EAC is intended to be a complete union and the Treaty lays down the key integration stages of a 'customs union, a common market, subsequently a monetary union, and ultimately a political federation.'[52] The customs union and common market have already been established and are functioning incrementally well.

The Partner States agreed to cooperate on monetary and financial matters, including monetary and fiscal harmonisation, macro-economic coordination, and banking and capital markets development. The Treaty mandates partner states to conclude protocols in each area of cooperation that spell out the objectives and scope of cooperation and integration and the institutional mechanisms for such cooperation and integration. The protocols form an integral part of the treaty.[53]

The EAC Monetary Protocol was signed in November 2013 and announced by the Summit in November 2014.[54] The roadmap attached to the Protocol sets the agreed time for implementation as ten years, thus taking the target date for the single currency to 2024. There are transitional arrangements providing for the progressive coordination of various processes and institutions, in particular the EA Monetary Institute to do preparatory work for the EA Central Bank. While there are fears and at the same time excitement among the population especially after the episodes involving the Euro, the prognosis is that monetary integration is likely to be successful.

There was a prior long history of close cooperation among Uganda, Kenya and Tanzania, including monetary cooperation under the East African Currency Board, which was established in 1905 and issued a joint currency in 1919 but subsequently dissolved. All the countries are members of the African Union, the United Nations and the International Monetary Fund and they receive financial and technical support from the European Union and agencies such as TradeMark East Africa.[55] One would therefore expect the new monetary union to conform to the norms of international monetary law.

---

[50] The Republic of South Sudan was admitted as a member at the 17th Ordinary Summit of EAC Heads of State held in Arusha, Tanzania on 2 March 2016.

[51] Treaty for the Establishment of the East African Community 1999, amended in 2006 and 2007Article 3.

[52] Treaty for the Establishment of the East African Community Articles 2(2), 75, 76 and the respective Protocols.

[53] Treaty for the Establishment of the East African Community Article 151.

[54] Protocol on the Establishment of the East African Community Monetary Union 2013. It is in force because it was ratified by each one of the Partner States and the instruments of ratification of all Partner States deposited with the Secretary General (Article 30).

[55] TradeMark East Africa is an organisation funded by a range of governmental development agencies with the aim of facilitating economic development through trade. The investors include agencies from Belgium, Canada, Denmark, Finland, Netherlands, Sweden, UK, and USA.

B. Legal Framework for EAC Monetary Integration: Protocol on the Establishment of the EAC Monetary Union

The Protocol contains comprehensive provisions on the monetary union, key among which are the following:

(1) *Establishment of Monetary Union*: The Protocol establishes the EAC Monetary Union, which shall be realised progressively and governed by the laws of the Community (Article 2).

(2) *Objective*: The objective of the EAC Monetary Union is to promote and maintain monetary and financial stability aimed at facilitating economic integration to attain sustainable growth and balanced development of the Community (Articles 3, 7, 11).

(3) *Scope of Cooperation in the Monetary Union*: Pursuant to the Treaty obligation to cooperate in monetary and financial matters, the Partner States have agreed to:
   a. harmonise and coordinate their fiscal policies;
   b. formulate and implement a single monetary policy and a single exchange rate policy;
   c. develop and integrate their financial, payment and settlement systems;
   d. adopt common principles and rules for the regulation and prudential supervision of the financial system;
   e. integrate their financial management systems;
   f. harmonise their financial accounting and reporting practices;
   g. adopt common policies and standards on statistics; and
   h. adopt a single currency (Article 4).

(4) *Pre-requisites for the Monetary Union*: For the purposes of realising the monetary union, partner states should:
   - fully implement the customs union and common market;
   - harmonise many of the items in Article 4, summarised above; and
   - adhere to some quantitative criteria geared to macroeconomic convergence; namely, core inflation (5%), fiscal deficit (6% of GDP) and the ratio of tax to GDP of 25%. (Articles 5 & 6).

(5) *Macroeconomic Policy Framework*: Partner States have agreed to a broad policy framework comprising of fiscal policies, monetary policy and exchange rate policy (Article 7). The framework on fiscal policies demands of Partner States substantial coordination, information disclosure and the avoidance of harmful tax competition, in addition to the creation of an institutional mechanism (Council)[56] to implement the fiscal policies (Article 8).

(6) *Economic Shocks*: Partner States have also agreed to establish mechanisms for monitoring risks, building resilience and managing economic shocks. These mechanisms include measures to avoid or mitigate risk that may originate in a Partner State and threaten the economic stability of the monetary union, and measures for stabilising the monetary union or the economy of a Partner State in the event of an economic shock. Particular mechanisms referred to include an early-warning system and a stabilisation facility for use in the event of a Partner State experiencing or being threatened with a severe exogenous economic shock. There is some flexibility for states to exceed fiscal deficit targets (Article 10).

[56] 'Council' means the Council of Ministers of the Community established by Article 9 of the Treaty.

(7) *Monetary Policy and Institutions*: *EACB as Key Institution*: The Protocol anticipates the creation of an East African Central Bank (EACB), which, together with the national central banks, will form a functionally integrated system of central banks. The EACB shall be independent and shall not be influenced by any Partner State. The Partner States in the single currency area shall provide capital for the bank (as determined by the Council) and the financial rights and obligations of the Partner States in the single currency area in relation to the EACB shall be distributed in accordance with a financial key,[57] determined by the Council, and shall be adjusted every three years (Article 20). The Partner States in the single currency area undertake to transfer reserves to the EACB (Article 12(3) and (4)).

The EACB is mandated to formulate a single monetary policy, which shall be binding on Partner States in the single currency area. The primary objective of monetary policy shall be to achieve and maintain price stability, and also contribute to financial stability, and economic growth and development (Article 11). The EACB shall formulate a single exchange rate policy for the single currency area and the exchange rate regime shall be free floating (Article 12(1) and (2)).

Article 21 provides for the establishment of institutions to support the Monetary Union; for example on surveillance, compliance, enforcement and statistics; while Article 23 puts in place transitional institutions; and in particular, the EA Monetary Institute to undertake preparatory work for the Monetary Union.

(8) *Currency*: There will be a new single currency if at least three Partner States that meet the convergence criteria adopt the single currency and, thereby, form the single currency area. The single currency, whose name has not yet been determined, will be legal tender in the single currency area and will be effective on a date determined by the Summit within a ten-year timeline. The single currency shall be used in the payment and settlement systems for the settlement of all transactions in the single currency area, except as otherwise provided by an Act of the Community (Article 18).

(9) *Financial, Payment and Settlement Systems*: The Protocol requires Partner States to develop and operate an efficient, stable and integrated financial system.[58] The 'financial system' is defined very broadly and includes:

a. banking;
b. capital and money markets;
c. insurance;
d. retirement benefits;
e. micro finance; and
f. other financial services.

The financial system shall, among other specified objectives, promote the development of the financial sector, promote financial inclusion and deepening, facilitate regulation and prudential supervision of the financial sector, facilitate the

[57] 'Financial Key' means the cost and benefit sharing formula or figure indicating the financial contribution of each Partner State in the single currency area in relation to the East African Central Bank (Article 1, Interpretation).

[58] 'Financial system' means interconnected financial institutions, markets, instruments, services, practices and transactions in the Community' (Article 1, Interpretation).

development of the financial system infrastructure,[59] and facilitate the orderly, fair and transparent market conduct of the financial sector (Article 14).

The Partner States are required to develop and implement secure, efficient, reliable and integrated payment and settlement systems so as to ensure the efficient flow of financial transactions within the monetary union. The Partner States have undertaken to adopt an integrated trading and securities depository system and to harmonise and integrate the payment and settlement system financial market infrastructure with other systems (Article 15).

(10) *Measures to address imbalances*: The Protocol enjoins the Council to develop measures to support a Partner State that experiences macroeconomic or structural imbalances arising from the implementation of the Protocol (Article 24).

(11) *Policies, Laws and Systems*: Last but not least, Article 22 requires the harmonisation of policies, laws and systems to support the Monetary Union. One notes, in this regard, an elaborate structure for the approximation and harmonisation of the commercial laws of the EAC that is well funded to support the regional integration project. There is also the EAC Court of Justice consisting of trial and appellate levels that may in the future be called upon to resolve commercial disputes.[60]

C. Observations

The overarching aims of EAC integration are to foster unity and increase trade among Partner States. Monetary Union is an advanced stage of true and deeper EAC integration and also contributes to the integration process.[61] While the EAC Partner States have yet to agree on the name of the new currency, the name will be decided upon by the Summit (Heads of State) upon the recommendation of the Council. They have also not yet decided the location of the new central bank but there are criteria in place for hosting EAC institutions and they will be followed.

Granted that the target date of 2024 for the full implementation of the monetary union is ambitious, this prospective review believes that the global and local context will result in the irreversible and successful adoption of a single currency and a common currency area. Success is reasonably assured since the Partner States have agreed on differentiated integration (also called 'variable geometry' or 'multi-speed EAC') for the implementation of the monetary union. This is implied in Article 18(2) of the Protocol which provides that the single currency shall be adopted when at least three Partner States meet the requirements. Several historical and economic factors support this prognosis for success. First, the success story of the European monetary union, albeit contested in quite a few circles,[62] has stimulated a renewed interest in monetary union in the region and provided a ready model to emulate. The EAC Partner States are well aware of the

[59] 'Financial market infrastructure' means a multilateral system among participating institutions, including the operator of the system, used for the purposes of clearing, settling, or recording payments, securities, derivatives or other financial transactions (Article 1, Interpretation).

[60] Most of the disputes that have so far been to the court relate to human rights, constitutional interpretations and administrative law.

[61] For the thesis that there is a strong political dimension to monetary union, *see* Mario Draghi, "Stability and Prosperity in the Monetary Union" in Project Syndicate, 2 January 2015 *available at* www.project-syndicate.org/print/ecb-eurozone-economic-union-by-mario-draghi.

[62] For the arguments for and against the European monetary integration see Paul Craig and Grainne de Burca, *EU Law Text, Cases and Materials*, 5th edition (Oxford University Press 2011) 701-703.

history of monetary failure in previous times in this and other regions[63] and have provided in the Protocol fortifications against known problems. For example, the EAC Monetary Union Protocol provisions on economic shocks, risk sharing and addressing imbalances[64] anticipate the recent debate concerning monetary transfers among euro zone countries. Similarly, the EAC right from the outset requires fiscal and capital market harmonisation, which is a structural issue that the European Union is grappling with.[65]

The local context also augurs well for the EAC monetary union. First, free exchange rates and full convertibility are operational in all the Partner States. Secondly, there is little sentimental attachment to the local currencies because they are generally weak, with a cross section of society ranging from astute investors to public servants and farmers preferring a stronger currency over its name. The dollarization[66] of the economies in the top echelons of society and in business circles provides proof of this realistic attitude. Thirdly, the whole process of EAC integration has the support of the supranational institutions (IMF and World Bank), the major foreign countries involved in the region (i.e., the European Union), and the business sector. These factors in combination reduce the hurdles to changing the currency and ceding control of monetary policy and money supply to a common authority.

The fragility of the economies of the EAC Partner States may also be a strong reason for monetary union to take hold. Monetary union is likely to reduce the cost of conducting regional business (eliminating exchange-rate risk and facilitating region-wide price harmonisation), enhance currency stability and credibility, encourage internal and international tourism, and increase regional and foreign direct investment.[67] In the search for sustainable growth and economic development, the EAC monetary union is a big innovation that has been broadly welcomed.

VII. Crowdfunding in International and National Regulatory Frameworks

A. Background

The EU regulators have defined crowdfunding as "a means of raising finance for projects from 'the crowd,' often by means of an Internet-based platform through which project owners 'pitch' their idea to potential backers, who are typically not professional investors."[68]

The benefit appreciated by the regulators is providing funds for projects which are normally not tackled by banks or other professional financial institutions, at least not at

---

[63] E.g., the Universal Currency involving Britain, France and US that failed in 1867; the Latin Monetary Union that failed in 1927 and the previous monetary alliance in the form of a common currency zone in the then British East Africa: *see* Benjamin J Cohen, "Monetary Unions" *available at* https://eh.net/encyclopedia/monetary-unions/.

[64] Articles 10 and 24 of the Protocol.

[65] *See, e.g.*, Lydia Prieg, "There's no future for the Eurozone Without Fiscal Union" at www.theguardian.com 9 August 2011.

[66] "Dollarization" is used here to mean the use of the dollar in parallel to or in substitution of the local currency.

[67] *See, e.g.*, Abdirashid Duale, "The Pros and Cons of EAC Monetary Union" in African Business Magazine, 5 November 2014.

[68] ESMA/2014/1560, Advice, Investment-based Crowdfunding, p.4.

reasonable prices, due to related risks or small size. What are the reasons why authorities are considering regulation?

Crowdfunding is not restricted to charitable aspects. There are two commercial types: lending (commonly known as peer-to-peer lending) and investment-based crowdfunding, providing functions normally reserved to strictly regulated institutions such as banks and investment firms. The relevant authorities are bank supervisors, when loan contracts, and securities regulators, as far as profit sharing and securities are involved.

In Europe, crowdfunding is still a medium-sized market segment. The UK has taken the lead with loan-based crowdfunding at almost GBP 1.3bn and investment-based crowdfunding at GBP 84m (new business in 2014).[69] In the USA, maximum amounts in the range of US$ 170m and 3,800 private investors for single office developments have been achieved. The biggest market seems to be the People's Republic of China, estimated at some 2,316 lending platforms with RMB 82.5bn (US$ 12.5bn) transactions in July 2015 alone and over 100 investment based platforms raising RMB 915m (US$ 139m) in that year.[70]

B. Crowdfunding Parties and Basic Regulatory Approaches

Three parties are involved in a crowdfunding transaction and could be targeted by regulators:

- The operator of the platform – typically, he would be neither lender/investor nor borrower/recipient of funds, but rather intermediary;
- The owner of the project to be financed, i.e., the recipient of the funds respectively the borrower or obligor of related financial instruments; and
- The lender or investor.

Currently, two types of regulatory approaches are employed by regulators:[71]

- Applying the general regulatory frameworks with certain waivers, in particular from licensing, registration and prospectus requirements. Frequently, these general frameworks have been updated by regulations addressing investor protection; and
- Establishing specific regimes for crowdfunding and extending regulatory provisions into areas that would otherwise be unregulated, including requirements on registration, and on the conduct of business, in particular in order to address investor protection.

C. Reaction by International Standard-setting Bodies

Whereas the bank regulators – the Basel Committee on Banking Supervision (BCBS) – have not yet tackled the issue, in particular peer-to-peer lending, the International Organization of Securities Commissions (IOSCO) has published a statement[72] based on a

[69] Financial Conduct Authority (FCA), "A review of the regulatory regime for crowdfunding and the promotion of non-readily realisable securities by other media, " February 2015, p.3.

[70] Zhou/Arner/Buckley, "Regulation of Digital Financial Services in China," University of Hong Kong Faculty of Law Research Paper No. 2015/044, p.18.

[71] For a comprehensive overview *see* OICV-IOSCO, Crowfdfunding 2015 Survey Responses Report, *available at* www.iosco.org/library/pubdocs/pdf/IOSCOPD520.pdf.

[72] OICV-IOSCO Statement on Addressing Regulation of Crowdfunding, December 2015, *available at* www.iosco.org/library/pubdocs/pdf/IOSCOPD521.pdf.

recent survey.[73] The IOSCO refrained from proposing a common international approach at this stage, highlighting "that most regulatory regimes for crowdfunding have only recently been implemented." Nevertheless, the standard-setter "believes regulators should pay attention to the additional risks related to crowdfunding," and recommends that "…for the purpose of investor protection, regulators and policy makers should note some of the measures taken thus far by regulators to address these inherent risks related to crowdfunding…"[74] Notwithstanding the IOSCO's current wait-and-see attitude, the items identified by the statement might give an indication of future regulatory subjects.

D. Situation at EU Community Level

The EU regulators have been dealing with crowdfunding since 2013, starting with a formal Commission consultation process, which ended up with the following results:

(a) Crowdfunding is part of the EU work plan related to small and medium-sized enterprises (SME);
(b) Establishment of the European Crowdfunding Stakeholder Forum (ECSF), an expert group;
(c) advice and opinion of the European Securities and Markets Authority (ESMA) re. investment-based crowdfunding;[75]
(d) opinion on lending-based crowdfunding by the European Banking Authority (EBA).[76]

The common conclusion is that the "EU financial services rules were not designed with the industry in mind," and that the application of EU laws highly depends on the related individual models. "Both the EBA and the ESMA have advised the Commission to consider direct regulation, addressed to platform operators: Given the significant risk currently not addressed at EU level … ESMA considers that developing an EU-level regime could be considered."[77] "ESMA advises the EU institutions to consider whether there is a case for action at EU level…"[78]

Until further action has been taken, two general regulatory frameworks are applicable in the EU:

(a) Banking regulation. However, the parties of lending-based platforms do not fall inside the perimeter of credit institutions as defined by EU legislation, because neither party carries out both lending while at the same time accepting deposits or other moneys from the public. But banking regulation can come into play in national jurisdictions with a wider definition of banking activities, such as Germany.
(b) Regulation on investment firms and markets in financial instruments, the so-called MIFID/MIFR (Markets in Financial Instruments) framework. Typically, a platform in its capacity as investment intermediary would not meet the criteria of a Multilateral Trading Facility, the basic model of all exchanges, because typically only one seller per instrument would be involved. However, the project owner or

[73] *See supra* note 71.
[74] *Supra* note 72.
[75] ESMA/2014/1378 and 1560.
[76] EBA/OP/2015/03.
[77] *Supra* note 68.
[78] ESMA/2014/1560, p. 28.

obligor of related funding instruments might be subject to certain regulations of the Markets in Financial Instruments framework, in particular the Prospectus Directive (2003/71/EC, as amended).

(c) There are a couple of further EU laws which are potentially applicable, but are restricted to specific fields depending on the individual crowdfunding business model.[79]

E. Selected National Regimes

(a) People's Republic of China

The authorities have taken up the subject with the 2015 Guideline on the Promotion of the Health Development of Internet Finance entrusting the People's Bank of China (PBOC) with the lead in respect of the regulation of Digital Financial Services (DFS).[80] The guideline itself defines high-level principles for DFS regulation such as preservation of clients' reserve funds, risk disclosure, consumer protection, internet security and prohibition of money laundering and crime.[81]

According to the guideline, the China Banking Regulation Commission (CBRC) is mainly responsible for the lending-based aspect, in particular peer-to-peer lending platforms, whereas the China Security Regulating Commission (CSRC) deals with equity-based crowdfunding and fund management.

The CBRC issued a Circular on Risk Associated with Peer-to-Peer Lending as early as 2011[82] - which, however, merely defined a number of related risks. On 28 December 2015, the CBRC published a consultation paper on "Temporary Regulatory Measures for Internet Finance Intermediaries' Activities" addressing registration and other issues.

The CSRC and the Securities Association of China published a joint consultation draft of Measures on the Administration of Equity Crowd Funding in December 2014[83] including entry criteria, obligations and liabilities, and regulatory requirements, intended to be a self-discipline instrument of the industry.

(b) France

France has issued a comprehensive framework for both lending-based crowdfunding, regulated by the Autorité de Contrôle Prudentiel et de Résolution (ACPR)[84] and investment-based crowdfunding (subscription of equity and debt securities), regulated by the Autorité des Marchés Financiers (AMF).

(c) Germany

The German legislators have not established a specific comprehensive regime for crowdfunding.[85] Basically, the general regulatory frameworks are applied, in particular as far as licensing requirements are concerned. However, a few overarching regulations for

[79] For a comprehensive overview see ESMA/2014/1560.
[80] Zhou *supra* note 70, p. 4.
[81] Zhou, *supra* note 70, p. 37.
[82] CBRC Circular No. 254, 23.08.2011; see Zhou (*supra* note 70), p. 28.
[83] Zhou *supra* note 70, p. 28.
[84] Order of 30th May 2014.
[85] For an overview, *see* the BaFin's (German Federal Financial Supervisory Authority) publications: *Crowdfunding*, BaFin Journal June 2014, p. 10, and *Crowdfunding im Licht des Aufsichtsrechts*, BaFin Journal September 2012, p. 11.

both lending- and investment-based crowdfunding are included in the Capital Investment Act ("VermAnlG") as amended by the Act on the Protection of Small Investors of 3rd July 2015.[86] The VermAnlG is applied to all public offerings of Financial Instruments as defined by § 1 sect. 1 and 2 of the VermAnlG. The recent amendment has introduced a catchall paragraph with § 1 sect. 2 no.7 including all other instruments giving a claim on interest and repayment or on any monetary remuneration for temporary allocation or usufruct of money, which has come into force on 1 January 2016.

As far as crowdfunding is concerned, a few specific exemptions have been introduced by §§ 2 and 2a-2c of the VermAnlG. These exemptions are mainly related to the publication of prospectuses and to the mandatory audit of issuers' annual financial statements. They are restricted to small and medium sized transactions.

Investors can cancel without reason and without penalty within 14 days after closing related contracts.

(d) UK

The Financial Conduct Authority (FCA) has issued specific and separate regulation on investment- and on lending-based crowdfunding taking effect from 1 April 2014 with its Policy Statement 14/4.[87]

- In respect of peer-to-peer lending, a new regulated activity of "operating an electronic system in relation to lending" has been defined to cover the platform's arrangements with both consumer-lenders and borrowers.
- In respect of investment-based crowdfunding, the scope of regulation encompasses platforms that allow persons to invest in new or established businesses by buying shares or debt securities. These investments are defined as "non readily realisable securities."

Whereas the full range of FCA consumer protection is always applied, all investment-based crowdfunding platforms targeting retail consumers are subject to additional investor-related restrictions.

(e) USA

As far as lending-based funding is concerned, the general rules on lending activities apply. In respect of investment-based crowdfunding, the US SEC has adopted a framework re. securities-based crowdfunding on 30 October 2015, which is incorporated in Title III of the JOBS Act as a federal exemption under the general securities laws.[88] An explanatory SEC "Investor Bulletin Crowdfunding for Investors" has been published on 16 February 2016.[89]

The final rules, Regulation Crowdfunding, permit individuals to invest in securities-based crowdfunding transactions subject to certain investment limits.

---

[86] German Federal Law Gazette (BGBl). I, 2015, p. 1245.

[87] "The FCA's regulatory approach to crowdfunding over the Internet, and the promotion of non-readily realisable securities by other media," PS 14/4, March 2014.

[88] Final rule: 17 CFR Parts 200, 227, 232, 239, 240, 249, 269, 274, with further amendments to the Securities Act Rules 147 and 504.

[89] *Available at* www.sec.gov/oiea/investor-alerts-bulletins/ib_crowdfunding-.html/.

As far as the scope of application is concerned, all transactions making use of the new rules and related exemptions have to be channelled through an SEC-registered intermediary, either a broker-dealer or a funding portal.

F. Conclusions

As the general frameworks on banking and securities regulation have not been designed with the crowdfunding industry in mind, and as their application highly depends on individual business models, some convergence is desirable from a regulatory perspective in order to avoid regulatory arbitrage, create a level business field and ensure that market participants can have confidence on a reliable basis. Further, as an Internet-based activity, crowdfunding has a strong potential for cross-border activities. The different national frameworks, even within the EU, are one of the key challenges posed to international platforms that wish to act globally. This is why a moderate regulation on the basis of minimum harmonisation might be in the best interest of the new developing industry.

COMMITTEE ON INTERNATIONAL MONETARY LAW

WORKING SESSION

Wednesday, 10 August 2016, 9.00am

Chair: Professor Andreas Ziegler (Switzerland)

Sir William Blair (UK) opened the session, and welcomed and thanked the Committee members and other attendees for their participation. He introduced the Chair and commended his expert work in the field of international monetary law. Sir William would be co-chairing the session.

Sir William highlighted that the session would consider the Committee report, the draft resolution to be put by the Committee before the ILA, and the report of the Study Group on Sovereign Bankruptcy. He noted that two members of that Study Group were present to lead the discussion on sovereign bankruptcy (including Professor Cynthia Lichtenstein). He noted that even though the Committee had very few members present, the quality of the Committee's work had not been compromised.

Mr Thomas Baxter, Jr (US) noted that he had stepped down as general counsel of the Federal Reserve Bank of New York and would be speaking in a personal capacity. He commended the work of David Gross in integrating the various contributions into the report and in producing a clear, single-authored report.

Mr Baxter then gave a presentation ethics in finance. The renewed focus had been prompted by the global financial crises that had affected the US, UK, EU and other parts of the world between 2007 and 2009. The presentation would not focus on the crisis itself, but the events that occurred during the financial crisis made that period a suitable starting point for addressing/analysing the renewed focus on ethics in finance. The behaviour of bankers in the industry during and after the financial crisis had contributed to the erosion of trust in the financial and banking industry. Loss of trust from the people the that industry serves. He cited two examples of behaviours that had contributed to the loss of trust:

1. The experience with respect to LIBOR. Bankers manipulated the rate so that they were advantaged. This had a negative impact. It was hard to understand why bankers engaged in manipulative behaviour. Many in the industry exploited the confidential information of customers. This was a basic form of dishonesty.
2. Individuals within the banking house had showed fundamental dishonesty. There was a series of incidents known as "robo-signing" done to facilitate the foreclosure of residential mortgages. Signing financial instruments as robots and falsifying information presented before courts, without conducting due diligence requirements, resulted in the eviction of people from their homes. This was another fundamental failure in terms of honesty and ethics in the financial services and banking industry. Other examples of dishonesty included the securitisation of the wholesale industry, and representations of quality of loans going into securitised vehicles. These fundamental failures contributed to the depth and severity of the financial crisis and the growing recognition that the industry had lost its moral compass.

Mr Baxter noted that the renewed focus on ethics in finance started out as a call for reform of banking business principles. The industry's cry for reform was met with scepticism.

Reform was viewed by cynical people as an effort lacking in substance because it urged bankers to do good. But the call for reform had since gained impetus. The banking industry realised the advantages of reform, mainly to regain the public trust that had been lost. The report highlighted some reforms made to regulatory authorities. The renewed focus on ethics in finance was now coming from the industry itself, and complemented the regulatory measures that had been put in place by the State in response to the financial crisis. After reviewing its performance during the crisis, the industry decided to take positive steps to quash a future possibility of crisis. They realised that it was going to take affirmative and positive steps to change the ethical culture of the industry. Bankers and bank officials had realised that they wanted to be associated with public good and to bring together savers and credit seekers so as to benefit the public at large. They did not want to be only associated with organisations whose main interest was to make money. The renewed focus encapsulated the power of the financial services industry to effect positive change. These realisations started the movement to pay greater attention to an ethical culture in the financial services industry.

Mr Baxter alluded to Angela Duckworth's book entitled *Grit*, in which she defined culture in terms of shared norms and values of a group, whether a group of people, a business organisation, or a country. It was important then to view the culture of business organisations. From the banking industry, it could be observed that bankers were now focused on the culture associated with the banks that they led. He referred to the key changes proposed by the July 2015 report on culture by the Group of 30, which added great value to studying ethics in finance, realising how ethics could change the culture of an organisation. There were several ways to focus on changing the culture of an organisation advanced by the First Savings Bank, the Group of 30, and other industry participants. First, there had been suggestions included changes in respect of human resources – thus, individuals who engage in robo-signings and dishonesty could be addressed in tbe context of performance appraisals or dismissal. Secondly, in the US, there were instances of legal action being brought against dishonest bankers. Pronouncements had been made by the US Department of Justice. Thirdly, there had been actions in respect of "rolling bad actors", ie bank officials who were terminated in one institution for misconduct only to get employed immediately in successive banking houses and continue their unethical behaviour. Action had to be taken so that the history of such individuals was known and the financial services industry could rid itself of such problematic individuals. This was one way in which the industry could be complementary to State policy and law enforcement. A fourth example from the G30 Report of 2016 highlighted the need for renewed effort to address the culture of the financial services industry. Culture renewal was not the only mechanism, but it was one way. The financial industry had not yet regained the trust of the people that it served. This was a work in progress.

The overall objective of the renewed effort was to restore public trust in the financial services industry. There would be far fewer of the kinds of offences seen during the global financial crisis. The industry would gain respect by reference to principles such as reliability, honesty and credibility. The renewed effort must be done on a global basis.

The Committee's draft resolution mentioned earlier was designed to continue to encourage the industry to sustain its focus on ethical culture. The key point in the resolution was that it called on international financial institutions and the international legal community to do the following four things:

1. to devote time and attention to the fostering of ethical culture, and to supplement and inform the operational law within the national and international industry and its institutions.
2. to take steps designed to restore trust in the financial industry nationally and internationally.
3. to study and implement better practices that would lead those who dealt with financial intermediaries having a higher confidence in their integrity.
4. to ensure that supervisors and financial intermediaries and financial service providers were adequately resourced to monitor and guide such entities in their implementation of good culture and conduct, and to encourage sound standard setting initiative.

Sir William noted that the things listed by Mr Baxter were discussed in the Steering Committee meeting, and only stylistic amendments had been made the day before. These amendments did not alter the substance of the resolution. A markedup copy of the resolution showing the amendments was circulated to members.

Professor Cynthia Lichtenstein (US) made a clarification for the benefit of attendees who were not familiar with ILA resolutions. ILA resolutions went from the working sessions to a Steering Committee (which worked on language not substance) and then on to the plenary session. If the plenary session approved the resolution, it become a resolution of the ILA. That meant that the ILA took note of all things said.

Sir William agreed with Professor Lichtenstein's comments, and added that a copy of the resolution in its final form would be made available to all members before the Committee took a break. He lauded Baxter's presentation, and invited him to elaborate on the "Global Ethics Code".

Mr Baxter informed attendees that the "Global Ethics Code" addressed some of the specific practices that had led to abuse, such as the use of customer information. A novelty of the Code was that it looked to apply to forex trading across the world (not only USD-EUR trade, but trade in other currencies). It supplemented the regulation of specific conduct. The renewed focus on ethics in finance aimed at the culture of the industry. The key word was "complementarity" – all the codes would together work to regain public confidence.

Mr David Gross (US) gave a presentation on recent US and UK litigation. The Committee had decided to look at the ramifications of the global financial crisis in terms of attempts by institutions and public authorities to find those deep pockets for the purpose of recovering compensation for losses suffered as a result of the crisis. This was done through the courts (eg, through misrepresentation claims). The focus had been on commercial disputes between institutions, not so much on consumer disputes. The report commenced with public law claims and also addressed private law claims. The first public law claim was against the US Federal Reserve Bank (the "Fed"), which resulted from the FED's rescue of AIG Corporation. AIG was in financial difficulty as a result of the crisis, and a policy decision was taken to save AIG to prevent its collapse. The Fed came to the rescue with a bailout of USD85 billion, which was given on conduction that the federal government get some 80 percent share/equity in AIG. Star International, a shareholder in AIG claimed against the Fed, since the shareholding had been diluted by the bailout. They claimed that the bailout deal was illegal, done without authority from the Fed to take

interest in AIG. Alternatively, if the deal was lawful, the government had not paid just compensation for the deal. The claim was litigated in the US Court of Federal Claims. A case note was available in the 2016 *Harvard Law Review*. The court held that the deal was unlawful, but enquired whether the claimant had suffered any economic loss as a result. The logical answer was that they had not suffered any loss because AIG did no collapse due to the bailout from the Fed.

Mr Gross turned to claims in the private law area. These claims usually ended up in federal courts and commercial courts in New York and London, as detailed in Part III of the report. Because those were common law jurisdictions, there was substantial overlap within notions of negligence, fraud, and dishonesty. The bottom line was that these claims had been overwhelmingly unsuccessful due to long standing contract law rules on disclaimer provisions, even when product representations were made in the contract documents. Essentially, the big institutions were in a better position to protect themselves through the contract documents.

The theme in both the London and New York courts was that the parties had read the contract, they were in a position to make their own bargain, and the courts ought to respect that bargain. This analysis was included in the report, but it must be noted that it did deal with international law; instead, it showed that international financial disputes were mostly played out in domestic courts.

Mr Baxter added that he obviously had so much to say about this presentation. He had strong views regarding the AIG matter, since the litigation was led in terms of his legal opinion. The statute allowed the Fed to rescue AIG in return for interest/equity. The decision to rescue AIG had important policy concerns that required taking consideration in addition to interest. The loan was made by the Fed to avoid the systemic consequences that would have resulted from an AIG insolvency. That was a public purpose, and that was the reason for the world's largest loan in history. It was to avoid the innocent paying the price. AIG was the world's largest insurance company. The Fed did this not to benefit AIG or its shareholders but for the general public in the US and the world economy. That was the primary purpose. The secondary purpose was to protect the taxpayers' interests, and thus to receive a fair amount of consideration for the risk that the taxpayer was taking in making the largest loan in the world. That meant that they had to get consideration to take into account the risk of the lending. The problem with taking interest rate compensation only was that one could not charge an interest rate high enough. The goal was to get consideration consistent with the risk. But if an exorbitant interest rate would be charged on a rescue loan, the debt service faced by the private company would result in further downgrades because it would fail to sustain the debt service, and ultimately the primary purpose (ie, to rescue that organisation from insolvency and to protect the innocent) would not be fulfilled. An alternative to interest compensation was imperative. That alternative in the heat of the AIG moment was equity. A success of the deal would then be realised by the true beneficiaries of the process (the taxpayer). That was public purpose. It was permitted by statute, which conferred incidental power on the Fed. Finally, equity was a successful alternative to charging high interest. The taxpayer was saved. Therefore, the Fed's act was for a greater purpose. Additionally, this decision to bail out AIG came after the private sector had failed or refused to rescue AIG.

The Chair referred the most recent edition of the *The Economist*, which had revisited the collapse of Lehman Brothers. He asked the panel why Lehman Brothers could not be saved.

Mr Baxter responded that a rescue did not success because Lehman Brothers was dealing with Barclays as a rescuer, which had in turn they failed because of London Stock Exchange requirement.

Sir William identified the difference between the two cases. The collapse of Lehman Brothers was containable, but the collapse of AIG would have brought the whole house down. It saved us all from a crisis that would have been much worse.

Professor Christos Gortsos (Greece) gave a presentation on the operation of the European Banking Union (EBU). He began by recalling that the fiscal crisis in the Eurozone in 2010 was partly caused by the global financial crisis. He recalled the 2010 Committee meeting and noted that in that year the EBU did not exist. When the Committee's report was presented in 2012, the EBU was being established.

The political decision to create the EBU was taken on 28-29 June 2012. When the Committee's report was presented in 2014, the creation of the EBU featured significantly. The first pillar of operations of the EBU started in 2014. Therefore, the present report was a stocktake of the developments in the EU Banking Union from its beginning on 4 November 2014 to Spring 2016. A lot had happened in that time.

It was important to briefly define what the EBU was – it was an economic and political organisation. The term "European Banking Union" was allencompassing. Its functions were divided into several pillars. The EBU had a single supervisory mechanism (SSM), a single resolution mechanism (SRM), and featured a deposit guarantee scheme and deposit guarantee fund. The first two pillars were already in place; the third pillar is yet to be put in place. These pillars were contained in a single rulebook (ie, a set of rules for the supervision, regulation and authorisation of credit institutions or banks in the EU). The substance of these rules had been influenced by developments in international financial law. Therefore, there was a link between European financial law and international financial law.

The first two pillars (the SSM and SRM) could be described as consisting of the hub and some spokes. The hub was the European Central Bank (ECB), and the spokes were the national competent authorities (ie, independent administrative authorities and credit institutions which the ECB did not have the power to supervise in terms of domestic legislation). The SRM had a similar structure. Its hub was a newly established agency based in Brussels (an independent institution). Its independence had some institutional implications. It could not take final decisions as a national resolution authority. The fact that it could take final decisions was demonstrated in Articles 18-19 of the relevant regulations.

Professor Gortsos noted that, if one took into account all the different legal acts which had shaped the EU, the legal bases were different. It was "à la carte" process/framework. The framework was fragmented.

Professor Gortsos concluded by noting that the EBU was a major development in EU economic law. It was the single most important development from an institutional and

substantive standpoint, after the creation of the Monetary Union. It was an alleviation of the asymmetry consisting of the fact that, until 2014, monetary policy/activity was conducted at the supranational level, now it was at the national level. In that sense, it had become more consistent with the goal of realising effective banking supervision. Banking regulations at supranational level and now at national level; therefore, the SSM was a major development. The SRM was also a positive development in that a resolution regime did not exist in the EU before 2014. It was the first regime for the resolution of credit institutions. The EBU was now operative, and had been tested through the case of capitalisation of banks within a short period of time. The second major test was going to be the resolution of the Italian banking crisis.

Professor Chiara Zilioli (Italy) made an observation in relation to the recapitalisation of Greek banks in 2015, at a time when the Single Resolution Board (SRB) was not yet in charge, and the Bank Recovery and Resolution Directive (BRRD) rules for compulsory bailingin before any public money could be contributed to the capital were not yet in force. The recent EU Court of Justice decision in the Kotnik case had reminded us that the Commission's Banking Communication, which required bailing-in before State aid could be authorised, allowed Member States to submit other reasons for not bailingin before State aid in exceptional circumstances and obliged the Commission to consider these reasons when making decisions. This was still relevant today in the field of precautionary recapitalisation to which the BRRD did not apply.

Professor Rene Smits (Netherlands) responded to the point made by Professor Gortsos that the European banking framework was fragmented or "à la carte".

He also made the point that Mr Gross had rightly distinguished between significant and non-significant institutions, the former supervised by the ECB, the latter supervised by the national competent authorities under the ECB. But there was one element that was not widely known in the EU system, which was most revolutionary. That was that all banks in the EU (even less significant institutions) were subject to the central provisions of the ECB which dealt with authorisations. All banks were subjected to fit and proper suitability provisions of the ECB. This was crucial, and Professor Smits expressed hope that its elements would develop more profoundly.

The Chair applauded the very interesting and informative presentations and invited attendees to take a short break.

Sir William opened the second half of the working session by inviting Mr Gross to present on virtual currencies.

Mr Gross summarised Part V on recent developments in payment and settlement systems.

He noted that virtual currencies remained a matter of importance for law and public policy. They might affect the central banks' payment systems, stability of prices exchange controls, financial integrity, taxation, fluctuating value, and capital flow management. Underlying concerns also included the absence of government authority, transparency and fairness in terms of fees, hacking, finality of payment, insolvency, and fraud security. In Hong Kong, for example, bitcoin theft had caused the halt of trading. Theft did not happen only online – there had been incidents of bitcoin theft at gunpoint during an attempted sale.

Mr Gross concluded by noting that the Committee acknowledged that regulatory and legislative measures would have to be put in place to curb the negative effects of unregulated virtual currencies, and to accommodate the fast pace at which virtual currencies were operative.

Professor Zilioli offered a belated intervention on Mr Baxter's earlier presentation on ethics in finance. She applauded the draft resolution, and recommended the improvement of the industry's reputation. She queried whether, as an alternative to enforcement to ensure ethical behaviour, bankers could be made to have more "skin in the game" and be more worried about their reputation. At the board level, that message had been clear and well received, but when it came down to the subcultures, there were actors within the ranks who were ready to take risks and exhibit bad behaviours through unethical conduct. In other words, she queried what more could be down at the send level (ie, under the board) so that there was more incentive for officials to maintain ethical behaviour.

Mr Baxter responded that this was a great point. He suggested that the subculture must be integrated into the ethical culture of the organisation as a whole. But it was a challenge. It might be suggested that when an official learnt of unethical behaviour, they must come forth and speak, raise their hand and expose dishonest practice. We could also make the subculture more diverse. He agreed that the less desirable cultures must be broken down. Additionally, there was a need to develop the principle of joint and several liabilities within an organisation.

The Chair commended the Committee for its openness by allowing the officers of other ILA committees to present their work. In this regard, he introduced Dr Freya Baetens and Professor Cynthia Lichtenstein from the Study Group on Sovereign Bankruptcy to present their work.

Dr Freya Baetens (Belgian) thanked the Chair for kind introduction and thanked the Committee for the invitation to present the report of the Study Group on Sovereign Bankruptcy. She began her presentation by noting that she would deal with the highlights of the report on the legal approach to sovereign bankruptcy. This followed on from the 2010 report of the Study Group, which was presented at the Hague Conference. This report set out some issues but did not come to a conclusion on how those issues should be dealt with. Several ways forward for responding to sovereign bankruptcy were identified in the Hague report:

1. a voluntary, contractual regime, which left the resolution for sovereign insolvency to contracts that had been concluded between issuers and bondholders;
2. the adoption by treaty or statute of a limited provision for creditor voting on a plan;
3. the adoption by treaty or statute of a wider bankruptcy regime that reflected the relevant aspects of corporate insolvency reorganisation practice;
4. the adoption of measures to strengthen creditor positions and the dilute the protections insolvent States.

The Study Group examined State practice: the entry of the IMF, the role of the Paris Club, and some specific country situations (eg, Argentina). They examined whether due diligence of a regime for sovereign bankruptcy should be achieved by contract in the bonds themselves, or by treaty or legislation. The realisation was that the method of

achievement of a particular result was a secondary issue. The primary issue was to decide what should be the substance of rules for the resolution of bankruptcy, and then procedure could follow. The achievement of a proper regime for State bankruptcy could be a mix of contract and law, which in turn depended on the agreement between the parties.

The work of the Study Group also dealt with collective action clauses in terms of which bondholders could vote by majority so as to bind all bondholders, examined the pros and cons of that, as well as the description of certain clauses and gaps. The main recommendation was that collective action clauses and crucial aggregation clauses had solved many obstacles in resolving sovereign bankruptcy. Their universal use was encouraged in international issues. Their utility in domestic issues should be kept under review.

With respect to standstill clauses, the Study Group recommended that further work needed to be done with the view to developing such clauses. At present, creditor litigation prior to exchange of bonds if the debt was negotiated with creditors seemed rather unusual. But the situation should be monitored to assess whether disruptive and unjustified creditor action became a threat to the resolution of a sovereign bankruptcy.

The Study Group did not consider that sovereign States should be entitled to immunity through the imposition of a unilateral vote or a stay on creditor enforcements or explorations of debt.

The next issue dealt with was that of trustees. The appointment of trustees should be seriously considered on case by case basis. They were a communication link with the sovereign, and the fact that they had to distribute proceeds pro rata was an incentive to aggressive action by a bondholder to secure recovery. To do their job, however, it was sometimes said that trustees should be bolder and they were disincentivised by liability risks. The Study Group recommended that further work be taken to standardise documentation in this respect.

The mixed element of the report dealt with creditor committees and creditor engagement clauses. Creditor engagement clauses were endorsed by some members, while some were less convinced by their substance. The final recommendation was that further work be done to see whether such clauses could be adapted so as to give the regime acceptance and to be routinely used by issuers and bondholders.

On the issue of priorities, the Study Group recommended that the level of priorities in negotiations by public officials and private sector actors be done on a case by case basis. In most cases this worked satisfactorily. If the private sector objected, they could decline to participate and have some say in the priorities.

On the issue of an international sovereign bankruptcy court, the Study Group believed that the case still had to be made for such a court having jurisdiction over sovereign bonds to oust the traditional sovereign jurisdiction of national courts chosen in the bonds.

Professor Lichtenstein thanked the Chair and Vice-Chair for including the Sovereign Bankruptcy Study Group in the session. She noted that the report was written by the Chair of the Study Group, Professor Philip Wood, who was an expert in financial markets. An important point was made on page 4 of the report where an important point is made, namely that the IMF sought to distinguish between cases where the problem was

one of liquidity only, and cases where debt stock was is too high (a solvency problem). She queried what it meant to have debt stock too high, and how it got to be too high. This was exactly the same problem that agencies in charge of bank resolution had: was the bank in trouble merely for experiencing temporary liquidity problems, or was it in fact insolvent and should either be resolved or wound up. She posed the question whether there should be an international lender of last resort.

Next, Professor Lichtenstein noted that page 8 of the report referred to a change in solving sovereign bankruptcy. A decision had to be made whether to put money where a sovereign was in arrears either to its private creditors or to bankers before research on sustainability analysis was carried out. Unless it was highly likely that the debt stock was sustainable, money would not be provided. This led to a problem in Greece. Creditors were against reducing the total amount of debt. They were willing to extend the due date of payment, adjusting interest, austerity measures etc, but never to reduce the debt.

The question was how does debt stock become unsustainable. Underwriters on issues of sovereign debt competed with one another. Professor Lichtenstein queried whether there were any rules in international law that forbade lenders to "over-lend" hence causing unsustainability. She then referred to the resolution on ethical standards, and concluded by posing the question whether there were ethical codes to prevent the above possibility of an unsustainable debt.

Professor Gortsos asked whether the presenters considered establishing or applying the principle of responsible lending to sovereign debt as it was known in consumer lending.

Professor Lichtenstein responded that this aspect had not been taken up by the Study Group, but the principles did exist in private lending. Perhaps the principle could be better formulated and incorporated in international law as possibly binding. But the Study Group would think about in depth.

Professor Zilioli followed up on Professor Gortsos's presentation. What he was suggesting was that we place a duty on the bank to monitor or to ethically discourage issues of bigger/unsustainable debt. The point was to limit States from over-borrowing and other financial institutions from over-lending. We were not yet there, but it was a good point to be further investigated.

Professor Engela Schlemmer (South Africa) asked why lenders should not lend if the risk of not getting paid back was not there. Why should we destroy the rules of the game? She also made a further comment that it remained important to consider private law principles for responsible lending (eg, whether the loan amounted to "reckless lending"). It was also important to consider whether the lender should have required additional security or guarantees.

Sir William closed the discussion on the work of the Study Group on Sovereign Bankruptcy and introduced Mr John Taylor to present on the East African Community Monetary Union.

Mr John Taylor (Australia) began by acknowledging Professor Agasha Mugasha has written the presentation that he would be giving. The EAC was a dynamic community consisting of five members (Uganda, Kenya, Tanzania, Rwanda and Burundi). South Sudan was about to join as a sixth member. They came together historically and signed

a treaty in 1999 with the aim to become a complete union – a customs union, a common market with free movement of goods, persons and labour, a monetary union (which was of most interest to the Committee), and a political federation (which is the slowest process in the organisation).

With regards to the monetary union, it was decided in 2013 that concrete efforts should be taken to lean towards monetary union for a potential common/single currency if three members agreed that there should be a single currency. The monetary union had features similar to the European monetary union. The objective of the monetary union was the harmonisation of fiscal policy, financial payment and settlement systems, regulations and supervision of the financial system, and the adoption of a single currency. There were stated prerequisites for the monetary union, and for membership. Other aspects were covered in the treaty. The States had also agreed to build resilience to address economic shocks, and to establish an East African central bank to complement national central banks. Single monetary policy and single exchange rates were also envisaged. It would be a dramatic achievement if EAC States could indeed achieve what the treaty was envisioning.

Mr Taylor noted that there was also an East African Court of Justice that handled human rights, administrative law and constitutional law cases. The objective was that there would be an attempt to harmonise financial laws in the region and that the Court of Justice would be given jurisdiction to deal with commercial cases. Mr Taylor hoped that this would be successful, and encouraged attendees to watch this space. The success of the monetary union would mean additional strengthening of the other regional unions in West Africa and Southern Africa. It would foster regional groupings in Africa by leading as an example.

Mr Taylor concluded his presentation my emphasising that the EAC consisted of an estimated 150 million people with a GDP of USD 160 billion. This put it in the world's 55th largest grouping by GDP.

Sir William invited Professor Gortsos to give the final presentation on crowdfunding.

Professor Gortsos acknowledged that the part of the report on crowdfunding was prepared by Dr Klaus Peter Follak. It was divided into five parts. It addressed regulatory developments in international financial law. Crownfunding was part of the financial technology known as FinTech. Crowdfunding as a new type of financing raised one major regulatory concern because it involved an unregulated platform. Profssor Gortsos asked whether this type of activity should be regulated, and what type of regulation was necessary. Would the existing rules in capital markets regulation or banking regulation be suitable in protecting investors? There was no conclusive proposal on regulation. There might be a need for regulation, but a lot of work was still to be done. The discussion may be of interest to future Committee meetings.

Sir William noted that FinTech was indeed an important subject to explore. It was also relevant in Africa because of the rise of mobile banking, which is used by large population. This raised significant legal questions.

Professor Lichtenstein made one final note in respect to the East African Monetary Union. She noted that at the time of the entry of the European monetary union, there were

difficulties pointed with regard to the fiscal union. She therefore asked whether there was a regime on fiscal union envisioned in the East African Monetary Union. Having a monetary union without a fiscal union might not work.

Mr Taylor responded that there was no such fiscal union. Instead, there were mechanisms of managing or monitoring risks and managing shocks, ie, early warning systems and stabilisations. There was no specific reference to fiscal union. They had considered it but it was not in the plans. Another interesting question to ask further was whether there were provisions in the treaty on the term of the treaty and withdrawal from the treaty.

Sir William intervened that it was important to state that Euro had been a very successful currency. There was a lot of confidence among the EU general public that the Euro meets its objective. The Chair then stated that the Session has come to an end. The draft resolution entitled "The Ethical Culture of Financial Services" was adopted by unanimous vote of members present.

Reporters: Dr Musa Shongwe

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW

Members of the Committee

Professor Toshiyuki Kono (Japan): *Chair*
Professor Pedro A de Miguel Asensio (Spain): *Co-Rapporteur*
Professor Axel Metzger (Germany): *Co-Rapporteur*

Professor Marie-Elodie Ancel (France)
Professor Stefania Bariatti (Italy)
Alternate: Professor Benedetta Ubertazzi
Professor Nicolas Binctin (France)
Professor Joost Blom (Canada)
Professor Claire Wan-Chiung Cheng (China (Taiwan))
Professor Carlos Correa (Argentina)
Professor Francois Dessemontet (Switzerland)
Professor Graeme B Dinwoodie (UK)
Professor Josef Drexl (Germany)
Professor Rochelle C Dreyfuss (USA)
Professor Susy Frankel (New Zealand)
Professor Jane C Ginsburg (USA) - Nominee of Chair
Dr Jie (Jeanne) Huang (HQ
Dr Paulius Jurcys (HQ) - Nominee of Chair
Professor Ryu Kojima (Japan)
Professor Daniel Kraus (Switzerland)
Professor Ivana Kunda (Croatia)
Professor Gyooho Lee (Korea)
Professor Rita Matulionyte (HQ/)
Professor Dario Moura Vicente (Portugal)
Professor Fabricio Bertini Pasquot Polido (Brazil)
Professor Alexander Peukert (Germany)
Professor Sierd J Schaafsma (Netherlands)
Professor Dan Svantesson (Australia)
Professor Paul Torremans (UK)
Professor Edouard Treppoz (France)
Professor Marketa Trimble (USA)
Professor Mireille van Eechoud (Netherlands)
Professor Marcos Wachowicz (Brazil) - Nominee of Chair
Professor Dai Yokomizo (Japan)
Professor Peter Yu (USA)

THIRD COMMITTEE REPORT (2016)

I. General Remarks

This is the Third Activity Report of the ILA Committee on "Intellectual Property and Private International Law" prepared for the 2016 ILA Congress.[1] Since its creation in 2010, this ILA Committee has been working intensively in order to examine the current state of affairs related to the protection of IP in the transnational sphere. Acting in accordance with its mandate, the members of the Committee gathered on at least six occasions. In addition, a number of seminars, workshops and meetings have been organized by sub-committee members and project officers.

[1] The First and Second Committee Report are available at the Committee's website at: www.ila-hq.org/en/committees/index.cfm/cid/1037.

The Committee's activities conducted within six years of its existence could be divided into three main stages: (i) preparing comparative studies of the pre-existing projects and starting discussions in sub-committees about the future drafting of the ILA Guidelines[2] (2010-2012); (ii) drafting of the first proposals for the ILA Guidelines, mainly on non-controversial issues related to jurisdiction, choice of law, and, recognition and enforcement (2013-2014); (iii) finalizing the draft guidelines on non-controversial issues as well as seeking Committee's approval for continuing the discussions on "controversial issues" (e.g., ubiquitous infringements, law governing initial ownership and IP-related contracts, arbitrability, coordination and cooperation, etc., (2015-2016)). During the final stage of its mandate, the Committee aims to conclude its work by finalizing the guidelines on remaining controversial issues and preparing a publication. This would provide a commentary on the Guidelines, and also map the directions in which the development of the legal framework for the transnational exploitation of IP rights should head to.

This Third Activity Report attempts to provide an overview of the work accomplished by the Committee since the last ILA Congress, which took place in 2014 in Washington DC. In particular, Section II provides a short overview of the structure and the main elements of the draft Guidelines on Intellectual Property in Private International Law. Section III summarizes the Committee's activities, inter alia, two meetings held in 2015 including the expected future collaboration with several international organizations. Finally, Section IV briefly addresses the current state of the debates within the Committee with regard to the "controversial issues" that have to be crystallized and approved by the whole Committee in order to be included in the Guidelines.

II. Draft Guidelines: "Intellectual Property in Private International Law"

[as of May 25, 2016]

[PREAMBLE]

GENERAL PROVISIONS

1. Scope of the Guidelines

(1) These Guidelines apply to civil and commercial matters involving intellectual property rights which are connected to more than one country.
(2) These Guidelines may be applied mutatis mutandis to claims based on unfair competition, if the matter arises from the same set of facts as relating allegations involving intellectual property rights, and on the protection of undisclosed information.

2. Definitions

"Intellectual property right" means copyright and related rights, patent, utility model, plant breeder's right, industrial design, layout-design (topography) of integrated circuits, trademark, geographical indication and similar rights.

[2] Some of the Reports were published in the Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC) Vol. 3, No. 3 (2012), available at: jipitec.eu/issues/jipitec-3-3-2012.

JURISDICTION

Basic Forum

3. Defendant's Forum

Unless otherwise provided for in these Guidelines, the defendant should be subject to jurisdiction to the courts of the State in which he or she is habitually resident. The courts' jurisdiction shall be territorially unlimited.

Alternative Fora

4. Contracts

In disputes concerning intellectual property license or transfer contracts, a person may be sued in the courts of the State for which the license is granted or the right is transferred; the courts' jurisdiction shall be territorially limited to the State in which the court is situated.

5. Infringements

In case of an alleged infringement a person may be sued:

(a) In the courts of the States where the alleged infringer has acted to initiate or further the alleged infringement; the courts' jurisdiction shall be territorially unlimited with regard to any damages caused by those acts; or
(b) In the courts of the States where the infringement may have caused substantial damages unless it could not be anticipated that the infringement would cause those damages; the courts' jurisdiction shall be territorially limited to the State in which the court is situated.

6. Consolidation

A plaintiff bringing an action against a defendant in a court of the State in which the defendant is habitually resident may proceed in that court against other defendants not habitually resident in that State if –

(a) The dispute involves the same or substantially related intellectual property rights granted for one or more States, and
(b) The claims against the defendant habitually resident in that State and the other defendants are so closely connected that they should be adjudicated together to avoid a serious risk of inconsistent judgments, and
(c) As to each defendant not habitually resident in that State, there should be a substantial connection between the intellectual property rights at issue and the dispute involving that defendant.

7. Title and Ownership

The court of the State where the intellectual property right exists or for which application is pending shall have jurisdiction over matters of title to and ownership of that right.

Other Fora

8. Choice of Court

The parties to a particular relationship may designate in an agreement a court to have jurisdiction over any dispute that has arisen or may arise in connection with that relationship. The chosen court shall have jurisdiction to decide all contractual and non-contractual obligations and all other claims arising from that legal relationship unless the parties express their intent to restrict the court's jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

9. Submission and Appearance

A court shall have jurisdiction if the defendant appears and does not contest jurisdiction in the first defense.

10. Validity Claims and Related Disputes

(1) In proceedings which have as their main object the grant, registration, validity, abandonment, or revocation of a registered intellectual property right the court of the State of registration shall have exclusive jurisdiction.
(2) Any other court having jurisdiction may decide on these matters when they arise in proceedings other than those referred to in paragraph 1. However, the resulting decision shall not have any effect on third parties.

11. Declaratory Actions

Subject to Guidelines 8 [validity] and 11 [coordination], a court may hear an action for a negative or a positive declaration on the same ground as a corresponding action seeking substantive relief.

12. Provisional and Protective Measures

(1) A court having jurisdiction as to the merits of [of the claim], shall have jurisdiction to order provisional and protective measures.
(2) Other courts shall have jurisdiction to order provisional and protective measures within their territory.

13. Scope of Injunctions / Jurisdiction

The scope of an injunction is limited both by the extent of the jurisdiction of the court and by the territorial reach of the intellectual property right enforced.

14. Counterclaims

A court which has jurisdiction to determine a claim under these Guidelines shall also have jurisdiction to determine a counterclaim arising out of the same set of facts on which the original claim is based.

15. Insufficient Grounds for Jurisdiction

Insufficient grounds for exercising jurisdiction include:

(a) the presence of (any) assets [, physical or intellectual property, or a claim] of the defendant in a State, except when the dispute is directly related to that asset;
(b) the nationality of the plaintiff or the defendant;
(c) the mere presence of the plaintiff or of the defendant in that State;
(d) the mere conduct of commercial or other activities by the defendant in that State, except when the dispute is related to those activities;
(e) the service of a writ upon the defendant in that State; or
(f) the completion in that State of the formalities necessary to execute an agreement.

Coordination and Cooperation

16. Lis pendens

(1) Where proceedings between the same parties on the same cause of action are brought in the courts of more than one State, any court other than the court first seized shall suspend its proceedings until such time as the jurisdiction of the court first seized is established, and thereafter it shall terminate its proceedings.
(2) A suspension may be lifted or a terminated proceeding may be restored if the proceeding in the court first seized does not proceed within a reasonable time.
(3) This guideline does not apply if:
  (a) the proceeding is within the exclusive jurisdiction of the court subsequently seized;
  (b) the proceeding is for provisional or protective measures; or
  (c) it is shown by the party invoking the jurisdiction of the court subsequently seized that a judgment of the court first seized would not be recognized in the State of the court subsequently seize.

17. Related Proceedings

Where related proceedings are pending in the courts of more than one State, any of the courts may take any step permitted by its own procedures that will promote the fair and efficient resolution of the related proceedings considered as a whole. The scope of this guideline includes both consolidating proceedings in one court and coordinating the conduct of proceedings in different courts.

APPLICABLE LAW

General Rules

18. Existence, Scope and Transferability (Lex loci protectionis)

The law applicable to determine the existence, validity, registration, duration, transferability, and scope of an intellectual property right, and all other matters concerning the right as such, is the law of the State for which protection is sought.

[19. Law Applicable to Initial Ownership]

Contracts

20. Freedom of Choice

Parties may choose the law governing their contractual relationship.

21. Absence of Choice

(1) In the absence of choice of law by the parties pursuant Guideline 20, a contract other than an employment contract shall be governed,
   (a) if the contract deals with intellectual property granted for one State only, by the law of this State, unless it is clear from all the circumstances of the case that the contract is [manifestly] more closely connected with another State. Then the law of that other State shall apply;
   (b) if the contract deals with intellectual property for more than one State, by the law of the State with which the contract is most closely connected; in determining this State, the court shall take into consideration among other possible factors:
      – the common habitual residence of the parties;
      – the habitual residence of the party effecting the performance characteristic of the contract;
      – the habitual residence of one of the parties when this habitual residence is located in one of the States covered by the contract.

(2) For the purpose of this provision, the habitual residence of a party shall be determined at the time of conclusion of the contract.

22. Employment Contracts

(1) An employer and its employee whose efforts give rise to an intellectual property right may choose the law governing their contractual relationship in accordance with Guideline 20.

Such a choice of law shall not, however, have the result of depriving the employee of the protection afforded to him by the provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2 and 3.

(2) In the absence of choice of law by the parties, the contractual relationship between employer and employee shall be governed by the law of the State in which or, failing that, from which the employee habitually carries out his work in performance of the contract.

The country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country.

(3) Where it is clear from all the circumstances of the case that the contract is [manifestly] more closely connected with a State other than that indicated in paragraph 2, the law of that other State shall apply.

23. Formal Validity

Any contract dealing with intellectual property rights shall be formally valid to the extent that it satisfies the formal requirements:

(a) of the law of the State which governs the contract pursuant Guidelines 20-22 [Freedom of Choice, Absence of Choice, Employment Contracts], or
(b) of the law of the State in which either of the parties or their agents is present at the time of the conclusion of the contract, or
(c) of the law of the State in which either of the parties has its habitual residence at the time of the conclusion of the contract.

Infringements

24. Basic Rule on Infringement

(1) The law applicable to the infringement of an intellectual property right is the law of each State for which protection is sought.
(2) The law applicable to the remedies for the infringement may be chosen by the parties.

25. Law Applicable to Ubiquitous or Multi-state Infringements

(1) When the infringement in multiple states is pleaded in connection with the use of ubiquitous or multinational media, it may be appropriate to apply to the infringement as a whole only the law or laws of the State(s) having an especially close connection with the global infringement.
(2) Relevant factors to determine the applicable law (or laws) in these situations may be:
   – the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety;
   – the parties' habitual residences or principal places of business;
   – the place where substantial activities in furthering of the infringement have been carried out.
(3) In situations where paragraph (1) is applied, any party may claim that, with respect to particular States covered by the action, the solution provided by any of those States' laws differs from that obtained under the law(s) chosen to apply to the case as a whole. The court must take into account such differences when fashioning the remedy.
(4) Paragraphs (1) to (3) above may apply mutatis mutandis in cases of secondary or indirect infringements of intellectual property rights.

26. Public Policy

The application of the law determined under these Guidelines may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum.

27. Overriding Mandatory Provisions

(1) Nothing in these Guidelines shall restrict the application of the overriding mandatory provisions of the law of the forum.
(2) When applying under these Guidelines the law of a country, the court may give effect to the overriding mandatory rules of any State with which the dispute has a close connection.

28. Renvoi

The application of the law of any State determined under these Guidelines means the application of the rules of law in force in that State other than its rules of private international law.

[Security rights]
[Consumer protection]
[Unitary rights]

RECOGNITION AND ENFORCEMENT

29. Object of Recognition and/or Enforcement

(1) A foreign judgment may be recognized and enforced in accordance with this part of the Guidelines.

(2) For the purposes of these Guidelines, a judgment means any judgment rendered by a court or tribunal of any State, irrespective of the name given by that State to the proceedings that gave rise to the judgment or the name given to the judgment itself, such as decree, order, decision, or writ of execution. A judgment for the purposes of these Guidelines also includes court approved settlements, provisional and protective measures, and the determination of costs or expenses by an officer of the court.

(3) If a judgment is still subject to appeal in the State of the rendering court, or if the period for launching ordinary review has not expired in that State, the requested court may stay the recognition and enforcement until the appeal is decided or the period expires, or may make it a condition of the recognition and enforcement that the party seeking it provides security.

(4) Provisional and protective measures adopted without prior hearing of the adverse party and enforceable without prior service of process to that party shall not be recognized or enforced.

30. The Effect of a foreign Judgment

The effect of a foreign judgment in the State of the recognizing and/or enforcing court shall to the extent possible be the same, and under no circumstances greater, than the effect enjoyed by the foreign judgment in the State of the rendering court.

31. Grounds for Non-Recognition and Non-Enforcement

(1) A court shall not recognize or enforce a foreign judgment if:

(a) such recognition or enforcement would be manifestly incompatible with the public policy of the requested State;

(b) the proceedings leading to the judgment were manifestly incompatible with fundamental principles of procedural fairness of the requested State;

(c) the judgment was rendered by default where i) the defendant to the proceeding was not adequately and timely notified of the proceeding, or ii) the defendant was deprived of an adequate and meaningful opportunity to present its case before the rendering court;

(d) the judgment is inconsistent with a prior judgment rendered in the requested State and having preclusive effect;

Wording A:

(e) the foreign judgment is inconsistent with another foreign judgment that was rendered earlier by a court of competent jurisdiction, where the earlier-rendered foreign judgment addresses the same parties to the same dispute and the same of cause of action, and was either recognized in the state of the recognizing and/or enforcing court, or has not yet been recognized but fulfills the conditions necessary for its recognition in the recognizing or enforcing state, unless the party against whom recognition and/or enforcement is sought had full opportunity in the second action to argue the binding force of the earlier judgment;

Wording B:

(e) the judgment is irreconcilable with an earlier judgment given in another State between the same parties and having the same cause of action, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested State.

(f) the rendering court exercised jurisdiction in violation of the rules of jurisdiction under these Guidelines.

(2) In assessing the rendering court's jurisdiction, the recognizing and/or enforcing court is bound by the findings of fact made by the rendering court in the original proceeding.

(3) The requested court shall not review a foreign judgment as to its merits.

32. Partial and Limited Recognition and Adaptation

(1) If the foreign judgment contains elements which are severable, one or more of them may be separately recognized or enforced.

(2) If a foreign judgment awards non-compensatory, including exemplary or punitive, damages that are not available under the law of the requested state, recognition and enforcement may be refused if, and only to the extent that, the judgment awards damages that do not compensate a party for actual loss or harm suffered and exceed the amount of damages that could have been awarded by the courts of the requested State.

(3) If a judgment contains a measure which is not known in the law of the requested State, that measure shall, to the extent possible, be adapted to a measure known in the law of the requested State which has equivalent effects attached to it and which pursues similar aims and interest.

(4) If a foreign judgment includes a decision concerning the validity of a registered intellectual property right and the rendering court is not a court of the State of registration, the decision on the validity shall be effective only between the parties to which the foreign judgment pertains.

ARBITRATION

[33. Arbitrability of Intellectual Property Disputes]

– [end] –

III. Activities Report

III.1 Outreach Activities of the Committee

III.1.1 Joint Seminar with WIPO (January 2015)

The ILA Committee had a joint meeting together with WIPO on January 15-16, 2015 in Geneva. Besides ILA Committee members, representatives for the HCPIL (Ms Marta Pertegás) and WIPO (Ms Min Eun Joo) took part. The overall objective of the Committee meeting was to resolve some of the pending issues and seek approval by the whole Committee in order to prepare the draft for the ILA Guidelines for the 2016 Congress in South Africa. During those two days, open and closed sessions were held. In closed sessions, the Committee members discussed the following issues: the scope of the Guidelines, coordination and cooperation, choice of law matters, arbitrability,

recognition and enforcement of judgments in IP-related cases and the future activities of the Committee.

Scope. The first issue on the Committee agenda was the scope of the Guidelines. Firstly the Committee members discussed whether the Guidelines should apply to "international" or "transnational" disputes. The general opinion was that it is important to avoid confusion with other already existing terms of art (e.g., reference to "international" might create confusion with the existing international investment dispute settlement mechanisms). Hence, it was agreed to use a more open and explanatory language. Second, the material scope (*ratione materiae*) has raised many questions. Namely, it was discussed whether such issues as trade secrets, undisclosed information, geographical indications, topography-related rights, etc. should fall within the scope of the Guidelines. One suggestion was to keep the definition quite open so that the court hearing a case would have the possibility to apply the ILA Guidelines. In deciding upon the scope of the Guidelines, the ILA Committee agreed that further study is needed to explore how inclusion of certain rights would affect the operation of ILA Guidelines on jurisdiction, choice of law and recognition and enforcement. Finally, it seems that there is a quite general agreement within the Committee to exclude personality and privacy rights from the scope of the Guidelines because those rights are analyzed by other ILA Committees and also because their nature is quite different from IP rights.

Jurisdiction, Coordination and Cooperation. Since most of the ILA Committee work at the early stage was aimed at drafting guidelines on jurisdiction, the discussion focused mainly on several remaining issues, i.e., coordination and cooperation. The Committee members shared the view that special rules on coordination and cooperation are desirable, and that their objective should be to increase efficiency, prevent parallel proceedings and torpedo actions. Yet it was not clear to what extent the ILA guidelines should address these issues. One view was to adopt a minimalist approach and leave it up to the countries to modify their own domestic laws to facilitate coordination and cooperation. Another view was that the ILA Committee should take a more courageous approach and establish a more elaborate set of provisions on cooperation and coordination. Sources of inspiration for the ILA work could be the 1997 UNCITRAL Model Law on Cross-border Insolvency[3] or the recent steps to establish a Unified Patent Court in Europe. At the initial stage, however, the Sub-committee decided to continue work in order to crystallize the definitions of such complex notions as "the same cause of action" or "the same party" and then consider further directions of drafting guidelines on coordination and cooperation.

Applicable law. Much time was devoted to discuss various aspects of choice of law provisions. A number of issues related to choice of law issues have been raised. For instance, the Committee considered whether it is reasonable to add a separate guideline specifying the application of mandatory rules. Although this could be considered to be outside of the scope of the Guidelines, in certain cases, e.g., ubiquitous infringements, some certainty with regard to the applicability of mandatory rules would certainly add to the efficiency of litigation.

The ILA Committee also considered whether a choice of law provisions for consumer related contracts should be added. A special Sub-committee had been entrusted with

[3] For more information see: http://goo.gl/knp34Q

the task of deciding whether there were any IP-specific consumer related contracts that needed to be addressed by drafting a special rule, or whether a general guideline referring to *lex fori* would suffice. The risk was that the Committee might go beyond its mandate; yet, if some IP-specific matters were identified (e.g., in cases of mass-market contracts), the ILA guideline should be in line with the existing legal framework in various countries. Further complexities may require deliberation with regard to the definition of a "consumer". In addition, further studies may be necessary with regard to the proposed choice of law rule relationship with jurisdiction rules as well as other choice of law rules (namely, party autonomy, *lex loci protectionis* or mandatory rules).

One of the controversial issues in the field of choice of law is initial ownership. There are multiple circumstances in which creative activities take place, and the Committee members shared the view that *lex loci protectionis* is no longer the most appropriate rule to allocate IP rights to newly created works. Even though the departure from the territoriality principle is widely supported, the members of the Committee did not entirely agree whether one choice of law rule would suffice, or whether several alternative provisions to various case-by-case based scenarios should be adopted. Moreover, there was a debate whether the ILA Guideline should provide several alternate choice of law provisions that would help determine initial ownership. Some Committee members expressed their strong preference to have one single law governing questions related to initial ownership. The advantage of such a solution would be legal certainty and predictability which are very important in globally intertwined economies. Some other members of the Committee were more reserved and highlighted the need to be aware that choice of law dealing with the law governing initial ownership should be in line with other choice of law provisions (e.g., transferability of IP rights).

One session open to the public was held on January 16, 2015 during which the ILA Committee members presented general progress regarding the drafting of the guidelines. The first presentation was given by two reporters of the ALI Principles on Intellectual Property[4] (Professors Rochelle Dreyfuss and Jane Ginsburg) who briefly explained the goals of the ALI Principles. They also provided a succinct presentation of the scope and main principles on jurisdiction, choice of law and recognition and enforcement of foreign judgments in IP cases. Professor Josef Drexl from the Max Planck Institute of Innovation and Competition (Munich, Germany) gave a presentation about the CLIP Principles – a major legislative proposal prepared by a group of European scholars.[5] Professor Toshiyuki Kono followed up with a similar overview of the Japanese Transparency Project.[6]

Professor Andrew Christie presented the results of a survey concerning national approaches to cross-border online IP infringement disputes. The survey identified 56 court

[4] The American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes* (Chestnut, ALI Publishers, 2008).

[5] European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary* (Oxford University Press, Oxford, 2013).

[6] J. Basedow, T. Kono, and A. Metzger (eds.), *Intellectual Property in the Global Arena: Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US* (Tübingen, Mohr Siebeck, 2010), Transparency Proposal is also available at www.tomeika.jur.kyushu-u.ac.jp/ip/proposal.htm.

decisions from 19 different jurisdictions. The survey included different fields of analysis in various degrees of detail such as: a) factual issues (type of IP rights, fact scenario and cross-border elements), b) types of claims (civil or criminal, primary or secondary, IP validity challenge and parallel proceedings), c) orders (provisional measures, remedies and foreign enforcement), and d) private international law issues and how they were treated in online infringement cases. Professor Christie emphasized that from the data collected there were no online (ubiquitous) infringement cases where a single plaintiff would seek multi-state relief or where parallel proceedings would take place. This led him to question whether online IP infringements should not be treated in the same manner as local infringements.

After Professor T. Kono's presentation about the ILA Project and the current state of affairs, Professor Gyooho Lee from Korea introduced the Japan-Korea Principles on Private International Law on IP Rights.[7] Taking into account that most East Asian countries belong to the civil law tradition, the purpose and scope of these Principles is to create a model law, which can be a source of inspiration for legislators in East Asian countries. This proposal was drafted jointly by a group of scholars from Japan and Korea and its conceptual roots could be traced back to the ALI and CLIP Principles. Professor G. Lee discussed the solutions adopted in the joint Japan-Korea Principles with regard to such matters as jurisdiction, choice of law, and recognition and enforcement of foreign judgments. Professor G. Lee noted that these Principles were taken into account in preparing the amendment of the Korean Civil Procedure Act in 2014.

Some selected issues in relation to the ILA Committee Draft Guidelines were presented to the audience by members of the Committee in a session chaired by Professor Joost Blom. Professor Axel Metzger and Professor Benedetta Ubertazzi discussed the main features of the jurisdiction provisions of the Guidelines. The most relevant issues of the applicable law section of the Draft Guidelines were presented by Professors Pedro de Miguel Asensio, Marie-Elodie Ancel, Rita Matulionytė, and Mireille van Eechoud. The provisions on recognition and enforcement of judgments were introduced by Professor Marketa Trimble.

Professor Dr Dário Moura Vicente discussed about the legal issues, which arise with regard to the arbitrability of IP matters. The advantages of arbitration as an alternative to court litigation of IP disputes are manifold. Yet one should be aware of the fact that IP rights are monopolies granted by States, which explains why jurisdiction over IP disputes is in many states reserved to domestic courts. Professor Moura Vicente explained that there are at least five approaches to arbitrability of disputes pertaining to registered IP rights: (i) registered IP rights disputes are not arbitrable (e.g., South Africa). In other countries arbitrability is possible, however, with some limitations. In Germany, for instance, jurisdiction of the court is generally held to be exclusive, hence validity issues are not arbitrable even if raised as a defense in infringement or breach of license disputes. (ii) the French approach, validity issues are arbitrable, although the arbitral award only has *inter partes* effect; (iii) the American approach (S. 294 of the Patent Act), which also

[7] The Joint Japanese-Korean Proposal, see 'Commentary on Principles of Private International Law on Intellectual Property Rights (Joint Proposal Drafted by Members of the Private International Law Association of Korea and Japan)' (2011) 2(6) *Kigyō to Hōsōzō*, available at www.globalcoe-waseda-law-commerce.org/activity/pdf/28/08.pdf.

allows arbitration of any disputes related to validity or infringement arising under contract. In case of no contract the parties may agree to settle the dispute by arbitration with *inter partes* effects. (iv) In some states disputes over registered IP rights are arbitrable and arbitral awards have *res judicata* effect (e.g., Belgium, Art. 51(1) of the Patent Law of 1984), and (v) in other countries such disputes are even mandatory (e.g., Portugal, Art. 2 of the Law No. 62/2011 of 2011).

Differences among the national legal systems exist also with regard to arbitrability of non-registered IP rights. For instance, in France such disputes are not arbitrable (perhaps stemming from *droit d'auteur* considerations) whereas in other states such a dispute resolution method could be framed as "default" (e.g., Quebec, Art. 37(1) of the Act Respecting the Professional Status of Artists) or Portugal where such dispute resolution method is mandatory. In the opinion of Professor Moura Vicente, existing differences create uncertainty and show the need for a uniform conflict of laws rules.

III.1.2 ILA Committee Meeting in Munich (November 2016)

On November 21-22, 2015 a Committee meeting took place at the Max Planck Institute for Innovation and Competition. During those two days, three sessions were held: one session open for the wide public and two closed sessions during which the Committee members were able to discuss pertinent matters concerning the drafting of the ILA Guidelines.

The open session began with a short presentation about the outline of the Guidelines and its main underlying objectives. The structure as well as the main solutions with regard to jurisdiction and choice of law were presented to the audience by the officers of the Committee. This was followed by a presentation by Ms Marta Pertegás, who is the First Secretary at the Hague Conference on Private International Law ("HCPIL"). Ms M. Pertegás introduced the status of the so-called Hague Judgments Project the objective of which was to develop an international instrument for the facilitation of the recognition and enforcement of judgments. Ms M. Pertegás noted that the draft of the HCPIL contained only provisions on recognition and enforcement; besides, it was not clear whether any provisions on jurisdiction would be added. Ms M. Pertegás also drew attention to the fact that the HCPIL draft did reflect the peculiarities of IP-related cases and that future cooperation with the ILA Committee should be greatly facilitated.

The second presentation in an open session was given by Ms Min Eun Joo who is a Senior Legal Officer at WIPO who made a presentation about recent and future activities of WIPO in the areas of private international law and IP. Ms Joo explained that at the outset there was no debate concerning transnational aspects of IP at WIPO. This was so because the nature and mandate of WIPO, differently from HCPIL, is less related to norm-setting. Instead, WIPO has been often providing legal assistance to national judiciaries in creating a more efficient IP enforcement framework. Therefore, judges form a very important stakeholder group in the operation of WIPO. Ms Joo further discussed a WIPO report prepared in 2015, which focuses on "online" IP infringements, which was presented in advance by Professor Christie at the above mentioned meeting at WIPO in January 2015. Some members of the Committee pointed out that the case studies in the report are not representative enough to draw conclusions, because for example only two cases from EU were reviewed in the report. With regard to the future activities of the

WIPO, Ms Joo emphasized that WIPO is likely to take some active steps to highlight the interface between IP and private international law and seek to provide more assistance to national judges in this regard. Therefore, WIPO will need partners with strong private international law expertise, which may lead to a closer cooperation between WIPO and the ILA Committee.

The third guest speaker at the open session was Professor Dr Burkhard Hess[8] who prepared a thorough presentation addressing various issues of the Draft of the ILA Guidelines from a procedural law perspective. Professor B. Hess began by drawing attention to the recent changes of procedural law in the EU: namely, the adoption of the Brussels I bis Regulation[9], the signature of the Agreement on the Unified Patent Court (UPC)[10] and more recent work conducted at the HCPIL in the area of recognition and enforcement of foreign judgments. Professor B. Hess noted that the conceptual approach taken in the ILA Guidelines places them somewhere in between the HCPIL draft, which is very territorial, and the UPC, which aims to establish a uniform regime for the whole region. From a purely procedural point of view, however, the draft of the ILA Guidelines seemed like a private international law instrument. This feature, in the opinion of Professor B. Hess, sets conceptual limitations for the ILA Committee to introduce desirable rules that would facilitate direct communication between courts and other agencies related in the administration of IP rights.

Overall, Professor B. Hess admired the structure of the ILA Guidelines and the way specific rules are organized. He commended the approach taken by the ILA Committee with regard to matters of validity and raised the provoking question of whether in such exclusive head of jurisdiction is still necessary. Professor B. Hess also suggested considering the need to eliminate, or at least curtail, differences that exist in national laws with regard to evidence gathering. Professor B. Hess also questioned whether it would be advantageous to define clearly the definition of "priority" in *lis pendens* situations or what period is "reasonable" in the case where the court later [required the ability] seized needs to suspend the proceedings. The idea of closer coordination of parallel proceedings and the need to enhance direct communication was raised multiple times. The UPC was referred to as one possible source of inspiration. Professor B. Hess finished with a short exposition about the activities of the ILA Committee on Privacy.

The last presentation at the open session was given by Professor Christian Heinze who spoke about the applicable law issues related to security rights in IP. This area of law is rather new and the ILA Committee is considering adding a separate rule on this matter. Professor C. Heinze explained various choice of law rules (*lex loci protectionis, lex fori, lex contractus*) and how they applied to various aspects of IP: existence, initial ownership, infringement as well as complexities related to the securities in IP. Professor C. Heinze addressed the need to fine tune traditional approaches to the realities of today

[8] Prof. B. Hess is the Executive Director at the Max Planck Institute for International, European and Regulatory Procedural Law (Luxembourg) and the Chairman of the ILA Committee on the Protection of Privacy in Private International and Procedural Law. More information about the activities of the ILA Comitee on Privacy is available at: www.ila-hq.org/en/committees/index.cfm/cid/1047.

[9] Available at: http://goo.gl/f6NhYe.

[10] 2013 O.J. C 56/175 (20 June 2013), text also available at: http://goo.gl/P754t.

in order to cope with the challenges brought by global business models and digital means of communication. He also discussed whether there is a need to have so-called *de minimis* rule in the choice of law context.

The open session ended with a Q&A session in which the participants were able to raise questions and seek clarifications about the practical results that would be achieved if ILA Guidelines were applied. Such issues as the scope (*ratione materiae*) of the ILA Guidelines as well as the applicable laws to initial ownership received much attention. With regard to initial ownership, much time was spent to consider the most suitable connecting factor for the determination of initial ownership in online cases as well as in cases where there are multiple creators.

Besides the open session, the ILA Committee held two closed sessions, the aim of which was to discuss some of the remaining controversial issues (namely, law governing initial ownership, arbitrability of IP disputes, the scope *ratione materiae* as well as some drafting-related issues) and discuss the future of the ILA Committee's agenda.

III.1.3 Officer's Meetings

The ILA Committee officers met at least four times in 2014-2016 (November 28-29, 2014 in Berlin, 6-7 February, 2015 and January 14-17, 2016 in Japan, and May 26-27, 2016 in Paris). Those meetings usually were to create and adapt strategies in order to streamline the activities of the Committee as a whole and coordinate the work between the sub-committees. Officers also decided about the future steps that are necessary in order to further develop the drafting work of the ILA Guidelines and to prepare for the forthcoming Committee meetings.

III.1.4 Future Relationship with the HCPIL

The cooperation between the ILA Committee and the HCPIL seems to be very desirable and necessary. Moreover, such a necessity of cooperation between HCPIL and ILA is clearly acknowledged by the staff of both organizations. Since the establishment of the ILA Committee, the cooperation between two organizations has been quite close: representatives of the HCPIL participated in ILA Committee meetings in Amsterdam (2014), and Munich (2015), while the representatives of the ILA Committee were invited to the Council of General Affairs and Policy of the HCPIL meeting in 2013 as well as the Special Commission on the Judgment Project in 2016.

The cooperation between the ILA Committee and the HCPIL has been mutually beneficial since a number of substantive law issues overlap. Although the present Draft of Provisions on Recognition of Judgments prepared by HCPIL barely reflect the specifics of IP-related cases, three overlapping substantive law areas could be highlighted. First, HCPIL will have to investigate the different nature of registered IP rights and those IP rights that require no registration and how this dichotomy affects the recognition and enforcement of foreign judgments. In this regard, ILA Guidelines could provide for a solid foundation for HCPIL's work. Second, HCPIL could benefit from the ILA Committee's work with regard to the interplay between the court's jurisdiction in IP matters and how this affects the recognition and enforcement of a particular judgment in a foreign state. Third, the HCPIL could exploit the insights of the ILA Committee members with regard to the cross-border ramifications of cases where the validity of registered IP rights is

challenged as a main claim or as a defense. Sharing information and expertise also in other related areas could certainly save resources of both organizations and further collaboration is expected to continue.

III.2 Remaining Issues and Future Work of the Committee

Three main issues proved to be controversial and require more time for the Committee's deliberation: coordination and cooperation, initial ownership and arbitrability of IP disputes. Coordination and cooperation is one of the areas where most of the work is still remaining. The Sub-Committee will prepare several alternative provisions to facilitate further discussions within the Committee as to what extent the ILA should address the issue of coordination and cooperation. A more humble approach would be limited to matters of dealing with parallel proceedings and it would be up to the Committee to decide whether more detailed Guidelines are desirable to provide some guidelines for the cooperation between courts in transnational IP proceedings.

Initial ownership remains another area of controversy for the Committee. The shared understanding among the members of the ILA Committee is that the territorial approach to such questions as initial ownership has two main drawbacks: first, applying the *lex protectionis* rule increases uncertainty about the ownership, adds transaction costs and reduces the value of IP assets. Second, territorial approaches potentially adds undue burden on weaker parties (e.g., employees) in exploiting IP rights. In order to overcome such shortcomings and contribute to greater certainty in the global IP marketplace, the Committee is likely to adopt the approach where initial law would be determined by way of applying single choice of law rule. Moreover, in situations where the parties are engaged in pre-existing relationships (e.g., based on employment or production contract) the law governing such relationships might be also applicable to the issue of initial ownership. The Committee also discusses to what extent party autonomy should be allowed.

With regard to registered IP rights, the Committee is likely to adopt the *lex loci protectionis* rule to determine entitlement and ownership of registered IP rights. However, in the case of a non-registered approach, the law of the closest connection to the creation (e.g., habitual residence of the creator) might be applied to determine initial ownership. In situations where there are multiple authors involved, some limited possibilities of exercising party autonomy might be allowed. More conceptually, the ILA Committee struggles to resolve such complex matters as the interface between choice of law rules for ownership and transferability interface and making sure that these two legal issues are subject to the same governing law as much as possible.

Regarding arbitrability of IP-related disputes, one of the initial questions for the ILA Committee is whether the Guidelines should contain a special section on arbitration at all. Given the existing differences among national legal systems, the proposed guidelines should be in line with the prevalent international arbitration practice. Since many of the Committee members agree that there has been a notable degree of liberalization of domestic laws allowing more IP-related disputes to be resolved by means of arbitration, it is likely, that some guidelines will be proposed. Moreover, taking into consideration the fact that ILA Guidelines will not have the force of law, it is widely agreed that some sort of guidance for the future with regard to settlement IP disputes in arbitration proceedings is desirable.

Among the matters discussed within the arbitration Sub-committee were arbitrability of IP-related matters. Among the possible approaches considered within the Committee, arbitrability may be resolved by way of applying the law of the place of arbitration, but this remains controversial. The Committee discussed in which scenarios the arbitral tribunal should take into consideration the law of the protecting country. One of the possible provisions in the ILA Guidelines may be that the law of the protecting country would have to be taken into consideration when the arbitral award is to be enforced in that country.

To complete the Guidelines, the Committee needs to further decide upon the guidelines concerning the scope and draft the preamble. With regard to the scope of the Guidelines, the Committee will have to crystallize the notion of "IP rights" and specify what other areas of law should fall within the scope of the Guidelines. As mentioned in other parts of this report, the scope of the Guidelines has to be carefully framed in order to make sure that important aspects of transnational IP litigation are not left out of reach of the Guidelines. This, in particular, requires a careful consideration of matters that are dealt with by unfair competition rules as well as regimes regulating traditional knowledge, geographical indications etc. At the final stage of its work, the ILA Committee will also have to make a decision whether to introduce special provisions covering unitary IP rights, consumer protection and law governing securities in IP.

IV. Concluding Remarks

Eric Schmidt, Executive Chairman of Google, once stated that we are creating as much information every second day as all of the humanity created from the beginning of recorded history to 2003.[11] Much of such information is created in online environments or transnational settings. ILA Committee's Guidelines is one of many projects, which aims to contribute to creating more transparent legal framework for the appropriation and exploitation of ideas. While the basic structure and principles proposed in the ILA Guidelines are already in place, some further work will still have to be done. First, the ILA Committee will have to finalize the Guidelines and seek comments from the public. Second, the Committee will have to continue working with partner organizations and institutions in order to spread the information about the existence of the ILA Guidelines. Finally, in the remaining period of its mandate, the Committee aspires to prepare a more comprehensive publication, which could potentially involve a brief explanatory report about the underlying considerations behind the Guidelines and also offer some recommendations about the work that could be done in the future.

[11] G. Siegler, Eric Schmidt, Every 2 Days We Create as Much Information as We Did up to 2003, TECHCRUNCH (Aug. 4, 2010), see: http://techcrunch.com/2010/08/04/schmidt- data/.

INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW

WORKING SESSION

Wednesday, 10 August 2016, 9.00am

Chair: Professor Burkhard Hess (Germany)

The Chair welcomed attendees and introduced the Chair of the Committee. Before giving him the floor, he acknowledged the absence of one of the CoRapporteurs, Professor Axel Metzger (Germany).

Professor Toshiyuki Kono (Japan) began his presentation by giving a brief overview of how the Committee was established and its modus operandi in trying to produce draft guidelines on intellectual property (IP) in private international law (PIL).

Professor Kono dealt with the concept of territoriality in IP law by giving a historical background of how IP was established from the era of sovereign rulers who used to grant special permission to engage in particular activities. Countries then evolved in the 19th century to protect IP.

The issue of cross border protection of IP was very important and explained the use of bilateral and multilateral treaties such as the Berne Convention and the Paris Convention. One of the fundamental principles underlying these treaties was territoriality and the national treatment principle.

The advent of the 20th century brought digitisation and globalisation, which influenced markets to change. Finding the best way to protect IP within the context of globalisation and digitisation was the most fundamental question that the Committee sought to answer in the draft guidelines.

Prior to the creation of the Committee, there were a number of projects that dealt with this issue. However, these projects were only regional, and most had ended by 2011. Therefore, the Committee aimed to widen the reach of the previous projects and to continue dealing with the issues with a view to reaching recommendations that could be accepted at a global scale.

To achieve their aim, the Committee devised a new way to recruit the members. It approached the best experts all over the world to join the ILA and then had their national branch nominate them. This was central to the success of the Committee's activities, as it ensured that the best experts and specialists of IP and PIL would be selected.

Professor Kono elaborated on the methodology used by the Committee. Each member was requested to identify the fundamental issues to be discussed by the Committee. Subcommittees were constituted to discuss particular issues. To facilitate communication and the exchange of information and ideas, regular Skype meetings were conducted. A drafting committee of junior participants was also constituted to record all meetings.

Most importantly, there was a concerted effort to collaborate with prominent international organisations. In particular, the Committee had a joint meeting with the World Intellectual Property Organisation (WIPO) in January 2015 in Geneva (live streamed globally). Cooperation had also been intense with the Hague Conference on Private International Law and the Max Planck Institute for Innovation and Competition.

The guidelines that the Committee had developed were structured as follows:

1. General provisions
2. Jurisdiction
3. Applicable Law
4. Recognition and Enforcement of Judgments.

The draft guidelines were published in the Committee's third report, although several significant issues remained open. Regarding scope, one issue that was still in preliminary discussions was the protection of traditional knowledge applicable to one country and how it should be enforced in a territory that does not recognise that particular traditional knowledge. Furthermore, the Committee's future works could involve an array of undecided provisions that still needed discussion, including the development of new issues, such as collective management of IP and PIL, and possible collaboration with the Hague Conference in this respect.

The Chair commended the Committee for the work done so far, especially the initiative to collaborate with other international organisations such as WIPO and the Hague Conference.

Professor Pedro A de Miguel Asensio (Spain) walked attendees through the draft guidelines relating to jurisdiction.

Guideline 3 established the defendant's habitual residence as the basic forum. This allowed for the enforcement of IP rights on a crossborder basis and enabled consolidation of claims by granting access to IP protection beyond where the right was registered. This possibility was identified by the Committee as being of great importance in the current context of globalisation and digitisation. However, to provide a reasonable balance, this ground of jurisdiction was only available with respect to disputes not falling within the exclusive jurisdiction of the court of the State of registration, as provided for in guideline 10.

The main purpose of guideline 4 was to provide an alternative ground of jurisdiction for IP licence or transfer contracts.

Guideline 5 concerned infringement claims, and was very relevant in the context of the digital exploitation of rights. It allowed for the enforcement of an IP right both where the event giving rise to infringement occurred and where the damage occurred. This was in tandem with the concerns of the effect of digitisation on the enforcement of IP rights to which Professor Kono alluded.

Paragraph (a) conferred unlimited jurisdiction to the courts of the place where the event giving rise to the infringement occurred. This provision was of limited practical significance since it usually led to the courts of the infringer's habitual residence, and the enforcement of IP rights before those courts was envisaged by the basic forum of the defendant's habitual residence.

Paragraph (b) conferred jurisdiction on the courts of the place where the infringement caused damage, but the courts' jurisdiction was territorially limited to the State in which the court was situated. The use of the phrase "substantial damages" was intended to

limit this ground of jurisdiction and to exclude its application on the basis of the mere accessibility of Internet content without any significant connection with the forum.

Guideline 7 concerned title and ownership and applied to specific disputes relating to who owned an IP right. Such disputes did not fall within the exclusive jurisdiction provided for in guideline 10.

Guideline 8 provided for party autonomy. Professor De Miguel Asensio emphasised that the choice of court applied to noncontractual disputes.

Guideline 9 conferred jurisdiction on a court where a defendant appeared and did not contest jurisdiction upon the commencement of proceedings.

Guideline 10 conferred exclusive jurisdiction in certain matters, and to that extent, prevailed over the other provisions in the draft guidelines. The Committee had focused on reducing the matters in which exclusive jurisdiction was conferred as a key element to make possible the use of cross-border private enforcement of IP rights. Exclusive jurisdiction was conferred on the courts of the State of registration with regard to proceedings which had as their main object the grant, registration, validity, abandonment, or revocation of a registered IP right. To attain a reasonable balance, a decision of a court of a different State on these matters when they arise in another sort of proceeding would not have any effect on third parties (ie, the decision only applied to the parties to the dispute).

Guideline 13 did not establish a ground of jurisdiction, but rather dealt with the scope of injunctions. In the Internet context where judicial measures might have global consequences, it was important to highlight that, in many situations, injunctions to enforce IP rights were to be regarded as territorially limited. Therefore, the Committee had considered it appropriate to address expressly this issue and to state that injunctions should be limited both by the extent of the jurisdiction of the court and by the territorial reach of the IP right enforced.

Guideline 14 provided that a court with jurisdiction on a claim could also hear a counterclaim on the same facts.

Guideline 15 did not establish direct grounds of jurisdiction but rather a non-exhaustive list of grounds of jurisdiction which were not regarded as appropriate. This list was of particular significance in the context of the recognition and enforcement of foreign judgments.

Guidelines 16 and 17 reflected a recognition by the Committee that coordination between courts in different territories might face significant difficulties in the global context. Resources were limited and some countries did not have efficient or well-functioning courts, which could hamper coordination across boundaries. The guidelines included two provisions on lis pendens and related proceedings. A safeguard had been included in guideline 16(2) with a view to impeding "torpedo" strategies that had been common in cross-border IP litigation.

The Chair commended Professor De Miguel Asensio on the work of the Committee, particularly on issues of jurisdiction. He then opened the floor to comments on the issues of jurisdiction introduced by Professor de Miguel Asensio.

Professor Frederick Abbott (US) suggested that an explanatory document on the guidelines would be of interest.

With regards to guideline 3, Professor Abbott queried the meaning of the courts of the defendant's forum being "territorially unlimited". The concept might be problematic in practice. With regards to guidelines 13, he queried why it was limited to injunctions only, and not to other forms of relief such as damages. With regards to the definition of "intellectual property right" in guideline 2, Professor Abbott expressed concerned that the words "and similar rights" might be too broad, extending to subject matter not specifically addressed in the draft guidelines, such as goods in transit.

Professor De Miguel Asensio accepted the concern about the words "similar rights" in guideline 2, adding that the Committee recognised the need for additional precision and would address this in the final version of the guidelines or in its explanatory report. The guidelines clearly encompassed core traditional IP rights, such as patents, trademarks, design rights, and copyright and related rights.

The issue of goods in transit had been the focus of a special subgroup within the Committee. The subgroup concluded that the current private international law rules were sufficient to enable right holders and customs agencies to stop goods found in transit if there was a suspicion that the situation was not one of mere transit. Therefore, no new jurisdiction or choice of law rules covering the issue of jurisdiction goods in transit were envisaged, since the guidelines already included rules on provisional matters. However, the subgroup identified a need for a precise definition of the concept of transit in substantive trademark and customs laws, but that fell beyond the scope of the guidelines.

In so far as guideline 3 was concerned, the purpose of the Committee was to facilitate cross-border litigation in the courts of the defendant's habitual residence and such provision had to be read in conjunction with guidelines 8 and 10, which contained rules of jurisdiction that prevailed over guideline 3. Therefore, such unlimited jurisdiction was not open-ended and was restricted by law to the extent that exclusive jurisdiction was conferred on other courts.

Professor Jan von Hein (Germany) congratulated the Committee for the draft guidelines and offered some suggestions with regard to guideline 5 in an attempt to draw a line in localising the relevant place.

First, he queried the location of the place where an alleged infringement is "furthered" (see guidline 5(a)), and whether this extended to acts of third parties, such as industrial espionage. Second, with regard to guideline 5(b), he suggested that it was advisable to limit this to the State of *immediate* damage, since the mere reference to substantial damages might be too openended, and mere financial or indirect consequential damages should be excluded.

Professor De Miguel Asensio agreed that substantial financial damages should not be included. However, there was a need to compromise. Be that as it may, it seemed reasonable for clarity that mere financial damages were not included, at least in the commentary to the draft guidelines. He informed attendees that the Committee intended to supplement the final text of the guidelines with a commentary or explanatory report that could clarify such issues.

Mr Alexander Kunzelmann (Australia) queried what the Committee sought to achieve by the guidelines, given that they were guidelines after all but were formulated almost as a draft treaty. This did not seem appropriate to the target audience.

Professor De Miguel Asensio noted that the Committee was considering mentioning in a preamble to the guidelines to whom they were principally addressed, which might include international and national legislators, as well as courts and tribunals and other relevant actors. The guidelines were not yet complete, and there was still work to be done.

Professor Kono noted that similar questions had been raised on the language used in the draft guidelines in the context of a presentation before the Japanese branch. He suggested that the use of softer language, for example, shifting from the use of "shall" to "may" should be looked into as a possibility by the Committee.

The Chair noted that most IP disputes involved legal persons, and queried what the habitual residence of such a person would be. It would be helpful if the guidelines included a definition of habitual residence to avoid interpretive challenges.

The Chair also asked whether the requirement in guideline 9 that the defendant "not context jurisdiction in the first defense" was referring to national or regional laws or instruments. There was a need for some clarification on this in the commentary.

Furthermore, in relation to injunctive relief, the Chair asked how this rule applied to orders of discovery in IP litigation. He added that he supported the approach of the Committee to limit torpedo strategies in IP litigation.

Professor De Miguel Asensio noted that the definitions in guideline 2 were not complete, and that there was a need to include other definitions. In this regard, the Committee was considering a possible definition of "habitual residence" and the position to be adopted with regard to legal persons. With respect to the need to determine if jurisdiction had been contested in the first defense in the context of jurisdiction based on appearance, it could be assumed that the court would apply its own procedural rules to determine whether its jurisdiction had been contested (in the absence of additional indication in the guidelines). As for discovery in IP litigation for injunctive relief, Professor de Miguel Asensio noted that this was a very important aspect and the Committee would consider further whether additional clarification was needed.

Professor De Miguel Asensio proceeded to walk attendees through the draft guidelines relating to applicable law.

With regard to guideline 18, the Committee was still in discussions about transferability of an IP right, since this issue was very much related to the question of the law applicable to initial ownership. Initial ownership was currently the main focus of the Committee's discussions on applicable law issues. Reaching a compromise solution would be a significant achievement in the light of the conflicting approaches on this issue that had prevailed in previous projects.

Guideline 20 allowed party autonomy to choose the applicable law. This would not apply to consumer contracts, since the latter remained at this stage outside the scope of the draft guidelines.

Professor De Miguel Asensio noted that, since in reality the legal systems in most countries lacked specific rules on how to determine the law applicable to IP contracts in the absence of parties' choice, guideline 21 was inserted to address the gap and could be of particular significance.

Professor Abbott intervened to ask if the guidelines referred to the habitual residence of the licensor or the licensee of the IP right as a connecting factor to determine applicable law.

Professor De Miguel Asensio responded that guideline 21(1)(b) merely provided a non-exhaustive list of factors that might be relevant to establish the State with which the contract was most closely connected. Those factors included the common habitual residence of the parties, the habitual residence of the party effecting the performance characteristic of the contract, and the habitual residence of one of the parties when this habitual residence was located in one of the States covered by the contract. The reference to the habitual residence of the party effecting the performance characteristic of the contract should be usually understood as being a reference to the licensor of the IP right.

Professor De Miguel Asensio went on to discuss guideline 24, which concerned the law applicable to the infringement of IP rights. The main problem with the traditional *lex loci protectionis* rule in the current context was that certain infringing activities might affect a number of countries and attempting to address such multinational infringements could face significant obstacles. A solution to this was difficult due to the territorial nature of IP rights. To address this quagmire, the Committee considered two solutions.

The first was guideline 24(2), which allowed the parties to choose the applicable law to the remedies available for the infringement. As such, there was no choice as to the infringement, but the possibility for the parties to choose a single law with respect to the compensation arising out of activities that infringed rights in several countries.

The second was guideline 25(1). The Committee advocated for an exception (to the traditional *lex loci protectionis* rule) that enabled the application of a single law to multi-state infringements in connection with the use of ubiquitous or multinational media. However, as it was difficult to determine which single law to apply in all situations, the factors contained in guideline 25(2) would be instrumental in determining this. These factors were flexible and nonexhaustive. Guideline 25(3) established a defence available to a defendant in multi-state infringement disputes and was intended to ensure a reasonable balance that safeguarded the territorial nature of IP rights. Guideline 25(4) addressed the position of internet intermediaries by stating that the preceding paragraphs of guideline 24 might apply *mutatis mutandis* in cases of secondary or indirect infringements.

The Chair opened the floor for questions and comments.

Professor Abbott queried whether trade secrets were included in the guidelines.

Professor De Miguel Asensio responded that the scope of the draft guidelines had not yet been finalised. It was the general consensus of the Committee that trade secrets shared only some features with IP rights and that therefore, although in principle they remained outside the scope of the guidelines, some of its provisions could apply *mutatis mutandis* to trade secrets.

The Chair asked if guideline 24(2) could apply to standard clauses in IP contracts which gave specific jurisdiction to a particular territory regardless of where the infringement occurred.

Professor De Miguel Asensio responded that, as a general rule, the guidelines did not apply to consumer contracts, however exceptions to this might need to be discussed further by the Committee. Therefore, in commercial disputes, guideline 24(2) would apply.

Professor von Hein requested for some clarity on guideline 18, specifically on what the choice of law rule should be for the transfer/assignment of IP rights. Was it the general law of contract that applied?

Professor De Miguel Asensio responded that complex characterisation issues might arise in this regard. Contractual issues fell within guidelines 20 and 21, but transferability fell in principle within the scope of guideline 18. The Committee was still working on the issue of ownership, which affected transferability.

Professor De Miguel Asensio then turned to the guidelines dealing with the recognition and enforcement of foreign judgments.

Guideline 29 included a broad definition of foreign judgment for the purposes of recognition and enforcement. Guideline 31 established the grounds for non-recognition and non-enforcement in line with the recent texts drafted under the auspices of the Hague Conference.

Professor Abbott asked if there was ever a case in which a patent registered in the US was invalidated in the EU (ie, whether court had ever invalidated a foreign registered patent).

Professor De Miguel Asensio responded that, although the current EU instruments established a broad jurisdiction based on the defendant's habitual residence, the reach of the exclusive jurisdiction concerning registered IP rights had so far prevented judgments concerning the validity of IP rights other than those created in the forum. The guidelines intended to improve that situation by allowing a court having jurisdiction on other grounds to decide on the validity of a foreign IP right, but only in proceedings which did not have validity as their main object (eg, because non-validity was raised as a defence); moreover, the resulting decision would not have any effect on third parties.

The Chair raised the need for the Committee to address arbitration issues.

Professor De Miguel Asensio noted that a number of issues had arisen concerning arbitration in the discussions of the Committee. The guidelines on applicable law could be relevant to arbitrators in cases where they had to determine the law applicable to the substance of a dispute as an indication of general principles of private international law. Additionally, the Committee was considering the possibility of the guidelines addressing the law applicable (by State courts) to the arbitrability of IP disputes.

The Chair emphasised the importance of guidelines for arbitrability so as to aid dispute resolution. This would pave the way for an arbitrationfriendly approach that brought about a coherent and unambiguous answer to those who chose arbitration.

Professor Abbott expressed his agreement with the Chair, adding that arbitration was central especially when dealing a country that had poor track record with upholding the rule of law. This would address the level of corruption and poor rule of law found in several counties and provide a speedy solution to this possibility.

The Chair expressed his sincere gratitude to the CoRapporteurs for their diligent work and looked forward to the final draft of the guidelines.

Professor Kono expressed his gratitude to the Chair for facilitating the session, and looked forward to addressing all the issues raised during the session in the ongoing work of the Committee.

Reporter: Rutendo Muchinguri

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

CULTURAL HERITAGE LAW

Members of the Committee

Professor James Nafziger (USA): *Chair*
Professor Robert Paterson (Canada): *Rapporteur*

Thomas Adlercreutz (Sweden)
Dr Kaare Bangert (Denmark)
Professor Margaretha Beukes (South Africa)
Dr Janet Blake (UK) - Nominee of Chair
Mr Kevin John Chamberlain CMG (UK)
Alternate: Ms Viviane Contin-Williams
Dr Patricia Conlan (Ireland)
Ms Marie Cornu Volatron (France)
Mr Piers Davies (New Zealand)
Dr Lilian Del Castillo de Laborde (Argentina)
Dr James Ding (Hong Kong)
Professor Talia Einhorn (Israel)
Dr Craig Forrest (Australia)
Alternate: Professor Lyndel V Prott
Professor Manlio Frigo (Italy)
Alternate: Dr Federico Lenzerini
Ms Sabine M Gimbrere (Netherlands)
Dr Andrzej Jakubowski (Poland)
Professor Toshiyuki Kono (Japan)
Professor Shigeru Kozai (Japan)
Dr Lucas Lixinski (Brazil)
Mr P B Mauleverer QC (UK)
Alternate: Ms Kristin Hausler
Professor Kerstin Odendahl (Germany)
Dr Jorge Sanchez Cordero (Mexico)
Alternate: Ernesto Becerril Miro (Mexico)
Dr Beat Schoenenberger (Switzerland)
Alternate: Professor Marc-Andre Renold
Professor Kurt Siehr (Germany)
Dr Abhishek M Singhvi (India)
Dr Anastasia Strati (Hellenic)
Alternate: Professor Elina Moustaira
Dr Nout van Woudenberg (Netherlands)
Dr Sabine von Schorlemer (Germany)
Professor Ana Vrdoljak (Australia)
Alternate: Professor Patrick J O'Keefe

THE UNESCO CONVENTION ON THE UNDERWATER CULTURAL HERITAGE

In its 28 years, among many projects, the Committee on Cultural Heritage Law has drafted two international conventions. The more recent of these is the Convention on Immunity from Suit and Seizure for Cultural Objects Temporarily Abroad for Cultural, Educational or Scientific Purposes. The 76th conference in Washington, D.C. (2014) approved of the committee's resolution for adoption of the convention. Although the Immunity Convention is too new to have generated any significant developments, the Committee's earlier project, the Buenos Aires Draft Convention on the Protection of the Underwater Heritage (1994), has had an important history.

Committee member Piers Davies presented a biennial report, as follows, on progress in the ratification and implementation of the UNESCO Convention of the same name, based on the Committee's Buenos Aires Draft Convention: Mr. Davies acknowledges that the comments and assistance of David Conlin, Sarah Dromgoole, Craig Forrest,

David Gadsby, Paul Myburgh, Jim Nafziger, Patrick O'Keefe, Ole Varmer, Andy Viduka and Nout van Woudenberg have been most helpful in completing this report.

* * *

The ILA Committee on Cultural Heritage Law has had a long connection with the UNESCO Convention on the Protection of the Underwater Cultural Heritage Convention since 1990 when the Committee first discussed the project. Eventually, the Committee's Buenos Aires Draft Convention was approved by the ILA in 1994 and then submitted the United Nations Educational, Scientific and Cultural Organization for its consideration. UNESCO developed the draft and adopted a revised version of it in November 2001. The Convention entered into force on 2 January 2009 after the requisite 20 ratifications had been submitted.

When the Committee met in Washington during the 76th Conference of the I.L.A. (April 2014), 46 States Parties had ratified or acceded to the Convention. Since then, nine more states have ratified or acceded, making a total of 55. The last two ratifications were by Ghana and Guinea-Bissau, making the number of African States Parties 14, including Madagascar off Africa's southeastern Coast, four states in North Africa, eight in Western and Southern Africa, and one in Central Africa (the Democratic Republic of Congo, which has a narrow coastal access to the Atlantic Ocean). The acceptance of the Convention by South Africa in May 2015 is a major exemplar. France's ratification of the Convention in 2013 has undoubtedly encouraged other neighbouring States Parties to ratify it -- for example, Belgium -- or to accelerate the process of consideration leading to ratification. The Netherlands announced on 19 May 2016 that it will ratify the Convention, but established no timeframe. Germany is also moving towards ratification.

There is a significant concentration of States Parties around the Mediterranean Sea and the Black Sea. Indeed, apart from Monaco (which is not a Party), the States Parties that have ratified the Convention run continuously from the Albanian / Greek border around the Mediterranean to Spain and then up the Atlantic Coast to Portugal, France and Belgium. There are also important States Parties clustered around the Black Sea and on the southern rim of the Mediterranean. Yet another concentration of States Parties in the Caribbean suggests a pattern: once a substantial number of States Parties in a region ratify the Convention, the pressure mounts for other States in the same region to do so as well.

In the South Pacific, the ratification by France has added the substantial maritime areas of the Exclusive Economic Zones around French Polynesia including Tahiti, New Caledonia and its dependencies, and the Wallis and Futuna Islands. Also, Australia has begun the process of reviewing its historic shipwreck legislation as a first step towards ratification, but the process is taking time despite the urging of a number of academics and maritime archaeologists as well as an element of urgency because of the sunset provisions in the existing legislation. New Zealand is unlikely to give the issue any urgency until Australia has become a State Party.

The Annex to the Convention sets out detailed Rules which have become accepted as international law norms. These Rules have been widely referred to, either directly or indirectly, by countries that have not ratified the Convention, including the UK, the USA, Australia and New Zealand. The contract awarded over the *H.M.S. Victory* wreck

(1744) to Odyssey Marine illustrates this insofar as all participants in the ongoing debate about the contract have quoted from the Annex to support their opposing positions. For example, Odyssey argues that the way it is proposing to carry out the wreck recovery project complies with the Convention Rules. In the USA, all of the federal agencies conducting activities in the marine environment have sent letters to the Society of Historical Archaeology pledging to follow the Annex as a matter of practice and policy. In particular, the National Oceanic and Atmospheric Administration and the National Park Service have entered into bilateral non-binding agreements with Spain and the UK that incorporate the Annex and other provisions consistent with the Convention. In addition, courts in the USA have recognized and upheld conditions for the conservation of the *RMS Titanic* wreck (1912) that are consistent with the international law norms. This trend of officially applying the Convention's Rules, continues to be one of the most significant developments in recent years.

Finally, it should be noted that World War I wrecks have become subject to the Convention because of the requirement in the Convention that sunken vessels must have reposed in that condition for 100 years. Many of these are war graves. This development has major political significance due to the large number of countries involved in the conflict and the numerous vessels and crews lost. For example, at the beginning of June 2016 the naval vessels lost by Great Britain and Germany in the battle of Jutland reached the 100-year anniversary of their sinking.

THE LAW PERTAINING TO CULTURAL LANDSCAPES SIGNIFICANT TO INDIGENOUS PEOPLES

I. Background

Landscapes and, by extension, seascapes are becoming an important topic of cultural heritage law. Related issues are apparent in decision-making and dispute-resolution processes. Unfortunately, neither those processes nor the academic literature have adequately addressed the contours, limitations and future development of the pertinent transnational law. In 2013 the Committee on Cultural Heritage Law of the International Law Association therefore decided during an intersessional meeting at Herlufsholm near Naestved, Denmark, to focus its work on the international legal dimensions of landscapes as cultural heritage. In 2014, during the Seventy-Sixth Conference of the International Law Association in Washington, D.C., the Committee decided more specifically to prepare an exploratory report on the international legal framework for protecting cultural landscapes of significance to indigenous peoples. A preliminary agenda provided for submission of the report for approval during the ILA's Seventy-Seventh Conference in 2016. A summary of the Committee's discussion at the Washington, D.C. Conference may be found in International Law Association, *Report of the Seventy-Sixth Conference* (2014), at pages 776-79.

Immediately after the Washington, D.C. Conference, Professors Margaret Beukes of the South African Branch of the I.L.A. and Elina Moustaira of the Hellenic Branch agreed to serve as co-rapporteurs for the project. Members of the Committee were then invited to submit commentaries on the chosen theme and examples of cultural landscapes, without any agreed-upon definition, in their respective countries.[1] In June 2015 the Committee,

[1] Contributing members were: Thomas Adlercreutz, Kaare Bangert, Janet Blake, Ernesto Becerril, Margaret Beukes, Janet Blake, Kevin Chamberlain, Patricia Conlan, Piers Davies, Craig Forrest,

at the invitation of Talia Einhorn of the Israeli Branch, met in Jerusalem to discuss the project, taking account of commentary prepared by the chair and special rapporteurs.

The exploratory Report that follows is not intended to be definitive. It is set forth simply as a framework for further development of the pertinent transnational regime, as described in the Report, to assist governments, international organizations, non-governmental organizations, business interests and other stakeholders in efforts to protect cultural landscapes, with all of their diverse manifestations, that are of significance to indigenous peoples. In particular, assistance to the governing authority and other institutions of these indigenous peoples is essential. A special effort has been made to render the report accessible and understandable to the general public as well.

II. Applicable International and Regional Law

A. An Overview

An acceptable definition of the core concept, "cultural landscape," as a topic of international cultural heritage law, is uncertain, as is the precise scope of its application. In other disciplines, however – for example, archaeology, anthropology, environmental management, environmental law, and geography – the core concept has been more thoroughly and holistically developed as a tool to help shape research agendas and policy.[2] It is noteworthy that much of the resulting work has been closely linked to the principle of "sustainable development," which has thereby served as a basis for a shared understanding of cultural landscapes. Accordingly, interdisciplinary work has focused on interactions between humans and their environment and on cultural identity with landscapes as key factors in achieving biodiversity and land-use sustainability. The same kind of focus and objectives are apparent as the topic of cultural landscapes emerges in cultural heritage law.

> To be sure, the core concept of "cultural landscapes," specifically, may have less traction among those who prefer the generic term "landscape."[3] Arguably:
>
> [t]he distinction between natural and cultural landscapes is becoming increasingly difficult. Some landscapes are more influenced by natural processes while some of them are more intensively influenced by cultural processes. The transition between landscapes that are

---

Kristin Hausler, Andrzej Jakubowski, Federico Lenzerini, Lucas Lixinski, Elina Moustaira, James Nafziger, Patrick O'Keefe, Robert Paterson, Jorge Sánchez Cordero, and Sabine von Schorlemer. Gideon Koren and Amy Strecker also assisted the committee with their commentaries.

[2] *See, e.g.*, the cogent observation about cultural seascapes by C. Westerdahl, "The Maritime Cultural Landscape," in A. Catsambis, B. Ford and D. Hamilton, *The Oxford Handbook of Maritime Archaeology (*Oxford University Press, 2011), p. 732: "The study of maritime culture and its landscape ought to mean the exploration of all kinds of human relationships to the sea, or very plausibly to any large body of water" (p 754.) This report will therefore use the somewhat misleading but generic term "landscapes" to include maritime landscapes (seascapes).

[3] M. Jones, "The Concept of Cultural Landscape: Discourse and Narratives," in H. Palang and G. Fry (eds.) *Landscape Interfaces: Cultural Heritage in Changing Landscapes* (Springer, New York, 2003), p. 21, 22. This approach (to merely refer to "landscape" without the adjective "cultural") is apparent in Article 1 of the European Landscape Convention ("'Landscape' means an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors").

> predominantly culturally or predominantly naturally shaped is gradual. Therefore, in some respects, it appears better to simply use the term landscape without further qualification.[4]

On the surface, that observation rings true. As we shall see, however, it is precisely the varying fusion of natural and cultural phenomena in distinctive ways among different indigenous cultures as well as the mutuality of the interactions between human cultures and the natural environment that justify the core concept. Cultural landscapes may include, build upon, or be projected upon natural landscapes variously among different peoples. Sometimes natural and cultural landscapes are one and the same and sometimes they are not.

Given the complexity of the relationship between nature and culture among different peoples, this Report will devote only passing attention to a definition of cultural landscapes. Instead, the Report will offer a comprehensive typology of cultural landscapes defined by categories that merge natural and cultural phenomena in distinctive ways. Before doing so, however, it will be helpful to summarize the pertinent regime of transnational law, first in general terms and then more specifically.

The foundation of this regime is International Human Rights Law (IHRL), centered on the so-called International Bill of Rights that includes the Universal Declaration of Human Rights,[5] the International Covenant on Civil and Political Rights (ICCPR),[6] and the International Covenant on Economic, Social and Cultural Rights (the ICESCR)[7]. More specific agreements include, *inter alia*: the 1972 World Heritage Convention (of fundamental importance);[8] the 1965 Convention on the Elimination of All Forms of Racial Discrimination;[9] and the International Labor Organization's *Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169)*.[10] Any responsible enquiry into the place of the cultural landscape of indigenous peoples must take account of these instruments. International environmental instruments, such as those addressed

---

[4] H. Küster, "Cultural landscapes: An Introduction," in M. Dieterich and J. van der Straaten (eds.), *Cultural Landscapes and Land Use: The Nature Conservation – Society Interface* (Kluwer Academic Publishers, Dordrecht, Boston, London, 2004), pp. 1, 2.

[5] G.A., Res 217A(IIII), adopted on 10 December 1948.

[6] G.A., Res 2200A(XI), adopted and opened for signature, ratification and accession on 16 December 1966 (the ICCPR entered into force internationally on 23 March 1976).

[7] G.A., Res 2200A(XXI), adopted and opened for signature, ratification and accession on 16 December 1966 (the ICESCR entered into force on 3 January 1976).

[8] The Convention was adopted on 16 November 1972, available at http://whc.unesco.org/en/convention/text (last visited on 26 February 2015).

[9] This Convention was adopted and opened for signature by G.A. Resolution 2106 A(XX) on 21 December 1965 and entered into force on 4 January 1969. Article 5 provides that "…State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: …" Article 5(d)(v), under the heading "other civil rights, particular," provides that everyone has "the right to own property alone as well as in association with others."

[10] International Labor Organization, Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, adopted 27 June 1989, entered into force 5 September 1991. *See* 28 *ILM* 1382 (1991).

to biological diversity and decertification, are also relevant insofar as the foundation of IHRL enshrines the right of all to cultural development and to participate in cultural life.[11]

Regional treaties are also relevant, beginning with the following foundational human rights instruments, in chronological order of their coming into force: the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR);[12] the American Convention on Human Rights (ACHR);[13] and the African Charter on Human and Peoples' Rights (ACHPR) (the Banjul Charter).[14] All three of these fundamental conventions contain similar rights to the enjoyment of culture and cultural life within a community, particularly in the ECHR's Charter of Paris for a New Europe,[15] article 14 of the ACHR's Protocol of San Salvador,[16] and articles 17 and 22 of the ACHPR. All three Conventions also confirm a right to property – in Protocol 1, article 1 of the ECHR, article 21 of the ACHR, and article 14 of the ACHPR.

Two other European instruments are particularly relevant: the European Landscape Convention (the Florence Convention)[17] of 2000; and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice on Environmental Matters of 1998 (the Aarhus Convention).[18] The latter is essential in establishing public access to environmental information, public participation and access to justice.

These treaties are legally binding on States Parties. *Pacta sunt servanda. S*tates parties and their subordinate governments therefore can be held liable not only for violating the stipulated rights but also for failing to respect, protect and fulfil them. Accordingly, if a non-state actor such as a corporation violates such rights, either the actor's national state or the state on whose territory the violation occurred may be held responsible on the basis of an attribution to it of such violations or a lack of due diligence to fulfil its obligations to respect, protect and fulfil the stipulated rights. The state may limit them only on a sound legal basis that is both necessary and proportional.

---

[11] *See* section I (B) of this Report for a discussion of the specific content of these treaties pertaining to cultural development and cultural life.

[12] The Convention was signed in Rome on 4 November 1950 and entered into force in accordance with article 66 on 3 September 1953.

[13] The Convention (also referred to as the "Pact of San José") was signed at San José, Costa Rica on 22 November 1969 and came into force on 18 July 1978.

[14] The Charter was adopted by the 18th Assembly of the Heads of State and Government of the Organization of African Unity (OAU) (now the African Union (AU)) on 17 June 1981 and came into force on 21 October 1986.

[15] The Charter was adopted on 21 November 1990 at Paris.

[16] This Protocol was adopted on 14 November 1988 at San Salvador.

[17] The Convention, (Council of Europe Treaty Series no. 176), was adopted on 20 October 2000 in Florence, Italy and came into force on 1 March 2004 [hereinafter Florence Convention].

[18] Adopted on 25 June 1998, 2161 U.N.T.S. 447, 28 ILM 517 (1999). It should be noted that Directive 2003/04/EC implements the Aarhus Convention in respect of rights to information held by public authorities (Directive 2003/04/EC on public access to environmental information, OJ 2003 L 41/26). *See* J. Holder and M. Lee, *Environmental Protection, Law and Policy* (Cambridge University Press, Cambridge, New York, 2009), p. 102.

Numerous non-binding instruments of soft law[19] supplement and reinforce the treaty obligations.[20] The examples include the studies and reports of the International Council on Monuments and Sites (ICOMOS), a global non-governmental organization associated with UNESCO. Its mission is to promote the conservation, protection, use and enhancement of monuments, building complexes and sites. It participates in the development of doctrine, evolution and distribution of ideas and conducts advocacy. ICOMOS is the Advisory Body of the World Heritage Committee for the Implementation of the World Heritage Convention, to be discussed later in this Report. As such, it reviews the nominations for cultural world heritage sites and helps protect the conservation status of properties. Its National Committees and International Scientific Committees have made particular contributions to the doctrinal heritage internationally.

General principles of law apply as well. Because cultural landscapes are inextricably environmental, the guiding concept or root principle of sustainable development, noted earlier in this Report, is fundamental as the "contemporary international norm which underpins environmental law generally."[21] It is generally accepted that this multi-faceted concept was first mooted by the World Commission on Environment and Development (WCED) in 1987, calling for "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[22] Whatever has been written of the concept and from whatever angle, position or political agenda, it is clear that sustainable development "attempts to integrate three facets: *environmental protection; economic development;* and *social upliftment* … into decision-making".[23] These three facets will be pivotal in shaping a transnational regime of law to protect cultural landscapes. The ultimate questions are ones of spatial justice.[24]

The need for sustainable development whenever the prospect of development may impact a cultural landscape inevitably necessitates careful risk management or assessment in accordance with the precautionary principle of international law.[25] ICOMOS conducts

---

[19] *See*, e.g., P. Sands and J. Peel, with A. Fabra and R. MacKenzie, *Principles of International Environmental Law* (Cambridge University Press, Cambridge, New York, 2012), p. 108.

[20] The importance of soft law has been expressed as follows: "[t]he main advantage of 'soft law' over 'hard law' is that it can enable states to take on obligations that they would not have taken on had they been required to accede to a treaty, for instance, owing to the obligations being couched in vaguer terms. Alternatively, the obligations may be formulated in a more precise and restrictive form than would have been acceptable in a treaty." M. Kidd, *Environmental Law* (Juta, Cape Town, 2011), quoting from P.W. Birnie and A.E. Boyle, *International Law and the Environment* (Oxford University Press, Oxford, New York, 2005), p. 25.

[21] J. Glazewski, "The Nature and Scope of Environmental Law," in J. Glazewski (ed.) and L. du Toit (ass't. ed.), in *Environmental Law in South Africa* (LexisNexis, Durban, London, 2013), p. 1.

[22] WCED, *Our Common Future* (1987), p. 43 (also known as the Brundtland Report).

[23] Glazewski, *supra* note 20, p. 1 (emphasis added).

[24] A leading resource is E.W. Soja, *Seeking Spatial Justice* (University of Minnesota Press, Minneapolis, London 2010).

[25] The noun "risk" is described by UNESCO as "the expression of the likelihood and impact of an uncertain, sudden and extreme event that, if it occurs, may impact positively (opportunity) or negatively (threat) on the achievement of a project or program objective. *Risk Management Handbook*, UNESCO Bureau of Strategic Planning (Paris, France, 2010), p.11. In essence a "risk" is an "uncertain event" (p. 17) that has a potential impact. It is "as much a potential missed opportunity as well as a potential threat" (p.12).

the Heritage@Risk program to identify threatened heritage places, monuments and sites; to present typical case studies and trends; and to share suggestions for solving individual or global threats to our cultural heritage. Each year an invitation is made to all ICOMOS National Committees, International Scientific Committees and ICOMOS's world-wide professional network, to provide short reports outlining risks including case studies. This process is one of soft law in action.

Some risks are linked to the internal environment (for example, operational risks in executing a project or activity, general administration, human capital risks, information technology, and financial risks) whereas others are linked to the external environment (for example, political, economic, and socio-cultural risks; legal or regulatory requirements; and environmental and security risks).

"Risk management" encompasses, first, a "systematic approach to managing risks … by identifying, assessing, understanding, acting on and communicating risk issues;" second, within an organization, risk management "requires a clear delineation of roles based on existing hierarchy, responsibilities and areas of work. It has to be understood as a collective responsibility--the anticipation and management of risks have to become everyone's concern."[26] Third, risk management contributes to strengthening and maintaining the capacity to enhance the process of decision-making and manage change through a proactive anticipation of negative and positive uncertainties and the development of appropriate strategic plans; to adapt resiliently to unforeseen events or disruptions; to align strategies with the expectations of stakeholders; and to seize opportunities.

Careful risk management can help protect cultural landscapes of significance to indigenous peoples in several ways: by enabling responsible decision-making and priority-setting; by allocating resources in a better way; by increasing efficiency; by avoiding negative surprises; by facilitating innovation; by identifying indicators for change based on experience; by maintaining the trust of stakeholders; by analyzing causes and consequences of potentially difficult situations and disruptive challenges (transparency); by increasing credibility and reputation; and by strengthening foresight and anticipation in order to counter potential threats.

Sustainably developing cultural landscapes of significance to indigenous peoples does not, of course, mean that cultural landscapes are or should always be subject to development. But when development is at issue, as it so often is, it must comply with both substantive requirements, such as the integration of environmental protection and economic development, cultural considerations, and procedural requirements, such as access to information and public participation in decision-making. The procedural elements of accessibility and participation are of crucial importance to indigenous peoples, *as reflected in provisions of the* United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[27] to be discussed later in this Report. In 2012 the United Nations General Assembly underscored

---

[26] *Ibid*, p. 29 and p. 23, respectively.

[27] Adopted on Sept. 13, 2007, 45 ILM 1013 (2007) by the UN General Assembly following more than 20 years of negotiations between UN Member States and indigenous peoples' representatives. *See* S. Disko, H. Tugendhat and H. and L. García-Alix, "World Heritage Sites and Indigenous Peoples' Rights: An Introduction," in S. Disko and H. Tugendhat (eds), *World Heritage Sites and Indigenous Peoples' Rights* (IWGIA – Document 129, Copenhagen, 2014), p. 3.

the importance of participation by indigenous peoples in the achievement of sustainable development when it adopted Resolution A/RES/66/288.

Unfortunately, these procedural elements and hence the interests of indigenous peoples are too often overlooked, even within the supposedly protective regimes of environmental and cultural heritage law. Thus, "[w]hat is also clear is that the impact of World Heritage sites on indigenous peoples has not always been positive".[28] The rapporteur on the rights of indigenous peoples, James Anaya, made the same observation in his 2012 report to the United Nations General Assembly (UNGA), as follows:[29]

> 33. Indigenous peoples have expressed concerns over their lack of participation in the nomination, declaration and management of Word Heritage sites, as well as concerns about the negative impact these sites have had on their substantive rights, especially their rights to lands and resources.

B. Specific Provisions

1. General International Instruments

Ultimately, the interests of indigenous peoples rest on a qualified right of self-determination. It is enshrined in article 1 of The United Nations Charter, the ICCPR and the ICESCR as a right to "freely dispose of their natural wealth and resources"; other specific rights include a right to freedom from discrimination "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (ICCPR art. 2.1); rights to freedom of thought, conscience and religion (ICCPR art. 18(1))[30]; a right to take part in *cultural* life (art 15(1)(a) of the ICESCR)[31]; and, arguably by analogy, rights of minority groups (ICCPR art. 27). Article 27 reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

Another binding, overarching instrument relevant to this Report is the 1965 Convention on the Elimination of All Forms of Racial Discrimination.[32] As noted earlier, article 5(d)(v) of that Convention provides that everyone has "the right to own property alone as well as in association with others." This article is of cardinal importance to indigenous

---

[28] Disko, Tugendhat and García-Alix, *ibid.*

[29] *Report to the UN General Assembly of the UN Special Rapporteur on the rights of indigenous peoples (13 August 2012),* UN Doc. A/67/301 (hereinafter UN Report).

[30] Article 18(1) reads: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching".

[31] Article 15(1)(a) reads: "The State Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; …"

[32] The Convention was adopted and opened for signature by Resolution 2106 A(XX) of the UNGA on 1965-12-21 and entered into force on 1969-01-04. Article 5 provides that "…State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: …"

peoples insofar as they have often been marginalized by severe deprivations of the right under the guise of development.

Turning to the crucial elements of procedural rights, article 6 of the ILO Convention concerning Indigenous and Tribal Peoples *in Independent Countries*[33] requires consultation with the peoples concerned, "through appropriate procedures …" before they may be relocated or their land developed. Article 7 provides, that "[g]overnments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit." More specific to this Report, articles 13-19 deal with "land(s)". In article 13.2 the term "lands" is defined to "include the concept of territories, which covers the total environment of the area which the peoples concerned occupy or otherwise use". Article 16.2 provides that relocation must take place "only with their [the peoples'] free and informed consent."

The principle of "free, prior and informed consent" (FPIC) is well-established, particularly in international instruments that address biological diversity. The principle is fundamental whenever land development may have an impact in or on a cultural landscape of significance to indigenous peoples. FPIC requires transparency and the participation of impacted people. They possess a right to give or withhold their consent to proposed projects that may affect the lands an indigenous community customarily owns, occupies or otherwise uses. Those who wish to use the customary lands belonging to indigenous peoples must therefore enter into negotiations with them, in compliance with both substantive and procedural principles of sustainable development under international law. For example, the UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD) has issued Guidelines to this effect.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[34] is crucial even as soft law.[35] In the Preamble to the Declaration, the UN General Assembly "solemnly proclaims" the Declaration "as a standard of achievement to be pursued in a spirit of partnership and mutual respect". The Preamble also recognises that "respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment".

The principal operative provisions are as follows: Article 11(1) declares that "[i]ndigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts…" Article 3(1) echoes this expectation by pronouncing that "[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage…" and, by virtue of the right of self-determination, to freely pursue their cultural development.

One of the UNDRIP's paramount functions is to confirm the FPIC requirement in a host of scenarios that constitute the best practices for negotiations between indigenous

[33] *Supra* note 9.
[34] *Supra* note 26.
[35] The International Law Association's Resolution on the Rights of Indigenous Peoples (2012) acknowledges, however, that some of UNDRIP's provisions articulate customary international law.

peoples and other parties.[36] For example, article 10 of UNDRIP, concerning land rights, provides as follows:

> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 26 of UNDRIP specifically applies the right of self-determination to lands and thus cultural landscapes, as follows:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 28 provides, in specific terms, for a right to redress by indigenous peoples for confiscation, occupation, use or damage without their informed consent of lands and thus landscapes that they have traditionally owned or otherwise occupied or used.

Article 32, which addresses the threat to indigenous lands through resource development, enshrines the requirement of FPIC, as follows:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Finally, it should be noted that article 37 confirms the right of indigenous peoples to "recognition, observance and enforcement" of treaties (such as those that structure legal relationships between Native American tribes and the federal and state governments of the United States).[37]

---

[36] *See, e.g.*, article 19, which addresses negotiations, and requires that states consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Similarly, article 29.1, requiring conservation of the lands of indigenous people, as well as 29.2, which protects against having hazardous material stored or disposed in their territories require "their free, prior and informed consent". Under Article 31 indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sport and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

[37] *See infra*, text two paragraphs after note 60.

2. Cultural Heritage and Landscapes

a. Global Instruments

The 1972 World Heritage Convention merits specific attention. The following preambular paragraphs are especially relevant to this Report:

> *Noting* that the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction,
>
> *Considering* that protection of this heritage at the national level often remains incomplete because of the scale of the resources which it requires and of the insufficient economic, scientific, and technological resources of the country where the property to be protected is situated,
>
> *Considering* that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole,

As background for a typology of cultural landscapes, it will also be instructive to set forth the Convention's definition of "cultural heritage," as follows:

> **Article 1**
> For the purpose of this Convention, the following shall be considered as "cultural heritage":
>
> monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
>
> groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
>
> sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

In 1992 the UNESCO World Heritage Committee, during its 16th session, formally introduced the concept of "world heritage cultural landscapes" and opened that category for national nominations and UNESCO inscription. As of early 2016, some 88 of such cultural landscapes had been inscribed as World Heritage sites. Of these, only four are transboundary; the rest are solely within national boundaries.

Under Article 1 of the Convention, the Committee revised the cultural criteria for the inscription of properties on the World Heritage List to include "'the combined works of nature and man'" of "'outstanding universal value.'"[38] Later, the "Operational Guidelines for the Implementation of the World Heritage Convention" elaborated on the concept of "cultural landscapes"[39] as follows:

---

[38] *See* M. Rössler, "Linking Nature and Culture: World Heritage Cultural Landscapes," in P. Ceccarelli and M. Rössler (eds.), *Cultural Landscapes: The Challenges of Conservation,* presented at a workshop, Ferrara, Italy, 14-16 November 2002. *World Heritage Papers, No. 7,* (UNESCO World Heritage Centre, Paris, 2002), p. 10.

[39] For the original adoption of the concept "cultural landscapes," *see* the text prepared by an Expert Group on Cultural Landscapes at La Petite Pierre, France. UNESCO document WHC-92/

> Cultural landscapes are cultural properties and represent the combined works of nature and of man [under Article 1 of the *Convention* that] are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal.[40]

Because the Operational Guidelines are amended from time to time to ensure their fine-tuning on the basis of experience, definitional revisions and further elaboration of them would seem to be likely.[41] The category of "protectable" landscapes, however, has not been amended since 1992.

Annex 3, clause 10 of the World Heritage Committee's "Guidelines on the inscription of specific types of properties on the World Heritage List" identified three main categories of "protectable" landscapes. They are, as follows:

1. The "clearly defined landscape designed and created intentionally by man." Under this category the World Heritage Committee included, amongst others, garden and parkland landscapes constructed for aesthetic reasons "which are often (but not always) associated with religious or other monumental buildings and ensembles."
2. The organically evolved landscape that is the result of "an initial social, economic, administrative, and/or religious imperative." This category developed its present form "by association with and in response to its natural environment" and the landscapes "reflect that process of evolution in their form and component features." Two "sub-categories" are a "relict (or fossil) landscape -- in which an evolutionary process came to an end at some time in the past, either abruptly or over a period" and whose "significant distinguishing features" are that they are still visible in "material form" -- and "a continuing landscape," that is, one which "retains an active social role in contemporary society closely associated with the traditional way of life, and in which the evolutionary process is still in progress," and also "exhibits significant material evidence of its evolution over time."
3. The associative cultural landscape. Its inscription on the World Heritage List is justified by virtue of the landscape's "powerful religious, artistic or cultural associations of the natural element rather than material cultural evidence, which may be insignificant or even absent."

As applied to indigenous peoples, these criteria are relevant but inadequate. For example, although one might infer from the third category (through the reference to the "associative cultural landscape") an intangible element to cultural landscape, no such "intangible category" has been spelled out or identified in specific terms. This Report will therefore propose and develop a new typology based on a set of categories applicable to cultural landscapes of significance to indigenous people.[42]

CONF.202/10/Add, October 24-26 1992. The World Heritage Committee, at its 16th conference in Santa Fé in 1992, subsequently approved the text for inclusion in the Operational Guidelines for Implementation of the World Heritage Convention. Doc. WHC-92/CONF.002/12 [hereinafter Operational Guidelines].

[40] Operational Guidelines, *supra* note 38, para. 47.

[41] *See, e.g.*, the latest amendments to the Operational Guidelines by the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage. Doc. WHC 12/1, July 2012.

[42] *See infra* text after note 76 ("B. Five Categories").

b. Regional Instruments: Europe

(1) European Landscape Convention (Florence Convention)

In 2000 the Council of Europe opened for signature the European Landscape Convention (Florence Convention).[43] The Council of Europe observed that "as a reflection of European identity and diversity, the landscape is our living natural and cultural heritage, be it ordinary or outstanding, urban or rural, on land or in water".[44] Accordingly, "the European Landscape Convention promotes the protection, management and planning of European landscapes and organizes European co-operation on landscape issues".[45]

The Convention's Preamble sets out background and objectives relevant to this Report.[46] The most pertinent objective is, to achieve "sustainable development" based on a balanced and harmonious relationship between social needs, economic activity and the environment." The Preamble states that the landscape has an important "public interest role in the cultural, ecological, environmental and social fields, and constitutes a resource favorable to economic activity and whose protection, management and planning can contribute to job creation." Closely linked to this role is the acknowledgement of an awareness that the "landscape contributes to the formation of local cultures and that it is a basic component of the European natural and cultural heritage, contributing to human well-being and consolidation of the European identity." Finally, the Preamble acknowledges that the landscape is an "important part of the quality of life for people everywhere." Such landscapes vary from "urban areas" to the "countryside;" from "degraded areas" to areas of "high quality" (exactly what constitutes an area of "high quality" is not spelled out); and from areas recognized as being of "outstanding beauty" as well as "everyday areas."

The Florence Convention has been aptly described as a "dynamic, peoplecentred instrument."[47] It is an instrument that recognizes "the tangible and intangible duality inherent in landscape" and focuses on not only "outstanding landscapes, but also everyday or degraded landscapes – the places where most people live and work – hence the term 'landscape' in the singular".[48] The Convention also emphasizes planning and management of landscapes in line with the principles of sustainable development rather than mere preservation. The Convention, then, is for everyone: "The landscape is a key element of individual and social well-being [whose] protection, management and planning entail rights and responsibilities for *everyone.*"[49]

Unfortunately, the Convention is incomplete, if not defective. The reference to "rights and responsibilities for everyone" seems to implicate ideas of spatial justice, environmental

[43] *Supra* note 16.
[44] "Introduction," Florence Convention, *supra* note 16.
[45] *Ibid*
[46] Preamble, European Convention, *supra* note 16, from which all of the quotations in this paragraph of the text are taken.
[47] Amy Strecker, "The European Landscape Convention: A Commentary on Strengths, Weaknesses and Relevance" (2015) (unpublished commentary on file with the authors).
[48] Article 2 of the Florence Convention, *supra* note 16, makes it clear that it "applies to the entire territory of the Parties and covers natural, rural, urban and peri-urban areas. It includes land, inland water and marine areas. It concerns landscapes that might be considered outstanding as well as everyday or degraded landscapes."
[49] Preamble, Florence Convention, *supra* note 16 (emphasis added).

justice, human rights and democracy. Apart from the reference to the procedural requirements of the Aarhus Convention,[50] however, no mention of access to justice or judicial review is to be found in the text. Instead, the Convention emphasizes the pre-emptive and proactive planning and development of landscape that "can contribute to job creation"[51] but fails to contemplate disputes that may arise in the planning process when the "obligations have not been sufficiently provided for".[52] Another problem is that the definition of a cultural landscape is overly broad ("an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors."[53]) This definition is susceptible to varying interpretations by decision-makers such as a simple reference to the "environment", "cultural heritage," "economic development," or even everyday interactions of people rather than a particularized landscape. Moreover, the Convention lacks both a protection system and a procedure for definitive listing of European landscapes of cultural significance.[54]

(2) Aarhus Convention

The second European instrument that pertains directly to this Report is the Aarhus Convention, which has been described as the most detailed and farreaching international development in public participation to date,[55] particularly its requirement governing access to information by the public.[56] This is evident not only in the sheer breadth of the provisions, but also in the range of requirements relating to any requests for environmental information. Indeed, this barrage of requirements calls into question the actual accessibility of environmental information. The accessibility of indigenous peoples, particularly those who are remotely situated, is of particular concern. The provision of alternative means of communication may be essential.

The pertinent provision is Article 4, entitled "Access to environmental information." Its key language is as follows:

> 1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

---

[50] *Supra* note 17.

[51] *Ibid.*

[52] Strecker, *supra* note 46, p. 2.

[53] Florence Convention, *supra* note 16.

[54] *Ibid*, p.2

[55] Holder and Lee, *supra* note 17, p. 97. The Aarhus Convention, *supra* note 17, is a product of the UN Economic Commission for Europe (UNECE), one of five UN regional commissions, but is open to any member of the United Nations.

[56] Holder and Lee, *ibid*, p. 97. It is interesting that the Convention distinguishes between the "public" and the "public concerned". The purpose of this distinction is not clear, however. The "public" is defined in paragraph 2.4 as "one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups." Paragraph 2.5 defines the "public concerned" as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

(a) Without an interest having to be stated;
(b) In the form requested unless:
  (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or
  (ii) The information is already publicly available in another form.

Paragraphs 2-8 set out the required timeframe within which a response must be made to any request as well as limitations to such requests and the terms for any charges that a state may impose for its services. Under the provisions of paragraph 2 the requested environmental information must be made available "as soon as possible and at the latest within one month after the request has been submitted," unless the volume and the complexity of the information justify an extension of the period up to two months after the request. The paragraph provides, further, that the applicant must be informed of any such extension of time and of the reasons justifying it.

Paragraph 3 sets out the circumstances under which a request for environmental information may be refused. A refusal is permissible if: (a) the public authority to which the request is addressed does not hold the environmental information requested; (b) the request is "manifestly unreasonable or formulated in too general a manner"; or (c) the request concerns material "in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure."

In paragraph 4 further provisions relating to the refusal of any request to be provided with environmental information are set out. A request for environmental information may be refused if the disclosure would adversely affect:

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;
(b) International relations, national defence or public security;
(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;
(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;
(e) Intellectual property rights;
(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;
(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or
(h) The environment to which the information relates, such as the breeding sites of rare species.

The paragraph provides, further, that the grounds for refusal must be interpreted in a "restrictive way," taking into account the "public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment."

If a public authority does not hold the requested environmental information, it must "as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly." Under paragraph 6 each party must ensure that any information exempted from disclosure "can be separated out without prejudice to the confidentiality of the information exempted" but the responsible public authorities must make available the remainder of the requested environmental information.

Paragraph 7 provides that any refusal of a request must be in writing if the request was in writing or the applicant so requests and must state the reasons for the refusal and provide information to the applicant on access to a review procedure. Any refusal must be communicated as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant must be informed of any extension and of the reasons justifying it. Paragraph 8 of article 4 provides that each party may permit its public authorities to set a fee ("to make a charge") for supplying information, but such a fee must not exceed a reasonable amount. Public authorities intending to set fees for supplying information must make available to applicants a schedule of fees that may be levied, "indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment" of such a charge.

C. National Law: A Few Examples

Several national legal systems seek to protect lands significant to the cultures of indigenous peoples, including, but not limited to, those of: Australia, Bolivia, Brazil, Canada, Honduras, India, Norway, Panama, the United States, Venezuela and Vanuatu.[57] Although Mexico has no specific legislation for indigenous cultural landscapes as such, communities are entitled to an active role in the cultural life of the country, and the federal government has instituted a dialogue with them regarding cultural landscapes. Four national examples are as follows:

Australia has been described as a "leader in applying the idea of cultural landscapes to lands associated with Aboriginal people in its territory"[58] whose title to lands has been recognized. Ironically, in view of such accommodation, a difficult issue often arising and subject to detailed judicial consideration is that the entire continent might be viewed as a cultural landscape from the perspective of an Aboriginal or a Torres Strait Islander.

In the United States several federal statutes specifically seek to protect cultural sites, for example, the American Indian Religious Freedom Act of 1978[59] (*inter alia,* access to sacred sites) and the Native American Graves Protection and Repatriation Act[60] (*inter alia*, protection of pertinent monuments, Native American and Hawaiian land holdings, and burial grounds). The President of the United States also has authority under the

[57] *See, e.g.,* "*6. Land Rights*," International Law Association, Sofia Conference. The *Final Report of the Committee on the Rights of Indigenous Peoples* (2012), p. 23 [hereinafter the Sofia Report].
[58] S. Buggey, "*An Approach to Aboriginal Cultural Landscapes*" (Historical Sites and Monuments Board of Canada, Ottawa, March 1999), p. 16.
[59] 42 U.S.C. §§ 1996-1996b (2012).
[60] 25 U.S.C. §§ 3001-3013 (2012).

Antiquities Act of 1906[61] to set aside land as National Monuments. In 2016, for example, President Obama so designated three National Monuments covering a vast area (1.8 million acres) of southern California.

The three new National Monuments are all desert and mountain landscapes, as the President specifically noted, with significant features of significance to indigenous peoples. These features include ancient Native American trading routes (Mojave Trails National Monument); sacred, archaeological and cultural sites as well as some 1,700 Native American petroglyphs (Sand to Snow National Monument); and additional archaeological sites (Castle Mountains National Monument). The chief sponsor of the designation in the United States Senate emphasized that "[t]his kind of landscape represents icons of our cultural heritage."

The legal framework for protecting cultural sites in the United States also includes, at least inferentially, a few of some 371 treaties between the federal government and Native American tribes, state law, and tribal law. The pertinent treaties ensure the tribes' entitlements to natural resources embedded in traditional landscapes within designated "Indian country." In particular, they are found within Indian reservations throughout the country, which are home to both tribal members and non-members. The reservations often resemble a checkerboard of tribal trust land (with the federal government as a trustee), tribal fee land (in the common-law sense of fee ownership), tribal-member trust land, and non-member fee land.

Canada's Declaration on the Safeguarding of Indigenous Ancestral Burial Grounds as Sacred Sites and Cultural Landscapes 2014 observes that "ancestral burial grounds are both the tangible and intangible cultural heritage of indigenous communities as sites of historical and religious importance integral to their traditions and spiritual beliefs as unique cultural landscapes…Federal, provincial and local authorities [urgently need to] find legal means to protect ancestral burial grounds, skeletal and other physical remains and funerary belongings as integral parts of indigenous cultural landscapes interconnected with the health and well-being of indigenous societies…legally and ethically, there are professional, corporate, and political obligations and duties to recognize, assist and support indigenous communities in the care-taking, safeguarding, protection and preservation of ancestral burial grounds, ancestral remains and cultural landscapes."[62] The Canadian Declaration does not, however, provide any mechanism for undertaking this protection or any enforcement measures.

In Nigeria the National Commission for Museums and Monuments (NCMM) oversees two World Heritage Sites listed as cultural landscapes. The first is the Sukur Cultural Landscape located within the Mandara Mountains of the Madagali local government area of Adamawa state,[63] in northeastern Nigeria. The NCMM acts concurrently with the legal authority of the Adamawa state government and with the written consent of the

[61] 16 U.S.C. § 433-433 (2012). For commentary, *see* D. Brinkley, "Obama the Monument Maker," N.Y. Times (28 August 2016), p. SR10.

[62] Declaration on the Safeguarding of Indigenous Ancestral Burial Grounds as Sacred Sites and Cultural Landscapes, para. 5, 7, Dec. 10, 2014.

[63] *See* www.ncmm.gov.org.ng (last visited 8 February 2016).

"Hidi-in-Council."[64] According to the UNESCO World Heritage Centre, the recognition of this landscape of outstanding universal value is to be found in its consonance with three crucial criteria for such declaration: Criterion (iii): Sukur is an exceptional landscape that graphically illustrates a form of land-use that marks a critical stage in human settlement and its relationship with its environment.

Criterion (v): The cultural landscape of Sukur has survived unchanged for many centuries and continues to do so at a period when this form of traditional human settlement is under threat in many parts of the world. Criterion (vi): The cultural landscape of Sukur is eloquent testimony to a strong and continuing spiritual and cultural tradition that has endured for many centuries.

The second Nigerian cultural landscape of interest is the River-Side Shrine and Sacred Grove of Osun at Osogbo, Osun State.[65] It was declared a national monument in 1965 and a cultural landscape "of outstanding universal value" in 2005. Inscribed by UNESCO as the "Osun-Osogbo Sacred Grove,"[66] it is a dense forest on the outskirts of the city of Osogbo and is described as "one of the last remnants of primary high forest in southern Nigeria." The grove is also regarded as the home of the goddess of fertility, Osun, the most important god of the Yoruba people. Most importantly, the sacred grove "is now seen as a symbol of identity for all Yoruba people," probably the last in Yoruba culture. The site testifies to the once widespread practice of establishing sacred groves outside all settlements.

UNESCO inscribed the Osun-Osogbo Sacred Grove in view of three criteria: Criterion (ii): The development of the Movement of New Sacred artists and the absorption of Suzanne Wenger, an Austrian artist, into the Yoruba community have proved to be fertile exchange of ideas that revived the sacred Osun Grove. Criterion (iii): The Osun Sacred Grove is the largest and perhaps the only remaining example of a once widespread phenomenon that used to characterise every Yoruba settlement. It now represents Yoruba sacred Groves and their reflection of Yoruba cosmology. Criterion (vi): The Osun Grove is a tangible expression of Yoruba divinatory and cosmological systems; its annual festival is a living, thriving and evolving response to Yoruba beliefs in the bond between people, their rule and the Osun goddess.

Although Nigeria's statutory provisions for the protection of the cultural landscape appear elegant and sophisticated on paper, in reality the protection and preservation of the cultural heritage is -- as in virtually all other African countries -- unfortunately low on the list of priorities for both the federation and the various state governments.

III. Toward a Transnational Legal Regime to Protect Cultural Landscapes of Significance to Indigenous People

A. Conceptual Attributes of an Orientation to Landscapes

Against this background of incomplete normativity at best, the need for development of a more comprehensive and coherent transnational regime of law pertaining specifically

[64] *See* http://whc.unesco.org/en/list/938, p.4. (last visited 8 February 2016). The "Hidi-in-Council" to which the inscription refers is the chief of the community.
[65] *See* www.ncmm.gov.org.ng (accessed 8 February 2016).
[66] *See* http://whc.unesco.org/en/list/1118, p.3 (accessed 8 February 2016).

to cultural landscapes is apparent, particularly insofar as it might address the interests, perspectives and, indeed, way of life of indigenous peoples. But why seek to develop yet another regime of law? Seven distinctive attributes of landscapes are noteworthy in explaining the need to do so, as follows:

1. The sheer panorama of space in which issues may be considered comprehensively in terms of land-use sustainability at the congested intersection of multiple interests such as those of investment, construction and resource development, indigenous peoples, and environmental exigencies.
2. The specific recognition of the intrinsically "combined works of nature and of man," as elaborated in the Operational Guidelines for the Implementation of the World Heritage Convention.
3. The enhanced capacity to integrate otherwise disparate norms and rules of municipal and international law, and of soft and hard law, drawn from a variety of legal disciplines and services.
4. The freedom to focus on non-monumental, non-spectacular phenomena of cultural importance unlike, for example, the limitation under the World Heritage Convention to unique sites of great importance.
5. An alternative to the emphasis on a mosaic of land "rights" and their allocation under national law (usually that of settler societies).
6. A broad framework for legal development and decision-making that encourages the free, prior and informed consent (FPIC) of indigenous peoples to activities that may impact on the sustainability of their cultural environment, and with due regard to their right of access to information to guide them in legal development and the decision-making process.
7. The enhanced potential to address transboundary needs and issues in a more holistic manner defined by a common rather than territorially constricted panorama and derivative interests in common.

B. Definitional Issues

The various definitions of a "cultural landscape" range from very broad and ambiguous, as in the European Landscape Convention, to specific, as in the amended UNESCO Guidelines under the World Heritage Convention. An underlying political problem in the search for agreement on a single acceptable definition of the core concept is the difficulty raised by the welter of interests, rights, and legal disciplines that bear on the status and protection of cultural landscapes. These include, for example, the public interest, the property rights of indigenous peoples, developmental rights, environmental rights founded on the principle of sustainable development, rights derived from the law of contract – the list is virtually endless.

Yet another definitional problem relates to the very term, "indigenous peoples." The Sofia Report listed the following indicators:[67]

- *self-identification*: self-identification as both indigenous and as a people;
- *historical continuity*: common ancestry and historical continuity with pre-colonial and/or presettler societies;

[67] Sofia Report, *supra* note 56, pp. 2-3.

- *special relationship with ancestral lands*: having a strong and special link with the territories occupied by their ancestors before colonial domination and surrounding natural resources. Such a link will usually form the basis of the cultural instinctiveness of indigenous peoples;
- *distinctiveness*: having distinct social, economic or political systems; having distinct language, culture, beliefs and customary law;
- *non-dominance*: forming non-dominant groups within the society;
- *perpetuation*: perseverance to maintain and reproduce their ancestral environments, social and legal systems and culture as distinct peoples and communities.

Under the Sofia Report's "relative flexibility" approach, not all the elements are "absolutely indispensable to identify a particular group as an 'indigenous people'." The Sofia Report nonetheless emphasised two of the listed indicators as "essential for a community to be considered as an indigenous people":

> "These two criteria are *self-identification* – which should also be regarded as an essential element of the right to self-determination of indigenous peoples – and [the community's] *special relationship with its ancestral lands*. This said, it must be emphasised that – in terms of methodology – the fact of whether or not a community may be considered as an indigenous people is in any event to be established on a case-by-case basis."[68]

But merely identifying these two essential indicators of an indigenous community does not provide or readily lead to a reliable, operational definition of the term "indigenous peoples." Indeed, some populations that might qualify as "indigenous peoples" may not wish to be so defined. An ancillary problem relates to the distinction between the terms "indigenous peoples" and "minorities." They are not the same, but what is their relationship exactly? One example of the problem may be drawn from the Lusatia region in the eastern part of Germany. This region is populated by the Sorbs, a minority group of Slavic people, who saw their region damaged by industrialization and, in particular, coal mining. To what extent is their land a "cultural landscape" by virtue of their status as a minority group within Germany? Do the Sorbs' rights to their traditions, language, and land(s) transform the lands into cultural landscapes? Why would only these specific pockets of land be cultural landscapes and not, for example, the whole of Europe?

Would any of a national minority's lands – either the whole of its territory or only discrete panoramas -- qualify as cultural landscapes within a regime that is intended to pertain to indigenous peoples? This is a question insofar as a minority population is not necessarily indigenous. Also, in the case of a minority's lands, there is not as apt to be the kind of cosmological relationship (close link) between the particular people and the earth as is more characteristic of indigenous peoples such as the Aboriginals, the Mãori, the Inuits, the Cherokees, the Navajo (Diné), or the marginalized groups in Africa such as the Khoesan/San in southern Africa and the Endorois in Kenya.[69]

Finally, defining transboundary cultural landscapes shared by multiple states has its own distinctive problems. The Sami people in northern Scandinavia (Norway, Sweden, Finland and Russia) provide one example of the problem. Sami culture rests on two

---

[68] *Ibid,* p. 3 (emphasis added).

[69] *Ibid,* n. 3. For example, one comment noted "the profound extent of marginalisation suffered" by such communities of indigenous peoples in Africa.

fundaments: their linguistic identity and their characteristic tradition of reindeer herding with connected hunting and fishing. In general, the other vestiges of their transboundary culture are threatened by modern methods of forestry and other land uses. But the legal protection of the two fundaments is complicated by disparities among national laws. For example, the Sami are constitutionally recognised as a people in Sweden, but, unlike Norway, Sweden has not yet ratified the International Labor Organization (ILO) Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, which provides that existing land rights are to be recognized and respected such that a Sami right to substantial land use for reindeer husbandry would have to be as respected as other land rights in Sweden. The Swedish and Norwegian governments, after a long period of contention about borderland grazing rights, now cooperate in that regard, and, with Finland, seek a border agreement on grazing rights.

The African continent, where the borders are extremely "arbitrary,"[70] presents a particularly difficult challenge. For example, it was noted in 2007 that Africa has 165 designated borders,[71] and there is little doubt that they have since changed. Against such a backdrop, effective cooperation in the protection and preservation of the cultural landscapes of indigenous peoples that transcend national boundaries remains daunting.

IV. A Typology of Cultural Landscapes and Seascapes

A. The Need for an Expanded Framework

Given the difficulty of defining cultural landscapes to the satisfaction of all stakeholders and for all purposes, it may be considerably more productive to establish a typology that allows for variation in normative development among different categories of cultural landscapes. As this Report has already observed, the three categories of cultural landscapes identified by UNESCO are noteworthy, but they are incomplete as applied to indigenous peoples. They fail to recognize the reality that for many indigenous peoples "earth, people and history" form a distinctive, holistic perspective on life. For example, the roots of Native American tribal culture are grounded in the land. Many tribes regard specific lands as holy. In the Cherokee language, for example, the word *eloheh* means land, religion, culture, and traditional history.[72] Similarly, among the Navajo (Diné), "the land is the Earth Mother, she who gives life to humanity."[73] It is noteworthy that the Navajo (Diné) reservation, the largest in area, is bounded by four sacred mountains.[74]

The concept of *place* has a deep, often spiritual significance. The relationship between indigenous peoples and the earth is therefore apt to be regarded as sacred or cosmological. Natural, uncultivated or built landscapes can all be deeply cultural insofar as they

[70] If Africa's borders were to be redrawn to allow each ethnic group to have their own country, Africa would have "at least 2,000 countries." C. Mungai, "Africa's borders split over 177 ethnic groups, and their 'real' lines aren't where you think" available at http://mgafrica.com/article/2015-01-09-africas-real-borders-are-not-where-you-think/ (last visited on 26 February 2015).

[71] K. Akonnor, "Stuffing Old Wine in New Bottles: The Case of the African Union," in A. Mazama (ed.), *Africa in the 21st Century: Toward a New Future* (Routledge, Abington, New York, 2007), p. 200.

[72] B.E. Brown, *Religion, Law and the Land: Native Americans and the Judicial Interpretation of Sacred Land* (1999), p. 38.

[73] R.F. Locke, *The Book of the Navajo* (1992), p.5.

[74] National Geographic, *Indian Nations of North America* (2010), p. 222.

are associated with the spiritual nature of the earth. The barren, icy "nothingness" in Greenland, for example, may constitute an important cultural landscape for indigenous peoples. Another example is the Cultural Space of the Yaaral and the Degal in Mali.[75] It encompasses the vast pastoral lands of the Peul people of the inner Niger Delta. It is a space in which all the ethnic groups of the interior Niger Delta gather during and after the pastoral festivals, reactivating inter-community pacts and reinforcing social cohesion. The Yaaral and the Degal festivities mark the crossing of the river at the time of the transhumance when, twice a year, herds of cattle cross the arid land of the Sahel and the flood plains of the inner Niger Rover. Since they bring together representatives of all the ethnic and occupational groups in the Delta – the Peul cattle-breeders, Marka or Nono rice-growers, Bambera millet-growers and Bozo fishermen – the Yaaral and the Degal festivities continue to renew inter-community pacts and contribute directly to environmental protection. The children of Diafarabe (Yaaral) and Dialloube (Degal) must accompany the animals along with the adults who show them the pastoral ways, the correct behaviour with animals, strategies for animal survival, etc. This is the knowledge that children must learn in order to safeguard their social, cultural and identity values related to Yaaral and Degal and, in particular, the means of sustaining their pastoral way of life.

For many indigenous peoples, history is a spatial-temporal phenomenon, often differing fundamentally from the Western concept of history as a temporal sequence of past events. Thus:

> [m]any indigenous communities throughout the world have stressed that territories and lands are not only the basis of economic livelihood but also the source of spiritual, cultural and social identity, and form an essential part of their cultural heritage…[T]here is an obligation to protect the cultural heritage of indigenous peoples through recognition of their rights to own, control and manage their ancestral territories… under the banner of cultural rights.[76]

Against this background of an inextricable link in the belief systems of many indigenous peoples among earth, people, and history, the concept of "place" is becoming a critical focus of theoretical advancement. Two major qualities of place are contributing to this development as

> "1) … humans occupy a remarkable diversity of ecosystems (diversity of place), and 2) we are the dominant species of our ecosystems (therefore, we will change them; we may turn any place into "our place," even for a while). Humans create both qualities through their unique way of adaptation that is distinctively flexible, for adaptation is at once the solution to a particular problem and the source of unanticipated changes and new problems."[77]

---

[75] The Yaaral and Degal Cultural Space was initially inscribed by UNESCO in 2001 as a "Masterpiece of Oral and Intangible Heritage of Humanity" and then transferred in 2008 to the Representative List of the 2003 Convention on the Intangible Cultural Heritage. ITH/08/3.COM/CONF.203/1.

[76] J. Gilbert, "Indigenous Peoples' Heritage and Human Rights," in Disko and Tugendhat, *supra* note 26, p. 55.

[77] L. Lozny, "Place, Historical Ecology and Cultural landscape: New Directions for Applied Archaeology," in L. Lozny (ed.), *Landscapes Under Pressure: Theory and Practice of Cultural Heritage Research and Preservation* (Springer, New York, 2008), pp. 15, 19.

B. Five Categories

Taking into account the need for an improved typology of cultural landscapes as well as the essential concept of *place* among many indigenous peoples, the following list of categories is designed to help structure a transnational legal regime pertaining to cultural landscapes of significance to indigenous peoples:

1. Pure natural landscapes and seascapes of indigenous cultural significance.
2. Natural landscapes created by indigenous peoples (often as the product of indigenous knowledge systems and land-use practices).
3. Built or constructed landscapes such as villages whose layout or structure is of cultural significance.
4. Cultural imagery that projects cultural statements on a natural landscape.
5. Intangible landscapes characterized as "landscapes of the mind".

All of these categories of cultural landscapes reflect the mutuality of interaction between human culture and the natural environment. A few examples of each category of cultural landscapes, as follows, will illustrate the variations among them that suggest the need for variations in normative development according to the character of each category.

1. Pure natural landscapes of cultural significance

A world-renowned example of a pure natural landscape of indigenous cultural significance is the Uluru-Kata Tjuta National Park (the Park) in Australia (better known as Uluru and previously known as Ayers Rock). For millennia this immense monolith has been of paramount cultural significance to the Aboriginal peoples, the Anangu, in central Australia. In 1987 the Park was declared to be a World Heritage site of purely "natural value".[78] This declaration was highly controversial. Opponents argued that it showed a "lack of international recognition of the ongoing relationship between the Anangu and their country"[79] -- a matter of concern not only to the Anangu, but also to the Park's Board of Management and cultural heritage professionals.

This criticism appears to have influenced the World Heritage Committee in two respects: (a) developing the World Heritage Convention's Operational Guidelines; and (b) including "cultural landscapes" as a factor in reviewing nominations for the World Heritage listings. Consequently, in 1994 the Park was also inscribed as an associative cultural landscape, in addition to its listing as a World Heritage site of natural value.[80]

In the United States pure natural landscapes of significance to Native Americans range from sacred monoliths, such as Bear Butte in South Dakota, the Devil's Tower in Wyoming and Rainbow Bridge in Utah (the largest known natural bridge in the world), to more extensive settings. For example, a Blackfeet healer, Molly Kicking Woman, campaigned against an oil-drilling venture by attributing religious significance to "all the mountains and not just the area where we pick plants and roots."[81] The Yurok, Karok,

[78] "Pukulpa pitjama Ananguku ngurakutu – Welcome to Anangu land: World Heritage at Uluru-Kata Tjuta National Park", in Disko and Tugendhat (eds.), *supra* note 26, p. 289, p. 291.
[79] *Ibid*, p. 291.
[80] *Ibid*, p. 292, p. 292, n 11.
[81] *See* "The Blackfeet Nation (U.S.) and Petroleum Exploration," in *The Eagle*, Late Winter 1993.

and Tolowa religious traditions sanctify the entire high country in parts of the western United States.[82] The seeds of conflict and the needs for legal intervention inhere in the ambiguity of defining and demarcating landscapes as fundamental constructs of Native American culture.

In South Africa the Richtersveld Cultural and Botanical Landscape was inscribed by UNESCO as a World Heritage site in 2007. What makes this particular landscape exceptional is that it is owned and managed by a community that until recently had very little to call its own. This community comprises the Nama, which was so named after the merger of two groups, the Khoi (termed "Hottentots" by Europeans who effectively eliminated them), and the San (termed Bushmen by the Europeans and of whom a small number survives in the country). The cultural distinction of this population lies in the Nama "still practis[ing] seasonal migration between stock-posts, using and building portable rush-mat houses. The Nama are the last practitioners of this millennia-old way of life".[83]

The Sami and the Inuit people provide two examples from the Arctic North. In 1996, the Laponia area -- really a vast landscape -- covering some 9,400 square kilometres in the north of Sweden, was placed on the World Heritage List based on both cultural and natural criteria. The cultural criteria are "exclusively connected with the Sami population and its use of the area for reindeer herding, hunting and fishing". As the United Nations rapporteur on the rights of indigenous peoples pointed out in his 2012 Report to the United Nations General Assembly, the Sami "actively supported"[84] the inscription of the Laponian area as a World Heritage site.

Although the landscape of Greenland may, on the face of it, appear to be terrestrial nothingness or a polished white emptiness – a vast icy and uninhabited landscape – it has deep cultural significance to the Inuit people. Measures are therefore afoot to have the Greenland landscape declared a World Heritage site in recognition of Inuit culture and to protect it.[85]

Seascapes are also noteworthy. An early definition of a seascape as a maritime cultural landscape, was "the network of sea routes and harbours, indicated both above and under water".[86] In other words, a "seascape" can be much more that the mere expanse of the ocean. A good example of a cultural seascape is the vast swath of ocean that the United States successfully nominated as its first mixed (natural and cultural) World Heritage site and cultural landscape, the Papahānaumokuākea Marine National Monument. As inscribed in 2010, it encompasses 140,000 square miles of water, islands and atolls to the northwest of the main Hawaiian Islands in the Pacific Ocean -- essentially a vast seascape. This huge seascape blends both living and non-living marine resources with traditional cultural connections between Native Hawaiians and the sea. In particular, the cultural

---

[82] *Religion, Law and the Land: Native Americans and the Judicial Interpretation of Sacred Land* (1999), p. 145.

[83] *World Heritage in South Africa* - SouthAfrica.info 207; p 6, available at http://www.southafrica.info/about/history/worldheritagesites.htm (last visited 26 February 2015).

[84] UN Report, *supra* note 28, para 40.

[85] The Inuit people in Denmark/Greenland, Canada, the USA and Russia are represented by the Inuit Circumpolar Council (ICC).

[86] C. Westerdahl, *supra* note 1, p. 732, 735.

seascape includes traditional wayfinding (non-instrument navigation) on double-hulled sailing canoes, a practice that continues today. In 2016 this National Monument was more than quadrupled in size to nearly 583,000 square miles.

2. Natural landscapes created by indigenous peoples

Natural landscapes created by indigenous people are often the products of indigenous knowledge systems and land-use practices. A salient example is the pattern of "gardens" of the Saramaka People in Suriname. The decision of the Inter-American Court of Human Rights in the *Case of the Saramaka People v Suriname,* involving the destruction of the gardens (land) by Chinese loggers,[87] is an early recognition and acknowledgment of the rights of indigenous peoples to a natural landscape of their creation. We shall return to this case later.

Another example of such a landscape involves the Rice Terraces in the Philippine Cordilleras. In the UNESCO inscription these "rice terraces" are described as follows:

> The Rice Terraces of the Philippine Cordilleras is an outstanding example of an evolved, living cultural landscape that can be traced as far back as two millennia ago in the pre-colonial Philippines. The terraces are located in the remote areas of the Philippine Cordillera mountain range on the northern island of Luzon, Philippine archipelago. While the historic terraces cover an extensive area, the inscribed property consists of five clusters of the most intact and impressive terraces, located in four municipalities. They are all the product of the Ifugao ethnic group, a minority community that has occupied these mountains for thousands of years.[88]

A sobering statement that accompanied the recognition of the terraces is noteworthy. It reads: "The rice terraces are an outstanding example of land-use that resulted from a harmonious interaction between people and its environment which has produced a steep terraced landscape of great aesthetic beauty, now vulnerable to social and economic changes."[89]

Moreover, the terraces not only are a product of tradition, but also represent an integral part of the indigenous knowledge systems insofar as the agricultural practices are

---

[87] Judgment of November 28, 2007. For an abridged version and discussion of it, see J.A.R. Nafziger, R.K. Paterson and A.D. Renteln, *Cultural Law: International, Comparative and Indigenous* 176-200 (Cambridge University Press, 2010). Paragraph 2 of the opinion sets forth the cause of action as follows: "The application submits to the Court's jurisdiction alleged violations committed by the State against the members of the Saramaka people, an allegedly tribal community living in the Upper Suriname River region. The [ACHR] Commission alleged that the State [Suriname] has not adopted effective measures to recognize their right to the use and enjoyment of the territory they have traditionally occupied and used, that the State has allegedly violated the right to judicial protection to the detriment of such people by not providing them effective access to justice for the protection of their fundamental rights, particularly the right to own property in accordance with their communal traditions, and that the State has allegedly failed to adopt domestic legal provisions in order to ensure and guarantee such rights to the Saramakas." See also the Sofia Report, *supra* note 56, p. 4 for a discussion of this decision within the context of requiring from the Saramaka people their free, prior and informed consent (FPIC) according to their customs and traditions.

[88] See http://unesco.org./en/list722 (last visited on February 26, 2015).

[89] *Ibid.*

accompanied by various rites and rituals.[90] Sustainable development[91] of the terraces is essential to their survival so as to ensure both that the indigenous knowledge system continues by allowing the continuity of traditional practices and that the integrity of the terraces remains intact in the face of negative impacts on a cultural and natural environment of outstanding universal value. Accordingly, only a balance between "economic growth, social development and environmental protection in order that future generations have the same or better opportunities than the present generations," to be understood as such by both management and the communities, will ensure the survival of the rice terraces.[92]

3. Built or constructed landscapes such as villages whose layout or structure is of cultural significance

A famous example of a built or constructed landscape is the Konso Cultural Landscape in Ethiopia, which was inscribed as a World Heritage site in 2011. Its inscription describes it as a "55^2 km property of stone walled terraces and fortified settlements … [constituting] a spectacular example of a living cultural tradition stretching back 21 generations (more than 400 years) adapted to its dry hostile environment".[93] The inscription continues, as follows: "The landscape demonstrates the shared values, social cohesion and engineering knowledge of its communities. The site also features anthropomorphic wooden statues – grouped to represent respected members of their communities and particularly heroic events – which are an exceptional living testimony to funerary traditions that are on the verge of disappearing. Stone stele in the towns express a complex system of marking the passing of generations of leaders."[94]

In South Africa the Mapungubwe Cultural Landscape was inscribed as a World Heritage Site in 2003. According to archaeological and research from other disciplines, Mapungubwe ("place of the stone of wisdom") was South Africa's first kingdom and "developed into the subcontinent's largest realm, lasting for 400 years before it was abandoned in the fourteenth century. Its highly sophisticated people traded gold and ivory with China, India and Egypt…The remains in the Mapungubwe cultural landscape are a remarkably complete testimony to the growth and subsequent decline of the Mapungubwe state. What remains are the almost untouched sites and also the entire settlement area dependent upon them, as well as two earlier capital sites, the whole presenting an unrivalled picture of the development of social and political structures over some 400 years."[95] In all, "[t]he importance of the Mapungubwe cultural landscape is enormous. It was here that social, cultural and political developments led to the first complex societies in southern Africa."[96]

---

[90] J. Mananghaya, "Living Cultural Landscape: Rice Terraces of the Philippine Cordilleras," in A Galla (ed.), *World Heritage: Benefits Beyond Borders*, (Cambridge University Press, Cambridge, New York, 2012), pp. 179-180.

[91] *See*, *e.g.*, the Brundtland Report, published in 1987 under the title *Our Common Future*, P. Sands et al., *supra* note 18, p. 39.

[92] J. Mananghaya, *supra* note 89, p. 187.

[93] "Konso Cultural Landscape," available at http://whc.unesco.org.list/en/list/1333 (accessed 2015/02/26).

[94] *Ibid.*

[95] *Ibid.*

[96] T.N. Huffman, *Mapungubwe: Ancient African Civilization on the Limpopo (2007).*

Sometimes a constructed landscape is defined by a complex of a natural landscape, indigenous heritage, and non-indigenous development. A good example is the Tequila landscape region in Mexico. This region, between the foothills of the Tequila Volcano and the deep valley of the Rio Grande River, is part of an expansive natural landscape of blue agave, shaped by the culture of the plan which has been used since the sixteenth century to produce tequila spirit and over at least 2,000 years to make fermented drinks and cloth. Within the landscape are working distilleries reflecting the growth in the international consumption of tequila beginning in the nineteenth century.

This landscape region reflects the fusion of pre-Hispanic traditions of fermenting mescal juice with the European distillation processes and of local and imported technologies. The property also covers archaeological sites which bear testimony to the Teuchitlan culture which shaped the Tequila area from 200 to 900 A.D., notably through the creation of terraces for agriculture, housing, temples, ceremonial mounds and ball courts.

Today, the agave culture is seen as part of a national identity. The area encloses a living, working landscape of blue agave fields and the urban settlements of Tequila, Arenal, and Amatitan with large distilleries and factories (both active and not), tabernas (distilleries that were illegal under Spanish rule), towns and Teuchitlan Archaeological sites. The property includes numerous haciendas (estates), some of which date back to the eighteenth century. The architecture of both factories and haciendas is characterized by brick and adobe construction, plastered walls with ochre lime-wash, stone arches, quoins and window dressings, and formal, neo-classical or baroque ornamentation.

4. Cultural imagery that projects cultural statements on a natural landscape

Rock art created by indigenous peoples is a common form of imagery projected by indigenous peoples as a cultural statement onto a natural landscape. A poignant example of such expression is to be found in the ancient rock art of the San people of Southern Africa [97] – the true "first peoples" of Southern Africa. Testament to this view is the declaration as a World Heritage site of the uKhahlamba Drakensberg Park in KwaZulu-Natal in South Africa inscribed in 2000. For more than 4,000 years the area was the home to the indigenous San people, who created a vast body of rock art – the largest collection in Africa.

Another site commonly known for its rock art covers the Tsodilo Hills of north-western Botswana. That site has some 4,500 rock-art sites "representing one of the highest concentrations of rock art in the world".[98] Moreover, what makes Tsodilo Hills particularly distinct is that it is a rock-site area where the descendants of the Khoesan (the ancient San people) still live.[99] Not only does the Tsodilo rock art serve as an example of cultural imagery that projects statements on a natural landscape, but it also offers a perceptive case study concerning land use involving indigenous peoples who continue to occupy the land.

---

[97] As far as science can determine today, the San people are the true First Peoples or Indigenous Peoples of southern Africa and in some writings they are referred as the "Khoesan." For example, M. Taylor refers to the "San" as the "Khoesan," in "'We are Not Taken as People': Ignoring the Indigenous Identities and History of Tsodilo Hills World Heritage, Botswana," in Disko and Tugendhat, *supra* note 26, p. 27, pp. 118, 120, n. 1.

[98] Taylor, *supra* note 96, p. 119.

[99] *Ibid*, p. 122.

The Declaration of the Tsodilo Hills[100] as a World Heritage site in 2001 has been controversial inasmuch as the Khoesan people were completely ignored in the declaration process even though the Hills represented an important "ritual site"[101] for them. Not only did this omission unfortunately reflect the Khoesans' status as a "marginalised and stigmatised minority",[102] but also their value only to "external researchers," insofar as the designation of Tsodilo as a World Heritage site would serve primarily as "'…an important data bank [to "ethnologists"] for the study of Indigenous peoples who continue to inhabit the site.'"[103]

The declaratory process of the World Heritage Committee has been doubly deplored for its uncritical acceptance and perpetuation of the one-sided official narrative of the Tsodilo-area peoples and for the failure of the World Heritage Committee to recognize them adequately as an indigenous community for whom the Hills has cultural significance in terms of their heritage, identity and status today. The Committee consequently failed to consider how their status, as a marginalized and stigmatized minority, has disabled them from engaging as equals in the changes associated with the designation of Tsodilo as a World Heritage site. The Committee failed "to make any recommendations for particular measures that should be put in place to reverse exclusionary processes or to ensure the equal participation of Tsodilo's indigenous residents in its representation to the outside world and in enjoying the benefits of heightened interest in the Hills".[104]

A very different example of cultural imagery that projects statements on a national landscape involves imaginative photographic panoramas. We usually think of constructed landscapes as actual human settlements and related activity, but the related category of projected imagery includes photographic constructions that infuse landscapes with artificial cultural elements. A superb example of such imagery is the didactic photography of a prominent Navajo (Diné) photographer, Will Wilson.

Wilson's panoramic commentaries on threats to Navajo (Diné) landscapes are stunning. In particular, the images in his *Auto Immune Response* series[105] portrays the environmental threats to, and consequences of, uranium mining and other exploitation of Navajo (Diné) lands as a legacy of colonization. In his words, the series

> has focused on a post-apocalyptic Navajo man's journey through an uninhabited landscape. The character in the images is searching for answers. Where has everyone gone? What has occurred to transform the familiar and strange landscape that he wanders? What has occurred to transform the familiar and strange landscape that he wanders? Why has the land become toxic to him? How will he respond, survive, reconnect to the earth?[106]

Perhaps the two most poignant images in the series feature gas-masked tribal members surveying, in one panorama, the Grand Canyon (adjacent to the Navajo reservation),

---

[100] *Ibid.*, p. 123.
[101] *Ibid*, p 122.
[102] *Ibid*, p. 127.
[103] *Ibid*, p. 125.
[104] *Ibid*, p. 127.
[105] *See* Wheelwright Museum of the American Indian, Exhibitions: Will Wilson (2015) (copy on file with the author).
[106] *Ibid,* p.1.

and, in the other panorama, an utterly barren, steaming wasteland.[107] The Navajo (Diné) world is thus viewed as both breathtakingly beautiful and deadly poisonous. The contrast between a natural utopia and a post-apocalyptic dystopia is jarring.

What makes Wilson's didactic imagery, his political intervention, so compelling is his forthright effort to reconcile traditional dichotomies, especially that between Navajo (Diné) and white stereotypes. Although he condemns the historic colonization by outsiders of Navajo land and landscapes, he nevertheless has candidly acknowledged the tribes' own contribution to a polluted environment that threatens their cultural equipoise as denizens and caretakers of sacred land. Wilson's motive of reconciliation is underscored by another series of his images, *Critical Indigenous Photographic Exchange.*[108] In this project he critiques and expands upon the iconic photography of Native Americans by the pioneering Edwards S. Curtis a hundred or so years ago. In defining photography as a mechanism of colonization, in his own words, Wilson "resumes the documentary mission of Curtis from the standpoint of a 21st century indigenous, trans-customary, cultural practitioner."[109] To Wilson, a romantic vision of Native Americans frozen in time is no more appropriate than a bucolic depiction of sacred landscapes if either type of image is to remain culturally cogent.

This brief excursus into land issues under the head "Cultural imagery that projects statements on a natural landscape" serves as a reminder that when cultural landscapes significant to indigenous peoples are in focus, we should always keep in mind the characteristic integration of human expression with the natural environment. After all, "[f]or indigenous peoples, 'heritage' is something holistic that includes not only products of human thought and craftsmanship but also natural features of the landscape and natural species of plants and animals with which a people has long been connected".[110]

5. Intangible Landscapes or "Landscapes of the Mind"

The category of "landscapes of the mind" can be approached from two angles. On the one hand are perceptions or experiences of indigenous peoples regarding, for example, land tenure, as expressed in terms of particular scientific disciplines. Accordingly, there is a spectrum of understanding between the consideration of land as part of the environment – its physical existence – and land in an emblematic, metaphoric[al] or symbolic sense. Unfortunately this dichotomy manifests itself most pointedly when natural resources are present on the land of indigenous peoples, resulting not only in the exploitation of these resources, but also in clashes between, for example, business operations sometimes assisted by governments, on the one hand, and environmentalists, indigenous peoples, and anthropologists -- often assisted by NGOs, on the other hand. Moreover, the dichotomy has "tended to shift the tribal focus from *all* land, given the economic advantages of

---

[107] For an excellent discussion of issues at the intersection of commercial development, the divided preferences of the Navajo (Diné) people, and environmental protection in the Grand Canyon, see D. Roberts, "Grand Canyon on the Edge," *Smithsonian* (March 2015), p. 58. *See also* K. Fedarko, "Losing the Grand Canyon," *Nat'l Geographic* (Sept. 2016), p. 114 (with excellent maps of the area in contention).

[108] Wheelwright Museum, *supra* note 104, p. 2.

[109] *Ibid.*

[110] J. Gilbert, *supra* note 75, p. 56.

exploiting some of it, to designated landscapes, in not only a physical, but also a metaphorical sense. After all, '[t]he landscape of the mind affects the use of land'".[111]

On the other hand, another sense of intangibility, a natural landscape may become of cultural significance by its transformation into a shared image or association that may even take on a mystical or mythological character in the human mind. Powerful religious, artistic or cultural associations of a natural element rather than "material cultural evidence" (physical reality) itself -- which may be insignificant or even absent -- comprise an intangible landscape or landscape of the mind. Such phenomena are apt to be highly nuanced, and, in addition, adept at reconstructing the meanings of heritage. Viewing landscapes from an intangible perspective allows for the social, spiritual and cultural significance of a landscape to be paramount, rather than the physicality of the terrain.

The attitudes of New Zealand's Māori toward their landscape serve as an example. For the Māori, "'Wāhi tapu'" is a place especially sacred in a traditional, spiritual, religious, ritual or mythological sense. Often particular features of the landscape are identified as being the core basis of the *iwi* (the tribe) or *hapū* (sub tribe). Frequently this is by reference to the most prominent feature in a landscape, for instance a mountain (*maunga*). Examples of this include Aorangi (Mount Cook), Taranaki (Mount Egmont) and the key volcanic cones of the Tāmaki Makaurau in the area of Auckland. For coastal or island iwi and hapū, the sacred landscape or at least one of several sacred landscapes may be a reef off the island or the seashore. An example of this is the Motiti Island where the nearby Otaiti Reef is sacred.

Another example of a cultural landscape that combines features of a natural landscape with an intangible landscape or landscape of the mind is a famous battlefield at "Blood River" in the South African province of KwaZulu-Natal. The battle fought there in 1838 between Black warriors (the Zulu) and the Afrikaners of today is now commemorated annually since 1994 on December 16 as a day of reconciliation. The purpose is not to celebrate the victory of one group over the other, but as the word "reconciliation" suggests, to bridge the chasm between conflicting racial groups that the battlefield recalls. Whether the noble aspiration of reconciliation can be realized is, of course, another matter. The reality is, however, that the battlefield is both a natural landscape of cultural significance in itself and a durable source of cultural imagery in the mind apart from, but clearly linked with, the physical reality of the battlefield itself.

To summarize, an intangible cultural landscape therefore can be understood as either the manifestation over territory of the historic signs and traces that shape cultural identity or as a geographical space associated with an event, activity or community, holder of aesthetical values and associated memory. After all, the UNESCO Operational Guidelines recognize that cultural landscapes are "combined works of nature and man," which arguably include the mental or imagined constructs (as works) of man that are, according to the Operational Guidelines, "illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces both external and internal."

---

[111] B.E. Johansen (ed.), *"*Land Tenure, Native American Conceptions of," in *The Encyclopaedia of Native American Legal Tradition (*1998), p 178.

V. Territorial Bases for Indigenous Custodianship of Particular Cultural Landscapes.

A. Property-based claims

Indigenous claims to custodianship may sometimes extend to cultural sites, including entire landscapes that are not owned by the claimants. For example, the Navajo (Diné) Nation in the United States has opposed tourist development near the sacred but *offreservation* Rainbow Bridge in Utah, through which they believe their ancestors arrived on earth.[112] Usually, however, indigenous claims rely on territorial rights. Property law may therefore be determinative in disputes pitting indigenous claims to custodianship against other interests, particularly those of economic development. But whose property law? After all, property is a highly contested concept as applied to indigenous peoples in view of the fundamental reverence for land in many indigenous societies. It therefore follows that western theories of property do not necessarily conform to the shared understanding of land-related interests among many indigenous peoples. Moreover, critical landscapes of indigenous peoples may be subject to distinctive rules and patterns of indigenous land-tenure, thereby complicating the process of providing comprehensive protection of the landscape, as in the case of the Saramaka people of Surinam.[113]

Three general arguments address the property interests of many indigenous peoples within settler societies. First are doctrinal arguments within the established normative order of settler states. Accordingly, the literature therefore distinguishes between two types of claims: property-right claims based on an explicit recognition of the exogenous laws and customs of indigenous peoples *by* the legal system of a settler society and claims based on a recognition of prior indigenous occupation and aboriginal rights *within* the rules of general application in the legal system of the settler society itself. Various legal structures that bring proprietary features within governmental authority, such as corporate forms, land trusts, and so on, have been used to accommodate the public-law dimension of indigenous rights.[114]

Second are arguments, not mutually exclusive of the first one, which rely upon international human rights law -- for example, the foundational right of self-determination;[115] the right to equality;[116] and the right to take part in a common culture[117] -- to support the property rights of indigenous peoples and potentially prevail over conflicting provisions of settler law.[118] It should be noted that the exercise of indigenous self-determination is

---

[112] F.M. Bordewich, *Killing the White Man's Indian: Reinventing Native Americans at the End of the Twentieth Century* (1996), p. 220 (emphasis added).

[113] *See International Human Rights and Indigenous Peoples* 298 (S. James Anaya ed. 2009).

[114] J. Webber, "The Public-Law Dimension of Indigenous Property Rights," in N. Bankes and T. Koivurova (eds.), *The Proposed Nordic Sami Convention: National and International Dimensions of Indigenous Property Rights* (Hart Publishing, Oxford and Portland, Oregon, 2013), p. 79.

[115] *See* article 1 of both the ICCPR and ICESCR: "all peoples have the right to self-determination" (a 1.1).

[116] Article 3 of the ICCPR.

[117] Article 15(1)(a) of the ICESCR.

[118] International case law in which property rights of indigenous peoples are linked to fundamental rights include, among others, the *Western Sahara, Advisory Opinion,* 1975 ICJ Reports (International Court of Justice). Regional jurisprudence includes the *Saramaka* decision (discussed earlier) of the Inter-American Court of Human Rights, *supra* note 86, the work of the Inter-American Commission

not to establish autonomous sovereignty, but rather institutional and normative autonomy for indigenous peoples within the established nation-state structure on the principle of *uti possidetís,* and to acknowledge indigenous control over resources necessary for their survival and livelihood in both physical and cultural senses.

Third are arguments, at least in English-speaking countries, that historically responded to the writings of John Locke, (English philosopher (1632-1704)). Locke's seminal work, *Two Treaties of Government*, published in 1690, set forth the then radical argument that human rights, not governments, come first in the natural order. Rights to life, liberty and property should be paramount, he argued. But Locke argued against the recognition of indigenous property interests. Today, of course, it seems clear that indigenous peoples never consented to the alienation of their traditional territories and are therefore not bound by the supplanting rules of settler societies. A gratifying cross-fertilization between national law and international law has helped shape the legal argumentation about property rights.[119]

A particularly critical aspect of property-based claims involves the emerging recognition of claims by indigenous peoples over resources necessary for their combined physical and *cultural* survival. One example involves the Sami people in Scandinavia. Until recently, traditional indigenous livelihood activities, such as hunting, fishing and migratory grazing, were not considered a basis for the recognition of title and rights of use, since such use of land was not deemed to be sufficiently intensive and continuous. During the 20th century, this argument significantly influenced Norwegian jurisprudence, for example.[120] However, it seems that this line of reasoning is slowly but surely changing. Even as early as 1968, the Norwegian Supreme Court delivered a judgment granting compensation to two Swedish Sami villages – Saarivuoma and Talma – for the substantial loss of grazing land on Norwegian territory resulting from the construction of a dam at Lake Altevann in Troms, Norway. The court stated that the Sami's right to use the area rested on ancient usage.[121]

In *Mabo v Queensland,*[122] the Australian High Court confirmed that the traditional land rights of Aboriginal and Torres Strait Islanders (known in Australia as "native title") were recognized by the common law of Australia. The Australian Federal Government

---

on Human Rights as well as communications of the African Commission. *See, e.g.*, Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. Kenya*, 4 February 2010 (the *Endorois* decision). At the national level, the Australian High Court decision of *Mabo v State of Queensland* (1992) 107 ALR 1 is pertinent (see too the decision by the Appellate division in *Mabo v Queensland (No.2)* [1992] HCA 23, (1992), 175 CLR 1 (HC). Within the South African context the leading South African decision on dispossession of land, linking it to fundamental rights is *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC). *See supra*, text at note 92.

[119] N. Bankes, "Recognising the Property Interests of Indigenous Peoples within Settler Societies: Some Different Conceptual Approaches," in N. Bankes and T. Koivurova (eds.), *supra* note 113.

[120] *See* O. Ravna, "The Draft Nordic Sami Convention and the Assessment of Evidence of Sami Use of Land," in N. Bankes and T. Koivurova (eds.), *supra* note 113, p. 177.

[121] *See* E.G. Broderstad, "Cross-border Reindeer Husbandry: Between Ancient Usage Rights and State Sovereignty", in N. Bankes and T. Koivurova (eds.), *supra* note 113, p. 163.

[122] *See supra* note 117.

responded by codifying the *Mabo* decision in the Native Title Act 1993.[123] It is controversial insofar as the resulting framework, as interpreted by the National Native Tribunal and Australian courts of general jurisdiction, has placed a heavy burden on Aboriginal and Torres Strait Islanders seeking to prove native title rights.[124]

B. Sacred Natural Sites

"Sacred Natural Sites" (SNSs) are natural areas of special spiritual significance that may constitute an integral part of ethnic identity and, if so, may form a cultural landscape. Some SNSs include cultural constructions; others do not. For example, within the Māori belief system, mountains are considered to be the frozen bodies of their ancestors. In tribal meetings, participants identify themselves by first giving the name of their mountain tribe, then their lake or stream, and finally their leader.[125]

Notwithstanding that SNSs often have compelling cultural significance to some indigenous peoples, their legal protection has often been inadequate because of either constitutional constraints on religious establishment, the exigencies of economic development or sheer neglect. For example, in the Arctic it is growing increasingly difficult to protect these ancient sites due to outside impacts, such as tourism, mining, and forestry. Also, infrastructural development such as the construction of roads and dams. Sometimes current policies and management practices differ fundamentally from traditional management structures based on indigenous laws and customary practices.

A good example of a landscape that included, *inter alia*, a major cemetery that was despoiled by a public works project involved the prehistoric Boyne Valley passage-tombs in County Meath, Ireland. The cemetery was associated with the early history of the royal establishment of Tara. As a focus of scientific study, the tombs have had "the inestimable advantage that some of them have been subject of the most detailed and careful excavation which also produced a limited but nevertheless significant number of radiocarbon dates."[126] (That, of course, raises questions in itself.)

The Irish government planned to construct a motorway through the cemetery. Legal action to halt the plans was not successful. The judge hearing the matter rejected a claim that the provision in the National Monuments (Amendment) Act 2004 that had authorized the proposed construction was unconstitutional. The court then ruled that the legislature was entitled to regulate land and provide for construction of roads in the interests of the common good, even when such developments interfere with property rights, monuments, and national sites that may have been sacred.

SNSs are gaining greater recognition at the international level. For example, at the fifth IUCN World Parks Congress in 2003, Recommendation V.13, entitled *Cultural and Spiritual Values of Protected Areas*, provided for the designation of sites of cultural value as "sacred areas," and these were given special protection. The Preamble to the 2003

[123] Native Title Act 1993*,* (cth), Act No. 110 of 1993 (Austl.).

[124] *See* S. Mascher, "The Australian Approach to Recognising the Land Rights of Indigenous Peoples: The Native Title Act 1993 (cth)," in N. Bankes and T. Koivurova (eds.), *supra* note 113, p. 323.

[125] E. Bernbaum, "Les montagnes sacrés", *Unasylva No.* 208, (2002), pp. 53, 54-55.

[126] P. Harbison, *Pre-Christian Ireland from the First Settlers to the Early Celts* (Thames & Hudson Ltd., London, 1988), p. 66 *et seq*.

UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage[127] confirms that: "…communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity." Of course, recognition is not tantamount to implementation, lending credence to the observation that "effective and culturally appropriate implementation is often still lacking".[128]

Apart from the recognition of SNSs indirectly under the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage,[129] it is possible to read into UNDRIP an explicit recognition of sacred places of indigenous peoples as an integral part of their culture.[130] Article 25 of UNDRIP provides that:

> Indigenous peoples have the right to maintain and strengthen their *distinctive spiritual relationship* (emphasis added) with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.[131]

Although the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No 169)[132] does not explicitly recognise SNSs, it does recognize and seek to protect social, cultural, religious and spiritual values and practices,[133] as well as the cultural and spiritual relationship of indigenous peoples to their lands and territories.[134] Also, article 27 of the ICCPR broadly recognizes an individual right of minorities to share cultural life with other members of their society.[135] This broad expression of minority rights entails a collective dimension, which by analogy helps support the culture-based claims of indigenous peoples.

At the regional level, decisions of the Inter-American Court of Human Rights (IACHR) are germane. For example, in *Mayagna (Sumo) Awas Tingni Community v Nicaragua,*[136] the IACHR stressed that the close ties of indigenous peoples with the land must be recognized and understood as the basis for their spiritual life. Similarly, in *Case of the Saramaka People v Suriname,*[137] the IACHR held that the Inter-American human rights

---

[127] Oct. 17, 2003, 2368 U.N.T.S. 3.

[128] *See* L. Heinämäki,and Th.M. Herrmann, "The Recognition of Sacred Natural Sites of Arctic Indigenous Peoples as a Part of Their Right to Cultural Integrity," 4 *Arctic Review on Law and Politics*, 2013, p. 207, 209.

[129] *Supra* note 126.

[130] L. Heinämäki, "The Nordic Sami Convention: The Right of a People to Control Issues of Importance to Them", in N. Bankes and T. Koivurova (eds.), *supra* note 113, p. 125. She also notes that the UN Declaration represents the first time that indigenous peoples have participated in the drafting of an international text on an equal footing with governments. She observes further that the status of indigenous peoples has been shifting, slowly but surely, from objects to subjects (p. 146).

[131] *Supra* note 26.

[132] *Supra* note 9.

[133] *Ibid*., article 5.

[134] *Ibid.,* article 13.

[135] L. Heinämäki, "The Protection of the Environmental Integrity of Indigenous Peoples, in Human Rights Law", XVII *Finnish Yearbook of International Law* (2006), pp. 1-46.

[136] Judgment of 31 August 2001, para 149.

[137] Judgment of November 28, 2007, para 95.

instruments protect the right of indigenous peoples to enjoy their spiritual relationship with the territory they have traditionally used and occupied. In other decisions such as *Case of the Yakye Axa Indigenous Community v Paraguay*,[138] *Case of the Plan de Sanchez Massacre v Guatemala*,[139] and *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*[140] – the IACHR has held that states have an obligation to protect indigenous territory as well as the relationship between indigenous communities and their lands and their resources, in order to preserve their spiritual life.[141] The IACHR thereby adopted an integrationist approach by balancing the interests of the state in economic development and the indigenous peoples' way of life. More than the UN human rights system, the IACHR's approach shows an endorsement of the customary norms of indigenous peoples as a primary means of strengthening their custodianship of SNSs against outside interference.

National governments have also supported indigenous claims to SNS. In the United States, for example, the Native American Graves Protection and Repatriation Act[142] establishes indigenous entitlement to ancestral burial sites. In Canada, through the Albanel-Témiscamie-Otish National Park Project, such cooperation brought the government of the province of Québec into partnership with the Cree First Nation of Mistissini, with the additional innovation that the Mistissini Cree Elders were vested with the authority to define the protected areas they considered sacred. In the arctic tundra of Nunavik, the Government of Quebec, in partnership with the Kativik Regional Government, created the Kuururjuaq National Park, which embraces the Caribou Heaven, an important spiritual site for the Naskapi First Nation.

In New Zealand, governmental protection of sacred landscapes of the Māori people has been evident especially in official acknowledgements and administration of sites.[143] The Māori people describe themselves as *tangata whenua*, that is, people of the land, thereby reinforcing the bond that they have with the land. Interestingly, this term is used for other indigenous people as well. Moreover, as Māori mythology attests, land is sacred.

In 1993 Tongariro National Park in the Central North Island, became the first of three New Zealand properties to be inscribed on the World Heritage list under the revised cultural criteria describing cultural landscapes. The volcanic mountains at the heart of the Park have cultural and religious significance for Māori and are acknowledged as embodying the spiritual links between the community and its environment. It has a range of landscapes from tussock to forests to lakes, a desert-like plateau, and active volcanoes. New Zealand rivers, too, are sacred landscapes. In an August 2014 settlement between the Crown and the Whanganui River iwi, the Whanganui River became a legal entity with legal standing, rights and an independent voice. This was to give expression to Māori belief that a river is a living entity from its source to the sea with the help of the local iwi inextricably linked with it.[144]

---

[138] Judgment of June 17, 2005.
[139] Judgment of November 19, 2004.
[140] Judgment of January 31, 2001.
[141] L. Heinämäki and Th.M. Herrmann, *supra* note 127, p. 223.
[142] *Supra* note 59.
[143] Heritage New Zealand Pouhere Taonga Act 2014, §6.
[144] *See* P. Davies and I. Peters, "Cultural Landscapes – Aotearoa/New Zealand," available at www.wwandd.co.nz.

The key volcanic cones of Auckland have been significantly modified, initially by Māori fortifications and later by housing that intruded up the slopes of the volcanic cones in the late nineteenth and twentieth centuries. In addition, an important issue has been what local tribe or tribes should have guardianship of the volcanic cones. The Ngāti Whaua o Orakei Hapū was initially recognised by the Crown as the sole guardian of the key volcanic cones, but this was disputed and taken as a matter of urgency to the Waitangi Tribunal, which is a type of truth-and-reconciliation forum to mitigate breaches by the Crown of the Treaty of Waitangi (1840) between the major Māori tribes and the Crown. After much discussion and negotiation, it was decided that the sacred volcanic cones should be administered by a body with six representatives each from the Auckland Council and the Tamaki Collective, a committee set up by Ngāti Whatua and other tribes and hapū that have land claims in relation to the Auckland area, and one Government representative. The new body took steps to limit excessive road access to the summit of the sacred Maungawhau (Mt. Eden), the highest volcanic cone.

VI. Recommendations

A. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), though not hard law,[145] establishes a commendable procedure of intercultural collaboration and a set of expectations concerning the protection of indigenous culture as well as land, and hence landscapes and even seascapes, of patrimonial importance to indigenous peoples. It cannot be the last word, of course. Article 31 of UNDRIP does not explicitly include the core concept of this Report -- *cultural landscapes* -- on its extensive list of cultural heritage phenomena. More specific and perhaps divergent initiatives at international, regional, national and local levels may eventually be helpful. For the time being, however, it may be wise to rely primarily on UNDRIP as a chosen instrument to shape general practices. Even in an age of legal pluralism and overlapping normative ordering (a description rather than prescriptive development, after all), the interests of indigenous peoples may be best served by universalizing and refining a single regime (UNDRIP) to provide an authoritative common language for protecting cultural landscapes and seascapes of significance to indigenous peoples. An obvious model for such an approach has been the Universal Declaration of Human Rights as a foundation for the progressive development of human rights law in all of its complexity today. Then, as empirical evidence accumulates about both the efficacy and limitations of an UNDRIP-based regime, modifications to it and entirely new initiatives will likely be in order.

B. The established principle of sustainability must guide the formulation of rules to protect cultural landscapes of significance to indigenous peoples and to resolve disputes among diverse stakeholders. Representatives of indigenous peoples must be allowed to participate in global initiatives, such as the preparation of the United Nations Sustainable Development Goals (SDGs 2030) and local efforts so as to take fully into account and apply the experience and contributions of these peoples in promoting harmony with the Earth. By the same token, the United Nations organs and agencies should integrate the emerging regime associated with this Report for protecting cultural landscapes of significance to indigenous peoples. Economic development that encroaches on or impacts such cultural landscapes necessitates careful risk management or assessment.

---

[145] *But see supra* note 34 (the ILA Resolution on the Rights of Indigenous Peoples acknowledges that some provisions of UNDRIP articulate customary international law).

C. The five distinct categories of cultural landscapes that the Report's typology proposes should structure the development of an effective international regime. Each category can be expected to generate its own normative variations.

D. The Aarhus Convention should be adopted as a model in requests to governing authorities for critical information that will enable interested parties to undertake good practices and collaborate effectively in making good choices concerning cultural landscapes based on risk assessment and sound policy. The limitations to access of information in the Aarhus model, however, should be modified to improve that access.

E. The UNESCO Operational Guidelines for the Implementation of the World Heritage Convention should be modified to require that all States Parties to the Convention obtain (as opposed to merely being encouraged to obtain) the informed consent of indigenous peoples as a condition for seeking inscription on the World Heritage List of a site traditionally belonging to an indigenous community.

James A.R. Nafziger, Chair
Margaret Beukes and Elina Moustaira,
Special Rapporteurs

COMMITTEE ON CULTURAL HERITAGE

WORKING SESSION

Wednesday, 10 August 2016, 9.00am

Chair: Professor Photini Pazartzis (Greece)

The Chair welcomed attendees to the session and noted that the Committee on Cultural Heritage Law was one of the longest standing committees in the ILA. The object of this session was to offer an opportunity for the attendees to make any final changes in the Committee's report and related draft resolution. The Chair of the Committee was invited to introduce and comment upon the agenda.

Professor James A R Nafziger (US), as Chair of the Committee, thanked the Session Chair and briefly summarised the work of the Committee in the 28 years since it had been first proposed. Its work product had included the preparation of two international conventions, a book, a law review symposium, three sets of guidelines and declarations, as well as numerous studies. One of these, on cultural landscapes significant to indigenous peoples, had been the Committee's primary focus during the past 2½ years. This project would conclude the Committee's work, as presently constituted. As one of the two oldest ILA committees, its mandate had been scheduled to expire in 2014 under the revised ILA rules, but it was then extended to enable the Committee to undertake the current study.

The agenda for this session included two items: a report on the first of the Committee's two international conventions concerning the underwater heritage, followed by a discussion of the current report and related draft resolution. Professor Nafziger noted that the second of the Committee's conventions, on immunities of cultural heritage on international loan from seizure and jurisdiction, had been completed only in 2014. It therefore was too recent to have generated any substantial considerations by States, general practice, or commentary. He then invited a Committee member, Mr Piers Davies (New Zealand), to present an update on the 2001 *UNESCO Convention on the Protection of the Underwater Cultural Heritage*, which was based on the Committee's 1994 Buenos Aires Draft Convention of the same name.

Mr Piers Davies (New Zealand) reported that 55 states had ratified the 2001 Convention. The last two ratifications were those of two African states, Ghana and Guinea. It was clear that South Africa's ratification had set an important precedent for the 14 African parties to the Convention. As to the ratification or accession by western European states, France's ratification in 2013 undoubtedly encouraged other states such as Belgium either to ratify the Convention or to accelerate the process of consideration leading to ratification. The Netherlands announced on 19 May 2016 that it would ratify the Convention, although no timeframe had been announced. Germany was also moving towards ratification. Elsewhere in the world, there were clusters of States parties around the Black Sea, on the southern rim of the Mediterranean Sea, and in the Caribbean area. Australia had started to review its historic shipwreck legislation as a first step towards ratification, but the process would take substantial time. New Zealand was unlikely to take any action until Australia has ratified the convention.

The rules for acceptable activity involving underwater heritage were set out in a detailed annex to the Convention. This annex was widely accepted as normative, even by State

that had not ratified the Convention such as the UK, the US, Australia and New Zealand. In the US, all of the federal agencies conducting activities in the marine environment had sent letters to the Society of Historical Archaeology pledging to follow the annex as a matter of practice and policy. The National Oceanic and Atmospheric Administration (NOAA) and the National Park Service (NPS) had entered into bilateral, non-binding agreements with Spain and the UK that incorporated the annex and other provisions consistent with the Convention. Courts in the US had ruled on issues related to the famous sunken vessel, the *RMS Titanic*, that were consistent with international law norms. World War I wrecks were all becoming subject to the Convention once its exclusion from coverage of heritage that had sunk more than 100 years ago no longer applied. Many of these wrecks were war graves. This development was of major political significance due to the large number of countries involved in the conflict and the numerous vessels and crews lost during World War I.

Professor Nafziger thanked Mr. Davies and introduced the other members of the Committee present. He had distributed to all attendees both an original Draft Resolution 3/2016 and a revised version with minor changes to reflect the formal requirements of the Conference Steering Committee. These documents would frame the concluding discussion in this session.

Professor Nafziger then introduced the report, 2½ years in preparation, on "The Law Pertaining to Cultural Landscapes Significant to Indigenous Peoples". In 2013, the Committee had decided during an intersessional meeting at Herlufsholm near Næstved, Denmark, to focus its work on the international legal dimensions of landscapes as cultural heritage. At the 2014 Washington Conference, the Committee had decided more specifically to prepare an exploratory, forward-looking report that focused on the interests of indigenous peoples.

Overall, the report was intended to provide a framework for further development of a pertinent regime in order to assist governments, international organisations, non-governmental organisations, business interests and, above all, indigenous peoples, in efforts to protect pertinent cultural landscapes, in all of their diverse manifestations, and resolve conflicts related to them. Assisting the governing authorities and other responsible institutions of indigenous peoples had been a fundamental objective of the project. A special effort had also been made to render the report accessible and understandable to the general public.

After the 2014 Washington Conference, Professor Nafziger had invited two Committee members, Margaretha Beukes (South Africa) and Elina Moustaira (Greece), to assist in the project. Committee members then contributed examples and commentary on the theme of the project within the purview of their national systems. In June 2015, the Committee and invited experts met for two days at Jerusalem's Rockefeller Museum to discuss a draft report. The report had gone through several subsequent drafts.

Professor Margaretha Beukes (South Africa) noted that cultural landscapes were a problematic issue in other disciplines such as environmental science and ecology, because their consideration of landscapes had largely ignored the cultural dimensions that were often of particular concern to indigenous peoples. The Committee's report offered a detailed typology that distinguished between different types of cultural landscapes. This

typology, accompanied by numerous examples, was intended to serve as a framework for differentiated regimes of protection. The concept of sustainable development was also essential, as was the principle of participation by indigenous peoples in decision-making and the development of a protective regime.

Professor Nafziger thanked Professor Beukes and invited commentary on the report.

Mr Thomas Adlercreutz (Sweden), a member of the Committee, noted a typographical error in the acronym for "free, prior and informed consent" and suggested rewording a related description of that principle of collaboration. These suggestions were then accepted. Professor Beukes explained that the principle had originated in Philippe Sands' work on procedural aspects of environmental law.

Professor Robert Paterson (Canada) added that the 1992 *Convention on Biological Diversity* was the only intellectual property convention that really addressed indigenous rights *per se*.

Mr Bruce Mauleverer QC (UK) expressed his delight to be present as a member of the Committee. It was worth noting that, in Olympic terms, the host country was a clear winner in this report in view of its rich cultural heritage in relevant landscapes. These landscapes included the Richtersveld Cultural and Botanical Landscapes, the Mapungubwe Cultural Landscapes, the UKhahlamba Drakensberg Park, and the famous Battlefield of Blood River. Mr Mauleverer also observed that the fact that the ILA as a whole and this particular Committee were meeting in a country imbued with such a rich culture and inhabited by indigenous people who rejoiced in their cultural landscapes was certainly worthy of celebration.

The Chair agreed, noting the report's reliance on examples of pertinent landscapes throughout the world.

Ambassador Ihor Turyanskiy (Ukraine) noted that the protection of culture was very important for many countries including Ukraine. Ukraine had always been at the centre of events on the historical and political maps of Europe, as a leading hub of trade and economic relations between West and East. It was a polyethnic State that had absorbed different cultures and had thereby developed a rich and diversified cultural heritage. The Ukrainian Constitution confirmed that the country's cultural heritage was clearly under the protection of the State. Ukraine also had become a party to several international instruments concluded under the auspices of UNESCO and the Council of Europe. Of UNESCO's 1034 World Heritage sites, seven were in Ukraine: the Saint Sophia Cathedral in Kiev, the Historical Centre in Lviv, the Residence of Archbishops of Bukovina and Dalmatia, the Struve Geodetic Arc, the wood churches of the Carpathian region of Ukraine and Poland, the KievPechersk Lavra, and the Ancient City of Tauric Chersonese and its Chora.

In 2015, the Government of Ukraine nominated 16 more sites for inclusion on the preliminary List of World Cultural Heritage. Five of these were in Crimea, which, along with Eastern Ukraine, was occupied by Russian forces. This situation had created a difficult problem in Ukraine's effort to protect sites. Therefore, Ukraine considered it necessary to strengthen international cooperation to protect world cultural heritage and thereby create legal mechanisms and actions to cover critical needs that were beyond the letter of its current law and of existing international law.

Ambassador Turyanskiy concluded his intervention by expressing his appreciation to the Committee and his hope that cultural heritage law would continue to be a focus of the ILA's work.

Professor Nafziger thanked Ambassador Turyanskiy and assured him of the broad support for future ILA projects focused on cultural heritage.

Mr Dipak Bhattacharyya (India) also expressed his support for the work of the Committee and future efforts by the ILA to develop the international law of cultural heritage. Although India had a national heritage law, its implementation relied on funding from UNESCO and efforts such as those of the ILA, given, for example, that the Indian government had done nothing to protect its cultural landscapes as such. He commended the Committee for its efforts to better define cultural landscapes significant to indigenous peoples. He then noted the distinction between natural and cultural landscapes, which, however, had become increasingly difficult to make.

Professor Mary Footer (UK) referred to the wording of the paragraph in the Committee's report that related to non-state actors, such as corporations, that threatened the rights of indigenous peoples regarding the protection of cultural landscapes. She indicated a need to clarify who was being held responsible for what when it comes to violations of those rights and the attribution of acts that might challenge the protection of cultural landscapes. She queried whether it was the State or the corporate which had the duty of due diligence. As to the ILA's continuing work on cultural heritage issues, which she enthusiastically supported, she drew on her similar experience with the Committee on International Trade Law, which had concluded its work at the 2014 Washington Conference after 22 years of work. What then emerged were two new committees. She observed that the theme of the Committee on Cultural Heritage Law was well suited to continuing with specific project-based committees. She endorsed the intent of this Committee as well as for all Committees in the future to undertake projects within defined periods of time instead of operating under an unlimited mandate, as had been the practice before the ILA's recently revised rules for the tenure of committees.

Professor Nafziger thanked Mr Bhattacharyya and Professor Footer for their cogent and helpful comments. He reiterated his hope and expectation that cultural heritage law would continue to be an important theme in the work of the ILA. Moreover, the presence of numerous Committee members at this session and their continuing commitment to the development of cultural heritage law would help insure an effective implementation of the recommendations in the Committee's report on "The Law Pertaining to Cultural Landscapes Significant to Indigenous Peoples".

Professor Beukes summarised the recommendations in the Committee's report. The paradigm of sustainability was essential to the development of an effective international regime to protect cultural landscapes significant to indigenous peoples. Also, an overarching requirement, which should encapsulate every single effort to protect landscapes, was an effective process for collaboration in the implementation of the recommendations involving the prior consent and participation of indigenous peoples. It was of no use to have only aspirations on paper. It was important for all stakeholders concerned about cultural landscapes to develop an understanding and appreciation of the ethos of indigenous people so as to move away from a traditional notion of "us" versus "them".

The Chair solicited further comments. Hearing none, Committee members then adopted the report and the Chair suggested that the session conclude with a consideration of the Committee's draft resolution.

After brief discussion, Committee members agreed on minor stylistic changes in the draft resolution that Professor Nafziger would discuss with the Conference Steering Committee.

The Chair and Professor Nafziger thanked the Committee members and other attendees for an amiable and productive discussion. The session concluded with strong support for the ILA's continuing attention to issues of cultural heritage law.

Reporters: Roxanne Barnard, Tahereh Fardin Tabrizi

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016[1])

INTERNATIONAL COMMERCIAL ARBITRATION

Members of the Committee:

Professor Filip De Ly (Netherlands): *Chair*
Professor Luca G Radicati di Brozolo (Italy): Co-Rapporteur
Mr Mark Friedman (UK): *Co-Rapporteur*

Judge Koorosh H Ameli (HQ)
Ms Louise Barrington (Hong Kong)
Professor Massimo Benedettelli (Italy)
Mr Denis Bensaude (France)
Alternate: M Alexis Mourre
Professor Karl-Heinz Boeckstiegel (Germany)
Alternate: Dr Norbert Wuehler
Hon. Charles Brower (USA)
Alternate: Professor Ved Nanda
Mr Christian Conejero (HQ)
Lord Collins of Mapesbury (UK)
Professor Talia Einhorn (Israel)
Mrs Teresa Giovannini (Switzerland)
Professor Julio Gonzalez Soria (Spain)
Mr Eduardo Grebler (Brazil)
Alternate: Ms Adriana Braghetta
Dr Horacio Alberto Grigera Naon (Argentina)
Professor Bernard Hanotiau (HQ)
Dr Mojtaba Kazazi (HQ)
Guy Keutgen (Belgium)
Alternate: Professor Michel Flamee
Dr Paul Key (UK)
Professor Richard Kreindler (Germany)
Mr Maciej Laszczuk (Poland)
Mr Barry Leon (Canada)
Alternate: Professor Janet Walker
Judith Levine (Australia)
Alternate: Jason Clapham
Mme Loretta Malintoppi (Italy)
Professor A F M Maniruzzaman (Bangladesh)
Mr Fernando Mantilla-Serrano (HQ)
Professor Koichi Miki (Japan)
Judge Gustaf Moller (Finland)
Alternate: Carita Wallgren-Lindholm
Professor Tetsuo Morishita (Japan)
Ms Sophie Nappert (UK)
Mr Philip O'Neill (USA)
Alternate: Professor Andrea Bjorklund
Mr Ucheora Onwuamaegbu (HQ)
Dr Georgios Petrochilos (Hellenic)
Professor Hilmar Raeschke-Kessler (Germany)
Alternate: Professor Burkhard Hess
Mr Klaus Reichert (Ireland)
Alternate: Louise Reilly
Dr Andreas Reiner (Austria)
Alternate: Dr Nikolaus Pitkowitz
Dr Jernej Sekolec (Slovenia)
Professor Christophe Seraglini (France)
Mr Audley Sheppard (UK: *Nominee of Chair)*
Dr Jose Soares-Machado (Portugal)
Alternate: Professor Mariana Franca Gouveia
Professor Ole Spiermann (Denmark)
Mr Damian Sturzaker (Australia)
Professor Yasuhei Taniguchi (Japan)
Professor Louise Ellen Teitz (USA)
Alternate: Professor Paul Dubinsky
Mr Joe Tirado (UK: *Nominee of Chair*)
Dr J J barones van Haersolte-van Hof (Netherlands)
Professor Ruth Wedgwood (USA)
Professor David Williams QC (New Zealand)
Advokat Tore Wiven-Nilsson (Sweden)
Alternate: Mr John Kadelburger
Ms Rabab Yasseen (Switzerland)

---

[1] This the same report as in 2014 except for the final part: "Part IV Findings and Recommendations".

REPORT FOR THE BIENNIAL CONFERENCE IN WASHINGTON D.C. APRIL 2014

I. INTRODUCTION

At the International Law Association's Biennial Conference in The Hague in 2010, the Committee on International Commercial Arbitration was mandated to study the topic of the inherent powers of arbitrators in international commercial arbitration. As the project developed and expanded, the Committee felt it appropriate to consider also the notion of implied powers and its relation to inherent authority, as well as arbitral discretion. Hence, reference will be made to inherent and implied powers throughout this Report. The Committee presented on this topic at the Biennial Conference in Sofia in August 2012, with an aim to present a final report and recommendations at the Biennial Conference in Washington, D.C., in April 2014. This is the final Report prepared under this mandate.

A. General Description of the Topic

Party agreement to arbitrate is the foundation of every international commercial arbitration. However, arbitrators are sometimes confronted with situations that are not addressed by either the parties' arbitration agreement or the applicable curial law and rules. What, if any, powers do the arbitrators have to deal with those situations? What is the source of those powers? What is the limit of them?

Within the arbitration community there appears to be a general, albeit diffuse, understanding that arbitrators in international commercial cases – in addition to their expressly enumerated and defined powers – enjoy some measure of inherent or implied powers. Parties cannot be expected to have anticipated every possible contingency in their arbitration agreement. After all, arbitration agreements are typically prepared long before a particular dispute crystallized; indeed, they are most often adopted at the time of contracting, when possible future disputes may seem unlikely and remote. Moreover, it would not be sensible, efficient, or commercial to require parties to attempt to provide express directives for every possible contingency that might arise in arbitration; the arbitration clause would become so complex and unwieldy that parties would hardly ever agree to arbitrate at all.

Instead, the parties typically draw the contours of the arbitral procedure and otherwise leave it up to the arbitrators and counsel to fill in much of the detail when a dispute has arisen. The arbitration laws of many countries, as well as various sets of rules commonly used in international commercial arbitration, recognize this and expressly afford arbitrators discretion over procedural questions not otherwise decided by the parties. Arbitrators acting in such jurisdictions or operating under such rules may cite this general grant of the discretionary power as giving them the authority necessary to flesh out procedural lacunae. But few would contend that arbitrators would be hamstrung in the absence of such provisions, unable to make the procedural judgment calls necessary to fulfill their adjudicative mandate. Instead, when faced with a situation for which the arbitration agreement and rules do not provide an answer, arbitrators might act on the basis of some power that is inherent or implied.

To take a very modest example, the parties typically will not empower the arbitrators to conduct a hearing on a day that is a public holiday at the seat of the arbitration, but most

people would agree that the arbitrators have the power to do so. In this sense, arbitrators routinely exercise a form of inherent or implied authority. They make concrete decisions based on only a general and imprecise grant of power. They fill in the gaps. That is what parties largely expect arbitrators to do: to exercise the authority implied by their mandate to enable them to manage and decide a dispute within the parameters provided.

Actions taken in the absence of explicit authority, however, carry a greater risk of running afoul of the parties' expectations when they extend beyond procedural questions, to more challenging and controversial matters that may fundamentally affect the outcome of the dispute. Indeed, the doctrine of inherent powers is invoked most often to deal not with routine matters of procedure but with challenging and unforeseen circumstances that implicate the integrity of the arbitral process itself. For example, in recent international investment cases, arbitrators have invoked such powers to exclude counsel chosen by a party from appearing at a hearing and to impose the costs of arbitration on a party found to have acted in bad faith where the parties' agreement provided for the sharing of costs.

Defining the scope of arbitrators' non-enumerated powers—or, at a minimum, developing a framework for understanding when they may be properly employed—is essential because a wrongful exercise of authority can have harmful consequences to the success and finality of arbitral proceedings. Arbitrators presented with novel problems that they resolve via recourse to implied or inherent powers may be challenged for bias by a disadvantaged or losing party. An exercise of authority attacked as improper at the setting aside or enforcement stage of proceedings risks imperiling the fate of a tribunal's award, if it is deemed to constitute a violation of due process or an act beyond the tribunal's jurisdiction.[2] These concerns, however, beg the question, insofar as it remains uncertain how, in the absence of a coherent jurisprudence on inherent powers, a reviewing court should determine whether arbitrators have exercised a power they inherently possess or have overstepped the bounds of their authority.

Despite the evident importance of understanding the proper limits of a tribunal's authority, the definition of and conceptual basis for inherent and implied powers, and the principles that may at once animate and constrain them, has not been carefully developed in the context of international commercial arbitration. Though regrettable, this is not surprising given the difficulty of such an analysis: insofar as every commercial arbitration is a unique product of a series of choices, each of which separately shapes the rules and laws that govern the conduct of proceedings, it is impossible to produce a universal catalogue of inherent and implied powers, with clear instructions on when they may be properly employed. The non-public nature of many arbitral awards adds to this challenge. Moreover, when challenged before national courts, commercial awards are more often criticized as falling outside of a tribunal's jurisdiction rather than as evidencing an improper exercise of implied or inherent powers *per se*.

---

[2] For example, the New York Convention contemplates that it is proper to refuse recognition and enforcement of all or part of an award upon proof that "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Art. V(1)(c); see also, e.g., UNCITRAL Model Law on International Commercial Arbitration (2006) ("UNCITRAL Model Law"), Art. 36 (circumscribing the grounds for refusing the recognition or enforcement of an award).

While understandable, the absence of clear guidance on the topic risks leaving parties and arbitrators adrift when confronted with difficult situations for which the parties' agreement or the arbitral rules provide no roadmap. In this Report, the Committee attempts more systematically to explore the notion of inherent and implied powers and to offer some guidance for their exercise in the international commercial arbitration context. In doing so, the Report raises a number of potentially controversial questions about the potential scope of a tribunal's power and the manner in which its implied or inherent powers might be exercised. Such questions are intended not to encourage or discourage invocation of implied or inherent powers but to prompt careful thought and consideration about the types of difficult issues tribunals might face. It is hoped that the Report will provide a conceptually satisfactory yet practical framework for thinking about inherent and implied powers, which will in turn assist parties in structuring their arbitration agreements, arbitrators in addressing problems for which the textual sources before them offer no pre-determined solution, and courts in reviewing arbitral awards.

B. Outline of the Report

Section II begins with an overview of the origin of inherent and implied powers, as they developed principally in the common law legal tradition and then migrated into international arbitration. The Report then discusses the various situations and circumstances where such powers may be relevant to international commercial arbitration, based on analogues drawn primarily from the investment dispute context. In Section III, the Committee proposes definitions and classifications regarding inherent and implied powers of arbitral tribunals as well as a framework for analyzing these powers in international commercial arbitration. Finally, Section IV sets out the Committee's findings and recommendations on the topic.

The Committee held six meetings to discuss the preparation of this Report and Recommendations.[3] It has widely surveyed the relevant literature and has received reports from several Committee members on the topic.[4] This Report expresses the consensus of the Committee; it does not necessarily and in all respects reflect the personal views of the chair, the rapporteurs, the individual members of the Committee, or the other lawyers who participated in the preparation of this text.

II. THE PRACTICE OF INHERENT AND IMPLIED POWERS

A. The Origin of Inherent and Implied Powers

The notion of inherent and implied powers has its origin in domestic common law courts, where its emergence can be traced back several centuries. The concept of inherent powers as a source of judicial power emerged first in England, where early judges, serving as the king's personal representatives, enjoyed substantial discretion in exercising the royal

[3] Committee meetings on this project were held in Geneva in May 2011; Dubai in November 2011; Stockholm in March 2012; and Paris in May 2012, May 2013, and February 2014. The Chairman and Rapporteurs are grateful to all those members who contributed to the Committee's work, attended the meetings, and submitted comments.

[4] Country reports were received from Committee members on the laws of Australia, Austria, Brazil, Canada, England, France, Hong Kong, Italy, Portugal, Sweden, and Switzerland.

prerogative to do justice.[5] Over time, as courts gradually developed greater autonomy and "judges' allegiance shifted from the king to the law, certain powers that had originated in the royal prerogative came to be seen as inherent characteristics of a 'court.'"[6]

Initially, the powers asserted as "inherent" were most often tied to the court's need to punish misconduct, protect against the abuse of process, and ensure its jurisdiction. As early as 1885, such authority was already well-established, as observed by Lord Blackburn when he commented that "from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds."[7] Pursuant to their inherent powers, courts have also long punished contempt, arranged the conduct of court business, and fashioned informal rules to regulate their proceedings.[8]

With the spread of the English common law system also spread the notion of inherent and implied powers. In the United States, courts saw their powers constricted in the immediate aftermath of the Revolutionary War,[9] but the federal judiciary established under the new Constitution quickly reasserted its authority as a judicial body to exercise power by implication. In the seminal 1803 case of *Marbury v. Madison*,[10] the United States Supreme Court inferred that it possessed the power to override laws it deemed unconstitutional.[11] Reasoning that it was the "very essence of judicial duty" to assess which rule should govern when two conflict,[12] the Court concluded that it could not, via a grant of statutory authority, exercise jurisdiction beyond the limits set by the Constitution.[13] The Court's determination that it possessed the power of judicial review, implied from the existence of a written Constitution that the judiciary was sworn to uphold, has had profound implications on the U.S. constitutional system. It was not until nearly a decade later, however, that the Court first made explicit reference to the judiciary having implied powers, when it observed, in *dicta*, that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution."[14] It found such "necessary" powers to include the authority to fine for contempt, imprison for contumacy, and to enforce its orders.[15]

Over time, common law courts began to invoke a wider breadth of authority under the mantel of inherent or implied powers. Today, inherent powers are routinely referenced to support a variety of claimed powers throughout numerous jurisdictions, including Australia, Canada, Singapore, and New Zealand, in addition to the United States and

---

[5] See the seminal article of I.H. Jacob, "The inherent jurisdiction of the Court", [1970] CLP 23 ff. and Robert J. Pushaw, Jr., "The Inherent Powers of Federal Courts and the Structural Constitution," *Iowa Law Review*, Vol. 86, 799–806 (2001).

[6] *Id.* at 810.

[7] *Metropolitan Bank Ltd. v Pooley*, (1885) 10 App. Cas. 210, 220–21 (Lord Blackburn).

[8] Pushaw, *supra* note 4, at 810–13.

[9] *Id.* at 821–22 (discussing the "weak and dependent" courts established under the Articles of Confederation).

[10] 5 U.S. (1 Cranch) 137 (1803).

[11] *Id.* at 178.

[12] *Id.*

[13] *Id.* at 176–79.

[14] *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

[15] *Id.*

the United Kingdom.[16] "These courts have variously invoked inherent powers to make rules of court and practice directions, to prevent abuse of the court's process, to remand cases involving pendent claims, to stay proceedings, to correct any injustice caused by an earlier order, … to allow the admission of evidence," and in myriad other situations.[17]

In recent decades, the notion of inherent powers has migrated from the common law tradition into the practice of international courts and tribunals, where they are conceived of in a manner that largely mirrors the domestic context. The Iran-U.S. Claims Tribunal, for example, has defined the inherent powers of arbitral tribunals as "those powers that are not explicitly granted to the tribunal but must be seen as a necessary consequence of the parties' fundamental intent to create an institution with a judicial nature."[18] Similarly, inherent powers may be viewed as the "logical corollary of the judicial nature of such organs and of their duty to ensure a sound administration of justice."[19] The source of this authority has been traced to international courts' need to safeguard their jurisdiction, conserve the rights of the parties, and fulfill their functions as adjudicative bodies.[20]

International tribunals today are widely recognized to possess inherent and implied powers. Indeed, their acceptance is so common that, for example, "there have been no challenges to the appropriateness of inherent powers *per se* in ICSID arbitration."[21] Given the sparse nature of these bodies' constitutive instruments relative to the more elaborate laws and procedural rules of domestic courts, inherent and implied powers arguably have greater relevance in the international context,[22] and it is not surprising that they have been used in a broad variety of circumstances.

---

[16] Chester Brown, "The Inherent Powers of International Courts and Tribunals," *British Yearbook of International Law*, Vol. 76, No. 1, 195, 205 (2005). A similar doctrine of inherent powers does not exist, as such, in the civil law tradition. In civil law jurisdictions, procedural law derives primarily from constitutional law and statutes. However, "the exercise by courts of jurisdictional powers which are not expressively provided for in legislation or statutory rules is not unknown in civil law countries." *Id*. at 206 & n.71.

[17] *Id.* at 205–06.

[18] *Islamic Republic of Iran v. United States of America*, IUSCT Cases Nos. A3, A8, A9, A14 and B61, Decision No. DEC 134-A3/A8/A9/A14/B61-FT, ¶ 59 (1 July 2011) (quoting David D. Caron, et al., *The UNCITRAL Arbitration Rules – A Commentary*, 915 (Oxford 2006) (internal quotation marks omitted)).

[19] Paola Gaeta, "Inherent Powers of International Courts and Tribunals," in Lal Chand Vohrah, et al. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, 353, 364–65 (Kluwer 2003).

[20] *See Islamic Republic of Iran*, *supra* note 17, ¶ 59 (citing Brown, *supra* note 15, at 228; *E-Systems, Inc. v. Iran*, IUSCT Case No. 388, Award No. ITM 13-388-FT (4 Feb. 1983).

[21] Martin Paparinskis, "Inherent Powers of ICSID Tribunals: Broad and Rightly So," in Ian Laird and Todd Weiler (eds.), *Investment Treaty Arbitration and International Law*, 9 (Juris Publishing 2012). For the view that inherent powers are also established in the international commercial arbitration context, see Robert Wachter, "Chapter II: The Arbitrator and the Arbitration Procedure: On the Inherent Powers of Arbitral Tribunals in International Commercial Arbitration," in Christian Klausegger, et al. (eds.), *Austrian Yearbook on International Arbitration*, 65–83 (Manz'sche Verlags – und Universitätsbuchhanlung 2012).

[22] *See* Abba Kolo, "Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal," in *Arbitration International*, Vol. 26, No. 1, 61 (LCIA 2010) ("Indeed, the possession of inherent powers is more pertinent with respect to international courts and tribunals, which operation in a 'decentralised

The limited availability of published jurisprudence from international commercial arbitrations makes it difficult to trace the degree to which inherent or implied powers have been called upon in that specific context. However, the widespread diffusion of national arbitration laws that give arbitrators substantial discretion over proceedings suggests that there exists a general recognition that arbitrators cannot carry out their mandate absent some authority to fill in gaps left unaddressed by party agreement. Indeed, common law and civil law jurisdictions alike have enacted national arbitration laws that afford arbitrators considerable flexibility in overseeing arbitral procedure.[23] These laws echo the approach embraced in the UNCITRAL Model Law, which confers upon parties the right to agree on arbitral procedure but otherwise gives the tribunal discretion to "conduct the arbitration in such manner as it considers appropriate."[24]

As the general authority of arbitrators to oversee proceedings has gained greater recognition, parties have come to view as routine actions by arbitral tribunals that, just decades ago, would likely have sparked debate or controversy. Before interim relief and document production were widely embraced by international arbitration, for example, few would venture to argue that arbitrators possessed a general power to grant provisional measures or order the production of documents. Today such authority is likely to be assumed, even if not explicitly provided for by the underlying arbitration agreement or applicable arbitral rules. To take another salient example, the *competence-competence* doctrine, now considered a central tenet of international commercial arbitration, did not historically enjoy universal recognition. In the early days of international arbitral practice, parties may have disputed the notion that a tribunal could assess its own jurisdiction on the basis of its inherent or implied authority.

Somewhat paradoxically, as certain arbitral powers have become so common in modern arbitration practice that they might now be considered inherent or implied, they have also increasingly found concrete expression in arbitral laws or rules and have, thereby, become explicit powers. As noted above, many national jurisdictions have passed laws that confirm that arbitrators enjoy a general authority to shape proceedings. Similarly, the principle of *competence-competence* has been enshrined in arbitration rules,[25] and the arbitration community has developed opt-in rules for document production.[26] As such practices become more common and accepted through the spread of laws and rules, they are increasingly viewed as naturally falling within the scope of arbitral power.

---

legal system', lacking a law-making body and judicial precedent, as obtained in the domestic legal systems."). *Cf.* Gaeta, *supra* note 18, at 365 (observing that the doctrine of inherent jurisdiction of the Court originated in common law countries in order to supplement the paucity of statutory provisions on procedural matters).

[23] Reports from the Committee members practicing in jurisdictions as diverse as Austria, Australia, Brazil, Canada, England, France, Hong Kong, Italy, Portugal, and Sweden have confirmed that, under the laws of those jurisdictions, arbitrators enjoy fairly broad discretion over arbitral proceedings. The enactment, in civil law jurisdictions, of provisions that explicitly endow arbitrators with discretion may be seen as reflecting an accommodation between the civil law notion, from the Rechtsstaat theory of law, that any legitimate exercise of state power must be grounded in a legal provision and the practical need for flexibility in arbitration.

[24] UNCITRAL Model Law, *supra* note 1, Art. 19.

[25] *See*, *e.g.*, UNCITRAL Arbitration Rules (1976), Art. 21.

[26] IBA Rules on the Taking of Evidence in International Arbitration (2010), Art. 3.

Arbitrators who creatively employ inherent or implied powers to achieve efficient and successful outcomes may take some comfort from the fact that actions previously perceived as novel have now become integral to the fabric of international commercial arbitration, and have even been given express incorporation into arbitral rules. However, when tribunals justify contentious decisions by mere reference to implied or inherent authority, they risk acting beyond the scope of the parties' agreement, to the potential detriment of the arbitral process. The use of inherent and implied powers in international arbitration thus merits reflection and examination.

B. The Diverse Application of Inherent and Implied Powers

When asked by the parties to act or intervene on a particular issue, an international commercial arbitral tribunal's first point of reference must always be the relevant sources governing the arbitration, namely the arbitration agreement, any arbitration rules, and the applicable curial law. A tribunal is uniquely shaped by the circumstances under which it is constituted, and the inherent or implied powers it may properly exercise will depend upon the distinct configuration of direction and autonomy produced by the parties' choices. While a tribunal overseeing a dispute governed by sophisticated arbitral rules and detailed curial law may find textual support for a particular action it sees fit to take during the course of an arbitration, another tribunal—operating without similar instruction and guidance in the same measure—might need to predicate the very same action on its implied or inherent authority. A third tribunal, by contrast, may find that same action prohibited by the parties' arbitration agreement or the set of rules governing its arbitration. It is thus neither possible nor useful to compile a universal list of inherent or implied powers to which parties or arbitrators may turn for guidance.

In order to gain a thorough understanding of the potential utility and outward limits of inherent and implied powers, the Committee has thus considered in what circumstances an international commercial arbitral tribunal—if not otherwise advised or constrained—might be permitted to act on the basis of its inherent or implied authority, and has sought to categorize these powers based on the function or objective that they serve to achieve.

Recognizing that the decisions of each tribunal are highly contextual and may not be applied mechanically in superficially analogous situations, the Committee has nonetheless found it helpful to examine and reflect upon the reasoning employed in various publicly-available awards rendered on the subject. It has drawn, in particular, from the decisions of international investment tribunals, the International Court of Justice, and ad hoc arbitral bodies.[27] The confidential nature of most international commercial arbitrations makes the "jurisprudence" developed by such cases inaccessible. The public decisions of other international tribunals are the best available proxy for studying the application of inherent and implied powers in international disputes. While there are important differences between commercial arbitration and other international fora, the differences—at least those between commercial arbitrations and investment arbitrations—by and large do not appear to be material to the present inquiry. At a basic level, all of these processes offer a consent-based form of binding dispute resolution achieved via an adjudicatory process. Whether it involves the adjudication of an investor-State dispute under a treaty and governed by international law or an international commercial dispute under a contract

[27] The Committee has also drawn from decisions of reviewing courts, where available.

and governed by the law of a particular state, arbitration represents a consensual process whereby the parties' elections afford jurisdiction and define its contours.

In extrapolating from examples that have arisen in the investment context to think about what issues may arise in a commercial context, however, there is one caveat to keep in mind. Arbitrators in commercial settings will likely be presented with more concrete and well-developed law than are arbitrators adjudging investment disputes. Commercial arbitrators must, therefore, be carefully attuned to any limits that the substantive law of the dispute, or the law of the place of arbitration or likely enforcement, may place on their exercise of inherent or implied powers, which may vary from those outlined below.

1. Powers Relating to Procedure

Tribunals routinely make decisions relating to the conduct of procedure that— where not explicitly contemplated or prohibited by the arbitral rules or curial laws before them— might be permissible exercises of their implied or inherent authority as quasi-judicial actors. These include determining the seat of arbitration, allowing *ex parte* proceedings,[28] bifurcating proceedings,[29] and facilitating or mediating settlement. Depending on the circumstances, arbitrators may have the inherent or implied authority to establish rules for the conduct of hearings and to fix the forms of argument permitted (i.e., written or oral). Such exercises of authority, readily viewed as incidental to the adjudicatory function of tribunals, are often exercised without debate or serious question.

Arbitrators also have a degree of discretion with regard to the admission, exclusion, and consideration of evidence. Arbitral rules often explicitly provide for the exercise of judgment by arbitrators in deciding what evidence they are to credit. However, "[e]ven when inherent powers are not invoked expressly to deal with evidentiary matters, reliance on comparative and functional analysis to flesh out necessary procedural powers supports the view that the intellectual operation that the Tribunals are engaged in relates to inherent powers."[30] For example, in *Methanex Corporation v. United States of America*,[31] the tribunal made reference to the UNCITRAL Rules and the discretion they afford over evidentiary matters in deeming inadmissible documents that Methanex had obtained via trespass onto private property and rummaging through dumpsters.[32] But the tribunal's

[28] In the Australian case of *Benedetti v Sasvary* [1967] 2 N.S.W.R. 792, for example, the court found that the nature of the office of the arbitrator authorizes arbitrators to proceed *ex parte* for good cause and that it was in the arbitrator's discretion to decide whether they had cause for doing so. *Id.* at 799.

[29] *See*, *e.g.*, Massimo Benedettelli, "To Bifurcate or Not to Bifurcate? That is the (Ambiguous) Question," *Arbitration International*, Vol. 29, No. 3, 505 (LCIA 2013) ("Even where not expressly mentioned, the power to split the proceedings in different phases, each finalized to the rendering of a decision on a discrete matter, may be considered 'inherent' to the judicial function performed by the arbitral tribunal."). However, as Benedettelli acknowledges, *id.* at 505 n.40, enforcement of an award has been refused where bifurcated proceedings, not provided for in the applicable arbitration rules and unacceptable to one of the parties, were found not to accord with the parties' agreement. *See* A.J. van deen Berg, "Why Are Some Awards Not Enforceable?," in A.J. van den Berg (ed.), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, Vol. 12, 302–03 (Kluwer Law International 2005).

[30] Paparinskis, *supra* note 20, at 23.

[31] *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (3 Aug. 2005).

[32] *Id.*, Part II, Chapter I, ¶¶ 53–60.

analysis gave equally significant or greater weight to considerations of good faith, the duty of which it noted was "incumbent on all who participate in international arbitration, without which it cannot operate."[33] Thus, although that tribunal did not need to justify its conduct by reference to inherent or implied authority, its reasoning suggests that another tribunal, operating without the benefit of the UNCITRAL Rules, might be able to reach the same conclusion on that basis.

It has also been argued that tribunals have an inherent power to permit non-party participation in arbitration. In *Aguas Provinciales v. The Argentine Republic*,[34] the tribunal denied the request of a would-be *amicus curiae* to attend arbitral proceedings where the request was predicated on the tribunal's inherent powers over procedure. Agreeing with the petitioner that the tribunal possessed "certain inherent powers with respect to arbitral procedure," it concluded that "it had no authority to exercise such power in opposition to a clear directive in the Arbitration Rules, which both Claimants and Respondent have agreed will govern the procedure in this case."[35] ICSID Arbitration Rule 32(2) conditioned the arbitrator's discretion over the attendance of non-parties on the consent of the parties, which was absent in that case.[36]

Interestingly, however, the tribunal considered the would-be *amicus*'s petition to submit a "friend of the court" brief over Claimant's objection.[37] In doing so, the tribunal referenced its grant of residual power under Article 44 of the ICSID Convention, which directs a tribunal to decide any question of procedure that arises outside of the agreed-upon rules of the arbitration and has been described as "provid[ing] explicit legal basis for the exercise of inherent powers that have not been already spelled out."[38] Using a multi-factor test drawn from its review of the practices of other jurisdictions and fora, the tribunal determined that the conditions for admission of the brief were not met in the circumstances of the case.[39] While the tribunal did not, therefore, admit the brief over a party's opposition, it did raise the prospect of such an eventuality. One wonders if, under the mantle of such "residual" or inherent power, a tribunal might determine, in a different context, that an amicus brief should be admitted over the objections of both parties. Would such a decision align with the concept of party autonomy? If this is a possibility, what other powers might a tribunal elect to exercise on the basis of its inherent powers of procedure?

2. Power to Issue Interim Relief

Tribunals have long maintained their inherent or implied authority to grant interim relief in order to protect their jurisdiction, even though the arbitral rules often expressly provide for such authority. In 1963, Judge Sir Gerald Fitzmaurice observed, in his separate

---

[33] *Id.*, Part II, Chapter I, ¶ 58.

[34] *Aguas Provinciales de Santa Fe S.A., Suez Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae* (17 Mar. 2006).

[35] *Id.* ¶ 7.

[36] *Id.* ¶¶ 6–7.

[37] *See id.* ¶¶ 9–34.

[38] Paparinskis, *supra* note 20, at 9.

[39] *Aguas Provinciales*, *supra* note 33, ¶ 34.

concurring opinion in *Case Concerning the Northern Cameroons*[40] that the Court possesses a "preliminary or 'incidental' jurisdiction" to decree interim measures of protection, admit counterclaims or third party-interventions, and take similar actions that "it can exercise in advance of any determination of its basic jurisdiction as to the ultimate merits."[41] Such authority was noted to inhere in the court's judicial nature:

> Although much (though not all) of this incidental jurisdiction is specifically provided for in the Court's Statute, or in the rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court—or of any court of law—being able to function at all.[42]

In cases following this *dictum*, tribunals have repeatedly cited their inherent powers to justify grants of interim relief, often in the context of addressing a party's out-of-court conduct that has the potential to interfere with arbitral proceedings.

In a case before the Iran-U.S. Claims Tribunal, *E-Systems, Inc. v. Iran*,[43] the claimant filed a motion to compel dismissal or a stay of proceedings that had been initiated in an Iranian court. After determining that Iran was free to initiate the subject claims in a domestic forum even though it could have brought them as arbitration counterclaims, the tribunal requested that Iran seek a stay of the Iranian case pending completion of arbitral proceedings. It based its authority for such action on its "inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective."[44] Noting that its award would prevail over inconsistent decisions rendered by the domestic courts of Iran or the United States, the tribunal resolved that a stay of proceedings was necessary in order "to ensure the full effectiveness of the Tribunal's decisions."[45] Relying in part on that decision, the tribunal in *RCA Globcom v. Iran*[46] similarly found a stay of domestic proceedings to be an appropriate form of interim relief, notwithstanding respondent Ministry of Defense's contention that it was beyond the scope of discretion afforded the tribunal under the applicable rules.[47]

Tribunals constituted under the ICSID Rules have similarly relied on their inherent powers to grant interim relief, often in contexts touching on a concern for the integrity of some aspect of proceedings. In *Quiborax S.A. v. Bolivia*,[48] the tribunal issued an interim measure to stop criminal proceedings threatening the claimant's right to present its case by obstructing access to potential witnesses and documentary evidence. The tribunal had "no doubt that it [possessed] the power to grant provisional measures to preserve the procedural integrity of the ICSID proceedings, in particular the access to and integrity

---

[40] *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, 1963 I.C.J. 15 (2 Dec. 1963).
[41] *Id.* at 103.
[42] *Id.*
[43] *E-Systems, Inc.*, *supra* note 19.
[44] *Id.*
[45] *Id.*
[46] *RCA Globcom Communications, Inc. v. Iran*, IUSCT Case No. 160, Award No. ITM 29-160-1, Interim Award (3 Oct. 1983).
[47] *Id.*
[48] *Quiborax S.A., Non Metallic Minerals S.A. and Alla Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 Feb. 2010).

of evidence."[49] In *EDF v. Romania*,[50] the tribunal banned, among other actions, the unauthorized disclosure of documents produced during the proceedings.[51] It based its order on the power conferred by applicable arbitration rules and "the inherent power of the Tribunal to take steps to prevent the exacerbation of the dispute and to maintain the integrity of the arbitral process."[52] Similarly, in *Biwater Gauff v. Tanzania*,[53] the tribunal issued an interim measure forbidding the parties from disclosing to third parties documents concerning the arbitration. It predicated this action on its responsibility to "ensur[e] that the proceedings will be conducted … in a regular, fair and orderly manner (including by issuing and enforcing procedural directions to that effect)."[54]

These decisions impose restrictions on parties' actions that may be justified based on their having consented to arbitration, a process that entails certain rules and an obligation to participate in good faith. But at what point does a tribunal's interim order risk unduly infringing on the autonomy of parties to act beyond the boundaries of the arbitration? For example, where the parties' agreement provides for full publication of all arbitral briefs and decisions, could a tribunal override that condition on the basis of its inherent powers, if it determines that the integrity of proceedings might be jeopardized by the risk of potential media frenzy?

3. Powers Related to Decision-Making

In relation to the decision of the dispute, the notion of implied or inherent powers may come into play in the context of a tribunal's deciding its jurisdiction, deeming certain issues as irrelevant or moot at interim stages of the arbitration, awarding declaratory or injunctive relief,[55] applying the law, investigating or taking of evidence *ex officio*, or summarily dismissing a case. In *Rio Grande Irrigation and Land Company, Limited (Great Britain) v. United States*,[56] the United States-United Kingdom Mixed Claims Commission considered, over an objection, a motion to dismiss on grounds that, as a matter of law, the claimant had no valid interest on which to predicate its claim. The claimant objected to the motion on the basis that "a preliminary motion of this character was not contemplated by or provided by the rules or any of the instruments controlling the Tribunal."[57] Viewing the issue as one of jurisdiction, the tribunal held that, "[w]hatever the proper construction of the instruments controlling the Tribunal or of the rules of procedure, there is inherent in this and every legal Tribunal a power, and indeed a duty, to entertain, and, in proper

---

[49] *Id.* ¶ 141.

[50] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 2 (30 May 2008).

[51] Id. ¶ 54.

[52] Id.

[53] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/02/22, Procedural Order No. 3 (29 Sept. 2006).

[54] Id. ¶ 145.

[55] Courts in Australia have found that arbitrators enjoy an implied power to order declaratory and injunctive relief under the same circumstances that it might be available in a court. See Cufone v Cruse [2000] SASC 304; Electra Air Conditioning BV v Seeley International Pty Ltd [2008] FCAFC 169.

[56] Rio Grande Irrigation and Land Company Limited (Great Britain) v. United States, Award (28 Nov. 1923), reprinted in 1990(IV) RIAA 131.

[57] Id. at 135.

cases, to raise for themselves, preliminary points going to their jurisdiction to entertain the claim."[58] It observed that this power "is inseparable from and indispensable to the proper conduct of business" and granted the motion.[59] Similarly, the ICSID tribunal in *Siag v. Egypt*[60] entertained new challenges to jurisdiction after having already issued an award on the matter, under its inherent power "to deal with any issues necessary for the conduct of matters falling within its jurisdiction."[61] It found this power to exist "independently of any statutory reference" and to be a broader expression of the tribunal's "inherent power to take measures to preserve the integrity of the proceedings."[62] In order to ensure continuity and fairness, however, the tribunal did not suspend its proceedings pending its consideration of the objections.[63]

Inherent powers may also be pertinent to arbitrators' ability to grant relief, award damages, and apportion costs. For example, the tribunal in the *Case Concerning the Rainbow Warrior Affair*[64] stated that "[t]he authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and which continues to be in force."[65] With respect to damages, the Iran-US Claims Tribunal noted nearly thirty years ago that it was already "customary for arbitral tribunals to award interest as part of an award for damages."[66] It found the power to award interest "inherent in the Tribunal's authority to decide claims," such that "the exclusion of such power could only be established by express provision."[67] The tribunal in *Vivendi v. Argentina*[68] confirmed that liability for interest remains "an accepted legal principle."[69]

It does not appear, however, that arbitrators possess the inherent power to issue binding arbitrator fee awards, enforceable against parties who do not pay. Assessing an interim award issued by an arbitral tribunal constituted under the Swiss Rules of International Arbitration, the Swiss Supreme Court expressly determined that the weight of scholarly opinion was against the position that arbitral tribunals have the power to issue a binding decision on fees owed under the arbitrators' agreement. It found the outcome justified "by the fact that claims arising from the relationship between the parties and the arbitrators do

---

[58] Id. at 135–36.

[59] Id. at 136, 138.

[60] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award (1 June 2009).

[61] Id. ¶ 366.

[62] Id.

[63] Id.

[64] Case Concerning the Rainbow Warrior Affair (New Zealand v. France), Award, (30 Apr. 1990), reprinted in 1990 RIAA 217.

[65] Id. ¶ 144. In that case, however, the tribunal declined to extend the desired relief because the order requested sought discontinuance of conduct that was no longer illegal.

[66] Islamic Republic of Iran v. United States of America, IUSCT Case No. A19, Decision (30 Sept. 1987).

[67] Id.

[68] Vivendi v. Argentina, ICSID Case No. ARB/97/3, Award (20 Aug. 2007).

[69] Id. ¶ 9.2.1. Similarly, in Australia, the power to award interest has been found by courts to flow from the arbitrators' implied authority and duty to follow the ordinary rules of law. Government Insurance Office of N.S.W. v. Atkinson-Leighton Joint Venture (1981) 146 CLR 206.

not arise under the arbitration agreement" and the determination that "it would represent an unacceptable situation in which the arbitrators were judges in their own cause."[70]

4. Powers to Safeguard Against Misconduct and Perceived Improprieties

As already touched upon in the context of interim orders, arbitrators sometimes turn to inherent powers when deciding how to address party behavior that poses a threat to the integrity of arbitral proceedings or the success of the tribunal's adjudicative mandate. While tribunals have shown a substantial degree of comfort with granting provisional measures to accomplish these goals, they have been hesitant to use inherent powers to grant dispositive relief as a remedy for party misconduct. In *Waste Management v. Mexico*,[71] the tribunal denied the respondent's request that the tribunal exercise its inherent powers to dismiss a claim on abuse of process grounds. The tribunal found it unnecessary to determine whether such an inherent power existed because there was no evidence of bad faith on claimant's part; however, it "inferred that if such a power exists, it would only be for the purpose of protecting the integrity of the tribunal's processes or dealing with genuinely vexatious claims."[72] Similarly, the annulment committee in *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. El Salvador*[73] observed that, in extreme circumstances, it could use its inherent powers to order security for costs "[a]s the guardian of the integrity of the proceeding."[74] In contrast, the Australian courts have held that arbitrators do not have the authority to order security for costs if the arbitration agreement does not confer the power to do so.[75]

In *Libananco v. Turkey*,[76] the tribunal was presented with an allegation by the claimant that the Turkish authorities were holding claimant's legal representatives and potential witnesses under surveillance, leading claimant's legal expert to refuse to testify for fear of government reprisal.[77] The claimant, having adduced *prima facie* documentary evidence that respondent had intercepted its counsel's email communications, sought to exclude respondent from participating in the "current phase of the arbitral process."[78] Recognizing the serious nature of the allegations at issue and the principles affected by them, the tribunal commented:

---

[70] See Christopher Koch, "The Limits of Arbitrators' Powers to Adjudicate Fees and Expenses—Commentary on the Swiss Supreme Court Decision 136 III 597 of 10 November 2010," Arbitration International, Vol. 27, No. 2, 239 (LCIA 2011) (quoting the Supreme Court's holding).

[71] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objections concerning the Previous Proceedings (2 June 2001).

[72] Id. ¶ 49.

[73] Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador, ICSID Case No. ARB/09/17 (Annulment Proceeding), Decision on El Salvador's Application for Security for Costs (20 Sept. 2012).

[74] Id. ¶ 45. The committee opined that such circumstances might include situations "where abuse or serious misconduct has been evidenced." Id.

[75] See, e.g., McKensey v Hewitt [2002] NSWSC 145, ¶ 29.

[76] Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (23 June 2008).

[77] Id. ¶ 72.

[78] Id. ¶ 73.

> Nor does the Tribunal doubt for a moment that, like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process – even if the remedies open to it are necessarily different from those that might be available to a domestic court of law in an ICSID member state. The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration[.][79]

However, the tribunal declined to grant the "extreme form of relief" requested, finding such relief unwarranted in the circumstances, where the issue of possible prejudice remained largely a matter of allegation and counter-allegation.[80] Instead, it ordered measures targeted at preventing concrete, future harm and warned that it could "consider other remedies available apart from the exclusion of improperly obtained evidence" if respondent wrongfully used information obtained through surveillance.[81] One wonders what "other remedies" the tribunal might have considered had it had occasion to do so: would sufficiently egregious behavior have permitted the tribunal to bar respondent from presenting its defense?

In international arbitration, the arbitration rules often provide for the tribunal to determine the proper allocation of fees as part of its award, and arbitrators have cited such authority to impose costs on parties whose participation has been marked by bad faith.[82] In some contexts, inherent powers have been cited as providing authority to sanction parties for misbehavior or improper conduct. In *ReliaStar Life Insurance Company of New York v. EMC National Life Company*,[83] a tribunal awarded attorneys' and arbitrators' fees to sanction the bad faith conduct of the losing party to the arbitration. The tribunal did so despite a provision in the parties' arbitration agreement explicitly providing that each party shall bear its own costs and share the expenses of the third arbitrator. The United States Court of Appeals for the Second Circuit determined that an arbitral panel had not exceeded the scope of its authority. The court reasoned that the parties' arbitration clause was a broad one of the sort that "confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that may include an award of … fees."[84] It characterized the contractual fee provision as a general statement of the

---

[79] Id. ¶ 78. It would not, however, appear permissible for a tribunal to invoke similar authority as a basis to annul an award. An ICSID ad hoc annulment committee, invited by a claimant to investigate bribery allegations as an exercise of the committee's inherent jurisdiction, found such an inquiry to lie outside of its narrowly defined jurisdictional mandate. The committee, viewing the explicit grounds for annulment provided in the ICSID convention as exhaustive, stated that "there are limitations on the exercise of inherent powers, including that such powers cannot be inconsistent with the terms of the relevant constitutive instrument of the international court or tribunal." It noted that tribunals "can only exercise [inherent] powers where those powers are necessary to ensure the performance of functions that have been expressly conferred." RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14 (Annulment Proceeding), Decision on RSM Production Corporation's Application for a Preliminary Ruling, ¶ 20 (7 Dec. 2009).

[80] Id. ¶¶ 80–81.

[81] Id.

[82] See, e.g., Liberian East Timber Corp. v. Republic of Liberia, ICSID Case No. ARB/83/2, Award (31 Mar. 1986), reprinted in 2 ICSID Rep. 343 (awarding arbitration costs and legal fees to LETCO, under Article 62(2) of the ICSID Convention, "based largely on Liberia's procedural bad faith").

[83] 564 F.3d 81 (2d Cir. 2009).

[84] Id. at 86.

American rule on fee sharing and found nothing therein "signal[ing] the parties' intent to limit the arbitrator's inherent authority to sanction *bad faith* participation in the arbitration," given the comprehensive arbitral authority expressly conferred on the arbitrators.[85] The Court noted that, should contracting parties wish "to limit the … sanction authority to exclude attorney's fees or arbitrator's awards," they would need to do so "explicitly and clearly" as part of their agreement to arbitrate.[86]

Although the case did not involve allegations of bad faith or professional misconduct, one tribunal, in *Hrvatska Elektroprivreda v. Slovenia*,[87] has invoked the concept of inherent powers to rule that a party's chosen counsel could not participate in arbitration proceedings. The excluded counsel's appearance in the case was disclosed only shortly before the merits hearing. That counsel was a member of the same London Chambers at which the tribunal's president was a "door tenant." [88] The opposing party, who was unfamiliar with the English legal system's "split profession" of solicitors and barristers, objected that the participation created an "appearance of impropriety."[89] In determining that counsel's participation would be inappropriate, the tribunal cited its "inherent power to take measures to preserve the integrity of its proceedings."[90] It noted that this power found "a textual foothold" in Article 44 of the ICSID Convention, which grants discretion on procedural issues, and observed that, more broadly, international courts possess an inherent power, independent of statutory reference, "to deal with any issues necessary for the conduct of matters falling within [their] jurisdiction."[91]

In the Canadian arbitration context, an arbitrator has deemed "well established" the power to entertain motions to disqualify counsel based on alleged conflicts of interest as "a necessarily implied adjunct to the power of any tribunal to control its own process," a power "clearly recognized and established by all provincial arbitration statutes."[92]

Is disqualification of counsel a general inherent power of arbitrators, and, if so, how much control may arbitrators properly exert over the decisions of parties with respect to their counsel? In reaching its decision, the *Hrvatska* tribunal was careful to emphasize the particular distinguishing circumstances of the case that justified its course of conduct, including the party's disclosure of counsel's participation "only at an extremely late stage of proceedings," suggesting that such power should be used sparingly.[93] When

---

[85] Id. at 88.

[86] Id. at 89.

[87] Hrvatska v. Elektroprivreda, d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24, Order Concerning the Participation of a Counsel (6 May 2008). Issues raised in this and subsequent cases are now addressed by the IBA Guidelines on Party Representation in International Arbitration adopted by the IBA Council on May 22, 2013.

[88] Id. ¶ 3.

[89] Id. ¶¶ 7, 21.

[90] Id. ¶¶ 33–34.

[91] Id. ¶ 33 (internal quotation marks and citations omitted).

[92] William G. Horton, "Note on Canadian Cases: The Jurisdiction of Tribunals to Control Counsel Conduct and Disqualify Counsel based on Conflicts of Interest," Canadian Arbitration and Mediation Journal, Vol. 22, No. 1, 18 (2013).

[93] Id. ¶¶ 28, 34–35. Moreover, having ascertained that the excluded counsel was retained in relation to damages issue only, it bifurcated the proceedings and adjourned all damages questions for later determination when substitute counsel could be utilized by the respondent.

asked by the respondent in *The Rompetrol Group N.V. v. Romania*[94] to exclude counsel who had previously been employed by a law firm of which one of the arbitrators was a member, the tribunal distinguished the circumstances present in *Hrvatska* and opined that the decision "might be better seen as an *ad hoc* sanction for the failure to make proper disclosure in good time than as a holding of more general scope."[95] The tribunal denied the respondent's request and took a highly skeptical view of whether the inherent power to preserve the integrity and effectiveness of proceedings extended to the exclusion of counsel. Observing that the power to exclude counsel was a power for which one would expect the relevant legal texts to provide, the tribunal commented that "[a]bsent express provision, the only justification for the tribunal to award itself the power by extrapolation would be an overriding and undeniable need to safeguard the essential integrity of the entire arbitral process."[96] It hypothesized that such control would be exercised rarely and only in compelling circumstances.[97]

If the power to exclude counsel is to be reserved only for compelling circumstances necessary to safeguard the essential integrity of the arbitral process, what might those circumstances be? More generally, what is the breadth of tribunals' inherent power to protect proceedings and is it possible to develop a principle to provide guidance on when that power may be employed? Could arbitrators terminate proceedings if they determine the underlying dispute to be characterized by bad faith conduct or infected with corruption? What remedies are available to punish contempt of a tribunal's decisions?

5. Powers of Revision

The decisions of international tribunals also indicate that commercial arbitrators might, in limited circumstances, possess the inherent or implied authority to revise their decisions, so long as they are still seized of a matter and are not yet *functus officio*. The U.S.-Iran Claims Tribunal expressly declined to hold that it has such an inherent power of revision, opining that a remedy of revision could only be established through the formal modification of its rules, but it left open the possibility of making an exception in cases of fraud or perjury.[98] In the *Sabotage Cases*,[99] the U.S.-Germany Mixed Claims Commission held that "[e]very tribunal has inherent power to reopen and to revise a decision induced by fraud," and took the firm view that "[n]o tribunal worthy its name or of any respect may allow its decision to stand" if confronted with well-founded allegations of perjury,

---

[94] The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on the Participation of a Counsel (14 Jan. 2010).

[95] Id. ¶ 25.

[96] Id. ¶ 16.

[97] Id.

[98] Islamic Republic of Iran v. United States of America, IUSCT Cases Nos. A3, A8, A9, A14 & B61, Decision No. DEC 134-A3/A8/A9/A14 & B61, ¶ 64 & n.105 (1 July 2011); see Riahi v. Iran, IUSCT Case No. 485, Decision No. DEC 133-485-1, ¶¶ 32–57 (17 Nov. 2004). However, its prior jurisprudence confirms that revision of a decision induced by fraud would only be available, if at all, upon the discovery of a new fact of a decisive nature that upsets the conclusions earlier drawn by the tribunal. See Ram International v. Air Force of Iran, IUSCT Case No. 148, Decision No. DEC 118-148-2, ¶ 20 (28 Dec. 1993).

[99] Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases), Decision (15 Dec. 1933), reprinted in VII RIAA 160.

collusion, and suppression."[100] Similarly, a tribunal proceeding under the UNCITRAL Arbitration Rules has held that tribunals and courts have the

> inherent power to take cognizance of credible evidence, timely placed before it, that its previous determinations were the product of false testimony, forged documents, or other egregious "fraud on the tribunal" … . Certainly if such corruption or fraud in the evidence would justify an international or a national court in voiding or refusing to enforce the award, this Tribunal also, so long as it still has jurisdiction over the dispute, can take necessary corrective action.[101]

These cases suggest that it may be within a still-sitting tribunal's inherent power to modify or even withdraw a prior decision that rewarded a party's misconduct. But under what circumstances might a tribunal actually do so? If a witness gives inconsistent testimony in a second case, would the tribunal in the first case have the authority to consider whether the inconsistency affected its view of the witness's credibility?

The recent decision and dissenting opinion on a request for reconsideration in *ConocoPhillips v. Venezuela*[102] confirm that the answer to this question is far from straightforward. In that case, Venezuela asked the tribunal to revisit a portion of its award on jurisdiction and the merits, based on new evidence revealed by Wikileaks, before proceeding to the quantum phase of proceedings. The majority rejected this request, concluding that its earlier decision was not of an "interim" nature but meant to be final, with *res judicata* effect.[103] It reasoned that the overall structure and the detailed provisions of the ICSID Convention precluded the exercise of a power of review under Article 44's gap-filling authority because there was "no gap to be filled by the power proposed" and nothing in the Convention's provisions on explicit powers "even hinting at such a power."[104]

In a sharply-worded dissent, arbitrator Georges Abi-Saab rejected the majority's reasoning and contended that it was in the tribunal's inherent jurisdiction to correct a material error made in an interlocutory decision:

> [I]n certain contingencies which put or risk putting the credibility and integrity of the tribunal into question – such as its becoming aware that it had omitted an error in interpreting evidence or in establishing the facts that led it astray in its legal findings; that the decision did not follow from the facts as determined; that new credible evidence demonstrate[s] that the facts as established by the tribunal were based on wrong premises; or that changed circumstances have rendered the decision otherwise untenable – inherent jurisdiction empowers and even mandate[s] the tribunal to reconsider the prior decision.[105]

The dissent found such power to exist within the "inherent jurisdiction [that] accrues to any body or organ by the mere fact of it[s] being possessed of the adjudicative function."[106]

---

[100] Id. at 190.

[101] Antoine Biloune v. Ghana Investments Centre, Award on Damages and Costs, ¶ 33 (30 June 1990), reprinted in 95 ILR 211.

[102] ConocoPhillips Petrozuata B.V., et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration and Dissenting Opinion of Georges Abi-Saab (10 March 2014).

[103] Id., Decision, ¶¶ 20–21.

[104] Id., Decision, ¶¶ 22–23.

[105] Id., Dissent, ¶ 61.

[106] Id., Dissent, ¶ 56.

According to the dissent, such jurisdiction "brings with it powers as well as duties and responsibilities," including the duty of "safeguarding the credibility and integrity of its adjudicative function."[107] Professor Abi-Saab opined that no self-respecting tribunal that took seriously its "overriding legal and moral task of seeking the truth and dispensing justice according to the law on that basis" could turn a blind eye to newly discovered evidence that severely contested its prior findings.[108]

III. A FRAMEWORK OF ARBITRAL POWER

As seen from the examples discussed above, the range in which inherent and implied powers have and potentially could be employed is broad and diverse, and the ability to invoke different powers will change depending on the stages and circumstances of a given arbitration. In the commercial arbitration context, the parties' choices—embodied in the arbitration agreement, the arrangements governing their relationship with the arbitrators, and the rules and curial law of the arbitration—are likely to produce significant variances in procedure from one arbitration to the next. At one end of the spectrum, a tribunal may find itself presented with a terse arbitration agreement providing for the ad hoc arbitration of any dispute arising out of the parties' contract and designating the seat of arbitration as a country with a minimally-developed national arbitration law. At the opposite end of the spectrum, arbitrators may be faced with an elaborate arbitration agreement providing for an institutional arbitration seated in a country with a detailed arbitration law that has generated extensive precedent. The express powers of the arbitrators will differ considerably in the two cases, as will the authority they can permissibly exercise as a matter of discretion and implication.

The context-dependent nature of international commercial arbitration renders difficult any attempt to develop a coherent framework for the use of arbitral power. In particular, the notion that one tribunal might be barred from exercising power that another justifies as "inherent" is conceptually problematic: if such powers are inherent—and, by definition, exist "in something as a permanent attribute or quality"[109]—how can they be said to vary based on the peculiarities of the case? One could respond that the inherent powers are those essential powers common to all tribunals and that all others are implied, but such a response is also intellectually unsatisfying. What qualifies as an "essential" power? By what exactly are other powers implied? Where a particular rule or provision of the parties' agreement implies the existence of a discrete power, deeming that power "implied" may be proper, but where a power appears to be implied from the nature and function of the tribunal as constituted, the power at issue seems more properly labeled "inherent" to that tribunal. These conceptual difficulties are compounded by the fact that the terms "inherent" and "implied" are often treated as fungible words, by arbitrators and practitioners, and may carry different meanings and understandings in the jurisprudence of different national legal orders. For that reason, the Committee refrains from formulating definitions as to the concepts of inherent and implied powers of arbitral tribunals and prefers to present a framework under which these powers can be further discussed and analyzed.

---

[107] Id., Dissent, ¶¶ 56–57.
[108] Id., Dissent, ¶ 66.
[109] Oxford English Dictionary, "Inherent" 3(a), http://www.oed.com/view/Entry/95945.

Despite these challenges, the Committee considers that it seems possible to divide a tribunal's non-enumerated powers into three different and somewhat overlapping categories, or conceptions, that may be instructive to arbitrators and parties in thinking about the scope of power that arbitrators may permissibly employ. *First*, beyond the express powers of arbitrators, there exist powers implied by the provisions of the parties' arbitration agreement and the other sources selected to govern the arbitration. *Second*, there is a general discretionary power over procedure that arbitrators enjoy in the absence of contrary instruction. *Third*, there exists a limited authority to exercise truly inherent powers, which arbitrators may employ only if presented with compelling circumstances that risk undermining a tribunal's integrity or compromising the enforceability of its award. Each of these categories and their implications are discussed in turn. This discussion is to be read against the background of each particular case where the applicable statutory framework at the seat of the arbitration, the applicable arbitration rules and the parties' arbitration agreement will provide the context of the arbitral tribunal's express, inherent or implied powers.

A. Powers Implied by Textual Sources: Powers Particular to the Parties' Agreement

A first category of non-enumerated powers may be said to consist of powers implied by express provisions contained in the sources governing a particular arbitration. As arbitrators' authority and jurisdiction fundamentally stems from the consent of the parties, arbitrators seeking to exercise authority must always look first to the text of the parties' agreement and the applicable arbitration rules, as well as the law chosen to govern the arbitration, to assess the permissible scope of action they may take. When these sources do not speak directly on a specific question, they may nonetheless imply some corollary authority to take action to effectuate the parties' agreement. For example, an arbitration agreement requiring that any dispute be decided "on the basis of law," and little else, might be read to imply that the tribunal is empowered to ask the parties to submit legal briefing or research the issue on its own. Similarly, to the degree that arbitral laws and rules assign various objectives or duties to arbitrators, such provisions may also be fairly interpreted as implying the authority to advance those prescribed goals. For instance, a provision saying the arbitration shall be conducted efficiently might give an arbitrator the implied authority to bifurcate proceedings or limit the scope of document production.

Because implied powers track closely with the selections made by parties in agreeing to arbitrate, they may permit arbitrators to make decisions that would otherwise be questionable absent explicit authorization. For instance, if the parties' agreement refers to U.S. Federal Rules of Evidence, an implied power to exclude expert witnesses based on qualifications established in American jurisprudence[110] is much more likely to withstand challenge than would a tribunal's decision to impose such requirements absent any such textual referent.

To the degree that arbitrators are able to justify contested decisions on the basis of implied powers, their actions are more likely to be viewed as falling within the reasonable contemplation of the parties' agreement to arbitrate. When properly used, implied powers

[110] See, e.g., Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) (articulating the standard for admitting expert testimony in U.S. federal courts).

permit arbitrators to implement the parties' choices and may thus be seen as promoting party autonomy. To arbitrators and parties with civil law backgrounds, their use is less likely to prompt the discomfort that the exercise of purely inherent authority—untied to any textual provision—might elicit.

B. Discretionary Powers of Procedure: The Right to Oversee Proceedings

It is possible to discern a second category of powers consisting of a tribunal's discretionary powers over procedure. These powers may include, among other things, the authority to hold evidentiary hearings, admit and weigh evidence, determine the order and method of witness examinations, and apportion costs. Insofar as they may be seen as broadly implied by the practical necessities of rendering an enforceable award, the powers in this category share some relation to implied powers, and it may be possible to find a textual foothold from which to imply the power to take a particular action that could also be justified as an exercise of a tribunal's discretion over procedure. These discretionary powers also resonate, however, as having an "inherent" quality, as arbitrators are widely understood to have some inherent degree of control over the efficient conduct of procedure. Indeed, the discretion "to determine the arbitral procedure, in the absence of agreement by the parties on such matters, is a[] foundation of the international arbitral process."[111]

In arbitrations governed by developed national arbitration laws or institutional rules, the authority to exercise such discretion will usually be confirmed by provisions that reserve to tribunals a significant degree of flexibility over procedure. For example, Article 17 of the UNCITRAL Arbitration Rules provides:

> Subject to these rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that an appropriate stage of the proceeding each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.[112]

In the same vein, the arbitration rules of the International Chamber of Commerce empower a tribunal to "proceed within as short a time as possible to establish the facts of the case by all appropriate means."[113] Following the widespread adoption of the UNCITRAL Model Law, the curial law of many states similarly confirms that arbitrators enjoy broad discretion over procedure.[114] However, while provisions confirming a tribunal's discretion

---

[111] Gary B. Born, International Arbitration: Law and Practice, 148–49 (Kluwer Law International 2012). A former Chief Justice of the High Court of Australia has observed in this regard that "[i]t is well settled that when parties submit their dispute to a private arbitral tribunal of choice, in the absence of some manifestation of a contrary intention, they confer upon that tribunal a discretion as to the procedure to be adopted in reaching its decision… . No doubt the conferral of that power upon the tribunal is incidental to the power which it is given to determine the dispute submitted to the Tribunal." Esso Australia Resources Ltd v Plowman [1995] 183 CLR 10, 26–27.

[112] UNCITRAL Arbitration Rules (2010), Art. 17(1).

[113] ICC Rules of Arbitration (2012), Art. 25(1). Similarly, the London Court of International Arbitration Rules provide that, unless otherwise agreed by the parties, "the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable." LCIA Arbitration Rules (1998), Art. 14.2.

[114] See UNCITRAL Model Law, supra note 1, Art. 19 (giving a tribunal discretion to "conduct the arbitration in such manner as it considers appropriate" in the absence of party agreement).

over procedure serve the useful function of articulating the existence of gap-filling authority, and arbitrators acting with the benefit of such rules or laws should make reference to them, such provisions should not be seen as the exclusive source of a tribunal's power in this regard. A tribunal proceeding without the advantage of such a provision cannot be said to lack the practical power to carry its mandate to completion.

As the institutional rules provide and acknowledge, discretionary authority gives arbitrators the right to make procedural decisions in the absence of contrary instruction or constraints. As such, they may be seen as a default or background authority that the parties' elections may supersede. Given the reality that "parties in practice often do not agree in advance on detailed procedural rules," however, arbitrators often exercise considerable power in determining the manner in which proceedings will be conducted, subject of course to certain due process requirements.[115]

While arbitrators will generally feel comfortable exercising such discretion where both parties acquiesce, a harder case is presented when one party opposes a proposed course of action. While a tribunal's discretionary powers typically do not permit arbitrators to take actions that override party agreement, they may permit a tribunal to authorize non-conventional and creative approaches to procedure that may not enjoy the universal support of the parties. For instance, should a party seek to preserve the testimony of a witness through a subpoenaed deposition procedure available in the witness's home country, a tribunal might determine it is proper to authorize the procedure, even if it is one previously unknown to the litigating parties, would not have been contemplated at the time of contracting, and is opposed by the party to whom the witness's testimony presumably would be adverse.

To pose a more difficult example, might arbitrators have the power to order consolidation of related arbitrations over the objection of one party? In permitting the mass claims of roughly 60,000 claimants to proceed in *Abaclat and Others v. Argentine Republic*,[116] the majority there determined the "the silence of the ICSID convention concerning collective proceedings" constituted a gap in the existing rules that it had the power to fill, by virtue of the discretionary power over procedure afforded by Article 44 of the ICSID Convention and ICSID Rule 19. The arbitrators characterized these provisions as "the mere expression of the inherent power of any tribunal to resolve procedural questions in the event of a lacunae."[117]

While this decision would indicate that a tribunal might have the power to order consolidation of parallel proceedings pursuant to its discretionary authority over procedure, the

[115] Born, supra note 110, at 148.

[116] Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011).

[117] Id. ¶¶ 521–26. In Abaclat, the tribunal found it would be contrary to the purpose of the underlying treaty and the spirit of ICSID "to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration" and declined to find that the ICSID Convention's silence on collective proceedings prohibited them. Id. ¶¶ 518–19. U.S. jurisprudence views the issue as one of contract interpretation, and an arbitral award will withstand a motion for vacatur where an arbitrator's decision to permit class certification is based on an interpretation of the parties' intent. See Oxford Health Plans LLC v. Sutter, 133 S.Ct. 2064 (2013).

decision in *Ambiente Ufficio S.p.A v. Argentine Republic*,[118] which permitted a multiparty action composed of ninety claimants to proceed, suggests that joinder lies beyond arbitral discretion. The tribunal there noted the case before it involved the original submission of a claim by a plurality of claimants in a single proceeding, and not the "*ex post* joinder or consolidation of proceedings," which would "no doubt" be "subject to the specific consent of the Parties."[119] Nonetheless, depending on the circumstances and the evolution of arbitral procedure, it is conceivable that another tribunal might one day come to a different conclusion—finding that a respondent's consent is not required for joinder, as that is a procedural issue over which the tribunal has discretion.

Arbitrators can expect to be presented with these and similar challenges in the future. As these examples suggest, a tribunal must initially determine, as a prerequisite to exercising its discretionary powers, that the action under consideration is strictly procedural in nature, and does not implicate substantive rights. In then assessing the breadth of its discretionary power, a tribunal must always first look to the arbitration agreement, the arbitral rules, and any other consensual agreement reached by the parties. If one of these sources provides an answer to the procedural question posed, that should generally end the inquiry because, on a matter of process not affecting the integrity of proceedings, a tribunal typically may not override the parties' agreement under the guise of its "inherent" authority. However, to the degree that those sources are silent, leave room for interpretation, or—in some cases—affirmatively endow the tribunal with discretion, the tribunal may properly employ its power of judgment to render a decision. It is through this exercise of judgment that the evolution of arbitral procedure often occurs.

C. Inherent Powers: The Duties of Arbitrators to Protect the Integrity of Proceedings and Render an Enforceable Award

Given the broad range of actions that may be justified on the basis of implied or discretionary power, arbitrators are unlikely to be presented—in the average international commercial arbitration—with circumstances that require action for which they truly cannot find any authority to act. However, as the examples from international investment cases demonstrate, tribunals could be faced with challenges that risk undermining the ultimate enforceability of their awards and for which the rules are of no assistance.

It is in such situations that a third and final category of non-enumerated powers becomes relevant, encompassing that authority which can be said to be truly inherent, namely those powers necessary to safeguard a tribunal's jurisdiction and the integrity of its proceedings. Stated differently, these powers are those required to decide a legal dispute fairly and in a manner consistent with at least the minimal requisites of due process and public policy. They trace their roots most clearly to the original notion of inherent powers as protecting jurisdiction and curtailing procedural abuses, and their exercise may justify overriding party preferences.

---

[118] Ambiente Ufficio S.p.A. v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb. 2013).

[119] Id. ¶¶ 123–25. U.S. courts likewise express considerable skepticism towards the permissibility of consolidating arbitral proceedings absent party consent. Martin Domke, et al., Domke on Commercial Arbitration, § 32.28 (Clark Boardman Callaghan, 3d ed. 2013).

Because such powers are key to ensuring that a tribunal obtains a final and enforceable award via procedures that are viewed as both fair and neutral, permitting their limitation by party agreement would threaten to undermine the arbitral process itself. Such powers are so core to the function of arbitration that they might be more properly termed arbitral duties, the fulfillment of which is a necessary function of serving as a competent arbitrator. The LCIA Arbitration rules, for example, recognize that arbitral procedure is subject to certain due process constraints that arbitrators are bound to enforce. To that end, Article 14 subordinates party autonomy over arbitral proceedings to the Arbitral Tribunal's general duties "to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent" and "to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute."[120]

Insofar as a tribunal's inherent authority stems from the need to protect the fundamental integrity of the arbitral process it is overseeing, it is an authority properly exercised in markedly limited situations; as "an extraordinary control," it "is to be resorted to only in compelling circumstances."[121] These powers may, depending on the context, permit a tribunal to issue interim relief to prevent the exacerbation of a dispute, to investigate or enjoin behavior constituting fraud or an abuse of process, and to take prudential action to ensure that its proceedings are fair. As seen from the cases discussed above, international investment tribunals have exercised powers in this category to stay domestic litigation impinging upon their jurisdiction and to enjoin party misbehavior that may undermine the fairness of proceedings.[122]

A hypothetical example is illustrative of other instances in which these powers, particularly in the international commercial arbitration context, might come into play. If presented with a request by parties for a consent award[123] in circumstances that reasonably indicate that the arbitration is being used as a vehicle to facilitate money laundering or reward corruption, a tribunal probably could—over the objection of both parties—conduct an inquiry to assure itself that the underlying settlement is lawful. In such a situation, arbitrators are not merely service providers but also play a role as "guardians of international public policy."[124] As a number of commentators have noted, enforceability problems could arise if arbitrators disregard such concerns and render an award that, when challenged before national courts, might be deemed invalid on public policy grounds.[125]

[120] LCIA Arbitration Rules, supra note 112, Art. 14.1.

[121] Commerce Group Corp., supra note 72, ¶ 44.

[122] It is noteworthy that a tribunal's authority to order such remedies may not necessarily be matched with the power to enforce them.

[123] See, e.g., LCIA Arbitration Rules, supra note 112, Art. 26.8 ("In the event of a settlement of the parties' dispute, the Arbitral Tribunal may render an award recording the settlement if the parties so request in writing ('a Consent Award'), provided always that such award contains an express statement that it is an award made by the parties' consent. A Consent Award need not contain reasons.").

[124] Bernard Hanotiau, "Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings," in Albert Jan van den Berg (ed.), International Commercial Arbitration: Important Contemporary Questions, 285 (Kluwer Law International 2003).

[125] See Michael Hwang S.C. and Kevin Lim, "Corruption in Arbitration – Law and Reality" (expanded version of Herbert Smith-SMU Asian Arbitration Lecture, delivered 4 Aug. 2011), ¶

Thus, it appears that arbitrators faced with such a situation could reasonably point to their inherent authority to protect the integrity of proceedings as a basis for undertaking a *sua sponte* investigation into evidence of corruption or money laundering.[126]

Inherent powers may also be implicated where arbitrators face competing duties that cannot be simultaneously satisfied. For instance, if an arbitration agreement provides for a hearing to take place in a particular location that is subsequently rendered inaccessible due to conflict and one of the parties insists on the original agreement with the goal of upsetting proceedings, a tribunal might cite its inherent power as providing the authority to move the place of the hearings. In that instance, the arbitrators' duty to render an award, pursuant to the parties' overall agreement, would be frustrated if it were unable to change one of the agreement's arguably less critical terms. So long as the arbitrators can determine that the condition of meeting in the designated city was not a fundamental element on which the parties' consent to arbitrate was predicated, invocation of inherent powers might offer a tenable exit from the seemingly irreconcilable dilemma the tribunal would otherwise face.

Because inherent powers of this type are a necessary correlate of a successful and functional arbitral system, they should be available to arbitrators operating under a variety of different arbitral rules and national jurisdictions, so long as compelling circumstances justifying action exist. However, as emphasized repeatedly in this Report, context remains important: any action taken should be carefully calibrated to respond proportionately to the exigencies of the circumstances and to align with the particular notions of fairness and due process that animate the legal culture from which the parties originate and under which they have decided to submit their dispute.[127] Such an approach strikes a proper balance between the notion of arbitration as a party-driven process and the imperative to respect due process, the disregard of which could give reason not to enforce an award.[128]

Although the context of international commercial arbitration affords parties considerable leeway in defining and constraining the manner in which their disputes are arbitrated, that

16, available at http://www.arbitration-icca.org/articles.html; Allan Philip, "Arbitration – money laundering, corruption and fraud: The role of the tribunals," in Kristine Karsten and Andrew Berkeley (eds.), Arbitration- Money Laundering, Corruption and Fraud (ICC Institute of World Business Law 2003).

[126] Arbitrators may also be able to find other bases on which to substantiate such action. As argued by Hwang and Lim, issues of corruption may be deemed to fall within the mandate of the tribunal when those issues are relevant to the dispute under consideration. Hwang and Lim, supra note 124, ¶¶17–23. Philip has asserted that ICC tribunals are obliged to investigate and decide issues of corruption and money laundering by virtue of the duties under the ICC Rules to make every effort to render an enforceable award and to establish the facts of the case by all appropriate means. Philip, supra note 124, at 153.

[127] Indeed, as the Honorable James Allsop, former Chief Justice of the Federal Court of Australia, has observed: "[T]he authority of the arbitrator can be enhanced and buttressed by the legal culture of the supervising authority." James Allsop, "The Authority of the Arbitrator" (Clayton Utz International Arbitration Lecture, University of Sydney, delivered 29 Oct. 2013), available at: http://www.claytonutz.com/ialecture/2013/speech_2013.html.

[128] See Wachter, supra note 20, at 73–75 (observing that "the outer boundaries of the tribunal's authority solely as a matter of contract interpretation will probably remain unanswered" in light of the statutory due process requirements imposed by the New York Convention and modern arbitration statutes).

control cannot be viewed as absolute, and arbitrators that blindly follow party elections notwithstanding their effect on the integrity of proceedings or the legality of the outcome risk abdicating their duties as adjudicators. While international commercial arbitration is a service-oriented process that seeks to satisfy the party-consumers, it also a legal process that results in an internationally enforceable award and should provide a just and fair result. As one commentator has noted, the "conforming notions of equality, fairness and reasonable cooperation in dispute resolution can be seen" as features common to both judicial and arbitral power, which "derive from the essence of the process and the task required: the civil resolution of disputes."[129] In deciding to arbitrate, parties consent to a legal process involving certain minimum standards of due process and fairness upon which they should not be able, consistent with that agreement, to renege. Arbitrators should be seen as having the authority to enforce these standards.[130] Thus, when faced with a challenge that risks undermining the very mandate they are empowered to carry out, arbitrators have the authority to depart from the parties' elections, or—if not able to do so within the bounds of due process and other considerations—to resign.

D. Exercising Inherent and Implied Powers

The first category above by and large does not generate major problems as to how an arbitral tribunal is to exercise its powers as they relate directly or indirectly to powers already embedded in the *lex arbitri*, the applicable arbitration rules and the arbitration agreement. The procedural discretionary powers of an arbitral tribunal referred to in the second category also will not often raise problems as the very nature of discretionary powers is that they give wide latitude to arbitral tribunals in making use of such powers provided these powers are respectful of procedural arrangements agreed upon by the parties and due process and are not used in an arbitrary way. As referred to above, it is the third category of inherent powers which intend to protect the integrity of the arbitral process that requires most attention as to how these powers are to be exercised. In addition to the requirement that the parties are to be heard as to how the arbitral tribunal intends to exercise its inherent powers, any orders the arbitral tribunal issues ought to be necessary to safeguard the integrity of the arbitral process and to enable the arbitral tribunal to proceed to an award which implies that the arbitral tribunal should consider not taking any measure if not strictly required to achieve that objective. Any anticipated order should also be proportionate to the aims it intends to achieve and, thus, should consider alternatives to achieve the intended objective and account is to be had to less intrusive measures meeting such objective.

In making use of an arbitral tribunal's inherent and implied powers, an arbitral tribunal is finally to consider the impact of any of its measures in relation to possible intervention of domestic courts pending the arbitration proceedings and, after an award is rendered, in the course of setting aside and enforcement proceedings. Although the exercise of inherent and implied powers is not specifically addressed in the New York Convention nor in the UNCITRAL Model Law and – save for violations of due process – ought not to come within the scope of these instruments, arbitral tribunals may well be advised to check the *lex arbitri* to verify whether their exercise of inherent and implied powers may

[129] Allsop, supra note 126.
[130] Id.

not come within the purview of local standards of annulment using standards such as excess of authority, excess of powers or excess of mandate.

E. Conclusion

Although the boundaries between the conceptions above of implied, discretionary, and inherent powers are imprecise and a tribunal's exercise of a particular power may fall into more than one category, it is hoped that this conceptual framework will assist arbitrators in deciding whether to take a particular course of action and in explaining their justifications for doing so, and courts when reviewing the actions of arbitrators. Arbitrators are most secure in exercising non-enumerated powers when the authority to act may be implied by a specific textual source governing the arbitration or when their action reflects a routine exercise of discretion over the conduct of proceedings. The use of inherent authority alone to overcome an impasse in proceedings, however, requires a considered determination that the arbitrators have a duty to act. Where arbitrators are unable to find a justification for a particular action within this conceptual framework, they should be hesitant to proceed.

It is hoped that locating the source of arbitral authority within one or more of these categories will enable arbitrators to describe more clearly and coherently the parameters and limitations of the powers they seek to exercise. The process may prompt deeper discussions among arbitrators regarding the decisions they reach or inspire them to initiate dialogue with the parties before acting, which could lead to an outcome more consonant with the parties' visions of the arbitral process. To the degree that it results in decisions that are more consistent and defensible, it carries the potential to strengthen arbitration as a means of achieving the efficient, binding, and fair resolution of international commercial disputes.

IV. FINDINGS AND RECOMMENDATIONS

E. Findings

1. In addition to the powers expressly conferred by the parties' agreement and by the laws and rules governing the arbitration, international arbitral tribunals ("arbitral tribunals") have powers that are inherent and implied.
2. There exists no universal or closed catalogue of such powers, nor any fixed rules governing their invocation. Instead, the powers available and the use to which they may be employed depend substantially on the particular circumstances of the case.
3. Arbitral tribunals have invoked inherent and implied powers in varied situations, involving, inter alia, arbitral procedure, interim relief, decision-making, sanctions regarding alleged misconduct and impropriety, and revision of earlier decisions.
4. The arbitral rules and laws that apply to the arbitration constrain the powers that arbitral tribunals may exercise, and meaningful limits on those powers can be expressed by party agreement.
5. Inherent and implied powers have grown in recognition over time, and the historical context in which arbitral tribunals are operating is relevant. Actions that were once considered novel and contentious to take, absent express powers to do so, have now become part of the fabric of international arbitration.

6. The recognition and development of inherent and implied powers have proceeded in tandem with the proliferation of international arbitration, fostering and contributing to its creative development.
7. Inherent and implied powers may be assigned to three potentially overlapping categories:
   (a) Powers implied by the parties' agreement and the rules and laws governing the arbitration,
   (b) Discretionary powers over procedure, which are related conceptually to both implied and inherent powers, and
   (c) Inherent powers necessary to preserve jurisdiction, maintain the integrity of proceedings, and render an enforceable award.
8. Implied and discretionary powers typically stem from and remain subordinate to party agreement.
9. Inherent powers are powers that would be expected to exist absent the clearest agreement, or provision of the lex arbitri, to the contrary.
10. Inherent powers will by their nature only arise for use in limited circumstances. They are to be read narrowly and used proportionately and only so far as necessary to meet the exigencies of the particular situation.
11. Categorising powers as implied, discretionary, or inherent helps ascertain the scope of powers that arbitral tribunals enjoy and assists in rendering orders and awards that withstand review.

The Committee recommends as follows:

1. To Parties:
   (a) Parties should understand that arbitral tribunals have inherent and implied powers.
   (b) Should parties wish to confirm, expand, or constrict arbitral powers, they should do so by agreement. However, it would be unusual and would at least require the clearest provision if arbitral powers were to be restricted in a manner that undermines an arbitral tribunal's jurisdiction, damages the integrity of its proceedings, or might result in an award liable to setting aside or unenforceability.
2. To Arbitral Tribunals:
   (a) In assessing the scope of their powers in any given situation, arbitral tribunals should first look to the arbitration agreement, the rules governing proceedings, and any relevant law.
   (b) If those sources do not adequately resolve the issue presented, arbitral tribunals should consider whether they can act on the basis of their implied, discretionary, or inherent power.
      (i) Implied power: Arbitral tribunals should examine the text of the parties' agreement and the other instruments governing the arbitration to determine if that text implies the power to resolve the particular issue.
      (ii) Discretionary power: Arbitral tribunals should assess whether the issue raised is a procedural question that, in the absence of contrary instruction, they would normally have the discretion to address.
      (iii) Inherent power: Arbitral tribunals should consider whether the issue before them risks undermining their jurisdiction, impugning the integrity of proceedings, or leading to their issuing an unenforceable award.

(c) In proper deference to party autonomy, arbitral tribunals should undertake the analysis in this section sequentially, first determining whether they have the implied power to act, then whether they may exercise discretion, and finally whether they are to exercise an inherent power.
   (i) Arbitral tribunals may determine that the power to act is supported by more than one type of power. Where there are multiple bases for acting, tribunals should feel more comfortable in exercising power.
   (ii) Arbitral tribunals should feel safer in acting on the basis of implied or discretionary power than in acting on the basis of inherent power.
   (iii) When arbitral tribunals act solely pursuant to their inherent power, they must satisfy themselves that there is a compelling duty to act in order to preserve jurisdiction, maintain the integrity of proceedings, or render an enforceable award.

(d) Before acting on the basis of any of these powers, arbitral tribunals should give the parties a reasonable opportunity to express their views and provide assistance to fashion the most appropriate solution in the circumstances before them. In doing so, the tribunal should also take into account the following:
   (i) The legal background of the parties, and the legal systems under which the parties have chosen to arbitrate. Where the law governing the arbitration speaks clearly as to the permissibility of the exercise of a certain implied or inherent power, that determination must of course govern.
   (ii) The appropriate scope of arbitral action, given the interests that a proposed measure might serve or put at risk. The remedy fashioned should be proportionate to the power being exercised and narrowly tailored to the situation presented.

(e) Arbitral tribunals should provide their reasoning for exercising implied, discretionary, or inherent powers, invoking such powers in a deliberate and thoughtful manner that will assist the award or decision in withstanding review at enforcement or set-aside proceedings.

3. To Courts:
Courts should appreciate that arbitral tribunals have inherent power as well as power conferred expressly or impliedly, as more fully described in paragraph 2 (b) and (c) above.

Mark W. Friedman	Filip De Ly	Luca G. Radicati di Brozolo
Rapporteur	*Chairman*	*Rapporteur*

INTERNATIONAL COMMERCIAL ARBITRATION

WORKING SESSION

Wednesday, 10 August 2016, 2.00pm

Chair: Mr Jeremy Carver (UK)

The Chair commence by introducing himself along with Professor Filip De Ly, Chair of the Committee.

Two topics were scheduled to be discussed, divided into the two sessions. The first topic was to complete business that was raised and discussed quite extensively at the last conference in Washington. The report discussed was on the work of the Committee, conducted over four years on "The Inherent and Implied Powers of Arbitrators".

The Chair explained that Professor De Ly would present the work of the Committee up to and at the Washington conference as well as the draft resolution, which was before attendees, who would be invited to comment and vote on it towards the end of the first session. Provided it passes the Committee session today, it would be put to the plenary session at the close of the conference and would be voted on appropriately as a resolution of the ILA.

Professor Filip De Ly (Netherlands) presented the work done up to and at the Washington conference along with the draft resolution. During the open session at the Washington conference on 10 April 2014, the report and recommendations on the implied and inherent powers of international arbitral tribunals were approved. Some suggestions were made for amendments to the recommendations, which were duly incorporated. The Steering Committee of the ILA refused to approve the recommendations due to some formulation and standard issues with the draft recommendations. The report was well prepared, well researched and original, but in relation to the innherent powers of arbitral tribunals did not have much literature and no comprehensive study on it. The Committee decided to resubmit the recommendations and to leave the report as it was in Washington.

In June 2016, Professor De Ly prepared slightly amended recommendations. They were circulated to the members of the Committee. The members endorsed the amended recommendations and they were then submitted to ILA headquarters. Professor De Ly noted that the interesting thing was the annex to the resolution found on pages 2 through 5. There were two sections in the resolution:

1. a summary of the major conclusions ("Findings") of the report were found in paragraphs 1 through to 11.
2. the "Recommendations" that followed had hardly any substantive changes.

Requests for further comments were invited from attendees and then Professor De Ly invited the session to proceed to the adoption of the text of the recommendations.

The Chair stated that the essence of the topic was powers available to arbitrators, which were categorised in view of the lack of scholarship on this subject.

There had been an attempt by the Committee to categorise them into powers that were necessarily implied by implication of the parties' own agreement to arbitrate and by the

lex arbitri, the law governing the arbitration. For convenience, those were described as 'implied powers'. In the first place, they derived from the instruments that created and governed the arbitration itself. Secondly, they were discretionary, in the sense that they derived from the fact that arbitrators had competence in order to decide the procedure to be adopted, save to the extent they were being contradicted by the parties' own agreement. Thirdly, the Chair explained that inherent powers of arbitrators existed in the nature of the functions that arbitrators performed. There must be a certain inherent power that arbitrators could draw upon when necessary to maintain the integrity of the process and to ensure that their function was discharged by the delivery of an enforceable award. Those were the three general categories. It was said that such powers should be exercised with great care and attention.

The draft resolution set out principles which, if adopted, could be extremely helpful to arbitrators. The Chair invited members of the Committee to add or subtract anything from what had already been said about the draft resolution.

Mr Eduardo Grebler (Brazil) stated that the draft resolution represented very precisely the understanding of the four years of work that the Committee had undertaken, and he supported the language in the document as perfectly appropriate.

The Chair thanked Mr Grebler for his comment and noted the importance of having such types of interventions. Other members of the Committee were invited to make their comments, express disagreements or make clarifications.

Mr Richard Allen (UK) noted that the draft resolution made only brief reference to the report in its recital. There was limited reference to actual implied and inherent powers that the tribunal was entitled to exercise. These were in the report itself, which he read with interest in Washington. He queried whether it was standard practice to omit the underlying report. As a practitioner, he would welcome having a single source to refer to in future cases.

Professor De Ly answered that generally recommendations were very abstract and that this was in conformity with the general format that one would expect from ILA recommendations. Further concrete indications could be found in paragraph 3 of the Findings on page 2:

> "3. Arbitral tribunals have invoked inherent and implied powers in varied situations, involving, *inter alia,* arbitral procedure, interim relief, decision making, sanctions regarding alleged misconduct and impropriety, and revision of earlier decisions."

Professor De Ly noted that the conference report from Washington already had the report and the non-approved draft recommendations. The conference report for the Johannesburg conference would probably only have these documents and a description of the open session. One could also visit the ILA website to obtain the Washington conference report along with the recommendations from the Johannesburg conference. The Committee intended to publish the report in one of the major arbitration journals. Most of the ILA reports such the one on *lis pendens*, published by Mr Sheppard and Professor Radicati di Brozolo, were published in *Arbitration International*.

Professor Catherine Kessedjian (France) recommended publication of the report again for the purpose of visibility of the record of the ILA. It would be much better if the report

signalled that it was the same report as in Washington DC but with a slightly different resolution.

Professor De Ly reiterated the suggestion to republish the report and recommendations and thanked the attendees and members for their suggestions and comments.

The Chair noted that a resolution would normally identify the report on which it was based. He did not understand why this draft resolution referred to a report without specifying or explaining that the report had already been considered and discussed by both the Committee in open session and by the ILA at the Washington conference. The first preamble could benefit from that reference to identify the report.

The floor was opened for any other thoughts on the substance of the general topic.

Mr Sanjeev Anand (India) noted that, since an arbitral tribunal was an adjudicatory body appointed by the parties to decide their dispute, in the absence of the restriction on the powers of the tribunal imposed by the parties, a tribunal should have inherent power to decide substantial matters affecting the merits of the matter, if it found it necessary to decide the dispute, effectively, fully and finally.

The Chair commented that one could be over-specific about recommendations that were of a general nature. Once one started subdividing different aspects, the generality (and power) of the text could be lost because it started to become more controversial. He would be reluctant to suggest that was a sensible way.

Professor De Ly agreed with the Chair. One should take to the Report for further understanding. Section C on page 17 of the report dealt specifically with inherent powers of arbitrators to protect the integrity of proceedings and to render an enforceable award. In order to better understand this form, paragraph 7 of the Findings and Section C of the report must be read together.

The Chair noted that Mr Allen had a very similar point on the record of the discussions in Washington. This point was recorded and was now part of the official record.

Professor Christopher Ward (Australia) had a question relating to paragraph 4 of the Findings, which spoke of the arbitral laws and rules "constraining" the power of the arbitral tribunal. He suggested that it refer instead to "constraining and supporting". It might be more accurate given that domestic laws in many countries supported and supplemented the powers of tribunals. For example, in Australia, the *International Arbitration Act 1974* expressly permitred parties in arbitration to approach a local court to obtain documents by way of subpoena, which was a power of the arbitral tribunal and might or might not be an inherent power.

Professor De Ly acknowledged that the law of the place of arbitration might explicitly support the arbitral process. He mentioned the French concept of "*le juge d'appui*" (the support judge).

These powers related to mandatory laws of the place of arbitration and the constraint in paragraph 4 did not refer to supporting functions but rather referred to the powers of arbitral tribunals and their relationship to mandatory rules that might constrain the exercise of those kinds of powers.

Professor Ward accepted the response, but invited the Committee to consider whether or not the paragraph read as an accurate statement.

The Chair answered by saying that, after reading paragraph 4, he would be satisfied with the wording that was suggested; they were only talking at this stage about constraint and not about support. Support was something that certainly existed and might open avenues for a tribunal.

The Chair read out the full draft preamble to the resolution. It was noted to be necessarily general and acceptable. It would more helpful for the first recital to identify the Commttee report as being submitted to and discussed by the Committee in open session at the Washington conference. The last two recitals would be dealt with in the last session.

Professor Kessedjian stated that it was strange that the draft resolution did not have the language that was usually in the introduction to a resolution, namely an instruction to the Secretary General of the organisation to send it to international organisations who might be interested in this topic and here of course, UNCITRAL, who would be the natural receiver of such a resolution. She suggested that the Committee add a recital to that effect.

The Chair stated that there was no difficulty in accepting such a suggestion.

Professor De Ly agreed.

The Chair continued to the Findings of the draft resolution, and read out the paragraphs one by one and invited any comments. Findings number 1 and 2 were read out. The Chair elaborated on paragraph 2 of the Findings, stating that the powers were case-specific and one could not apply general rules across the board. These were powers that might in a particular case be curtailed or excluded. There was not a finite catalogue of powers. They were not of universal application.

The Chair read out paragraph 3 of the Findings. He explained that this was a limited catalogue of circumstances in which inherent and implied powers had been invoked, but did not believe they were exhaustive. Studies in this area were met by the difficulty presented by only a small percentage of arbitral awards being published. It was difficult to draw much broader categories of use of powers when so much remained confidential.

Mr Anand proposed that, in paragraph 3 of the Findings, "revision of earlier decisions" be amended to ream to read "revision of its own earlier decisions".

The Chair considered this and countered that it should remain "revision of earlier decisions". The reference must by necessary implication be to earlier decisions of the arbitral tribunal.

Mr Anand agreed to leave the words unamended.

The Chair read out paragraph 4 of the Findings. No comments were made.

The Chair mentioned that this raised Mr Ward's earlier suggestion to refer to "constrain *and support*", which he believed was not necessary, and which Mr Ward had withdrawn.

Professor Ward interjected that he did not withdraw the point for formality's sake.

Professor De Ly stated it was noted on the record.

The Chair proceeded to read out paragraph 5 of the Findings. The Chair noted that he would like to analyse the sentence. He repeated the phrases "grown in recognition" and "historical context in which arbitral tribunals are operating", and said in other words there was relevance but this did not lead to precedence. Temporary development in international arbitration was being discussed here.

Professor De Ly acknowledged this.

The Chair considered the words "actions that were once considered novel and contentious to take, absent express powers to do so, have now become part of the fabric of international arbitration".

Professor De Ly stated the report gave the example of interim relief in the 1970s. It was novel when the question first arose. Now it was generally accepted and uncontroversial.

The Chair stated that by implication that process was continuing. What would be novel now would become an accepted use of power in 5 years' time.

The Chair proceeded to read out paragraph 6 of the Findings. Emphasis was placed on creative development. There was a lot of development in international arbitration but the process was not very creative.

Mr Grebler asked whether the word "proliferation" conveyed a certain critical contempt.

The Chair stated that it did not.

Professor De Ly noted that it referred to the increasing use of international arbitration.

The Chair continued by reading out both paragraphs 7 and 8 of the Findings. This was a reminder that international commercial arbitration was itself a product of a consensual process between parties. The Chair read out paragraph 9 of the Findings. It dealt with inherent powers that were expected to exist absent agreement to the contrary or constraint from the curial law.

Mr Allen stated that the term "lex arbitri" in paragraph 9 should be in italics to be consistent with the use of "*inter alia*" earlier in the document which is.

The Chair thanked Mr Allen for bringing this to the Committee's attention. The Chair read out paragraph 10 of the Findings. It produced no comments. He then read out paragraph 11 of the Findings. This really picked up on what was in the recommendations. The Committee felt – and invited the ILA to agree – that this categorisation would help tribunals when they were confronted with a need to draw upon power not stated expressly in the agreement, by inviting them to proceed on a tiered basis: first, are these powers that are implied; second, are these powers within our discretion; third, are these powers that are inherent because of the function we have to perform of delivering and enforcing.

The Chair then turned to the Recommendations. Recommendations 1(a)-(b) were read out. It would be unusual and would at least require the clearest provisions if arbitral powers were to be restricted in a manner that undermined an arbitral tribunal's jurisdiction, or damaged the integrity of the proceedings, or might result in an award liable to be set aside or unenforceable. The Chair elucidated that one could write whatever one wanted,

but in terms of powers that one should be wary of doing it in such a way that one actually damaged the powers of the arbitrators to do the job that they were called upon to do.

Recommendation number 2(a) was read out. Here, one would not only consider curial law but also other parts of the substantive law, both of which had an effect on these powers.

Recommendations number 2(b)(i)-(iii) and 2(c) were read out. These recommendations were directed to ensuring that the tribunal was firmly founded on what it was doing as opposed to taking an issue, as it were, that had arisen in the course of arbitration and simply saying that they must be able to do that. The recommendation was that tribunals should really consider what it was that they were trying to do and that would produce a sounder, more deliberate use of a power, and operate to exclude what a tribunal's first instinct would be to do.

Recommendation 2(c)(i) was read out. This recommendation meant that, if one thought to have the power in two or three categories, one should be much more comfortable. Recommendations 2(c)(ii)-(iii) and 2(d)(i)-(ii) were read out. Recommendation 2(d)(ii) was an important provision as it was seen at times that arbitrators made decisions on the basis of what they thought was the correct manner of solving a matter without actually inviting a response from the parties. Parties could sometimes be difficult or have different attitudes to solutions, but an arbitrator was not going to advance the interests of the arbitration as a whole by simply exercising their power without sufficient consultation with the parties.

Professor De Ly indicated that it was essential. It was the relationship between powers and how to exercise those powers on the one hand and due process on the other.

The Chair proceeded to read out recommendation 2(e). Many procedural orders by tribunals were made without reasoning. Tribunals should set out their reasoning for invoking these powers, particularly as it was not expressed in the terms of appointment that the Tribunal had such powers. Therefore, tribunals must explain the source of the power, and the reasons why it should be exercised in the way it had been exercised.

Recommendation 3 was read out. There were no comments on this recommendation.

The Chair queried whether the members were content for the draft resolution to go before the plenary session for adoption. This was enthusiastically accepted by members. The Chair thanked the members.

Mr Grebler asked a procedural question. Was the draft subject to any sort of correctional amendment or was it the final text that would either be approved or rejected.

The Chair replied that they had had difficulties in the past in plenary sessions where one person raised a procedural issue about the language and wanted to change it. It became extremely awkward to do so. The process was done in the working session with the people most interested in the resolution attending the session in order to consider, discuss, and arrive at a final text.

The Chair expected that the Chair of the plenary session would be resistant to changes, and would exercise his own discretionary implied and inherent power to do so! There had

been other committee reports in the past that had been argumented at the plenary session, but that was rare. He hoped that this would not be one of them.

Professor De Ly noted that there were four small corrections that would go before the Steering Committee meeting, and which would be included in the final text.

The Chair closed the first session and proceeded to open the second session to deal with proposed new projects. To begin with, the Chair proposed to continue on remarks stated earlier by Professor De Ly regarding what happened in Washington. The report of the Washington conference stated that, after the adoption of the resolution of inherent and implicit powers of arbitrators, the Chair of the Committee and the corapporteurs would resign from their office and the Committee would be dissolved and re-established anew in view of the 2016 ILA Conference. Of course, circumstances changed. The Chair asked Professor De Ly whether or not he still held to what was reported in his name in Washington.

Professor De Ly replied in the affirmative with the qualification that it would be useful to the Committee the he remain on for another two years to get the new project going. It has been ILA policy to dissolve committees. He had the impression that the ILA was somewhat coming back on that policy for a number of reasons, noting that it would take a long time for the ILA to go back to the branches for nominations to the new committee. The Director of Studies had agreed at present not to dissolve the Committee after the adoption of the draft resolution but to extend the mandate of the existing Committee. New nominations would need to be sought by the branches. The present membership of the Committee could be kept.

The present Committee could continue for a new project to be determined. Professor De Ly suggested that he remain Chair until the Sydney conference in 2018, provided that a new project could be completed and there were no more projects.

The Chair clarified the above procedure. The ILA had resolved the issue of unproductive committees by introducing an encouragement to ensure that committees would always generate a product at each conference, as opposed to producing nominal reports and having their mandate extended for an indefinite period of time. A principle was introduced that the committees had to justify themselves, noting that certain areas of the ILA work had generated almost perpetual committees. Those perpetual committees were encouraged to add and subtract to their membership and to come up with new topics and to develop new thought. The most obvious ones were International Trade Law and International Monetary Law. Each of those committees accepted the commitment and obligation to renewal. Certain committees had a limited life.

International Commercial Arbitration was one which, while not having a perpetual existence, was expected to have a long life. It was a large committee with 50 members, and could be unwieldy. However, the Committee had met six times since the Washington conference.

Professor De Ly replied that they only met to discuss inherent powers in 2010 and 2014, but there were six meetings in total, where they considered the 12 topics.

The Chair asked whether there were any members of the Committee or other attendees who would want to consider any other topics on the list of 12.

The decision to be considered now would be on whether "reasoning in international commercial arbitration" was the correct topic to develop.

Professor De Ly proceeded to discuss the background and why the Committee feels that the new project to develop should be "reasoning in international commercial arbitration". 19 of the 22 replies voted for the topic. One stated that it was a boring topic to consider. Two more members showed preference for arbitration and public-private partnership contracts. On the basis of this vote, Professor De Ly noted that there was broad support for the proposal when 22 members replied and 19 members had endorsed it.

The Chair asked whether anyone, either a member of this Committee or other attendee, wanted to consider any other topic on the list of 12, or would disagree with the proposal, or would hold that one of the other topics listed was more appropriate to be discussed.

Mr Grebler endorsed the topic. He queried the focus of the topic on international commercial arbitration, particularly as some of the other listed topics touched on investment arbitration. He queried whether the topic would simply focus on international arbitration.

Professor De Ly added that it was an interesting observation but it was necessary to look to the recent history within the ILA because of the surge in foreign investment arbitration. First, there was a Committee on foreign investment arbitration. While the Committee was active, the Committee coordinated with the study group and that explained why a number of the earlier projects excluded foreign investment arbitration. Some of the listed topics should be reconsidered, as they could only be pursued by this Committee after prior consultation with the other Committee. For instance, the topic of investment arbitration awards (number 11 on the list) was clearly a topic the Committee could only do after prior consultation with its sister committee. Accordingly, Professor De Ly recommended that the proposed topic be limited to reasoning in international commercial arbitration.

Mr Allen added that, without wanting to come across as a bit of an upstart, he noticed that it was mentioned by Professor De Ly **that** there were about 50 members of this Committee and only 22 responded one way or the other.

The Chair pointed out that this was a very high percentage.

Mr Allen continued to add to his previous intervention that it led him to a second question. Referring back to comments by the Chair about the need for renewal, he queried whether this was an indication of how involved members of the Committee were if they could not even email to let the Committee know if they agreed with this topic.

Professor De Ly answered that it was to be expected as it was the summer period at present.

The Chair said that it was up to the offices of each committee to try to ensure engagement with their members. Where a committee member was not contributing, the right course of action was to invite them to resign. The chair would exercise his inherent, discretionary and implied powers to subtract the non-performing member. It was important to do that. However, 50 percent of the Committee responding to the Chair was quite satisfactory.

Professor De Ly added that he received other responses from Committee members, some of whom where present. This was quite representative and gave sufficient confidence that this was a project that raised sufficient interest and support.

The Chair thanked the members and stated that he would like to consider the substance and possibilities of the proposed new topic. Again, this further work requires a positive decision to be made by the ILA. The topic was set out in general terms. The Chair referred to a discussion paper, which he found very useful, and which inviteed comments on the topic.

There were very interesting aspects to the topic. Again, arbitration in its historical origins was considered. Often, and certainly in the common law system, it did not encourage reasoning at all. The reason for this was simply that there was not expected to be any statement of legal significance in an arbitral award. An arbitral award was the manner of reaching a decision on usually some trade or commercial matter and the decision was the decision, and that was that. With the expectation that if there was deemed to be some mistake made by the arbitrators or there was something in the decision that was contrary to the law, the Courts would sort that out. It was the function of the courts, as the courts did have an obligation to produce reasons. With civil lawyers, the expectation was always to state reasons that were fundamental in due process. Reasons had to be given for any decision and these were reasons that were expected to deal with not only the facts but with the law.

From his own experience in International Commercial Arbitration, the Chair noted that he had seen some appalling reasons, which were not really reasons at all but rather a restatement, recital and plagiarism of the parties' submissions. Lazy arbitrators would do this, arbitrators should know much more about what they were doing. It was dishonest not to do so. Reasoning comprised much more than just citing the arguments of the parties before it, but rather actually engaging in the issues in dispute.

The Chair queried whether reasons had to be long. In answering this question, he recalled that the judgment of Lord Reid on the House of Lords were very short, but when one read them, nothing was lost. There was enormous strength in short judgments, as long as the key reasons were there. Very few arbitrators truly appreciated the importance of brevity and succinctness. They usually expanded to great lengths, and the award took on the characteristic of bricks.

The Chair hoped that this was a topic that Committee members were willing to include within their discussion.

Professor De Ly added that the Committee members present could reflect upon a proposal and express what they had expressed by email in relation to the proposal to have "reasoning in international commercial arbitration" as the topic for this Committee over the next few years.

Professor Burkhard Hess (Germany) noted that he supported the proposal because it was very important to look at the reasoning of the award. There were many problems which they might entail. One was of setting aside an award. Of course, there were also issues concerning a type of taboo, i.e. the extent to which arbitrators were committed to review, to correct, to improve the argument when giving the award. It remained to be seen

to what extent the Committee might be able to agree on this, but he would be very happy to see guidelines in this respect in practice.

One could also look at practice in the stakeholder's jurisdiction. Where recognition of foreign judgments was involved, the reasons for the judgment could be so contradictory that it was important to consider the reasoning carefully.

The Chair agreed and invited reactions to that.

Mr Grebler commented that it was not common to find awards that are totally deprived of any reasoning. However, there were multiple ways of constructing the award; and from what he had seen, especially from countries where arbitration was only developing recently, they lacked uniformity in terms of what they should do. The analysis of the situation might be helpful for arbitral tribunals to handle the awards or to define how they should handle the awards. It was possibly a very constructive topic for arbitral tribunals to address in a more adequate way than in some cases, that we could do this in several parts of the world.

Mr Grebler mentioned that he had a particular comment on one line of the proposal and would like to know whether to continue or come back to it later.

The Chair replied that they would come back to it as the Chair had a reaction to Mr Grebler's intervention. He agreed with the intervention, and said that it was indeed rare to find a complete absence of reasoning. He was more concerned by the other side of it, which was that the reasons were inadequately expressed or over-expressed as a way to justify large fees or for some other reason. This was not serving a useful purpose at all. He expressed his hope that the Committee would consider the manner and approach that arbitrators took when arriving at reasons, which was essentially to drill down into why it was that one side prevailed on a particular issue rather than the other.

Continuing contractual commitments to be resolved were often forgotten. Much arbitration took place in the heat of battle with no court sanction, with difficulties created for arbitrators and tribunals all the time, which in some respects could be a breach of the contractual obligation to settle the dispute by arbitration. The arbitrators had a function, which was to arrive at an answer and an answer that answered the questions that the parties delivered. Sometimes they did not articulate questions very well, but it was important that any difficult question was explained.

Professor De Ly noted that the worst case that he had seen was an 80 page award of which 60 pages was a repetition of all of the procedural orders and only 10-15 pages were on the substance of the case. The best case that he had seen was everything that needed to be said in 25 pages regarding a complex case. There were very different ways to do what was required, appropriate or necessary.

There was potential to look at the practice of arbitrators and at the membership of the Committee such as practitioners and arbitrators. It was difficult to get an overview of what arbitrators would want, but this was only a proposal and it was dynamic. As things developed, the Committee would need to make decisions as to the scope of its work.

Professor De Ly acknowledged that this was but one perspective. He referred to Professor Hess's earlier intervention about the role of institutions and scrutiny of awards.

The Chair expressed a hope that the Committee would also consider the role of a tribunal secretary's discretion. Arbitrators sometimes gave considerable responsibility to their registrars, which was an important function. These registrars could be of enormous assistance to arbitrators in shaping the reasoning.

The Chair elaborated on his own experience in public international law dispute resolution. The functions of this process was to resolve disputes. Disputes in this public sphere always had significant political dimensions. International commercial arbitration often involved States. There were very important key political aspects to them which could not be resolved at the domestic level. It was very important that a tribunal and an arbitrator have a clearer understanding of what those key points were and to provide an answer to them. Two sovereign States should be capable of resolving it themselves, but in this instance they could not and therefore they refer the matter to a court or tribunal to obtain an answer. That answer was not necessarily to provide a great panoply of reasons, but to say that the arbitrator understands the issue: 'this was our answer and these were our reasons for that answer in a way that helped the politicians come back and explain to their own populations why it was that the dispute had been resolved this way'.

The Chair referred to the *Beagle Channel* arbitration. A thoroughly unsartisfactory award was produced which resulted in Chile and Argentina commencing military action within hours of the award being delivered. The Pope at the time had to intervene and mediate the matter and the solution was eventually found some 6 years later which effectively endorsed a bad award.

There was a general aspect to this process and even in the area of international commercial disputes between private parties, there was a reason why the parties invoked arbitration and that reasons had to be provided. It was not an exercise in demonstrating how clever you were but to deliver a result for the parties to resolve their dispute. Even if one party did not want it, the arbitrator still had to do that.

Professor De Ly said that, unlike court proceedings, arbitration did not have avenues of appeal (noting that there were exceptions to this in commodities and maritime matters. Reasoning in arbitration did not have the function of facilitating review by a superior court. The main function of reasoning in arbitration was to convince the losing party that the arbitrator understood the case, that they took into consideration all of the arguments, and that there was a legitimate and a fair process.

The Chair invited contributions from the floor, adding that, at this stage, all that the Committee might be seeking was an endorsement and encouragement of its proposed future work program, which would then be submitted to the Executive Council for endorsement.

Professor De Ly added that, from the replies of Committee members, there was one expressing concern about whether the Committee should do a report focussing on reasoning. On the one hand, there was educational value for younger practitioners as well as for older practitioners. These were the benefits that some parties might still be dissatisfied with the award and would want to attack it in court to have it set aside or to apply for a dismissal. That was a fact of life. Also in that respect, we could do what courts had been doing, referring to the practice of the Swiss Supreme Court in finding a kind of balance

in terms of not wanting a review on the merits. That practice limited a lot. If one could not go into the merits, then how could the reasoning be reviewed? That was apparent in some English and French case law.

Mr Allen added that, in contrast to the criticism that Professor De Ly was mentioning immediately before his intervention, Mr Allen thought that it would be very helpful, and further explained that many arbitration awards that he had personally come across in the commercial context were extremely long because of the fears that the arbitrators had about being criticised for not following due process. He noted the practice of one arbitral process where parties were asked to submit Word versions of all of their documents so that they could be readily copied and pasted to make sure that the award touched on everything and could not be criticized for missing out on anything.

Mr Allen suggested that a guidance document from the Committee could hopefully result in something setting out the bare minimum on matters such as why certain evidence was given, the weight attributed to that evidence, and specific pleadings that went to the crux of the case. It would be extremely helpful in making an award shorter and also in allowing both the parties and the arbitrators to have some degree of certainty that they had done what they needed to do and commended it for that reason.

The Chair agreed with Mr Allen's intervention and expressed hope that the work would have a higher aspiration than just educative. He also addressed the point about improving the quality or efficacy of arbitration by dealing with issues that had to be resolved in the course of the arbitral process. Typical arbitrations and the experience of practitioners could be enormously valuable. That was why the ILA had such potential strength in its membership involving judges, scholars and lawyers of all walks of international life.

Dr Jie Huang (HQ) suggested that reasoning of the award might be developed into a course for younger generations.

Professor De Ly responded that the proposed topic was somewhat more limited than the drafting of an award. He concluded by expressing a hope that a report of the Committee at the Sydney conference would be considered so that it might be discussed.

The Chair thanked attendees for their participation and closed the session.

Reporters: Ms Elaine Mitchell and Ms Roxanne Barnard

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

INTERNATIONAL LAW AND SEA LEVEL RISE

Members of the Committee:

Professor Davor Vidas (Norway): *Chair*
Professor David Freestone (UK): *Co-Rapporteur*
Professor Jane McAdam (Australia): *Co-Rapporteur*

Professor Fernando Loureiro Bastos (Portugal)
Alternate: Professor Patricia Galvao Teles
Professor Elizabeth Burleson (USA)
Mr Bruce Burson (New Zealand)
Professor David D Caron (USA; *Nominee of Chair*)
Dr Chen-Ju Chen (China (Taiwan))
Professor Jean-Pierre Cot (France)
Professor Annie Cudennec (France)
Dr Maria Gavouneli (Hellenic)
Dr Antoine Grima (HQ)
Dr Daud Hassan (HQ)
Ambassador Marie Jacobsson (Sweden)
Alternate: Martin Ratcovich
Professor Walter Kälin (Switzerland; *Nom. Chair*)
Professor Nele Matz-Lueck (Germany)
Professor Charles Norchi (USA)
Alternate: Peter Prows
Dr Marcos Orellana (Chile)
Dr A G Oude Elferink (Netherlands)
Professor Alexander Proelss (Germany)
Professor Rosemary Rayfuse (Australia; *Nominee of Chair*)
Captain J Ashley Roach (USA)
Alternate: Dr Anita Halvorssen
Professor Shigeki Sakamoto (Japan)
Alternate: Jun Tsuruta
Professor Seokwoo Lee (Korea)
Professor Clive Schofield (Australia)
Alternate: Derek Tak Wei Wong
Professor Alfred H A Soons (Netherlands)
Dr Alejandra Torres Camprubi (Spain)
Professor Patrick H G Vrancken (South Africa)
Professor Maureen Williams (HQ)

INTERIM REPORT (2016)

PART I: Background

A. Establishment of the Committee and its Mandate

The International Law Association (ILA) Committee on International Law and Sea Level Rise (hereinafter: Sea-level Rise Committee, or Committee) was established with the approval of the ILA Executive Council in November 2012.[1] The Committee was tasked with a two-part mandate:

(1) to study the possible impacts of sea-level rise and the implications under international law of the partial and complete inundation of state territory, or depopulation thereof, in particular of small island and low-lying states; *and*

[1] ILA, *Minutes of the Meeting of the Executive Council* (London, 10 November 2012), at 5.

(2) to develop proposals for the progressive development of international law in relation to the possible loss of all or of parts of state territory and maritime zones due to sea-level rise, including the impacts on statehood, nationality, and human rights.

The ILA Executive Council approved the appointment of Professor Davor Vidas (Norwegian branch) as the Chair of the Committee, and Professors David Freestone (British branch) and Jane McAdam (Australian branch) as Co-Rapporteurs.[2]

B. Background for the Establishment of the Committee

When the proposal for the Sea-level Rise Committee was made in October 2012, it was prompted by the findings and conclusions of the ILA International Committee on Baselines under the International Law of the Sea (hereinafter: Baselines Committee), as contained in its report adopted at the 75th ILA Conference in Sofia, Bulgaria, in August 2012;[3] the discussions at the closed and open sessions of the Baselines Committee at the Sofia Conference;[4] and the Resolution 1/2012 adopted at that conference.[5] The proposal for the Sea-level Rise Committee was also prompted by scientific findings regarding the profound changes taking place in the Earth system, especially since the mid-20th century. The prospect of further and accelerating changes in the course of this century, including sea-level rise, will have consequent ramifications for the development of international law. This was the wider context motivating the proposal for a new ILA committee to focus on the international law implications of sea-level rise.

1. Conclusions of the Baselines Committee Sofia Report and Resolution 1/2012

The first international committee of the ILA set to study consequences of sea-level rise as regards the implications for international law was the Baselines Committee, formed in 2008.[6] The Baselines Committee was established with a two-part mandate; as stated in the Committee's report, this was:

> first, to "identify the existing law on the normal baseline" and, second, to "assess if there is a need for further clarification or development of that law". The need to identify, and possibly clarify or develop, the existing law concerning the normal baseline *arises in response to possible sea level rise* that has been predicted to accompany the phenomenon of climate

---

[2] Ibid.

[3] 'Baselines under the International Law of the Sea: Committee Report', in: International Law Association, *Report of the Seventy-Fifth Conference held in Sofia, August 2012* (London: ILA, 2012), 385–428. Hereinafter: *Baselines Committee Sofia Report*. That report is available also on-line at ILA Baselines Committee webpage, at <www.ila-hq.org/en/committees/index.cfm/cid/1028>. In further references to that report below, page numbers indicated relate to the ILA printed published report version, and pages referred to in brackets relate to the on-line report version.

[4] ILA, *Report of the Seventy-Fifth Conference held in Sofia, August 2012*, at 429–431 (regarding the record of the open session).

[5] Ibid, at 17. Available also on-line at ILA Baselines Committee webpage: http://www.ila-hq.org/en/committees/index.cfm/cid/1028.

[6] The Baselines Committee was established with the approval of the ILA Executive Council in November 2008; see: ILA, *Minutes of the Meeting of the Executive Council* (London, 15 November 2008), at 4. The issue of sea-level rise was later also touched upon by the ILA Committee on the Legal Principles Relating to Climate Change, in its Second Report (Sofia, 2012), at 29–30 and 39–40; text available at the ILA website, at <www.ila-hq.org/en/committees/index.cfm/cid/1029>.

> change, and the effects this may have in particular upon low-lying, small island developing states.[7]

In its 2012 Sofia report, the Baselines Committee concluded:

> [I]f current predictions of sea level rise are realized, some States will become completely submerged. The resulting deterritorialization will likely mean, among other things, a total loss of baselines and of the maritime zones generated by coastal territory and measured from those baselines. Should the issue of deterritorialization fall to be considered by the international community at least in part as a baseline issue, the existing law of the normal baseline does not offer an adequate solution. Here the Committee raises the possibility of deterritorialization in the context of Article 5 baselines, *but the loss of a State's territory to rising sea levels is not primarily a baseline or law of the sea issue*. Substantial territorial loss is a much broader issue encompassing concerns of statehood, national identity, refugee status, state responsibility, access to resources, and international peace and security. This issue requires consideration by a committee established for the specific purpose of addressing this range of concerns. The work of that committee should take into account the spirit of the modern law of the sea in which the interests of differently situated states are balanced. That committee should also recall the aims of the Convention: to strengthen peace, security, cooperation, and friendly relations among nations in conformity with the principles of justice and equal rights; to take account of the interests and needs of humankind as a whole; and to promote the economic and social advancement of all peoples of the world considering the special interests and needs of developing countries.[8]

Following on this, Resolution 1/2012 of the 75th ILA Conference recognised that:

> substantial territorial loss resulting from sea-level rise is an issue that extends beyond baselines and the law of the sea, and encompasses consideration at a junction of several parts of international law, including such fundamental aspects as elements of statehood under international law, human rights, refugee law, and access to resources, as well as broader issues of international peace and security.[9]

The 2012 ILA Conference acknowledged that the issue requires consideration by a committee established for the specific purpose of addressing this broad range of concerns.[10]

2. Scientific Assessments of On-going Sea-level Change and Projections of Future Rise

As indicated above, it was new scientific evidence and findings that prompted the establishment of the Committee in 2012. These include in particular the findings of the Intergovernmental Panel on Climate Change (IPCC) concerning the trends in sea-level rise during the course of 20th century and the first decade of the 21st century, as well as its projections for further sea-level rise. Scientists agree that one of the most certain outcomes of a warmer world is an increase in global sea-levels; the amount and rate of future sea level rise is, however, still uncertain, even for the rest of the 21st century. A review of the scientific literature on sea-level rise, as referred to in the proposal for this

---

[7] *Baselines Committee Sofia Report*, at 385–386 (on-line, at 1), referring to the *Proposal for the establishment of a new committee on baselines*, paras. 4 and 7; emphasis added.

[8] *Baselines Committee Sofia Report*, at 424–425 (on-line, at 30–31); emphasis added.

[9] Resolution No. 1/2012, para. 7.

[10] Ibid, para. 8.

Committee, was compiled in 2011;[11] the review indicated that, in a world that warms by 4˚C by the year 2100, the rise in global sea levels was estimated in the literature between 0.5 and 2 metres.

At the time of the establishment of this Committee in 2012, the IPCC had issued four assessment reports, the last of which was published in 2007.[12] The First IPCC Assessment Report (FAR), issued in 1990, laid the groundwork and resulted in important general findings, including recognition that: (a) sea level had risen during the 20th century; (b) the rate of rise had increased compared to the 19th century; (c) ocean thermal expansion and the mass loss from glaciers were the main contributors to the 20th century rise; (d) during the 21st century the rate of rise was projected to be faster than during the 20th century; (e) sea level will not rise uniformly around the world; and (f) sea level would continue to rise well after GHG emissions are reduced. The FAR also concluded, however, that no major dynamic response of the ice sheets was expected during the 21st century, leaving ocean thermal expansion and the melting of glaciers as the main contributors to the 21st century rise. This was, in retrospect, a significant misconception in the context of our current understanding of sea level rise.[13] The Second Assessment Report (SAR) in 1996 contained similar conclusions. However, by 2001, when the Third Assessment Report (TAR) was issued, new models replaced the energy balance climate models that had been previously used by the IPCC.

The 2007, Fourth Assessment Report (AR4) relied on more robust observations of the variations in the rate of global average sea level rise for the 20th century. Moreover, by the time of AR4, the satellite altimeter record[14] was long enough to reveal the complexity of the time-variable spatial distribution of sea level. Nevertheless, three central issues remained in AR4. First, the observed sea-level rise over decades was larger than the sum of individual contributions as estimated by the AR4 methodology. Second, it was not possible to make confident projections of the regional distribution of sea level rise. Third, there was insufficient understanding of the potential contributions from the destabilisation (melting) of ice sheets – and AR4 recognized that existing ice-sheet models were unable to simulate the recent observations of accelerated ice-sheet melting. Indeed, understanding of ice-sheet dynamics was too limited to assess either the likelihood of continued accelerated melting or to provide a reliable estimate or even an upper bound for their future contribution.

When comparing the projections of sea level rise for 2100 contained in the earlier IPCC Assessment Reports, it is notable that they contain remarkably similar range of predictions, despite changes in the scenarios. However, there was a progressive reduction in the upper end of their predictions:

---

[11] R Nichols et al., 'Sea-level Rise and Its Possible Impacts Given a "Beyond 4 C World" in the Twenty-First Century', *Philosophical Transactions of the Royal Society–A*, 369 (2011), 161–181.

[12] The brief overview, contained in this and the next two paragraphs, of the previous four IPCC assessment reports, as related to sea-level change, is based on J.A. Church et al., 'Sea Level Change', in: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2013), at 1142. Hereinafter: 'Sea Level Change', *Contribution of WG I to AR5*.

[13] See further below in this section, especially in subsections 2.1, 2.2 and 2.3.

[14] Satellite sea level altimetry began in 1993; see further below, especially notes 26 and 28, and the related text.

- FAR (1990): sea level rise from 31 cm, at the lower end, to 110 cm at the upper end;
- SAR (1996): from 13 to 94 cm;
- TAR (2001): from 9 to 88 cm;
- AR4 (2007): from 18 to 59 cm (not including dynamic ice-sheet response additions).

The Fifth Assessment Report (AR5)[15] of 2013/14, issued soon after this Committee was established, was the first to reverse this trend of successive reductions in the upper end of projections for 2100. With an upper end prediction of 98 cm,[16] it is the second highest so far. It is important, however, that this prediction is based on major scientific advances since AR4, resulting in a better understanding of 20th century sea level change and its components, and in an improved ability to project future rise.[17] The AR5 also acknowledged, however, that significant challenges remain, in particular in incorporating the dynamics of the Greenland and Antarctic ice sheets.[18] The findings of the AR5 provide a major context for the work of this Committee, therefore the next three subsections briefly review the salient aspects of AR5: its progress in the understanding of on-going sea level change; its improved projections of future sea level rise; and its analysis of the key challenges that remain.

2.1 Progress in the understanding of on-going sea level change

The findings of AR5 reflect a significantly improved understanding of the components that contribute to total sea level change.[19] The evidence now available in AR5 gives a much clearer account of the observed sea-level change than did the AR4.[20]

AR5 confirms that the amount of global mean sea level rise in the course of the 20th century and up to 2010 was ~20 cm.[21] A transition from relatively low mean rates of sea level change, that were characteristic for the previous two millennia (in the order of tenths of mm/year), occurred at some time between the end of the 19th to the early 20th

---

[15] In addition to *Contribution of WG I to AR5*, two further reports of IPCC within AR5 were drawn upon for presenting the overview in this section: *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Core Writing Team, RK Pachauri and LA Meyer (eds)), IPCC: Geneva, 2015 (hereinafter: *AR5 – Synthesis*); and *Summary for Policymakers. In: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2013), hereinafter: *AR5 – Summary for Policymakers*.

[16] 'Sea Level Change', *Contribution of WG I to AR5*, at 1186. It is, moreover, noted that if the Antarctic precipitation increase is omitted from the process-based projections, the likely range increases to 103 cm; ibid.

[17] 'Sea Level Change', *Contribution of WG I to AR5*, at 1204; also *AR5 – Synthesis*, at 62.

[18] *AR5 – Synthesis*, at 56.

[19] 'Sea Level Change', *Contribution of WG I to AR5*, at 1157-1159 and 1204; also *AR5 – Synthesis*, at 56.

[20] Models used in AR4 were able to explain only about 60% of the observed sea-level rise, and consequently projections of future sea-level rise in AR4 were underestimated; see *Contribution of WG I to AR5*, at 1182.

[21] That is: 0.19 [0.17 to 0.21, i.e., +/-0.02] m; see 'Sea Level Change', *Contribution of WG I to AR5*, at 1150.

century,[22] and led to higher rates of rise in the course of the 20th century (in the order of mm/year) – with a global mean rate of rise of 1.7 mm/year over the span of the century.[23] The key distinction observed in the course of the 20th century, as compared to previous centuries and even previous millennia, is not only the absolute amount of rise but also the accelerating rate of mean sea level rise that was noted, especially in measurements since 1971.[24] Between 1993 and 2010, the observed rate is already markedly greater: 3.2 mm/year.[25] This indicates both a greater amount of rise and an acceleration in the rate in the late 20th and the early 21st century.[26]

Current understanding of sea level rise identifies ocean thermal expansion and glacier melting (not including Antarctica) as the dominant contributors for most of the 20th century mean sea level rise; observations since 1971 result in estimates, with a degree of high confidence, that those two sources contribute about 75% of the observed rise.[27] However, the contribution of the Greenland and the Antarctic ice sheets to sea-level rise has increased since the early 1990s.[28] AR5 indicates a progressive trend in which the Greenland contribution has 'very likely' increased from 0.09 mm/year (for 1992-2001) to 0.59 mm/year (for 2002-2011), while the Antarctic contribution 'likely' increased from 0.08 mm/year (for 1992-2001) to 0.40 mm/year (for 2002-2011).[29] This trend is significant for future projections, and it also poses important challenges for the (process-based model) projections, especially regarding the dynamical responses of the Antarctic ice sheet.

2.2 Improvements in projections of future sea level rise

Confidence in the projections of global mean sea level rise has increased since the AR4, because of improved understanding of the physical components of sea level, the improved correlation between the process-based models and actual observations, and the

---

[22] AR5 refers to most recent studies concluding that sea level began to rise above the late Holocene background rate (characteristic of the previous ca 2000 years) between 1905 and 1945; 'Sea Level Change', *Contribution of WG I to AR5*, at 1146 and 1184–1185.

[23] 'Sea Level Change', *Contribution of WG I to AR5*, at 1146 and 1150, indicating the rate as 'very likely', meaning in AR5: 90 to 100 % probability; see also *AR5 – Summary for Policymakers*, at 9.

[24] Since 1971, significantly more ocean data became available and systematic glacier reconstructions began; global mean rate of sea-level rise since 1971 was estimated to approximately 2.0 mm/year.

[25] 'Sea Level Change', *Contribution of WG I to AR5*, at 1204, 1150; with the indication of this being 'very likely'. This rate is found by the satellite sea-level altimetry data.

[26] In this context, 1993 is also important as the first year when satellite sea level altimetry record, and observations of all sea level components, became available; a 20-year span (1993-2012) enabled trend analyses as presented in AR5; see *AR5 – Synthesis*, at 41; 'Sea Level Change', *Contribution of WG I to AR5*, at 1139 and, especially, at 1150. It is important to note here that satellite altimetry measures *sea surface height* (SSH), primarily in the open ocean, whereas tide gauges measure *relative sea level* (RSL) along the coastline. A change in RSL is the difference between the change in SSH and the vertical land motion. See also section I.B.2.3 below.

[27] 'Sea Level Change', *Contribution of WG I to AR5*, at 1139 and 1157.

[28] Ibid, at 1153–1157. Data for those contributions comes primarily from satellite and airborne surveys.

[29] 'Sea Level Change', *Contribution of WG I to AR5*, at 1153. This translates into the average rate of ice loss from the Greenland, from 34 Gt/year (for 1992-2001) to 215 Gt/year (for 2002–2011), and from the Antarctic, from 30 Gt/year (for 1992-2001) to 147 Gt/year (for 2002–2011). As to contribution to global mean sea level rise: 100 Gt/year of ice loss is equivalent to 0.28 mm/year increase; *AR5 – Summary for Policymakers*, at 7.

inclusion of ice-sheet dynamical changes.[30] The projections of sea level rise contained in AR5 are larger than in AR4, primarily because of the improved modelling of land-ice contributions.

The projections of the likely amount of sea level rise in the 21st century range in AR5 from 26 cm rise at the lower-end of the lowest scenario (RCP2.6) to 98 cm rise at the upper-end of the highest scenario (RCP8.5).[31] The rate of rise, between 2081 and 2100, in the latter scenario is 8 to 16 mm/year.[32] This is, in the upper-end, a five-fold increase if compared with the rate of rise from 1993 to 2010, or almost ten times the average rate of rise (of 1.7 mm/year) in the 20th century.

Two additional aspects are estimated by AR5 as 'very likely' in the 21st century. First, that sea level change will have a *strong regional pattern*, with some places experiencing significant deviations of local and regional change, which can differ from the global average rate by more than 100%; second, that there will be a significant increase in the occurrence of future sea level *extremes* in some regions (with a likely increase in the early 21st century).[33]

While exact figures of amount and rates of future sea level rise still remain uncertain, even for the 21st century, AR5 states that it is 'virtually certain'[34] that sea level will continue to rise during the 21st century, and for centuries beyond – even if GHG concentrations are stabilized (with the amount of rise in later centuries dependent on future GHG emissions).[35] For higher emission scenarios and warmer temperatures, surface melting of the Greenland ice sheet is projected to exceed accumulation, leading to its long-term decay and a sea level rise of several metres, consistent with paleo sea-level data,[36] which indicates – for the last interglacial (between 129 and 116 thousand years ago) – between 5 and 10 m higher than the present-day global mean sea level that has been relatively constant for the last several thousand years.[37]

On current understanding, the only event that could cause global mean sea level to rise substantially above the *likely* range presented in AR5 during this century would be the collapse of the marine-based sections of the Antarctic ice sheet. However, the effect of this, which AR5 states 'cannot be precisely quantified', is, with *medium confidence*, predicted to be within several tenths of a meter of sea-level rise during the 21st century.[38] The

---

[30] 'Sea Level Change', *Contribution of WG I to AR5*, at 1139.

[31] 'Sea Level Change', *Contribution of WG I to AR5*, at 1180. 'Representative Concentration Pathways' (RCPs) are different future scenarios of concentration of GHGs, aerosols, and other climate drivers. RCPs are dependent on human activities, technology and policy developments, however these factors are not assessed in AR5.

[32] 'Sea Level Change', *Contribution of WG I to AR5*, at 1180.

[33] 'Sea Level Change', *Contribution of WG I to AR5*, at 1140.

[34] In AR5 terminology of likelihood, 'virtually certain' means 99 to 100% probability.

[35] 'Sea Level Change', *Contribution of WG I to AR5*, at 1205.

[36] Ibid.

[37] 'Sea Level Change', *Contribution of WG I to AR5*, at 1139 – implying, for estimates up to 10 m, substantial contributions from both the Greenland and the Antarctic ice sheets.

[38] *AR5 – Synthesis*, at 59; 'Sea Level Change', *Contribution of WG I to AR5*, at 1140.

distinction between Antarctica and Greenland is that the latter has no known large-scale instabilities that might generate an abrupt increase in sea level rise.[39]

2.3 Challenges that remain

Despite the progress since AR4, it is clearly acknowledged in AR5 that significant uncertainties remain, particularly related to the magnitude and rate of the ice sheet contribution to sea level during the 21st century and beyond, as well as the regional distribution of sea level rise and the regional changes in storm frequency and intensity.[40] AR5 states that:

> Although improved understanding has allowed the projection of a *likely* range of sea level rise during the 21st century, it has not been possible to quantify a *very likely* range or give an upper bound to future rise. The potential collapse of ice shelves, as observed on the Antarctic Peninsula (…), could lead to a larger 21st century rise.[41]

It should be added here that, regarding ocean warming, the AR5 predicts the most pronounced warming at greater depth in the Southern (Antarctic) Ocean.[42] Recent studies, including those following the publication of AR5, have focused on the destabilisation of the West Antarctic ice sheet and its potential for contributing rapidly to global sea level rise.[43]

Another challenging aspect is the wide range of differences in the results for the upper bounds of projected sea-level rise, identified in assessments using process-based modelling, on the one hand, and those based on semi-empirical models, on the other – with the latter resulting in upper bounds of up to 2.4 m of global mean sea level rise by 2100.[44]

A further important consideration is that of *relative* sea level rise, which is defined by the elevation of both the land and the sea. This concept acknowledges that as sea levels rise, complex feedbacks may occur on the shape or morphology of the coast as well as its associated systems (such as coral reefs) making some coasts highly responsive to changing sea levels.

Records of past sea level changes provide insights into the sensitivity of sea level to past climatic changes, and may also be able to contribute to our understanding of current

---

[39] 'Sea Level Change', *Contribution of WG I to AR5*, at 1179. For recent studies on the destabilisation of the West Antarctic ice sheet (especially around the Antarctic Peninsula and the Amundsen Sea area), see, e.g., Craig Rye et al, 'Rapid sea-level rise along the Antarctic margins in response to increased glacial discharge', *Nature Geoscience*, 7 (2014), 732–735, estimating that an excess of freshwater input of 430 (+/- 230) Gt/year is required to explain the observed sea-level rise. Compare this with AR5 data, as presented *supra*, in note 29.

[40] 'Sea Level Change', *Contribution of WG I to AR5*, at 1205.

[41] 'Sea Level Change', *Contribution of WG I to AR5*, at 1205. In AR5 terminology of likelihood, 'likely' refers to a probability between 66 and 100% (while 'very likely' is 90 to 100 % probability).

[42] *AR5 – Synthesis*, at 60.

[43] See, e.g., Rye et al, 'Rapid sea-level rise along the Antarctic margins'. A highly relevant study, supplementing the findings in AR5, is found in: RM DeConto and D Pollard, 'Contribution of Antarctica to past and future sea-level rise', *Nature*, 531 (31 March 2016), 591–597.

[44] See 'Sea Level Change', *Contribution of WG I to AR5*, at 1179–1186. The semi-empirical approach regards changes in sea level as an integrated response of the entire climate system, reflecting changes in the dynamics and thermodynamics of the atmosphere, ocean and cryosphere – in contrast to process-based approach, which explicitly attributes sea level rise to its individual physical components; ibid, at 1182.

changes and to provide a means of evaluating projections.[45] In contrast to the more recent gradual progressions of sea-level rise that have occurred over a very long period, there is geological evidence of significant 'jumps' over a relatively short time-span of centennial – perhaps even decadal – scale,[46] followed by longer periods of general stability or slower rises. The timing of such future 'jumps' is very difficult to predict.

Discussing risk and the management of an uncertain future, AR5 states that – while it is 'unlikely' for global mean sea level rise to exceed one meter in this century – the consequence of a greater rise could be so severe that this possibility must become a significant part of risk assessment.[47] Relatively low confidence but high consequence outcomes are policy relevant – and therefore an aspect pertinent also in the considerations of the present Committee.

3. Change of Epochs in the History of the Earth: A New Context for International Law

The wider context for the proposal for this Committee were recent scientific findings regarding the profound changes that have been taking place in the Earth system, especially since the second half of the 20th century. The prospects of further and accelerated changes in the course of this century (reflected in sea-level rise) have possible ramifications for the development of international law. Scientific evidence increasingly indicates that, due to the nature and size of on-going and predicted changes, the Earth may already be undergoing a shift from the conditions of the current officially accepted geological time interval, the Holocene, to a new planetary state.[48] The Holocene is the latest, and formally still current, geological epoch. It comprises the past 11,700 years,[49] which have been marked by an exceptionally long period of relative environmental stability, especially during the last few thousand years.[50] As such, the conditions of the Holocene were a key factor facilitating the development of human civilization and, ultimately, the territorial divisions of the political world as we know it today.

It has been argued that, because of the interaction between the global environmental effects of economic development and increased human population, the Earth system

---

[45] 'Sea Level Change', *Contribution of WG I to AR5*, at 1145 – confirming also that important progress has been made since AR4 in understanding the amplitude and variability of sea level during the past intervals when climate was warmer than pre-industrial.

[46] See, e.g., M O'Leary et al, 'Ice Sheet Collapse Following a Prolonged Period of Stable Sea Level during the Last Interglacial', *Nature Geoscience*, 9 (2013), 796–800.

[47] *AR5 – Synthesis*, at 36.

[48] See especially the recent review by 24 members of the Anthropocene Working Group of the International Commission on Stratigraphy published in journal *Science*: C Waters et al, 'The Anthropocene is functionally and stratigraphically distinct from the Holocene', *Science*, 351 (2016) 137.

[49] M Walker et al, 'Formal Definition and Dating of the GSSP (Global Stratotype Section and Point) for the Base of the Holocene Using the Greenland NGRIP Ice Core, and Selected Auxiliary Records', *Journal of Quaternary Science*, 24 (2009) 3–17.

[50] The lower boundary for the 'late Holocene' is currently proposed at 4200 years BP; see M Walker et al, 'Formal subdivision of the Holocene Series/Epoch', *Journal of Quaternary Science*, 27 (2012), 649–659.

has already left the Holocene and has entered a new epoch: the Anthropocene.[51] So far, the 'Anthropocene' is an unofficial scientific term referring to the human imprint on the Earth system that is already so profound as to have reached geological significance.[52] Since 2009, the Anthropocene hypothesis is under formal scrutiny within geology. In that year, the Anthropocene Working Group (AWG) was set up within the International Commission on Stratigraphy to examine the stratigraphic basis and the scientific justification for possible formalization of the Anthropocene as the most recent geological time unit.[53] The AWG held its latest meeting in Oslo, 22-23 April 2016, and currently works on completing the interim findings and recommendations.

The Holocene has been characterized, especially in its late stage, by the longest period of stability in environmental conditions on Earth since the appearance of *Homo sapiens.* By contrast, the Anthropocene is seen as characterized by change, uncertainty and instability in the future behaviour of the Earth system.[54] This may have increasing relevance and, over time, important consequences for the organisation of international relations as currently reflected in international law.[55] It has been argued that within the current system of international law, the stability of the late Holocene has played a major role in the development of the political system which has in turn reflected the generally stable natural conditions of the Earth system.[56] Changes in that underlying element of stability contain the potential for new types of tension in relations between states.[57]

One such core aspect, which is in the focus of this Committee, relates to the international legal implications of sea-level rise, as it is already projected for this century. The onset of changing Earth system conditions in an Anthropocene epoch may draw into question some key aspects of international law, since these rely on the general stability of geographic conditions, and may require the re-examination of some currently accepted paradigms of international law.

---

[51] On the onset of the Anthropocene, see: J Zalasiewicz et (24) al, 'When did the Anthropocene Begin? A Mid-Twentieth Century Boundary Level is Stratigraphically Optimal', *Quaternary International*, 383 (2015), 196–203. For the origins of the Anthropocene hypothesis, see: P Crutzen and E Stoermer, 'The Anthropocene', *Global Change Newsletter*, 41 (2000), 17–18; and P Crutzen, 'Geology of Mankind', *Nature*, 415 (2002), 23.

[52] On the possible magnitude of that impact, see also a recent article in journal *Nature*: A Ganopolski et al, 'Critical insolation- CO_2 relation for diagnosing past and future glacial inception', *Nature*, 529 (2016), 200–203 – reporting a modelling study confirming findings that the Earth would already be entering a new glacial interval (an 'ice age') absent human impact on the CO_2 concentration in the atmosphere from the 18th century on, and concluding that the onset of a glacial interval is, due to that impact, postponed by at least 100,000 years.

[53] On the International Commission on Stratigraphy, see at: www.stratigraphy.org. On the Anthropocene Working Group, see at: http://quaternary.stratigraphy.org/workinggroups/anthropocene/.

[54] J Zalasiewicz, P Crutzen and W Steffen, 'The Anthropocene', in F Gradstein et al. (eds), *The Geologic Time Scale 2012*, Vol. 2 (Amsterdam: Elsevier, 2012), 1033–1040; and M Williams et al, 'The Anthropocene Biosphere', *The Anthropocene Review*, 2 (2015), 196–219.

[55] D Vidas, J Zalasiewicz and M Williams, 'What is the Anthropocene – and Why Is It Relevant for International Law? *Yearbook of International Environmental Law*, 25 (2015), 3–23.

[56] D Vidas et al., 'International Law for the Anthropocene?'*Anthropocene*, 9 (2015), 1–13.

[57] Ibid.

C. Work of the Committee and Focus of this Interim Report

After the establishment of the Committee at the end of 2012, its membership was initially appointed during the course of 2013 in two rounds (May and November). The first meeting of the Committee was held at the 76th ILA Conference, in Washington DC, in April 2014.[58] An *Initial Discussion Paper* was prepared by Committee officers and several members in order to facilitate discussions at the first meeting, the primary purpose of which was to identify questions and issues related to the mandate, rather than to present pre-formed solutions.

Three main issue-areas to be dealt with by the Committee were defined at the Washington DC meeting: the law of the sea; forced migration and human rights; and issues of statehood and international security. Although each of these issue-areas has already attracted a lot of research and publications, the Committee considered that it could make a useful contribution, within the framework of its mandate, by synthesising these various issues, elaborating interlinkages and considering options for proposals *de lege ferenda*. In addition, the Committee discussed impacts of sea-level rise on other areas of international law, such as cultural heritage law and environmental law (e.g., in the context of biodiversity protection regimes), and it was suggested that these issues might as well be relevant in the later stages of the Committee's work.

The Committee agreed to divide its work thematically into two main stages. The first stage involved two parallel streams of study: one on the law of the sea issues, and the other on the migration and human rights issues. The second stage would then involve the study of the statehood question, but also other relevant issues of international law and broader issues of international security, as the point of commonality of both streams.

On this basis, the Committee agreed to plan its work around the two reports that would need to be presented at the next two ILA conferences, namely the Interim Report at the 77th ILA Conference in Johannesburg, South Africa in 2016; and the Final Report at the 78th ILA conference in Australia in 2018.[59] The Interim Report, it was agreed, would not be fully comprehensive and would focus on the two streams of study, identified above. The Final Report will be the subject of the work of the Committee thereafter, with the aim of presenting it at the 78th ILA conference in 2018. In order to facilitate the work of the Committee on the Interim Report, and to strengthen the communication and coordination between the two agreed streams of study, a two-day inter-sessional meeting was held in Oslo, 12-13 June 2015, organised and hosted by the Fridtjof Nansen Institute.

---

[58] See ILA, *Report of the Seventy-Sixth Conference, held in Washington D.C., April 2014* (London: ILA, 2014), at 877–881. At the time of the Conference, the Committee had 21 members and 4 alternates. Two-thirds of the members (14 out of the 21) took part in the work of the Committee at its first meeting in Washington DC. Minutes of the sessions (open and closed), held on 9 and 10 April 2014, are available at: http://www.ila-hq.org /en/committees/index.cfm/cid/1043. As of 6 May 2016, the Committee has 27 members and 5 alternates.

[59] This required the adjustment of the Committee time-frame, from November 2016 to November 2018.

PART II:
International Law and Sea-level Rise: Law of the Sea Issues

This part of the Committee's interim report addresses some of the law of the sea issues that are raised by both segments of its mandate, i.e., regarding the *study* of the "possible impacts of sea-level rise and the implications under international law", and some preliminary considerations in connection with *developing proposals* "for the progressive development of international law". This part draws upon the findings and recommendations of the *Baselines Committee Sofia Report* of 2012, and develops the issues for further consideration of the present Committee on that basis.

A. Sea-level Rise and Maritime Zones

As already outlined in part I of this report, the IPCC in AR5, revising the predictions in AR4, posits global mean sea-level rise of up to approximately one metre by 2100. This may ultimately prove to be a conservative estimate. Moreover sea-level rise is likely to exhibit "a strong regional pattern, with some places experiencing significant deviations of local and regional sea level change from the global mean change."[60] This degree of change in sea level may pose potentially serious, maybe even disastrous, threat to many coastal States, especially those with large, heavily populated and low-lying coastal areas, as well as for small, low-lying island States. Such sea-level variability is also highly likely to impact coastal areas where wetlands and other sites may be protected by international treaty regimes,[61] although the highly variable responses of different coastal environments to changing sea levels also needs to be taken into account.

In addition to the threat posed to low-lying coastal areas and their associated populations, as well as to coastal infrastructure from inundation by rising seas, there are also threats to the ocean spaces adjacent to such threatened territories. In particular, sea-level rise has the potential to impact significantly the spatial extent of national claims to maritime jurisdiction.[62]

Generally, the baseline from which States' maritime zones are measured is the 'normal' baseline, determined in accordance with Article 5 of the 1982 United Nations Convention on the Law of the Sea (LOSC).[63] From the baseline States may measure

[60] 'Sea Level Change', *Contribution of WG I to AR5*, at 1140.

[61] Under, e.g., the 1971 Ramsar Convention on Wetlands of International Importance, 996 UNTS 245; ILM, (1972), 963; as well as under regional conventions.

[62] The literature on this is extensive. Early (legal) writers agreed that this was a consequence of ambulatory baselines: ECF Bird and JRV Prescott 'Rising Global Sea Levels and National Maritime Claims', *Marine Policy Reports*, 1 (1989), 177–196; AHA Soons 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries', *Netherlands International Law Review*, 37 (1990), 207–232. DD Caron, 'When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of Rising Sea Level' *Ecology Law Quarterly*, 17 (1990), 621. D Freestone, 'International Law and Sea Level Rise' in: RR Churchill and D Freestone (eds), *International Law and Global Climate Change* (London/Dordrecht: Graham and Trotman/Martinus Nijhoff, 1991), 109, 119–122. D Freestone and J Pethick, 'Sea Level Rise and Maritime Boundaries: International Implications of Impacts and Responses' in: G Blake (ed.) *International Boundaries: Fresh Perspectives*, Vol 5 (Routledge, 1994), 73–90.

[63] Article 5 of the 1982 United Nations Convention on the Law of the Sea, UN Doc A/CONF.62/122; text in 1833 UNTS 3; text reprinted in ILM, 21(1982), at 1261; available at <www.un.org/ Depts/los>.

their territorial sea,[64] contiguous zone,[65] exclusive economic zone (EEZ)[66] and continental shelf.[67] Consequently, if those 'normal' baselines move inland as a consequence of sea level rise, so too will the outer limits of those maritime zones measured from such baselines, if the basepoints that control the definition of the outer limits to maritime zones are impacted. As a result of such shifting baselines and a re-adjustment of the boundary of maritime zones, waters previously under national jurisdiction could become part of the high seas. Moreover, changes to the baselines could impact upon maritime boundaries between adjacent or opposite States.

Further, sea-level rise has the potential to inundate small islands and other geographical features which may have generated their own maritime zones,[68] or been used by the coastal State as base points for drawing straight baselines.[69] This too may have major impacts on the capacity of a feature to generate maritime jurisdictional claims.[70] As the discussion in part III of this report demonstrates clearly, some low-lying island States, already under pressure, may find their land area rendered uninhabitable well before they are overrun by the sea. In extreme cases this will raise questions as to the ability of some island States to maintain their statehood without a habitable land area, and to maintain sovereignty over the territorial sea, and sovereign rights over the resources of the maritime zones appurtenant to those land areas.[71]

The Sea-level Rise Committee has decided that in its final report in 2018 it will consider how international law may be able to respond to these unprecedented existential challenges as well as the serious human dimension of the issues. It will consider whether these issues need to be addressed by treaty law or whether customary international law and 'softer' methods of norm creation will be sufficiently flexible to address these challenges, and what might be the appropriate mechanisms for this.

---

[64] Article 3, LOSC.

[65] Article 33, LOSC.

[66] Article 57, LOSC.

[67] Article 76(1), LOSC. Of course, defining the outer limit of the continental shelf is more complex as the continental shelf extends beyond a coastal State's territorial sea "throughout the natural prolongation of its land territory to the outer edge of the continental margin", and therefore for many coastal States it extends beyond 200 nautical miles from the baselines.

[68] Article 121, LOSC.

[69] As permitted by Article 7, LOSC.

[70] See generally the detailed provisions of Part II, LOSC. For example, the low water line of islands may be used to measure maritime zones (Article 121(2)). The low water line of low tide elevations (LTE) may also be used to measure maritime zones if the LTE is situated "wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island" (Article 13(1), LOSC). All these features are susceptible to change.

[71] This may include the resources of the 200 nautical mile EEZ in which coastal States have "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil" (Part V, LOSC), and of the continental shelf over which coastal States exercise "sovereign rights for the purpose of exploring it and exploiting its natural resources" (Part VI, LOSC). See also R Rayfuse, 'Sea Level Rise and Maritime Zones: Preserving the Entitlements of "Disappearing" States' in: MB Gerrard and GE Wannier, *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013), 167–191.

In this first interim report the Committee considers some preliminary legal issues regarding the potential impacts of sea-level rise on coastal States' maritime zones. The Committee decided that it was appropriate to begin its review by revisiting the findings of the Baselines Committee as regards its interpretation of Article 5 of LOSC as the basis for its own further deliberations.

B. The Existing Law of the 'Normal' Baseline

In its 2012 Sofia Report,[72] the Baselines Committee considered at some length the legal implications of Article 5 LOSC which in the English text reads as follows:

> Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

The Baselines Committee concluded that "the legal normal baseline is the actual low-water line along the coast at the vertical datum, also known as the chart datum, indicated on charts officially recognized by the coastal State" and that "the phrase 'as marked on large-scale charts officially recognized by the coastal State' provides for coastal State discretion to choose the vertical datum at which that State measures and depicts its low-water line". The charted low-water line "illustrates the legal normal baseline, and in most instances and for most purposes the charted low-water line provides a sufficiently accurate representation of the normal baseline". However, the Committee considered that although the charted line appears to enjoy a strong presumption of accuracy, "where significant physical changes have occurred so that the chart does not provide an accurate representation of the actual low-water line at the chosen vertical datum, extrinsic evidence has been considered by international courts and tribunals in order to determine the location of the legal normal baseline".[73]

In accordance with the Baselines Committee's view, "it follows that if the legal baseline changes with human-induced expansions of the actual low-water line to seaward, then it must also change with contractions of the actual low-water line to the landward."[74]

The Baselines Committee therefore reached the view that

> the existing law of normal baseline applies in situations of significant coastal change caused by both territorial gain and territorial loss. Coastal States may protect and preserve territory through physical reinforcement, but not through the legal fiction of a charted line that is unrepresentative of the actual low-water line.[75]

Consequently, the Baselines Committee concluded that

> the normal baseline is ambulatory, moving seaward to reflect changes to the coast caused by accretion, land rise, and the construction of human-made structures associated with harbour systems, coastal protection and land reclamation projects, and also landward

---

[72] *Baselines Committee Sofia Report*, *supra* note 3.

[73] *Baselines Committee Sofia Report*, at 425 (on-line, at 31). This was the view of 28 of the 30 member Committee, with two statements of dissent, from Dr Oude Elferink (Netherlands) and Professor Yee (HQ), with reasons as further explained in footnotes 217 and 218 of the *Baselines Committee Sofia Report*, at 425 (on-line, at 31).

[74] *Baselines Committee Sofia Report*, at 422 (on-line, at 28).

[75] *Baselines Committee Sofia Report*, at 424 (on-line, at 30).

> to reflect changes caused by erosion and sea level rise. Under extreme circumstances the latter category of change could result in total territorial loss and the consequent total loss of baselines and of the maritime zones measured from those baselines. The existing law of the normal baseline does not offer an adequate solution to this potentially serious problem.[76]

The Baselines Committee recommended "that the issue of impacts of substantial territorial loss resulting from sea level rise be considered further by a Committee established for the specific purpose of addressing the wide range of concerns it raises".[77] This, therefore, was the wider issue that the Baselines Committee passed on to the new committee.

C. Preliminary Issues Addressed by the Sea-level Rise Committee

In considering the implications of this finding by the Baselines Committee, the Sea-level Rise Committee decided to address two important preliminary issues that the Baselines Committee had identified in its 2012 report:

> [T]he prospect of significant sea level rise carries with it problems of global scale and effect and serious existential implications for some States. Among these problems are negative impacts on maritime boundaries negotiated in reliance on normal baselines in existence at the time of a delimitation, and the outer limits of a State's maritime zones proclaimed in reliance upon a normal baseline.[78]

It should be noted that the Baselines Committee had also identified a third issue, namely that:

> [T]he likelihood that some offshore low-lying islands will be completely submerged … which will give rise to debate as to whether a coastal state loses the totality of its entitlement to claim a normal baseline from territory that has become submerged.[79]

All those issues were identified by the Baselines Committee independently of the extreme scenario of sea-level rise leading to the submergence of the entire territory, and actual low-water line, of low-lying small island States below the vertical datum, thereby, as stated by the Baselines Committee, "eliminating entirely the normal baseline and any entitlement to maritime zones generated from the baseline".[80] The Sea-level Rise Committee will revert to and address this issue in its final report (in 2018), in conjunction with the discussion of statehood.

1. The Effect of Sea-level Rise on the Outer Limits of Maritime Zones

The issue simply stated is that as sea levels rise the low water line along the coast, which marks the 'normal baseline' for the purposes of Article 5, will usually move inland and some key geographical features used as base points may be inundated and lost.

If, as a matter of international law, the coastal baseline is ambulatory (as the Baseline Committee has concluded)[81] then where a baseline moves inland[82] and critical basepoints

---

[76] *Baselines Committee Sofia Report,* at 426 (on-line, at 31).
[77] *Baselines Committee Sofia Report*, at 426 (on-line, at 31).
[78] *Baselines Committee Sofia Report*, at 422–423 (on-line, at 29).
[79] *Baselines Committee Sofia Report*, at 422 (on-line, at 29).
[80] *Baselines Committee Sofia Report*, at 422 (on-line, at 29).
[81] *Baselines Committee Sofia Report*, at 426 (on-line, at 31).
[82] Also, note that because of changes in sediment flows rising sea may in some circumstances also have an opposite effect in some places – accreting sediments to push the low water line seaward.

from which maritime zones are measured are inundated, then the outer limits of the maritime zones which are measured from this baseline may also move landward.[83] Where key geographical features which are used as basepoints for the construction of straight baselines are totally inundated then these movements inland may be even more substantial. This same principle of course applies to the archipelagic baselines of archipelagic States, where the effect of losses of key basepoint features may appear to be even more pronounced.

This is the issue which has exercised writers. For example, Judge Jesus has argued that "a substantial rise in sea level, whatever the cause, should not entail the loss of States' ocean space and their rights over maritime resources, already recognized by the 1982 Convention and by the community of nations."[84] However, this is the unavoidable legal consequence of the finding of the Baselines Committee that baselines are ambulatory.

Schofield has however cautioned that, extreme as this issue may seem in theory, the outer limits of broader maritime zones, notably the EEZ, are often less susceptible to change as they are reliant on a restricted number of contributing or critical basepoints. Thus, even significant changes in the location of the coastline may have only limited impacts in terms of 200 nautical miles outer limits so long as key basepoints are not subject to change.[85]

In the longer term however, as reported above,[86] the planet is already irrevocably committed to continued sea-level rises in the course of this and the coming centuries, and the actual amount and pace of sea-level rise is as yet unknown. Moreover, as IPCC reports in AR5,[87] the actual amount of sea-level rise is uncertain even in the course of the 21st century, and significant changes, especially in some most affected regions, cannot be excluded at this point.

This Committee considered the views of a number of scholars who have written on this issue. There was a common understanding that the unavoidable consequence of the impact of sea-level rise, using the existing law of the normal baseline, is the loss of maritime space. However, legal authors that have addressed this issue so far seem equally dissatisfied by this result, and have proposed different solutions *de lege ferenda*. Soons had pointed out in 1990 that coastal States may legally defend existing coastlines by artificial

---

[83] Where the outer edge of the natural prolongation of the continental shelf is less than 200 nautical miles from the coastal baseline, then the outer limit of the shelf may extend to 200 nm from the baseline (Article 76(1), LOSC). Due consideration should be here also given to Article 76(9) LOSC, which states that the 'coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf'.

[84] JL Jesus, 'Rocks, New-born Islands, Sea Level Rise and Maritime Space' in: J Frowein et al. (eds), *Negotiating For Peace – Liber Amicorum Tono Eitel* (Berlin/Heidelberg: Springer, 2003), 599, 602.

[85] CH Schofield, 'Defining the "Boundary" between Land and Sea: Territorial Sea Baselines in the South China Sea', in: R Beckman, MR Page and L Bernard (eds), *UNCLOS and the South China Sea* (Cheltenham: Edward Elgar, 2014), 21–54.

[86] IPCC projections in AR5; see further above, in part I, section B.2.2 of this report.

[87] Ibid.

means but accepted that this was an extremely expensive option.[88] As the 2012 *Baselines Committee Sofia Report* summarized the issue: "Short of actual physical protection of the coast the authors do not find that the existing law provides for any other way to protect the maritime interests of States threatened with a total loss of territory."[89]

The Sea-level Rise Committee considered that this was an appropriate issue on which to make proposals for progressive development of international law. In order to preserve – at least provisionally – existing maritime zone entitlements, the Committee discussed two possible options for progressive development. The first option would be to propose a new rule freezing the existing baselines in their current position, using the "large scale charts officially recognized by the coastal State";[90] the second option would be to propose a new rule freezing the existing defined outer limits of maritime zones measured from the baselines established in accordance with the LOSC.

The practical complications of divorcing the actual low water line from the 'legal' low water line had already been explored by the Baselines Committee, which had also looked at State practice in some detail. Although it had found evidence that at least one State took the view that the charted line was the definitive baseline for maritime entitlements even where it might depart from the actual low water line,[91] this was found by the Baselines Committee to be at the extreme end of the spectrum of State practice studied, and the majority of State practice was to the contrary or hybrid,[92] while also "the preponderance of the scholarship in this area appears to support the view that charts are not determinative of the naturally ambulatory normal baseline."[93]

The second option of proposing the freezing of the outer limits of maritime zones was the option also discussed by a number of authors cited, most of whom now take part in the work of the Committee as its members. Soons had suggested the creation of a new rule of customary international law which allows coastal States in case of sea level rise to maintain the original outer limits of their maritime zones.[94] Like Soons, Caron had recognized early on the waste of resources that would be involved in physically defending basepoints simply to protect maritime interests[95] and has suggested that, in order to address the problems of inefficiency and conflict, "States should move toward permanently fixing ocean boundaries."[96] He, like Jesus, is in favour of freezing baselines, whereas Rayfuse has proposed that a freezing of maritime zone outer limits "would be consistent with, and

---

[88] Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries', at 231.

[89] *Baselines Committee Sofia Report*, at 422 (on-line, at 29).

[90] Article 5, LOSC. Note there is no requirement in the LOSC for the coastal State to notify these 'normal baselines'. Article 16(2) appears only to require coastal state to give 'due publicity' to such charts when lines are "determined in accordance with articles 7, 9 and 10."

[91] See *Baselines Committee Sofia Report*, at 412 (on-line, at 21), citing Netherlands Ministry of Defense press release of 22 December 2009, stating: "A change in the actual coastline thus has no effect, until it is included in the nautical chart" (translation by the Baselines Committee members Oude Elferink, Soons, and Kwiatkowska).

[92] *Baselines Committee Sofia Report*, at 413 (on-line, at 21–22).

[93] *Baselines Committee Sofia Report*, at 413 (on-line, at 22).

[94] Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries', at 231.

[95] Caron, 'When Law Makes Climate Change Worse', at 621.

[96] DD Caron, 'Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict', in: Seoung-Yong Hong and JM Van Dyke (eds), *Maritime Boundary*

would significantly assist in, the promotion and achievement of the LOSC objectives of peace, stability, certainty, fairness, and efficiency in ocean governance."[97] Schofield and Arsana had considered that one option would be to "legally fix or declare the location of normal baselines and/or the maritime limits derived from them."[98]

Hayashi thinks that "the idea of freezing, and thus permanently fixing, the baselines and consequently the outer limits of various maritime zones, has considerable merit."[99] However he contrasts the two possible approaches pointing out that "the fixing of baselines would mean that the future submerged area becomes internal waters, whereas fixing only the outer limits of maritime zones would result in expanding the breadth of the territorial sea landward to the extent of the shifting baselines" and he considers the proposal to fix baselines, in contrast to fixing outer limits, as having "the merit of not changing the rules on the breadth of the territorial sea and the EEZ as stipulated in Articles 3 and 57, respectively."[100]

This issue was the subject of a preliminary discussion at the Oslo intersessional meeting of the Committee (June 2015) and there was preference expressed for considering modalities *de lege ferenda* for freezing the outer limits of maritime zones. It was felt that the issue would benefit from wider discussion within the Committee in its work on the 2018 final report.[101] The legal consequences of 'divorcing' coastal baselines (which would still be ambulatory) from the outer limits of maritime zones, by freezing the outer limit without freezing the baseline, has implications for some of the key provisions of the LOS Convention, including the breadth of the territorial sea[102] and of the EEZ.[103] Hayashi has also highlighted the risks of freezing what might already be 'excessive' claims where

Disputes, Settlement Processes, and the Law of the Sea (Boston/Leiden: Brill/Martinus Nijhoff, 2009), 1, 14.

[97] Rayfuse, 'Sea Level Rise and Maritime Zones: Preserving the Entitlements of "Disappearing" States', at 191.

[98] C Schofield and I Made A Arsana, *Imaginary Islands? Options to Preserve Maritime Jurisdictional Entitlements and Provide Stable Maritime Limits in the Face of Coastal Instability*, 6th IHO-IAG ABLOS Conference, 25–27 October 2010, at 6; see at: www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf6/ABLOS_Conf6.htm. While considering the potential for unilateral state practice in this area to develop new customary law, they assert that a "preferable approach would be to seek multilateral agreement on, effectively, a revised legal regime applicable to normal baselines".

[99] M Hayashi, 'Sea Level Rise and the Law of the Sea – Future Options', in: D Vidas and PJ Schei (eds), *The World Ocean in Globalisation: Challenges and Responses* (Boston/Leiden: Brill/Martinus Nijhoff, 2011), at 197.

[100] Ibid, at 196.

[101] Note that on 16 July 2015, seven leaders of Polynesian States and Territories signed at Papeete the Taputapu-ātea Declaration on Climate Change. This Declaration states (in para. 4) that, ahead of COP 21 in Paris, "the Polynesian Leaders Group call upon all State Parties to the UNFCCC to" … "with regards to the loss of territorial integrity:… [A]cknowledge, under the [UNCLOS], the importance of the Exclusive Economic Zones for Polynesian Island States and Territories whose area is calculated according to emerged lands and permanent-ly establish the baselines in accordance with the UNCLOS, without taking into account sea level rise."

[102] Article 3, LOSC: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention."

[103] Article 57, LOSC: "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

States have established baselines in violation of the rules of the Convention.[104] Moreover, a decision would also need to be made as to which specific point in time that any 'freezing' might be permissible. Concerns have also been raised about the fundamental principles of the law of the sea, such as the principle of the land dominating the sea, rather than vice versa.[105] Although the motive for making such a proposal would be to facilitate stability and orderly relations between States, there might well be unintended negative consequences.

The Sea-level Rise Committee has also yet to discuss in detail how any proposal *de lege ferenda* might best be implemented. Hayashi has systematically adumbrated a number of options, some of which he admits may not be practical – they include the development of customary international law,[106] a protocol to the UN Framework Convention on Climate Change,[107] utilization of the amendment provisions of the LOSC, a decision of the Meeting of the State Parties to the LOSC (SPLOS), or by means of a diplomatic conference open also for States non-parties to the LOSC, or by an agreement adopted by the UN General Assembly after negotiation in its subsidiary bodies or informal consultations.[108]

There is also the question of how long such a 'freezing' might be effective? Would it be regarded as a permanent solution or as a temporary provisional measure until such time as the international community might agree upon a more permanent approach?

2. Effects of Coastline Changes on Maritime Boundaries

The second issue flagged by the Baselines Committee was what it termed the "negative impacts on maritime boundaries negotiated in reliance on normal baselines in existence at the time of delimitation." In other words, if the representatives of two (or possibly more) States negotiating a maritime boundary delimitation agreement have relied on the coastal baseline in order, for example, to measure an equidistance line, and then the coastal baseline changes as a result of inundation and resultant shift in the location of baselines landward caused by sea-level rise. Is it possible for one party then to argue that this is a fundamental change of circumstances which would undermine the validity of the maritime boundary agreement?

The concept of 'fundamental change of circumstances' or clausula *rebus sic stantibus*, is specifically referred to in Article 62 of the 1969 Vienna Convention on the Law of Treaties. Article 62(1) reads:

---

[104] Hayashi, 'Sea Level Rise and the Law of the Sea – Future Options', at 196, citing T. Palmer, 'Sea-level Change and Baselines', in: *Proceedings of the Canadian Hydrographic Conference and National Surveyors Conference, 2008*, at 4.

[105] *Baselines Committee Sofia Report*, at 423 (on-line, at 29).

[106] As suggested by Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries', at 255.

[107] As proposed in 1990 by the Coastal Zone Management Subgroup of the IPCC, reported by Freestone and Pethick, 'Sea Level Rise and Maritime Boundaries: International Implications of Impacts and Responses', at 76.

[108] All discussed further by Hayashi, 'Sea Level Rise and the Law of the Sea – Future Options', at 200–206.

> A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
> b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

However, Article 62(2) does specifically exclude two situations from the application of this doctrine. It provides that:

> A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary;[109]

Commenting on this provision in the Vienna Convention, Aust notes that "the principle cannot be invoked if the treaty establishes a boundary, that term being used so as to include treaties which cede territory, not merely delimit a boundary".[110] Some scholars have suggested that the application of this provision of the Vienna Convention to maritime boundaries is still an open issue. For instance, Caron has argued that "it is entirely plausible that a State might argue that circumstances had changed in that the parties had not foreseen such a rise in sea level."[111]

Lisztwan has looked in detail at the *travaux préparatoires* of the Vienna Convention text – itself based on an International Law Commission draft prepared by Rapporteur Sir Humphrey Waldock (building on the previous 1957 report of Sir Gerald Fitzmaurice). Her research reveals that many types of boundary treaties were referred to in the context of the negotiation and she concludes that "[a]lthough limited, those comments, and the absence of any contrary statements, suggest that the State Parties intended maritime boundaries to fall within the Article 62(2) boundary exception."[112] From this, Lisztwan draws the conclusion that: "States cannot invoke coastline shift as grounds to terminate a maritime boundary."[113] She also cites the dicta in the *Aegean Sea case*, where the International Court of Justice (ICJ) said

> Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances.[114]

---

[109] The second exception is not relevant here: "(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."

[110] A Aust, *Modern Treaty Law and Practice*, 3rd edn (Cambridge University Press, 2013), at 264.

[111] Caron, 'Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal To Avoid Conflict', at 13–14; cited by J Lisztwan, 'Stability of Maritime Boundary Agreements', *Yale Journal of International Law*, 37 (2012), 153, 186, who also cites cautious support from J Lusthaus, 'Shifting Sands: Sea Level Rise, Maritime Boundaries and Inter-state Conflict', *Politics*, 30 (2020), 113, 115–118.

[112] Lisztwan, 'Stability of Maritime Boundary Agreements', at 189.

[113] Ibid.

[114] *Aegean Sea Continental Shelf* (Greece v. Turkey), [1978] ICJ Reports 3, 85 (19 December 1978).

As a matter of existing law, the Committee took the view that changes in coastlines arising through sea-level rise or any other reason did not affect, and had not to date affected, the validity of existing maritime boundary agreements. On the grounds of legal stability and certainty the Committee was sceptical as to whether this rule should be re-examined *de lege ferenda* or be subject to revision at this stage, since this could involve a revision of both the LOSC and the Vienna Convention on the Law of Treaties, Article 62(2).

Re-examination of the above rules may, however, become necessary in connection with the extreme scenario of sea-level rise leading to the submergence of the entire territory of low-lying small island States or to their territory becoming uninhabitable. The Sea-level Rise Committee will revert to and address this issue in its final report (in 2018), in conjunction with the discussion of statehood.

The preliminary view of the Sea-level Rise Committee was that, for any treaty negotiated since the time that the issue of climate change and consequent sea-level rise has been in the public domain, the negotiators must be deemed to have been aware of it, hence sea-level rise could not in that event be regarded as a fundamental change of circumstances.

The key question in this regard is to assess at which point in time it could be considered that sea-level rise, of such a magnitude as to impact objective criteria for negotiated boundaries, became a matter which was in the 'public domain'. The First World Climate Conference hosted by the World Meteorological Organization (WMO) was in 1979, while the IPCC was established by UNEP and WMO in 1988 – and the First Assessment Report by the IPCC was published two years later, in 1990.[115] As already mentioned, however, in 2014 the IPCC revised its predictions published in AR4 (2007), and posited sea-level rise of up to approximately one metre by 2100. IPCC estimates in AR5 are, already as of 2016, considered to be rather conservative.

This time could arguably be as early as at the time of the WMO First World Climate Conference in 1979. However, it has been noted that "during the Third UN Conference on the Law of the Sea [which was concluded in 1982], there was no widespread recognition of the possible problems of sea-level rise, and negotiators did not anticipate that there would be a significant global regression of coastlines".[116] There are therefore no provisions in the 1982 LOS Convention itself for dealing with possible rises in sea level;[117] it can therefore hardly be expected that maritime boundary negotiators before that time could have been deemed to have been aware of the issue of sea-level rise as potentially relevant to the agreement they were negotiating.

On the other hand, it could be argued that the latest estimates by the IPCC, as contained in AR5 of 2013/2014, are now based on significantly improved understanding

[115] Regarding findings on sea-level rise in that and subsequent IPCC assessment reports, see *supra*, part I of this report, section B.2.1. Note also General Assembly Resolution 44/206, 'Possible Adverse Impacts of Sea-Level Rise on Islands and Coastal Areas, Particularly Low-lying Coastal Areas', UN Doc A/44/206, adopted on 22 December 1989, 85th plenary meeting; and General Assembly Resolution 43/53, 'Protection of Global Climate for Present and Future Generations of Mankind', UN Doc A/43/905, adopted on 6 December 1988, 70th plenary meeting.

[116] Hayashi, 'Sea Level Rise and the Law of the Sea – Future Options', at 194, as well as the literature cited there.

[117] Ibid.

of components that contribute to sea-level rise, and have for the first time introduced in the public domain a well-founded scientific explanation of all components of sea-level rise and its projections for the 21st century, of such a magnitude as to have the potential to affect the objective criteria on which the negotiation of maritime boundaries is based.

There could also be various other points in time – before, between, or after those already discussed above – at which the knowledge or presumed awareness of the negotiators of the maritime boundaries about sea-level rise as the relevant circumstance might be regarded as being 'foreseen by the parties' at the time of the conclusion of the agreement. Moreover, in those instances in which negotiators are clearly aware that there may be changes to the relevant baselines subsequent to the conclusion of a boundary treaty, the fact that they opted for a defined boundary instead of allowing for later changes indicates a preference for legal stability. The views, suggestions and opinions of the Committee members on this wide range of issues will be required in the further work of the Committee towards its final report in 2018.

PART III: International Law and Sea-level Rise: (Forced) Migration and Human Rights

This part of the report focuses on a segment of Committee's mandate relating to "the study of the … implications under international law of the partial and complete inundation of state territory, or depopulation thereof, in particular of small island and low-lying states" by examining issues relating to human rights and mobility.[118] The combined and cumulative impacts of relative sea level rise, sea-level extremes and other effects of climate change present a range of direct and indirect negative consequences for human lives and living conditions in coastal and low-lying areas. They pose risks to all aspects of human life, including mortality, food and water security, health and well-being, housing, land and other property, livelihoods and industry, infrastructure and critical services,[119] and cultural heritage,[120] which may progressively threaten human security over the course of this century and beyond.[121]

Current legal frameworks do not facilitate the movement of people across borders in anticipation of future climate change-related harm. As explained below, international refugee law generally will not apply. Likewise, it is a misconception that people will necessarily be rendered stateless as a matter of law if their small island country becomes uninhabitable.

The first section (A) provides a brief overview of the ways in which sea-level rise may affect the enjoyment of human rights, including people's ability to remain in their homes. The second section (B) identifies 'tools' that have the potential to address the implications of sea-level rise on human mobility, both in terms of interventions that would enable

[118] For a more detailed analysis, see J McAdam, B Burson, W Kälin and S Weerasinghe, *International Law and Sea-Level Rise: Forced Migration and Human Rights* (FNI Report 1/2016), at http://www.fni.no/pdf/FNI-R0116.pdf.

[119] *AR5 – Summary for Policymakers*, at 13.

[120] P Wong et al, 'Coastal Systems and Low-lying Areas' in *Climate Change 2014*, 381.

[121] *AR5 – Summary for Policymakers*, 1–32; W Adger et al, 'Human Security' in *Climate Change 2014. Contribution of WG II to AR5, Chapter 12*, 755–791.

affected people to remain *in situ*, as well as those that would assist them to move either within their own country or to another country. The final section (C) draws out key areas and principles of international law with the capacity to lend clarity and content to States' obligations to address the mobility challenges presented by sea-level rise, which will be explored in greater detail in the Committee's final report in 2018.

A. Background

At the outset, it is important to note that sea-level rise does not automatically mean that people will need to leave their homes. Rather, legal, policy, technical and scientific interventions now and in the coming years, including through climate change adaptation and mitigation, will determine whether, and for how long, it is possible for people to remain *in situ* – and whether doing so enables them to lead dignified lives or exposes them to risks and increased vulnerability. The impacts of sea-level rise on the enjoyment of human rights can be favourably influenced by State action on disaster risk reduction and management, climate change mitigation and adaptation, and development policies, among others. Identifying the need for a broad, complementary set of policy strategies necessarily affects how international law should be progressively developed in this area.

Not all communities will experience the same pressures or have the same needs, and the needs of particular individuals within communities will also vary. This is because underlying socio-economic circumstances, differing degrees of exposure and vulnerability, general environmental and geographical circumstances, adaptive capacity and resilience, and the resources of governing institutions will all affect the ability of individuals, communities and governments to respond to change.

These impacts will, in turn, affect human mobility. Where people cannot live in safe conditions with access to livelihoods – or expect they will not be able to in the future – they may move elsewhere. Sometimes they may move because of a sudden-onset event, such as a storm surge, astronomical tide, or flooding. At other times, they may plan to move in anticipation of longer-term changes to their environment due to erosion, change in wetlands, or saltwater intrusion into groundwater. The nature of any movement – as well as its geography – will depend in part on mitigation and adaptation action, what assistance and protection is available to people, and on legal and policy frameworks regulating cross-border movement. Even so, the precise scale and timeframes remain unclear.

1. Sea-level Rise and Human Rights

There is already a substantial body of literature describing the impacts of climate change, including sea-level rise, on people's ability to enjoy their human rights.[122] In successive UN Human Rights Council (HRC) resolutions, States have acknowledged that "the adverse effects of climate change have a range of direct and indirect implications for

[122] See, e.g., literature cited in J McAdam and M Limon, *Human Rights, Climate Change and Cross-Border Displacement: The Role of the International Community in Contributing to Effective and Just Solutions* (Universal Rights Group, Geneva, 2015); S Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press, Cambridge, 2010); W Kälin, 'The Human Rights Dimension of Natural or Human-Made Disasters', *German Yearbook of International Law*, 55 (2012), 119, 128–29.

the effective enjoyment of all human rights",[123] including "immediate and far-reaching threats to people and communities around the world".[124] The rights to life, adequate food, health, housing, cultural identity and self-determination may be particularly affected.

Since climate change interacts with other stressors, there will always be multiple reasons why people's rights are negatively impacted. As the HRC has stressed, "the effects of climate change will be felt most acutely by individuals and communities … that are already in vulnerable situations owing to geography, poverty, gender, age, indigenous or minority status or disability",[125] with "people in developing countries, particularly in least developed countries, small island developing States and African countries … among the most vulnerable to the adverse effects of climate change on the full and effective enjoyment of all human rights".[126] As such, it is impossible to isolate the precise role that sea-level rise will play in any given scenario (although this may change over time). Similarly, in most cases, more than one human right will be affected because of the interdependence of many rights.

Of course, identifying that the enjoyment of a right may be impacted by rising sea levels does not automatically render a State in breach of its international obligations. States have an obligation to respect, protect and fulfil human rights to protect people from *foreseeable* harm, including from the impacts of sea-level rise, and this may be tempered by a number of factors. In particular, the jurisprudence of both the European Court of Human Rights[127] and the New Zealand Immigration and Protection Tribunal has drawn a distinction between man-made and natural hazards, the latter noting that:

> The disasters that occur in Tuvalu derive from vulnerability of natural hazards such as droughts and hurricanes, and inundation due to sea-level rise and storm surges. The content of Tuvalu's positive obligations to take steps to protect the life of persons within its jurisdiction from such hazards must necessarily be shaped by this reality.[128]

Accordingly, an affected State would be faced with 'an impossible burden' were it required, as a matter of law, to mitigate the underlying environmental drivers of these hazards in order to comply with the obligation to protect against the arbitrary deprivation of life.[129]

Thus, while there is growing recognition that inherent in existing human rights obligations are duties that require States to address adverse impacts of climate change, greater clarity and guidance is needed on the ways in which international and regional human rights law obligate States to take action to adapt to and address the mobility-related

---

[123] 'Human Rights and Climate Change', UN Doc A/HRC/26/L.33/Rev.1 (25 June 2014), para 1. Other resolutions on this subject include UN Doc A/HRC/RES/7/23, (28 March 2008); UN Doc A/HRC/RES/10/04 (25 March 2009); UN Doc A/HRC/RES/18/22 (17 October 2011); UN Doc A/HRC/29/L.21 (30 June 2015). Beyond these, resolutions on the thematic topic of the 'environment', including 'human rights and the environment', also reference climate change.

[124] UN Doc A/HRC/RES/18/22 (17 October 2011), para 1.

[125] UN Doc A/HRC/29/L.21 (30 June 2015), preamble.

[126] UN Doc A/HRC/26/L.33/Rev.1 (25 June 2014), preamble.

[127] *Budayeva v Russia* App Nos 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02 (20 March 2008); *Öneryildiz v Turkey* (2005) 41 EHRR 20.

[128] *AC (Tuvalu)* [2014] NZIPT 800517–520, para 75.

[129] Ibid.

impacts of sea-level rise on their populations. This is especially so where movement occurs across an international border.

2. Sea-level Rise and Mobility

In 2014, more than 19.3 million people fled their homes in the context of disasters stemming from natural hazards.[130] Each year since 2008, disasters have displaced an average of more than 26 million people.[131] Most movement took place within countries, not across international borders – a trend that is predicted to continue.[132] In some contexts, however, such as low-lying island States, international movement may become inevitable over time.[133]

Global estimates for movements linked to slower-onset changes, such as sea-level rise, do not exist. However, an array of literature, including research and findings from the Nansen Initiative, shows that the gradual impacts of sea-level rise, such as erosion, saltwater intrusion into groundwater and rising water tables, will progressively affect living conditions and livelihood opportunities, which may spur migration.[134] Experience indicates that people will seek to migrate from at risk areas, rather than waiting for a crisis point.[135]

A key point to note is that even when land is not submerged, it may become unsuitable for human habitation. Saltwater intrusion into groundwater, surface water and land may jeopardize fresh water supplies, diminish the fertility of agricultural land, and in turn affect livelihoods and food security. Immediate and short-term impacts, such as flooding, inundation and saltwater intrusion, are likely to be exacerbated by longer-term impacts, such as erosion.[136] Additionally, States whose governance capacity is already weak may

---

[130] Internal Displacement Monitoring Centre (IDMC), *Global Estimates 2015: People Displaced by Disasters* (July 2015) 8, http://www.internal-displacement.org/assets/library/Media/201507-globalEstimates-2015/20150713-global-estimates-2015-en-v1.pdf.

[131] Ibid.

[132] The Government Office for Science, *Foresight: Migration and Global Environmental Change: Future Challenges and Opportunities* (The Government Office for Science, London, 2011) 37; Asian Development Bank, *Addressing Climate Change and Migration in Asia and the Pacific: Final Report* (Asian Development Bank, 2012) viii, 4; W Kälin and N Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches* (UNHCR Legal and Protection Policy Research Series, Geneva, 2012), 32–34, http://www.refworld.org/docid/4f38a9422.html.

[133] Small island developing States are disproportionately affected by development associated with floods and storms (as well as earthquakes). Relative to their population size, between 2008 and 2014, they experienced levels of displacement that were three times higher than the global average; IDMC, *Global Estimates 2015*, 9.

[134] See, e.g., Nansen Initiative, *Pacific Regional Consultations: Outcome Report* (2013); Nansen Initiative, *Southeast Asia Regional Consultation: Background Paper* (2014); Nansen Initiative, *Greater Horn of Africa Regional Consultation: Background Paper* (2014), all available at http://www.nanseninitiative.org/.

[135] See ibid; J McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, Oxford, 2012); S Martin, S Weerasinghe and A Taylor (eds), *Humanitarian Crises and Migration: Causes, Consequences and Reponses* (Routledge, London, 2014).

[136] R Nicholls, 'Planning for the Impacts of Sea-level Rise', *Oceanography*, 24 (2011), 144, 147.

be significantly challenged long before substantial portions of habitable territory are lost and populations are seriously affected. This has implications for human mobility.

It is also important to note that slow-onset processes like sea-level rise may have more immediate impacts. Indeed, most movement will be triggered by 'interim' extreme weather and sea-level events, such as storm surges, astronomical tides, and flooding. The ~20 centimetre increase in global sea levels since the mid-19th century means that there is now much more water riding on a storm surge, which makes flooding more extensive and severe.[137] Sea-level rise may also interact with other oceanic impacts associated with climate change. Such interactive effects were seen in Cyclone Pam in Vanuatu in March 2015, when higher water surface temperatures also created faster wind speeds and more damaging rainfall.[138] The cumulative effects of a series of sudden-onset events can erode resilience over time and contribute to further displacement.

Overall, the relationship between human mobility and climate change, including sea-level rise, is complex and non-linear, and depends on a range of interacting factors.[139] It is a multi-causal phenomenon in which climate change impacts interact with other economic, social, and political drivers (or stressors) that themselves affect migration.[140] In many cases, it will be impossible to disentangle the impacts of sea-level rise from other impacts when it comes to mobility decisions.

Finally, although movement away from the impacts of environmental change has long been an important adaptation strategy,[141] it will not always be an option. The most vulnerable people may be 'trapped' because they do not have the resources to move at all.[142] Those who can move may not be able to go very far because they do not have the economic or social networks to assist them. Movement across international borders may be hampered by immigration formalities and high costs.[143]

B. Tools

Mobility issues associated with the impacts of sea-level rise[144] require both timely and proactive interventions, and pertinent reactive responses. International law has a role to play, but there are also many pragmatic national, regional and/or bilateral interventions that will not require the creation of new international legal principles or frameworks.

---

[137] Climate Council, 'Damage from Cyclone Pam was Exacerbated by Climate Change' (Briefing Statement 2015) 3, http://www.climatecouncil.org.au/uploads/417d45f46cc04249d55d59be3da6281c.pdf. Regarding IPCC estimates of sea-level rise in the course of the 20th century, see *supra*, Part I in this report, section B.2.1.

[138] Climate Council, 'Damage from Cyclone Pam was Exacerbated by Climate Change', at 2.

[139] See W Kälin, 'Conceptualising Climate-Induced Displacement' in J McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, Oxford, 2010) 82.

[140] See, e.g., *Foresight* report; McAdam, *Climate Change, Forced Migration, and International Law*, in particular Chapter 1, synthesizing other research.

[141] W Adger et al, 'Human Security' in *Climate Change 2014. Contribution of WG II to AR5*, at 758.

[142] See Martin, Weerasinghe and Taylor (eds), *Humanitarian Crises and Migration*, in particular Chapters 1 and 14.

[143] Adger et al, 'Human Security', *Climate Change 2014. Contribution of WG II to AR5*, at 758.

[144] In general, throughout this part of the report, unless the context indicates otherwise or 'sea-level extremes' is explicitly mentioned, whenever a reference is made to sea-level rise, it is intended to also encompass sea-level extremes.

In short, legal and other measures are needed to help people: (a) remain *in situ*, where this is possible and desirable; (b) move elsewhere, in anticipation of harm; and (c) be protected and assisted if they are displaced (whether internally or across an international border). In all cases, the principles of human dignity, non-discrimination and international cooperation must be paramount.[145]

1. Avoiding Movement: Disaster Risk Reduction and Climate Change Adaptation

Most communities likely to be adversely affected by the impacts of climate change and disasters want to remain in their homes for as long as they can. For example, in the South Pacific, where low-lying islands are particularly susceptible to sea-level rise, communities want to develop adaptation initiatives to enable them to remain in their homes for as long as possible, while also developing strategies to facilitate migration for those who wished to move.[146]

Disaster risk reduction is a very important tool in this regard. It seeks to avert damage where possible, lessen its negative impacts when it does occur, protect the most susceptible through risk and vulnerability assessments, build people's resilience, and take multi-sectoral approaches to creating national strategies.[147] The Sendai Framework on Disaster Risk Reduction 2015–30 highlights the need to develop disaster risk reduction policies based on information on persons and communities particularly exposed to disaster risks, and to formulate "public policies, where applicable, aimed at addressing the issues of prevention … of human settlements in disaster risk zones"[148] It also calls for the promotion of "transboundary cooperation … to build resilience and reduce disaster risk, including … displacement risk".[149] Likewise, national climate adaptation plans and similar instruments can importantly help people to stay in their homes, even when the impacts of climate change seriously affect their traditional livelihoods.

By enhancing resilience, any displacement that is triggered by a sudden-onset event may only be a short-term, emergency measure to get out of harm's way. Where *in situ* adaptation is not viable, has been exhausted, or is unsatisfactory for other reasons, movement away from impacted areas may be another form of adaptation/disaster risk reduction.

2. Responding to Movement: The Role of International Law

Movement can be both a form of adaptation, as well as a sign that other types of adaptation have failed,[150] and will fall somewhere on a spectrum from forced to voluntary. For instance, 'displacement' describes the (primarily) forced movement of people, often at

---

[145] See, e.g., The Nansen Principles, the recommendations stemming from the Nansen Conference on Climate Change and Displacement in the 21st Century, held in Oslo 6–7 June 2011, available at: https://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/nansen_prinsipper.pdf. Principle 1 specifically references human dignity.

[146] See, e.g., *Nansen Initiative Pacific Regional Consultation*.

[147] McAdam, *Climate Change, Forced Migration and International Law*, 242.

[148] Sendai Framework for Disaster Risk Reduction 2015–2030, UN Doc A/RES/69/283 (23 June 2015) para 27, http://www.preventionweb.net/files/resolutions/N1516716.pdf.

[149] Ibid, para 28.

[150] E.g., K Warner et al, *Changing Climate, Moving People: Framing Migration, Displacement and Planned Relocation*, UNU-EHS Policy Brief (2013), http://collections.unu.edu/view/UNU:1837#viewAttachments.

the point when disaster strikes. 'Migration' refers to (primarily) voluntary movement, which, in the present context, would likely occur in anticipation of future harm (and in stages, over a longer timeframe). The extent to which people can migrate voluntarily in anticipation of, or in response to, the impacts of sea-level rise, will depend upon the legal and policy frameworks in place, and the resources available to those wishing to move. 'Planned relocation' describes a process in which people move or are moved away from their homes, settled in a new location, and provided with the conditions for rebuilding their lives. It can be either forced or voluntary, large-scale or small-scale.[151] It is generally carried out by the State as a risk mitigation strategy, but it is also possible that communities may take the initiative to relocate themselves.

Reflecting these forms of mobility and the critical role of policy in shaping their contours, paragraph 14(f) of the Cancun Adaptation Framework, adopted in 2010, invited States to enhance action on adaptation by undertaking, inter alia, "measures to enhance understanding, coordination, and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate at the international, regional and national levels".[152] Although non-binding, paragraph 14(f) has operational significance. First, it evidences States' recognition of the impacts of climate change on human movement, the need for strategies to address this, and the recognition of three types of movements as forms of adaptation: displacement, migration and planned relocation. Secondly, it provides a basis for securing adaptation funding to develop strategies that support mobility as an adaptation option.

The Paris Agreement, adopted in December 2015, has moved towards a more action-oriented agenda. It calls for the establishment of a task force, under the auspices of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, "to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change".[153] The agreement does not specify how the task force will operate, and it is not yet clear how its recommendations will be implemented, what weight they will carry, or how they will be financed. The Advisory Group on Climate Change and Human Mobility, comprised of a small number of academic, policy and operational actors, including the United Nations High Commissioner for Refugees and the International Organization for Migration,

[151] E Ferris, *Protection and Planned Relocations in the Context of Climate Change* (UNHCR Legal and Protection Policy Research Series, Geneva, 2012) 11; http://www.refworld.org/docid/5023774e2.html. See also *Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation* (Brookings/Georgetown/UNHCR, 2015). The term should not be confused with the notion of 'resettlement' in the refugee context, which refers to resettling refugees from a country of first asylum to a third State on a permanent basis.

[152] Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011, paragraph 14(f).

[153] Draft decision -/CP.21, Adoption of the Paris Agreement, UN Doc. FCC/CP/2015/L.9/Rev.1, 12 December 2015, paragraph 50; see also paragraph 51. The preamble also notes that when taking action to address climate change, States parties should "respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".

has recommended that the task force should have four key objectives in carrying out its mandate, namely to enhance (a) knowledge; (b) policy coordination; (c) action; and (d) technical expertise and capacity-building.[154]

Cross-cutting all three forms of mobility – displacement, migration and planned relocation – is whether the movement in question occurs within a State, or involves movement across an international border. As noted above, most displacement, migration and planned relocation is likely to take place *within* countries. This is significant because the range of applicable international law is not identical in each case, and consequently the need for development of international law to address any resulting gaps differs.

The extent to which people feel compelled to move across international borders may be tempered by the degree to which assistance and protection is available to people who are internally displaced, as well as the legal and policy frameworks regulating cross-border movement. Some international movement is inevitable and is already occurring (although the scale is unclear).[155]

Proactive interventions that can be put in place now to allow people to undertake planned migration can be an effective way to build long-term resilience, especially in the face of slower-onset impacts of sea-level rise and sea-level rise itself. Research has shown that resilience determines the extent to which people can use migration to 'flourish', rather than just to 'survive'.[156] Any migration or relocation strategies must be developed and executed in a manner fully consistent with the minimum standards of protection articulated under human rights law.

2.1 Displacement

Some existing legal tools are relevant to displacement. With respect to internal movement, the UN Guiding Principles on Internal Displacement are particularly relevant. Although in themselves non-binding, the Guiding Principles reflect binding international legal standards and have been recognized by the international community as an "important international framework for the protection of internally displaced persons",[157] addressing people's needs and rights before, during and after displacement.[158]

---

[154] Inputs from the Advisory Group on Climate Change and Human Mobility to Executive Committee of the Warsaw International Mechanism for Loss and Damage, Bonn, 2–5 February 2016, http://www.unhcr.org/56b9a4c19.pdf. The Executive Committee has already invited relevant organizations and experts to provide "knowledge, data and scientific information on both internal and cross-border migration, displacement and other forms of human mobility owing to factors related to climate change impacts, including in combination with other factors": letter dated 30 March 2016 (on file with the Co-Rapporteur).

[155] See, e.g., reports by the Nansen Initiative above.

[156] Warner et al, *Changing Climate, Moving People*, 21.

[157] UNGA, 2005 World Summit Outcome, UN Doc A/RES/60/1 (24 October 2005) para 132.

[158] Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998), http://www.un-documents.net/gpid.htm. They are complemented by other international and regional instruments on human rights and disasters, including the 2009 African Union Convention for the Protection and Assistance to Internally Displaced in Africa (Kampala Convention), which has a specific provision (Article 5(4)) obliging States parties to take measure to protect and assist persons who have been internally displaced due to natural and human made disasters, including climate change. They are further complemented by non-State initiatives, such as the Peninsula Principles on

The challenge lies in strengthening the normative and operational implementation of the Guiding Principles and related instruments. They can be strengthened *normatively* through the development/amendment of national laws, policies and strategies, and/or sub-regional and regional instruments, to recognize and respond to displacement as a response to disasters including those linked to climate change. They can be strengthened *operationally* by building/enhancing the capacities of national and local authorities to implement and apply them.[159]

At the international level, the 1951 Convention relating to the Status of Refugees, as well as complementary forms of protection under human rights law, are also potentially relevant. As explained elsewhere,[160] however, the existing international legal regime on refugees, complementary protection and stateless persons is unlikely to provide assistance in most cases. Further, there is no political will among States to expand their protection obligations under international law at this point in time.

Nevertheless, it may *already* be possible to engage States' existing refugee or complementary protection obligations in the context of sea-level rise and other environmental degradation or destruction – for instance, if a government were to restrict access to fresh water supplies or agricultural land, or to limit humanitarian assistance in the aftermath of an extreme weather event.[161] The 'cause' of the harm would not be sea-level rise or environmental destruction per se, but it would provide the background setting.

2.2 Migration

Migration can be an effective way to build long-term resilience of people and communities, allowing them to cope with adverse impacts of sea-level rise and potentially reduce or avoid displacement at a later stage. Experience indicates that people will initially seek to migrate from at-risk areas rather than wait until a crisis point arrives.[162] In this respect, proactively anticipating and planning for migration is an important policy option. Migration can enable people to move 'voluntarily' and relatively safely away from the impacts of sea-level rise, be a beneficial channel for livelihood diversification, and play an important role in risk management strategies. Increased migration could also help relieve population and resource pressures, particularly in some low-lying island States, where these are of pressing concern.[163]

People who voluntarily migrate to another part of their home country to avoid the anticipated negative impacts of sea-level rise remain entitled to the full range of rights and protections afforded by international (and domestic) law as nationals of that country including, in particular, the right to liberty of movement and freedom to choose one's place of residence. While core norms of international human rights law, such as the prohibition on discrimination, will be important, the main challenges for international law in the case of internal (voluntary) migration will be more operational and compliance-oriented, than

---

Climate Displacement, which seek to contextualize the Guiding Principles to the specific context of climate change-related displacement.

159 Kälin, 'Conceptualising Climate-Induced Displacement', at 94.

160 McAdam, *Climate Change, Forced Migration and International Law*.

161 See *AF (Kiribati)* [2013] NZIPT 800413, paras 58–59.

162 See *supra*, note 135.

163 McAdam, *Climate Change, Forced Migration, and International Law*, at 204.

normative. In contrast, while there are some tools to address cross-border movement, there are also considerable legal gaps.

Many of the existing tools to address cross-border mobility are premised on the idea that it is too dangerous to return *now or in the immediate future*. One important tool in this regard is the use of temporary protection visas, or ad hoc adjustments to existing immigration processes, to assist people who need to leave disaster-affected countries.[164] Such tools are more displacement-oriented and remedial than proactive, and do not facilitate movement that is anticipatory – namely, where people calculate future risks and decide to leave rather than stay.[165] International treaties concerning labour migration will typically not apply because they are designed to regulate movement across borders for purposes of employment.

Existing national immigration laws and regulations related to employment, family or education, as well as other forms of privileged access to territory, might allow for adaptive international migration.[166] In some parts of the world, processes of colonization and trusteeship have provided the foundation for sub-regional 'clusters' of States within which varying levels of privileged rights to temporary or permanent residence, or labour-market access, are conferred, particularly in the State that acts as a 'cluster hub'. Examples in the Pacific include New Zealand, USA and France, and new clusters are emerging centred around countries such as Australia.[167] At the regional level, existing free movement agreements also present important existing frameworks for facilitating migration as adaptation, but require adjustment to be effective in the context of sea-level rise.[168]

Nevertheless, targeted mechanisms for enabling people to migrate in the context of sea-level rise, and indeed the broader effects of climate change, need to be part of the policy mix. Some States affected by sea-level rise have already called for the expansion of existing migration opportunities to create planned movement pathways for their nationals

[164] Ibid, Chapter 4; D Cantor, *Law, Policy, and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters, States of the Regional Conference on Migration and Others in the Americas*, Background Study for the Regional Workshop on Temporary Protection Status and/or Humanitarian Visas in Situations of Disasters, San José (10–11 February 2015) 42–54, available at: https://www.nanseninitiative.org/central-america-consultations-intergovernmental/.

[165] See discussion in *AC (Kiribati)* [2013] NZIPT 800413, para 89–91, where the NZ Immigration Tribunal discussed the requirement that harm be 'imminent', a standard it equated to the 'real chance' standard in refugee law as requiring more than conjecture or surmise.

[166] Family reunification may provide greater scope for more permanent international migration through sponsorship and other mechanisms.

[167] B Burson and R Bedford, *Clusters and Hubs: Toward a Regional Architecture for Voluntary Adaptive Migration in the Pacific* (Discussion Paper, Nansen Initiative, 9 December 2013), Executive Summary, https://www2.nanseninitiative.org/wp-content/uploads/2015/02/DP_Clusters_and_Hubs_Toward_a_Regional_Architecture_for_Voluntary_Adaptive_Migration_in_the_Pacific.pdf.

[168] See, e.g., the Economic Union of the Organisation of Eastern Caribbean States, the Caribbean Single Market and Economy, the Central American '4 Border Agreement', the East African Community Free Movement of Persons Protocol, and the Economic Community of West African States (ECOWAS).

and to enable them to 'migrate with dignity'.[169] Managed regular admission schemes, including immigration quotas or targeted admission of migrants from particularly affected areas, would assist adaptation efforts, and at the same time potentially reduce the extent of irregular migration. These could be implemented through bi-lateral or (sub-) regional agreements between countries, building on historical migration flows and new patterns of movements.

2.3 Planned relocation

In the face of sudden- and slow-onset impacts of sea-level rise, planned relocation may be used as a preventative measure to reduce the risk of future displacement by moving people out of risk-prone areas. Planned relocation may also serve as a durable solution by enabling displaced people to return as a community to a new part of the country, in the event that their original place of origin has been destroyed or rendered uninhabitable. Most planned relocations are envisaged as taking place within countries, rather than across international borders (for practical, legal, cultural and related reasons). In cases where internal planned relocation is not a viable long-term solution, such as in some low-lying island States, it remains to be seen whether movement will take place as individual/household migration, or whether the planned relocation of whole communities across international borders will be possible. This will depend on what other States are prepared to offer.

The planned relocation of persons or groups of persons should be an option of last resort. This was the clear message from the Pacific Island consultation held by the Nansen Initiative in 2013,[170] and is borne out by fraught experiences of cross-border relocation in the past in that region,[171] and the experiences of development actors in moving populations to facilitate various development projects.[172] Over the course of this century and beyond, the planned international relocation of groups may, however, be necessary for those remaining in low-lying island States, as their territory becomes uninhabitable from the impacts of sea-level rise and other effects of climate change. In part, this will depend on what other mitigation and adaptation strategies are put in place – including migration strategies to enable people to move if and when they so desire.

In a context where planned relocation becomes a necessary and viable option, policy-makers will need to pay acute attention to planning, embrace lessons learned from past experiences,[173] prioritize a human rights-centred approach throughout the process, and involve and consult those to be relocated as well as host communities.

Planned relocation is a tool with myriad complexities. Aside from the intricacies of securing agreement to relocate communities to the territory of another State, there are

[169] Kiribati is one example; see McAdam, *Climate Change, Forced Migration, and International Law*, 175.

[170] *Nansen Initiative Pacific Regional Consultation*.

[171] J McAdam, 'Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change', *Journal of Pacific History*, 49 (2014), 301.

[172] See, e.g., Ferris, *Protection and Planned Relocations*.

[173] J McAdam, 'Relocation and Resettlement from Colonisation to Climate Change: The Perennial Solution to "Danger Zones"', *London Review of International Law*, 3 (2015), 93; J McAdam, '"Under Two Jurisdictions": Immigration, Citizenship, and Self-Governance in Cross-Border Community Relocations', *Law and History Review*, 24 (2016) (published online 6 April 2016).

implications for fundamental issues such as self-determination, identity and status, as well as other important facets of daily life including livelihoods, health, shelter, culture, and property. Effects of dislocation can have intergenerational consequences. Experiences from the development field demonstrates that impoverishment of relocated groups is a distinct risk. There are also questions about how to balance the human rights of relocated groups with those of the communities into which they move.

C. Further Issues for the Consideration of the Committee

1. International Human Rights Law

Human rights law, and the different categories of obligations (respect, protect, and fulfil) intrinsic in specific rights, must inform the ways in which States undertake action to address the impacts of sea-level rise, including action to facilitate *in situ* adaptation and prevent and address internal and international movements. Greater clarity and guidance is needed on the ways in which international and regional human rights law obligate States to take action to adapt to and address the impacts of sea-level rise on their populations, including as they pertain to the three different types of mobility discussed above in section B.

Beyond this general duty, emerging jurisprudence from the European Court of Human Rights and UN treaty bodies have shed light on the ways in which States' obligations to respect, protect and fulfil certain human rights relate to phases of disaster response.[174] Arguments have also been made that victims of natural disasters can claim a right to humanitarian assistance when in need pursuant to extant human rights.[175] In these ways, there is growing recognition that inherent in existing human rights obligations are duties that require States to address adverse impacts of climate change. Various bodies are attempting to articulate and give meaning to the content of such duties.[176] In addition, some treaties expressly refer to disaster relief,[177] and there are also efforts to recognize a single, overarching right to a healthy environment.[178]

However, the risks posed by sea-level rise for some States may, in turn, challenge contemporary understandings about State responsibility, including which State(s) bear legal duties when it comes to the protection and enjoyment of human rights.

2. Other Principles of International Law

States that have contributed the least to anthropogenic changes to the climate system will be many of the worst affected. They will require support to assist and protect their own populations and to respect, protect and fulfil their human rights obligations. Support may

---

[174] Kälin, 'The Human Rights Dimension of Natural or Human-Made Disasters', 128–29.

[175] Ibid, 141.

[176] These aspects are expected to be the subject of further research within this Committee.

[177] Convention on the Rights of Persons with Disabilities, entered into force 3 May 2008, 2515 UNTS 3, Art 11; African Charter on the Rights and Welfare of the Child, entered into force 29 July 1999, OAU Doc CAB//LEG/24.9/49, Arts 23 and 25.

[178] J Knox, *Report of the Independent Expert on Issues of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean Healthy and Sustainable Environment: Preliminary Report*, United Nations Human Rights Council, UN Doc A/HRC/22/43 (24 December 2012) para 51.

take the form of technical, financial and operational measures, aspects that are already envisioned under the UNFCCC and associated instruments.

In this context, greater clarity is needed on the role and responsibility of the international community to step into the breach. Further guidance is needed on the ways in which the international community's collective responsibility to adapt to the impacts of climate change should be translated into more specific obligations and discharged in specific situations.

In particular, two general principles of international law – the duty to cooperate, and the principle of common but differentiated responsibilities – have the potential to provide greater clarity on the role and responsibilities of the States. Additionally, elementary considerations of humanity and the closely connected concept of human dignity may provide overarching normative concepts to guide the development of strategies to respond to the impacts of sea-level rise, acting as meta-principles guiding necessary conduct.

Clarifying the content of States' existing duties under human rights law as they pertain to the impacts of sea-level rise, and complementing them by determining the content of the duty to cooperate in light of the principle of common but differentiated responsibilities, has the potential to provide a substantial contribution to the field and to lead towards developing options for the progressive development of international law. These aspects will be the subject of further research and discussion in the lead-up to the preparation of the Committee's final report in 2018.

ILA COMMITTEE ON INTERNATIONAL LAW AND SEA LEVEL RISE

WORKING SESSION

Wednesday, 10 August 2016

(2:00 pm – 4:00 pm)

Chair: Professor Aziz Tuffi Saliba (Brazilian)

The Chair welcomed attendees and introduced the reporters after which he invited the Chair of the Committee, Professor Davor Vidas, to outline aspects of the Committee and its work towards the draft Interim Report that is presented at today's session.

Professor Davor Vidas (Norway), Chair of the Committee on International Law and Sea Level Rise, thanked the session Chair for the opportunity and said that the main purpose of today's open session of the Committee was to present and discuss its draft Interim Report.

He reminded the delegates that while this Committee has the reference to 'sea-level rise' in its name, it is in fact not the first International Committee of the ILA set to study international legal implications of sea-level rise, rather that it was the Committee on Baselines under the International Law of the Sea (hereinafter: Baselines Committee) which was formed in 2008 with a part of its original mandate stating that: "the need to identify, and possibly clarify or develop, the existing law concerning the normal baseline *arises in response to possible sea level rise* that has been predicted to accompany the phenomenon of climate change, and the effects this may have in particular upon low-lying, small island developing states".

He also reminded that in 2012, when the Baselines Committee adopted its first Report at the Sofia Conference, it concluded that: "the loss of a State's territory to rising sea levels is *not primarily a baseline or law of the sea issue*. Substantial territorial loss is a much broader issue encompassing concerns of statehood, national identity, human rights, refugee status, state responsibility, access to resources, and international peace and security". The ILA Conference at Sofia acknowledged that this array of issues would require consideration by a committee to be set up for the specific purpose of addressing such a broad range of concerns.

Professor Vidas stated that this Committee on International Law and Sea Level Rise in a way evolved from part of the original mandate of the Baselines Committee, however with a mandate that is a far broader one than limited to baselines and the law of the sea only, since it includes the tasks to "study the possible impacts of sea-level rise and the implications under international law of the partial and complete inundation of state territory, or depopulation thereof, in particular of small island and low-lying states"; and "develop proposals for the *progressive development* of international law in relation to the possible loss of all or of parts of state territory and maritime zones due to sea-level rise, including the impacts on statehood, nationality, and human rights".

He added that the establishment of the Committee was prompted by current natural science concerns about the profound changes on-going in the Earth system (including, but not limited to, climate change) – and the possible ramifications of those changes for international law.

Although the exact figures are uncertain, even for this century, he reminded the meeting that scientists agree that one major feature of a warmer world will be rising sea levels and that scientific literature on this aspect is quickly growing. The matter is highly relevant for several areas of international law and requires a study inter-linking different parts of it, he said.

One such part, he stated, is directly related to the sea: to the law of the sea, regulating maritime entitlements of states and delimitation of their maritime zones. Ultimately, he continued, sea-level rise may call into question the conceptual architecture of the maritime zones under today's law of the sea. While this is a complex matter in its own right, the issue of sea-level rise may – in certain special situations, in particular of some low-lying Pacific and Indian Ocean states – extend far beyond the law of the sea and the determination of baselines and maritime zones of the coastal states, he stated.

He explained that this gives rise to fundamental questions regarding aspects of state territory and statehood under international law, such as the way that the concept of a defined territory is seen as a constituent criterion of statehood in international law. Aspects like that, he considered, may have to be re-examined in a perspective of profound changes in natural conditions. However, he held that the key factor may be population, rather than territory itself, as small island states are likely to become uninhabitable for other reasons long before they become physically submerged. Do people then resettle as individuals only, or as a community? And, indeed, when would a state cease to exist – given the criterion of population in defining statehood. These questions, he pointed out, have far-reaching implications.

Professor Vidas went on to explain that the Committee was faced with a rather comprehensive mandate, and that at the first meeting, at the Washington ILA Conference in 2014, it had already decided to address this mandate through two main phases – and accordingly, to produce an Interim Report first (the one presented today), and a comprehensive Report thereafter, for the next ILA Conference to be held in Australia in 2018, at which stage the Committee will also formulate some recommendations.

He explained that main issue-areas to be dealt with by the Committee were identified as:

- the law of the sea;
- forced migration and human rights; and
- issues of statehood and international security.

Although each of these issue-areas has already attracted a lot of research and publications, he further explained that the Committee considered that it could make a useful contribution, within the framework of its mandate, by:

- synthesising these various issues,
- elaborating interlinkages; and
- considering options for proposals *de lege ferenda*.

He explained that the Committee agreed to divide its work thematically into two main stages. The first stage involved two parallel streams of study: one on the law of the sea issues, and the other on the migration and human rights issues. That stage was now

completed with the Interim Report. The second stage, as he explained, will from now on involve the study of the statehood question and of subjects of international law, but also other issues of international law and broader issues of international security, as the common elements of both streams.

Finally, he added that the Committee had discussed impacts of sea-level rise on other areas of international law, such as cultural heritage law and environmental law (for instance, in the context of biodiversity protection regimes), but that it was suggested that these issues might be relevant in the possible later stages of the Committee's work.

Before inviting Professor David Freestone, Co-Rapporteur of the Committee, to present the main issues and findings in the Interim Report, Professor Vidas added that the themes dealt with by the Committee have so far attracted 29 Members and 6 Alternates from a total of 19 different ILA branches (and from six continents) to join the work of the Committee.

Professor David Freestone (United Kingdom), Co-Rapporteur of the Committee specially dealing with the law of the sea aspects of the Committee's mandate, introduced his presentation by underscoring the importance of the issue of sea-level rise and he alluded to the Intergovernmental Panel on Climate Change's Fifth Assessment Report which noted that projections of sea-level rise are larger than in the Fourth Assessment Report, primarily because of improved modelling of land-ice contributions. He then moved on to address the potential impacts of sea-level rise on maritime zones. In this regard, he noted that the Baselines Committee 2012 Sofia Report drew important conclusions, namely that:

- the normal baseline is ambulatory;
- under extreme circumstances … [a] change could result in total territorial loss and the consequent total loss of baselines and of the maritime zones measured from those baselines;
- the existing law of the normal baseline does not offer an adequate solution to this potentially serious problem;
- the existing law of the normal baseline applies in situations of significant coastal change caused by both territorial gain and territorial loss. Coastal states may protect and preserve territory through physical reinforcement, but not through the legal fiction of a charted line that is unrepresentative of the actual low-water line.

In relation to maritime boundaries, he then stated that there may be problems associated with maritime boundaries negotiated in reliance on normal baselines in existence at the time of delimitation and the outer limits of a state's maritime zones proclaimed in reliance upon a normal baseline. He noted that under these circumstances, a question arises as to whether the existing law of normal baselines would or should apply.

He then summarised the issues for the Committee's Interim Report. He said first and foremost the Committee will not second guess the findings of the Baselines Committee but it is considering advantages of ambulatory or fixed baselines or of fixed outer limits of maritime zones as well as how such lines might be fixed *de lege ferenda*. He added that the Committee is also seeking to answer the question whether or not maritime boundary treaties are affected by the rule generally known as *clausula rebus sic stantibus* despite

Article 62(2) of the Vienna Convention on the Law of Treaties and that this also includes the question whether or not sea-level rise does or should qualify as a fundamental change of circumstance for the purpose of *clausula rebus sic stantibus*.

The Chair invited questions and comments and none were forthcoming at this stage.

Professor David Freestone (United Kingdom) proceeded to present the third part of the Committee's Interim Report which was on migration and human rights. He acknowledged that this part was prepared by Professor Jane McAdam (Australia), Co-Rapporteur specially dealing with the aspects of migration and human rights, who unfortunately was unable to attend. The third part of the report had three sections. Section A focused on how sea-level rise may affect human rights, including people's ability to remain in their homes. Section B focused on 'tools' to address the impacts of sea-level rise on human mobility and the assistance of affected people to remain *in situ* or to move either within their own country or abroad. The last section dealt with key areas for future study.

He then reported that the key findings are that:

- displacement linked to climate change is a multi-causal phenomenon;
- climate change impacts interact with other economic, social, and political drivers (or stressors) which themselves affect migration;
- most movement will occur within states, not across borders;
- slow-onset processes like sea-level rise can also have more immediate impacts (e.g. stronger storm surges, flooding);
- people may be displaced by a sudden-onset event (cyclone) or may migrate in anticipation of longer-term changes to their environment (erosion, saltwater intrusion);
- people have different 'tipping points', related to such things as underlying socio-economic conditions, environmental exposure, vulnerability, resilience, and access to resources;
- governance will impact significantly on how disasters are experienced and responded to;
- building codes, disaster risk reduction, climate change mitigation and adaptation, development, etc. help to shape community resilience;
- legal and other measures are needed to help people to remain at home, where possible and desirable, to move elsewhere, before disaster strikes and to be protected and assisted if displaced.

Having outlined the preliminary findings he noted that in addressing the question of the impact of sea-level rise on human rights the needs and rights of affected individuals must be central to all responses and the principles of human dignity, non-discrimination and international cooperation must be paramount. Regarding displacement he stated that the guiding principles on internal displacement must address needs and rights before, during and after displacement but these need to be strengthened normatively and operationally.

He stated that, in sea-level rise induced displacements, people will not necessarily be rendered stateless as a matter of law if their state becomes uninhabitable. He also explained that generally, international refugee law will be inapplicable. In relation to migration he stated that current legal frameworks do not facilitate the movement of people across borders in anticipation of future climate change-related harm. He added, however, that

migration can be a form of adaptation by building long-term resilience hence states should consider mechanisms to enable people to move from particularly affected areas and this can be achieved through an expansion of existing visa categories, e.g., by special visas for at-risk areas. He then highlighted the significance of planned relocations as a response to forced migration noting that these would mostly be within states as opposed to cross-border movements.

Regarding human rights, he addressed the issue through questions, namely:

- What are States' obligations under international and regional human rights law to respect, protect and fulfil specific rights to protect people from foreseeable harm, including sea-level rise?
- Drawing on emerging jurisprudence in relation to disaster relief, to what extent are such duties inherent in states' existing human rights obligations? What is their content in specific situations?
- What are states' obligations under international and regional human rights law to take action to adapt to and address the impacts of sea-level rise on their populations, including in relation to displacement, migration and planned relocation?
- Which state(s) bear legal duties in this context (especially if sea-level rise challenges contemporary understandings of state responsibility)?
- What responsibilities does the duty bearer have with respect to adaptation, including mobility?
- Is there a right to a healthy environment? To disaster relief?

Similarly, he stated that the question of the international community's responsibility must be answered through the following questions:

- What is the role and responsibility of the international community to assist states vulnerable to sea-level rise?
- How should the international community's collective responsibility to adapt to the impacts of climate change be translated into more specific obligations, and discharged in specific situations?
- What is the meaning and content of the duty to cooperate (in light of the principle of common but differentiated responsibilities), especially when it comes to states taking joint and separate action to protect human rights in the context of sea-level rise?
- Can elementary considerations of 'humanity' and 'dignity' serve as overarching normative concepts to guide strategies to respond to the impacts of sea-level rise?

In conclusion, he stated that there was work underway to collate and compare states' understandings of international cooperation and international responsibility-sharing in the context of climate change law and refugee law, which might be used as a springboard for further research and analysis by the Committee. Also underway was work on the implications of sea-level rise on the protection of cultural heritage, and how international law should protect cultural heritage and identity as a human right if communities are displaced from their homes. He then concluded the presentation and thanked delegates for their attention.

The Chair invited questions and comments.

Professor Makoto Seta (Japan) asked why the Committee is concerned that freezing the outer limits of the maritime zones would challenge a fundamental principle of the law of the sea known as 'the land dominates the sea'. In his opinion, it is indeed possible to consider 'the land dominates the sea' as a general principle, but, in certain exceptional circumstances caused by sea-level rise, it will be so that, in effect, 'the sea dominates the land'; and in such situations an exception from the general principle should be allowed.

Professor David Freestone (United Kingdom) thanked Professor Seta for this comment and added that, with sea-level rise, the world will be facing some major changes in current natural conditions, due to which the Committee will have to contemplate proposals as to how to take geographical features into account in interpreting the provisions of the Law of the Sea Convention and also in progressively developing the law of the sea.

Dr Vasco Becker-Weinberg (Portugal) suggested that accepting that path might also have implications for maritime delimitation itself, including for the methodology developed thus far by international judiciary. He was therefore interested to hear views on whether raising the questions indicated in the discussion above might not entail implications beyond the issue of sea-level rise.

Professor Davor Vidas (Norway) responded that there are no readymade answers to a change of such proportions as presented in scientific predictions of sea-level rise in the long run. However, he went on to note, that the primary issue before the Committee in this respect concerns the specific situation, of a *sui generis* nature, of several low-lying island states. This is likely to require specially-tailored solutions to which the Committee will try to contribute by identifying options for practical solutions as regards this unprecedented situation. He acknowledged that the Committee will have to look into the fundamental principles as currently embodied in the law of the sea, and agreed that, even though the Law of the Sea Convention does not explicitly state as a principle that 'the land dominates the sea', its architecture of maritime zones is largely based on that approach. He added that, in a longer-term perspective, the consequences of a profound change in the current geographical circumstances due to rising sea levels will give raise to fundamental considerations for the law of the sea, and that the Committee is still in a position to analyse options for possible legal solutions in theory, whereas the broader aspects of the law of the sea will remain among core issues in the work of the Committee.

Dr Vasco Becker-Weinberg (Portugal) pointed out, with reference to the geographic situation of Bangladesh, that the sea is already 'dominating the land' there in some respects; and that, if current predictions as referred to in the report are accurate, the situation is only going to get worse. With this in mind, he was interested in views regarding the predictability and certainty of maritime boundaries, like those between Bangladesh and Myanmar in the Bay of Bengal, which is a matter related to maritime boundary delimitation and is therefore a process in its own right.

Professor David Freestone (United Kingdom) responded that, as the Law of the Sea Convention does not offer solutions here, the Committee will have to devise proposals *de lege ferenda*, and also recognise some principles as more important than others. He added that it is unclear whether these proposals might entail challenges to the current law of the sea, but in any case, the Committee will need to present concise arguments for and

against the different approaches suggested. He further noted that some changes in the current regime may be inevitable.

Pham Trang (ILA Scholar, Vietnam) was interested to know how sea-level rise might impact the practice of international courts and tribunals. She referred to the recent arbitral award in the South China Sea case in which the legal status of some maritime features was addressed, and pointed out that the evidence referred to dated from the 1930s to 1950s. She therefore wondered about the impact of sea-level rise since then, and whether this might have changed the characteristics of some maritime features, resulting, e.g., in islands becoming rocks or low-tide elevations. In her view, the Tribunal did not mention this issue in its award.

Professor David Freestone commented that the award in the South China Sea arbitration fleshes out and clarifies the meaning of some provisions of the Law of the Sea Convention, and that we can expect an evolution of legal thinking in the future, as the natural conditions are increasingly becoming subject to change – which is also a key issue for this Committee.

Professor Clive Schofield (Australia), Member of the Committee who also acted as an expert witness before the Arbitral Tribunal in the South China Sea case, commented that the Tribunal in the South China Sea arbitration did consider issues related to tidal conditions in its assessment of the relevant insular features, and concluded, as evident in its award of 12 July 2016, that it had sufficient information concerning historical observations of tidal conditions in the South China Sea, and was confident in the consistency of the hydrographic information before it regarding tidal levels.

Gawie Kanjemba (ILA Scholar, Namibia) asked about the most likely courses of action for maintaining statehood for low-lying island states and citizenship of their affected people, who will at some point be forced to migrate. He wished to know what international law provides in this regard and what can be done in terms of proposals for legal development in order to ensure smooth transitions in this respect.

Professor David Freestone (United Kingdom) responded that this is an issue that international law has not really had to address up until now; the Interim Report has identified some issues, and the Committee will in its further work aim at offering workable proposals in this regard.

Professor Davor Vidas (Norway) concurred with Professor David Freestone and added that this will be another important aspect of the Committee's work for the next two years, also noting that this inquiry might not necessarily be limited to the statehood question but could encompass broader considerations of international legal personality and subjects of international law.

The Chair asked if there were any further questions and thereafter invited the Chair of the Committee, Professor Davor Vidas, to add any closing remarks.

Professor Davor Vidas (Norway) thanked attendees for their participation and interest in the work of the Committee, and explained that the draft Interim Report of the Committee presented today will, pending minor updates, be forwarded to ILA Headquarters for publication.

The Chair thereafter thanked the Committee Chair, Professor Davor Vidas (Norway), Co-Rapporteur Professor David Freestone (United Kingdom), congratulated the Co-Rapporteurs and the Committee on their excellent work, and declared the session closed.

Swikani Ncube (ILA reporter)
Tracey Kanhanga (ILA reporter)
Martin Ratcovich (Committee reporter, Sweden)

COMMITTEE ON COMPLEMENTARITY AND
INTERNATIONAL CRIMINAL LAW

WORKING SESSION

Wednesday, August 10, 2016

Chair: Professor John Dugard (South Africa)

Professor John Dugard, the Chair, gave a welcoming address and opened the session, giving the floor to Professor Mia Swart, the Chair of the Committee.

Professor Mia Swart (South Africa) made some introductory remarks and noted that the Committee is over two years old with a mandate to look at positive complementarity. She noted that complementarity is a concept that lends itself to different interpretations. She explained that country reports were sent fairly late, which made it difficult to complete a full report in advance of the conference.

She informed that the country reports look at prosecution of international crimes in national jurisdictions.

She handed over to Professor Charles Jalloh.

Professor Charles Jalloh (USA) explained the structure and objectives of the committee's report, which he pointed out, had been previously circulated and would thus only be summarized here:

He stated that he had prepared the discussion report, which attempts to reflect the initial mandate of the committee, as a way of provoking substantive group deliberation about possible directions that the work could be taken. The background section had relied on information that was available on the ILA website. The report has three components and annexes individual country reports produced by three other members in respect of the Kenya, Mali and Sudan Situations presently before the International Criminal Court (ICC). It is not the official committee report but benefited from the useful input of several committee members who had offered helpful comments on it. The discussion report highlights broad strokes of the concept of complementarity that was introduced by the Rome Statute. The application of the concept has presented some challenges in conflict zones. And, as is widely known, there is a growing body of literature on complementarity which would need to be taken into account in future discussions of the committee's work.

The focus of the ICC and its mandate is centred around the notion of complementarity and is typically contrasted to that of the ad hoc tribunals created by the United Nations (namely ICTY and the ICTR) which operated under the so-called "primacy principle". The latter entailed that the tribunal would decide to take cases from the national prosecutions for example in respect of the ICTR it would prosecute at the Tribunal in Arusha as opposed to in Rwanda itself. The question, during the Rome Statute negotiations, was whether the ICC should also be organized around primacy and it was said at the time that it should rather have complementarity which gave the national jurisdictions both the right and responsibility to prosecute the crimes themselves. He explains that the ICC jurisdiction is thus, essentially, triggered by failure or the default of national jurisdictions to investigate and prosecute the Rome Statute crimes themselves.

The issue of "positive complementarity" arises in that we now wonder, whether in light of the practice of so-called self-referrals by states of situations that they should be investigating and prosecuting in the first place, post-conflict or transition countries actually have the capacity to investigate and prosecute the Rome Statute crimes.

There are questions raised about the principle of complementarity when countries defer to the ICC, instead of prosecuting at home, and then go to the ICC as a court of first instead of last resort. He cited the Uganda Situation as an example. Future committee work could shed light on these types of questions.

Some obstacles to prosecution are that the ICC is busy, some countries do not prosecute nationally due to lack of expertise, infrastructure, or impossibility for material reasons. He cites the case of Sudan.

Professor Jalloh explains further that the ICC has taken the view, at its Assembly of States Parties that positive complementarity is important, but that the role of the ICC is not to act as a development organization in addition to investigating and prosecuting the core crimes in its jurisdiction – which form part of its primary mandate.

He points out that the discussion report also details the history of the committee in its second part.

He informs that the third part of the discussion report includes addenda analysing the state of affairs in terms of investigating and prosecuting Rome Statute crimes at the national level. Individual members could report on the specific experiences of specific ICC situations, such has been done by three members in respect of Sudan, Kenya and Mali. This could open the door for the committee to identify the commonalities between the three situations and to measure the national level factors that gave rise to the failure to investigate and prosecute the cases. These country reports present useful data and were added to the report unedited.

To conclude his initial address, Professor Jalloh raised some questions for further deliberation: where does the committee want to go and does it want to start from the Rome Statute? Is the involvement of the court having impact on national implementation of ICC obligations, on the creation of specialized prosecution sections as in, for instance, the Crimes Against War Crimes Section in the Department of Justice in Canada? As well as: What are the results of the preliminary examinations by the ICC in certain countries? What about formally active situations presently before the ICC? Do they feel pressured to do something about the crimes because the ICC is involved or threatens to get involved?

He wrapped up by saying that he would like to emphasise that the discussion report is not an official document and that it aimed merely to provoke a discussion about the future direction of the committee's work.

The Chair said that the best course of action from this point was to allow Professor Swart to comment on the country reports that were based on the country specific questionnaire which was circulated. Thereafter, the floor would be opened for questions and comments.

Professor Mia Swart (South Africa) expresses that Professor Jalloh's document summarises some important information but her main concern with the document pertains to the focus of the report. She said that his view is that the first focus of the committee

should be on the situational countries' reports; whereas her view is to aim at divorcing complementarity from Article 17 and rather to look at national prosecutions even by non-signatory countries. Especially in light of Security Council referrals where any country can potentially become relevant to the ICC.

Professor Swart continues to draw the picture of membership to the Committee stating that there are Palestinian and Israeli members participating. She suggests working on the creation of a Palestinian Committee. She mentions that there are also members from the far east, with six country reports under the theme of complementarity as well as that there are not many members from Latin America. There are some European members and three members from the US. She expressed her contentment with having received 26 country reports for the purposes of the committee. While she wants to have wide representation at the Committee, she still wants to limit membership. She expressed that interest from a Colombian member was welcomed.

Going back to the reports, Professor Swart says that the idea is to draw from all the country reports and informs on the questions addressed in those reports.

Questions from the Committee to the country branches: Professor Swart reads the list of questions sent in a prior document annexed to this report. These questions include:

1. Give an overview of prosecutions of international crimes (whether prosecuted as such or as ordinary crimes) in your region, if any, since 1 July 2002.
2. Have these been prosecuted (either as ordinary or as international crimes) in the country where the crimes were committed?
3. Have these been prosecuted in other countries, and if so, on the basis of which head of jurisdiction?
4. If not, why have these cases not been prosecuted in the state where the crimes were committed, or in any other state? In discussing the causes of impunity the following can be considered:
   (i) The availability of evidence;
   (ii) The ability to arrest
   (iii) The investigatory powers
   (iv) The political obstacles for the police, prosecution, judiciary
   (v) The availability of relevant legislation
   (vi) The availability of capable justice institutions
   (vii) The priorities of the domestic justice system
5. Which States in your region have imported a) the core international crimes and b) modes of liability into national criminal law?
6. Which States in your region, if any, have specialized institutional capacity to investigate, prosecute and adjudicate core international crimes?
7. What role have actors other than prosecution authorities played e.g. civil society and the international community?
8. How can the political will to prosecute be bolstered in the states you have chosen to focus on in your region? In considering this question it will be useful to further consider: Why is there no political will? What are the political costs of proceedings? Which interests are at stake? And how could the political costs be alleviated?
9. Have there been strong calls for national prosecution of core international crimes after 1 July, 2002 and, if so, from whom?

10. To what extent is the prosecution independent from the executive? Is the prosecution under influences and pressures, and if so, which ones?
11. How independent is the judiciary in the states you have chosen to focus on? What is being done to reform the judiciary and the court system?
12. In certain contexts, truth commissions and traditional courts have been held out as alternatives by governments and have deeply impacted prosecutions where these take place. In other settings, they have been deployed in particular ways alongside prosecutions. To what extent have alternative (in the sense of non-criminal) justice processes interacted with or had an impact on prosecutions in the country concerned?
13. Sketch the context, particularly political in which the accountability debate and prosecutions unfold (for example the peace v justice debate) capturing both national and international dimensions of the politics of justice.

Professor Swart gave general feedback on the responses to the questionnaires and mentioned for example that in countries such as Malawi and Zimbabwe, the reports are short because there is not that much to report on due to the stance of the specific country.

She continues to reiterate that it would be useful to define complementarity because even though the decision has been made to focus on positive complementarity the Committee is still battling with some definitional issues. She asked whether the Committee would be seeing Complementarity as a function of Article 17; or is it going to be thrown open to say that complementarity is relevant to any jurisdiction.

The Chair gave the opportunity to members of the Committee to comment and says that before opening the floor Professor Charles Jalloh will make an additional remark.

Professor Charles Jalloh (USA) explains that the suggestion was to use current situations before the court as a starting point, without excluding reference to other situations later. He recalls that there were at least two phases to the undertaking of research and the preparation of a committee report.

Professor Mia Swart (South Africa) added that she would like to clarify regarding the phases of the report as Professor Jalloh mentioned, that Phase A would be a more geographical approach, and phase B would be to draw themes out from the various countries and have a more thematic approach.

The Chair then opened it to the floor for questions and comments.

.**Advocate Yael Gvirsman (Israel)** adds that the division between situation countries and non-situation countries or state parties and non-state parties is artificial and suggests that a broader scope is of interest for the questions looked at. She adds that the reason for such comment is that Security Council in terms of Article 13 may trigger jurisdiction globally as mentioned by Professor Swart. Secondly, she stated that situation may and do involve non state parties. She suggests the use of a thematic horizontal approach as being more helpful than putting all countries in geographical boxes.

Dr Sarah Nouwen (Netherlands) highlighted that getting 26 country reports is a success, and this is the result of Professor Mia Swart chasing members to submit reports with a great positive energy. She further noted that most reports were submitted to Professor

Jalloh in June, allowing him little time to draft a report and she would like to commend his ability to have done so in spite of the short time frame.

Dr Nouwen noted that the difficulty of decoupling this Committee's work from the legal provisions in the Rome Statute is deciding on what other concept of complementarity to base its work on. Articles 17 and 20(3) of the Rome Statute at least provided a definition She argued that because complementarity has been considered a linchpin of the Rome Statute and thus an important notion, it has become a term used by many, but for very different things: people have for instance begun talking about "positive complementarity", "investigative complementarity" or "proactive complementarity" and all these concepts mean different things to different people because they lack of legal basis in the Rome Statute and clear agreed upon definition.

If this Committee wished to focus on "positive complementarity", Dr Nouwen said, it should decide which type of positive complementarity it wants to focus on. She argued for adopting a definition from an official or semi-official ICC document, rather than an academic paper. ICC documents that came to mind are a policy paper from the Office of the Prosecutor (OTP) elaborating the idea of positive complementarity and the other are resolutions of the Assembly of States Parties, first adopted at the Review Conference in Kampala, where the states parties effectively embrace the idea of positive complementarity as long as the International Court itself stays away from implementing it.

Dr Nouwen added that if the Committee decided to focus on positive complementarity it should be clear that while there are some links with the legal concept of complementarity in the Rome Statute, there are also important differences. Both have to do with the idea of states investigating the crimes within the ICC's jurisdiction. However, complementarity as a legal concept in the Statute and positive complementarity require different types of actions and are implemented by different actors. Legal complementarity is an admissibility rule in the Rome Statute. Pursuant to Article 17, this rule puts an obligation on the court, not on states. Positive complementarity, by contrast, is not an arrangement of admissibility, but a policy aimed at enabling or encouraging states, through assistance from the ICC or from other states, to investigate and prosecute the crimes within the Rome Statute domestically. Positive complementarity is thus effectively a policy of co-operation, even if different from the type of cooperation primarily envisaged in the Rome Statute, namely co-operation by states with the ICC.

Professor Mia Swart (South Africa) asks Dr Nouwen to clarify as she is not sure she understands what Dr Nouwen said about positive complementarity being about co-operation. Professor Swart disagrees in part and points out that positive complementarity does not necessarily mean cooperation.

Dr Sarah Nouwen (Netherlands) responds that the degree to which positive complementarity is about cooperation, depends on which type of positive complementarity one has in mind. The OTP once set forth an idea of positive complementarity in which it involved the ICC helping states to prosecute domestically. Prosecutor Luis Moreno Ocampo had famously stated in his inaugural address that the ICC would be successful if there were no proceedings before the ICC because states were doing this domestically. Because of this, he had added, controversially, , that the first responsibility of the Court was to help states to do this. While it is difficult to find a legal basis for the claim that

this is the Court's responsibility, and for some of the proposed types of co-operation such as capacity building, other forms of ICC-to-state co-operation could be based on Article 93(10) of the Statute. Many states have argued that it is not the Court's responsibility to do capacity building but that other states and institutions could do so. For example, the UNDP could support in enabling prosecutions.

Dr Nouwen reiterated that the question remained which notion of complementarity the Committee wanted to work on.

The Chair asked Dr Nouwen a question regarding the duty on states to investigate and prosecute in the Rome Statute, saying that the prosecutor has often given the impression that there is such a duty on states. He asked whether this would be something that should be investigated by the Committee.

Dr Sarah Nouwen (Netherlands) answered that she refers to this as "the normative paradox of complementarity": on the one hand, complementarity may be based on the idea that ideally states investigate and prosecute domestically; on the other hand, the Statute itself does not impose such an obligation on states, nor does the Court have the jurisdiction to adjudicate state responsibility for failing this obligation. Indeed, the very creation of the Court, combined with the first Prosecutor's policy of inviting states to refer situations in their own states, may have undermined the sense of responsibility on states. While the Preamble recalls 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes', neither this nor any other provision in the Rome Statute creates an obligation to that effect. The Statute does impose an obligation on states to implement legislation to facilitate cooperation and to criminalise offences against the administration of justice, but not to investigate or prosecute crimes in the Rome Statute domestically, or to incorporate these into domestic law. She mentioned that nonetheless that certain states have domesticated international crimes, in part to make sure that they can fully benefit from the complementarity arrangement. She argued that the preamble referred to existing obligations under bodies of international law other than the Rome Statute. She stated that the Committee could follow the approach suggested by The Chair, but would then move away from the idea of positive complementarity which the Chair of the Committee had suggested focusing on, and begin to examine the international duties of states to prosecute international crimes domestically. .

Professor Mia Swart (South Africa) asks what would be bad about doing so? She asks further how far the Committee can venture outside of complementarity.

Dr Sarah Nouwen (Netherlands) replied that the Committee could go beyond complementarity as a legal principle, merely stating that the Committee is inspired by the fact that the principle of complementarity grants states the primary right to investigate and prosecute and also to say that it seems to espouse a normative preference for proceedings at the domestic level. Another question for exploration could be what the obstacles are to domestic proceedings that are to be overcome.

The Chair gave the floor to others present to comment.

Bettina Ambach (Germany, Wayamo Foundation) informs that her organization was involved precisely in a project on 'Complementarity in Practice' as they called it. The German's warned her against using the word "positive" complementarity or she would

not get anything done. The project in Kenya was in capacity building and lasted two years, offering practical field insight. She suggests identifying "what we want to achieve," and says that for her it is strengthening global capacity so that international crimes can be dealt with. She raises that the second question to follow would then be "How can we do that" and she is of the opinion that the answer lies in capacity building on a very wide scale rather than engaging in academic discussions. In her organization's project, the result was that complementarity was positive. She noted that the ICC participated.

Director Ambach highlighted the importance of what is happening on the ground, and the field experience. In the project she mentioned, if there was a judge, ICC judges also participated. She noted that this is was positive complementarity could entail. If there was a need of a prosecutor, an ICC prosecutor also participated. This does not mean that the ICC should do the actual training but this is where smaller organisations such as the Wayamo Foundation could play a role.

Dr Charles Alenga Khamala (East Africa) explained that in 1998 there was no theoretical opinion. There was no theory at the origin. He suggested there are different perspectives, all of them viable. Continental European lawyers think of mandatory obligations namely that where there is enough evidence, prosecution should take place. He mentioned that in the common law system countries – the opportunity principle demands that despite the existence of sufficient evidence, the prosecutor only prosecutes where it is in the public interest. This illustrates how different traditions have different perspectives; each can opt for the principle that best suits them.

Dr Khamala invited the committee to develop guidelines which could reduce the independence of the prosecutor and no longer allow prosecution to be a subjective test.

The Chair clarified that the purpose of the session is to raise issues of importance to the work of the Committee and reiterates that it is important to discuss issues of this kind. He invites participants to share their comments.

Judge Richard Goldstone (South Africa) indicated that he has an open mind as to the conceptual limitation and as to what aspects and topics are included under the term complementarity. He underscores that the ultimate goal is to formulate recommendations and, with this in view, it is good to provide guidance on concrete themes that the Committee would be looking at. This should be tied to the question of recommendations.

Advocate Yael Gvirsman (Israel) Advocate Yael Gvirsman (Israel) added that when the Committee speaks of complementarity the idea that they should have in mind is the broader notion of accountability.

She said States have an interest to know what they need to do to answer the legal definition of complementarity. She added that it is a challenge to state's understanding of legal complementarity to even consider the ICC's case law. So far there is a case to case analysis. If earlier case law is considered such as the Lubanga case, where the focus was on what a 'situation' or a 'case' is. Then the Kenyan case law changed that. The approach now is a 'case by case' approach so there is even lack of clarity as to what is meant by 'legal complementarity'. She added further that the Libyan case law proved an entirely new plethora of issues. There is no longer the obligation to call a crime an international crime in order for a domestic procedure or prosecution to be valid in the eyes of the ICC.

She said that there is an unsettling lack of clarity as to legal complementarity and that is an aspect the Committee could focus on.

She also said that accountability should be read in a broad manner and not restrict itself to 'purely' prosecution or criminal purposes. She states further that there is an earlier hint in one OTP Prosecution Policy Paper of 2007 with regard to Article 53. She said that it also reflects on complementarity because it states an array of domestic mechanisms of accountability that may be valid domestic mechanisms. This list was far broader than criminal prosecutions. This strengthens the view that the Committee should observe accountability under a broad scope.

In addition, Advocate Gvirsman stated that the way victims perceive accountability is useful. She suggests thinking of a broad understanding of accountability.

Professor Mia Swart (South Africa) raised a question which was directed at Bettina Ambach about the German understanding of complementarity. Does the ICC always have to be the measure of all things? Should it provide all the answers?

She mentioned that there is an interesting example in the Indonesian report which says that Indonesia has enacted legislation for the prosecution of international crimes independent of the ICC or the ICC statute. She explained that this could be a theme to explore: legislation that is not in response to the ICC Indonesia is not even a member to the ICC but they showed political will which some member countries have not.

Professor Sharon Weill (France, non-member) suggested methodological aspects. She says it is good to talk to relevant actors and in particular to the prosecution authorities in different places that have legislation in place and ask them what it is that they need.

University of South Africa participant pointed out that there are 32 indictments in Africa in 8 different countries, Shouldn't Africa and the African Union be one of the themes?

Judge Richard Goldstone (South Africa) highlighted that one interesting effect of complementarity is seen in the American Bar Association's efforts in Congress. They are encouraging legislation to domesticate the international crimes defined in the Rome Statute. This is a case of a non-member state where pressure is growing.

The Chair adds another theme, related to international accountability and states that the whole purpose of International Law is to secure International Accountability. He notes that in the discussion paper, Professor Jalloh raised the question of immunity for example. There is no ILA Committee examining immunity. He adds that he feels it would be helpful if this was possibly also included in the scope of this Committee.

Professor Mia Swart (South Africa) replied to say that the Committee had not discussed regional complementarity yet. She is uncertain whether this would really form a part of the mandate of the Committee. Professor Swart asked Dr Nouwen and Professor Jalloh what their opinion on this point would be.

Dr Sarah Nouwen (Netherlands) responded that from a technical perspective the question would probably be whether proceedings by a regional court could render cases inadmissible before the ICC. She said that this was an interesting legal question but one that

is not necessarily best suited for answering by the ILA. She thought that the Committee could best focus on a question that would make use of the fact that this Committee combines expertise from several countries.

The Chair added a point about immunity and complementarity in the African context and each are very prominent in debate at present. He relates back to what was mentioned or asked about complementarity and the proposed African Criminal Court. He commented that whether it is to ever come into existence is a debateable topic but he reiterates that this is an issue that requires attention because it is the prime regional issue.

Professor Charles Jalloh (USA) said that he would like to mention something which relates less to the immunity issue but instead goes back to what was mentioned before in Dr Nouwen's initial intervention about a theme that is about a legal question, where the issue is framed in a wider manner to allow the possible achievement of a number of objectives. He agrees with Dr Nouwen and says that he drew a parallel with one of the challenges of complementarity for the ICC with the broad and ambiguous meaning of the word 'justice'. He explained that this word could mean something different to one person when compared to another. Saying that we agree on what justice means might, in actuality, that we have agreed on something that is not necessarily the same. He thought complementarity is one of those broad terms that could mean different things to different people.

He said that maybe, one possible approach, would be to bring it back to the element of what is the responsibility of states at the national level to investigate and prosecute core international crimes more generally rather than focused only on the Rome Statute. And then the next question could then bring to the fore possible ways of implementation. He said he liked the idea of going beyond the Rome Statute, however, that raises a possible question of focus for the committee and the issue of what legal questions were being addressed by the committee and the added value of its studies. It might create a problem of the work not being anchored as such.

He felt that by framing the scope of the question more broadly, the ICC situation countries can be looked at but then also other countries that are may or may not be members to the Rome Statute system. Countries that are not presently states parties to the ICC could find themselves having a treaty basis or customary law obligation to prosecute certain core international crimes. He gave the example of genocide and the 1948 Genocide Convention and mentioned the duty, at least in respect of international armed conflict, to prosecute or extradite war crimes under the 1949 Geneva Conventions. The question of what is happening at a national level, which could preclude prosecution, he finds interesting as well. He explained further using the example of countries granting amnesty. He added further that countries having internal legislation to prosecute such crimes could be relevant to a complementarity evaluation.

The Chair invited non-committee members to give an opinion and concluded that there seems to be consensus on the need to go beyond the ICC. He posed the question as to whether anyone believes that the work should be restricted to states who are state parties to the ICC?

Mr Seko Samo from East Africa (non-member) said, relating back to the question of regional complementarity, he thinks that if the regional court came into place- what

would the relationship be between the regional court and domestic courts that were established due to the domestication of the Rome Statute.

Professor Charles Jalloh (USA) answers to say that, in terms of the question that Professor Mia Swart raised, it shows why it is a better idea to frame a broader question around legal accountability for core crimes. He suggested that, what we are seeing in the African context at least implicitly from the ICC's docket, is that are states basically saying that they do not have the capacity to investigate and prosecute the Rome Statute crimes. He adds that this could be examined under a notion of positive complementarity, loosely speaking, with the attempt to help the country in issue discharge its duty to prosecute. He cited the example of Uganda, where the government claimed it did not have the capacity to prosecute and then tried to pass the responsibility on to the ICC. He says that even in terms of the proposed regional court for Africa, where complementarity will play the same role, the same problem of lack of ability to prosecute will likely arise. He suggested that this means that we should have a more flexibile mindset about how to prosecute international crimes that implicates national, regional and international bodies/institutions. If you have mechanisms that are multi-layered, it can be seen as very helpful for criminal accountability in the end because then in the case of a failure at each level, reliance can be made of the next level and ultimately at the end of the line, at the ICC.

Mr Patryk Labuda (Poland – observer) refers back to The Chair's suggestion regarding themes that can be explored. He finds interesting the issue of seniority and the phrase that is used: "those that bear the greatest responsibility". He finds that there is a paradox on complementarity because it is said that the ICC and the International Criminal Tribunals are supposed to look at those most responsible but if capacity at a national level is being developed then it should be done with the view that the state could also then prosecute people who are in positions of power. Therefore, the states could then prosecute the low-level people and the rest could be sent to the ICC. The question that then follows is whether we want the ICC to prosecute only those bearing the greatest responsibility.

He summarises the point that he is making by saying that what might be interesting to explore is asking how this seniority should work in terms of the level of responsibility of perpetrators and how it feeds in to complementarity.

The Chair comments that the question raised by Mr Labuda raises a very important point relating to that International law allows for immunity at national level but not at the ICC and therefore the situation at present exist where a senior person in government is immune from domestic jurisdiction. He emphasises that this is also an important factor to consider.

Dr Sarah Nouwen (Netherlands) adds to the point made by Mr Labuda that Office of the Prosecutor has in recent years, when doing outreach in situation countries, often spoken on complementarity as meaning domestic and international courts 'complementing' each other, according to which the ICC investigates and prosecutes the 'big fish' while domestic courts investigate and prosecute the 'small fry'. She adds that this division-of-labour approach is not inherent in the legal provision of complementarity: complementarity in the Rome Statute gives states the primary right to investigate and prosecute also the senior people.

Professor Mia Swart (South Africa) mentioned that she would like to add to this debate about the ICC being the leader in terms of complementarity, that she could foresee that a country could do well on its own. She clarifies through the use of an example where in the very few war crimes provisions in the ICC statute- what if a country can on its own, in terms of 'ICC Plus Crimes' (as were referred to by Professor Jalloh), enable itself to develop its own sophisticated scheme of prosecution. She reiterates that she does not see why one should think of measuring up to the provisions of the ICC as being the end point.

Advocate Yael Gvirsman (Israel) intervened to say that we can choose to go beyond the ICC if we'd like, however, the ICCmust be taken into consideration by the Committee because it is the only authority at present as to what complementarity is.

Bettina Ambach (Germany, Wayamo Foundation) mentioned how, in Nigeria, actors questioned whether it made sense to domesticate the Rome Statute. They concluded that yes, it made sense, because then they would have laws and modes of liability that could help them prosecute terrorists for example. She adds that while states would like to have their own domestic systems, as The Rome Statue helps include aspects not contemplated in the national legislation already.

Professor Charles Jalloh (USA) said that the question about greatest responsibility is not only informally one of the yardsticks that the ICC Prosecutor is using to determine which cases to prosecute. It links back to the Rome Statute, though there it is not explicit as a criterion, but also back to the Special Court for Sierra Leone which used the terminology of greatest responsibility and popularized it in international criminal law. The debate at SCSL, he recalls, was that the 'greatest responsibility' principle was introduced into the statute of the court as a form of redline for prosecutorial discretion. The other view, advanced by the defense, was that it meant that only those from a given level of hierarchy could be prosecuted. In the end, the issue is really who should be prosecuted by what level of institution. The ICC and international courts are practically only able to prosecute a handful of persons, compared to national systems that are more able to investigate and prosecute a mass of perpetrators.

Participant from the University of Brussels (Observer) liability under the Rome Statute should be extended to states and corporations.

The Chair responded that the International Law Commission considered this carefully, and decided against criminal state responsibility because there is no authority to enforce because the ICC has no jurisdiction over states.

Participant from the University of Brussels replied that the AU does contemplate corporate criminal liability.

Hannah Woolaver (South Africa), proposed that the committee consider an in depth study of good practices or guidelines for domestication of the Rome Statute. She stated further that this should include: definitions of crimes, responsibility and political checks if any on domestic prosecutions as well as the issue of standing. She emphasised that in South Africa, domestic legislation has been very valuable in terms of getting a foothold for civil society to initiate domestic prosecutions.

The Chair summarised the point made by Hannah Woolaver by saying that the suggestion is that the domestication of laws should be included under the scope of complementarity.

Professor Claus Kress (Germany) added a few suggestions on the way the committee could deal with issues if they were chosen for study.

Firstly, he commented on the topic raised regarding those 'most responsible' and burden sharing. He did not feel that there is any paradox in legal terms. The ICC prosecutor, as he sees it, has never said that he/she wanted to prosecute the most responsible wherever it has jurisdiction - but what he/she has said is that it wishes to concentrate on the most responsible to the extent that the proceedings are admissible. That means whenever international proceedings are instituted, which presupposes that genuine national proceedings are not underway, the ICC will have to make a choice and the current tendency is that it chooses to focus on those who are most responsible.

With regard to burden sharing, he would not suggest that burden sharing is ruled out by complementarity. He explained that one of the beauties of complementarity is that it is not so rigid and inflexible as some may suggests. He added that it could be that burden sharing has had a certain appeal for a period of time, and perhaps the appeal has already started to fade but it has been an idea that has been ventilated and it is, legally, something that is possible. From the perspective of the Committee, it could therefore include it in their considerations and see whether and to what extent burden sharing could be useful in certain situations at least.

On regional complementarity, he opined that it does not have to become part of the Committee's agenda, but still, he stated, as one is now confronted with a proposal for the establishment of a regional court in Africa, however likely this is to materialise the question is worth asking on whether it is to be included in the Committee's Complementarity study. On this he added two points namely: is it to be approached more as a technical legal issue? In such a case then it would not be possible to avoid the applicable law on 'negative' complementarity as much as the Committee had hoped. He then added that the Committee could look into how such a regional court could be integrated in the ICC complementarity system. Secondly, he observed, the focus could be shifted from a legal study to a policy and practical level and he added that if more regions considered embarking on such an avenue, the need would increase to explore how they could most usefully do so.

Third, the notion of 'ICC plus crimes'. He did not see any principle preventing the Committee from including crimes not listed in the ICC Statute However, he added one word of caution, namely that the Committee should not be entirely liberal in the use of key concepts and should be aware at what point the demarcation line between crimes under international law and and transnational crimes is crossed. He pointed out that such conceptual distinctions are important because the applicable legal regimes partly differ. .

Professor Claus Kress summarises that ICC plus crimes can be included but that it should be kept in mind that the Rome Statute has been a watershed events in that proposals for crimes under international law had been put to a vote by the international community.

He then answered the question regarding Germany's position regarding 'positive' complementarity. He emphasized not to be in a position to speak on behalf of Germany, but he recalled that there has been a question to what extent the ICC should be charged with responsibilities for positive complementarity. He has understood the German position at the time to be that a juvenile, fragile and struggling institution such as the ICC should perhaps be cautious before taking on all kinds of duties on top of those falling upon it

under the statute, and he added that in his personal view this seems like a fairly reasonable scepticism..

The Chair made his closing remarks to the first working session of the Committee and that there should be a break before the start of the closed session which is for committee members only.

Professor Mia Swart (South Africa) mentioned in closing that she would like to thank Professor John Dugard for chairing the session and she congratulated him on the Special Award the ILA awarded him for his contribution to the association. She proceeded to thank Professor Charles Jalloh for the discussion report as well as for his various pieces of constructive input through the last six months as a rapporteur. Professor Jalloh also congratulated the Chair and wished her and the committee much success.

The Chair thanked Professor Swart for the comments and he added that he thinks the consensus in the meeting indicates that this Committee should adopt a broad approach to the subject of complementarity.

The Chair closed the first session.

Reporters: Maria del Pilar Vanegas Guzman & Natalie Venter

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

FEMINISM AND INTERNATIONAL LAW

Members of the Committee

Dr Patricia Conlan (Ireland): *Chair and acting Co-Rapporteur*
Professor Christina Binder (Austria): *Co-Rapporteur*

Professor Klaus Michael Alenfelder (Germany)
Mr Justice Muhammad Imman Ali (Bangladesh)
Miss Ugochi Vivian Anozie (UK)
Ms Hajar Azari (Belgium)
Ms Shrabani Chakrabarty (India)
Professor Adriana Di Stefano (Italy)
Isabel Fernandez-de la Cuesta (USA)
Honourable Marjory Fields (USA)
Professor Noemi Gal-Or (Canada)
Alternate: Nina Purewal
Lucy Greenwood (USA)
Ms Yoko Hayashi (Japan)
Alternate: Professor Kazuko Kawamata
Dr Anja-Riitta Ketokoski-Rexed (Finland)
Dr Oluwabunmi Lar (Nigerian)
Dr Jernej Letnar Cernic (Slovenia)
Justice Sujata V Manohar (India)
Professor Dianne Otto (Australia)
Professor Giuliana Redin (Brazil)
Alternate: Mrs Ana Claudia Ruy Cardia
Dr Maria Sjoholm (Sweden)
Ms Judy Walsh (Ireland)

I. INTRODUCTION

1.1 Background

Previous reports from earlier manifestations of the Committee and their related mandates included *Women's Equality and Nationality in International Law* (2000) and *Women and Migration (2002, 2004, 2006, 2008)*.[1]

This is the third report of the (current) ILA Feminism and International Law Committee (Committee). The mandate was approved by the Executive Council in May 2011 and is entitled *Economic Empowerment of Women: Contribution of International Law*. The overarching thrust of the combined reports is two-fold. In the first place, to explore the contribution of international law to achieving structural change. The second focus is to try to establish to what extent there has been a realisation of individual rights arising from positive obligations of States parties, as relating to the substantive aspect expressed in the title of the mandate.

The Committee presented an initial scoping report to the Sofia Conference in 2012, which explored the complexity of the umbrella topic and identified sub-themes, one of which was *Positive Obligations of States Parties in relation to Substantive Equality.*[2] The

[1] See, Committee on Feminism and International Law (Committee), *Final Report: Women and Migration,* International Law Association, Report of the Seventy-Fourth Conference, [2010 The Hague], 722-747, 722-723 for an overview of the Committee since its founding period.
[2] Committee, Report of the Seventy-Fifth Conference, [2012 Sofia], 717-752.

Washington Conference built on the Committee's mandate and on the initial scoping report. Acknowledging the multi-faceted nature of the topic, as well as the indivisibility of rights, the Washington report in 2014 focused on the sub-theme of *Positive Obligations of States Parties in relation to Substantive Equality* as it specifically related to two substantive areas: *Equal Remuneration* and *Equal Access to Economic Activities*. It examined relevant positive obligations in international law as well as national practice with respect to these two substantive areas. The report aimed to contribute both to current debate on the realisation of women's economic empowerment and to the work of the CEDAW Committee, in particular, by identifying instances of good practice in the implementation of rights at national level.[3]

1.2 Johannesburg Report

Building on the work of the two previous reports, and conscious of the multi-faceted nature of the mandate, for the Conference in South Africa the Committee decided to address two sub-themes, both of which are seen as potentially very important for the overall focus of the Committee's mandate. The two sub-themes are 'women in (power and) decision-making' and 'gender responsive budgeting' (GRB).

2. Definitions

2.1 Women's Economic Empowerment

As we pointed out in the Washington report, while the term 'women's economic empowerment' has been defined in various ways,[4] the Committee adopted UN Women's definition:

> '[*Women's economic empowerment entails] increasing the ability of women to bring about change that drives valuable outcomes as result of their increased economic capabilities and agency, i.e. their ability to function effectively in the economy, to participate in labour and product markets on equal terms with men, to shape the gender division of labour, to accumulate assets, and to shape the relationship between markets and the state and to influence the institutions and processes that determine growth and development'*.[5]

2.2 Women in (power and) decision-making

We have taken a broad view in adopting a definition, so that it may be applied to multilevel actors and actions, and not merely in one field. This is in line with the Beijing Platform for Action (BPfA) and encompasses

> '*women's equal access to and full participation in power structures and decision-making.*'[6]

An important qualification to this BPfA definition is that participation (for women) has to be 'meaningful'.[7] Therefore note should be taken of the reference to '*power* structures *and* decision-making' in the definition chosen. It should not be just a 'numbers' exercise.

[3] Committee, Report of the Seventy-Sixth Conference, [2014 Washington], 149-196.

[4] See the discussion of various approaches in Kabeer, N, *Women's Economic Empowerment and Inclusive Growth: Labour Markets and Enterprise Development*, SIG Working Paper 2012/1 [2012 London]

[5] UN Women and ILO, *Decent Work and Women's Economic Empowerment: Good Policy and Practice* [2012 New York] 2

[6] Beijing Platform for Action (BPfA), Strategic Objective 1

[7] http://www.mrfcj.org/wp-content/uploads/2015/11/MRFCJ-_Womens-Participation-An-Enabler-of-Climate-Justice_2015.pdf (last accessed 30 May 2016)

2.3 Gender responsive budgeting

There are myriad[8] definitions of gender budgeting,[9] using a variety of terms, including gender responsive budgeting (GRB), all with similarities of focus and differences of emphasis. Inspiration can be drawn from all of them. The definition we have decided on is

> '*Gender responsive budgeting (GRB) is government planning, programming and budgeting that contributes to the advancement of gender equality and the fulfilment of women's rights. It entails identifying and reflecting needed interventions to address gender gaps in sector and local government policies, plans and budgets. GRB also aims to analyse the gender-differentiated impact of revenue-raising policies and the allocation of domestic resources and Official Development Assistance. GRB initiatives seek to create enabling policy frameworks, build capacity and strengthen monitoring mechanisms to support accountability to women.*[10]

This is a very comprehensive definition. This is our preferred definition because of the identification of 'government' as the key actor, responsible for the actions laid down in the definition (of GRB). It also allows for the institutionalisation of GRB (in the process).[11] However, in the interest of trying to capture as complete a 'snapshot' as possible, from the contributions to this Report, we look at the broad 'gender' implications in the range of budgetary processes provided.

3. Scope

As previously noted, economic empowerment of women is a very broad concept. However, the two sub-themes chosen to be examined here strengthen the specificity of the scope of the Report. The focus in the first place is to attempt to establish the extent to which these two economically relevant concepts have been realised in those States being discussed in this Report. In addition, it is hoped that the influence of international law measures (as we have chosen) on the realisation of the two concepts can be identified. An appreciation of the experiences in different States will be facilitated by the contribution of Committee members coming from different legal and political regimes. It is not intended to be exhaustive or conclusive, but to provide a 'snapshot'.

4. Methodology

The Report looks at both the international legal framework, broadly defined, with the main focus on CEDAW, and selected national practice in relation to the two sub-themes identified above. Primary and secondary sources will be used, as well as publicly available data, as far as possible.

---

[8] See, inter alia, http://gest.unu.edu/static/files/unifem_work_on_genderresponsive_budgeting.pdf, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680599888, http://www.ilo.org/dyn/gender/docs/RES/498/F1229023063/Overview %20of%20GRB%20Initiatives.doc, http://africainequalities.org/wp-content/uploads/2014/01/Gender-Responsive-Budgeting-Policy-brief.pdf and

[9] Keane, C, Callan, T and Walsh, J R, *Gender Impact of Tax and Benefit Changes: A Microsimulation Approach*, 6-7, [2014, Dublin], (Keane et al), also http://www.esri/ie http://www.equality.ie/research

[10] http://www.gender-budgets.org/ (last accessed 5 December 2015)

[11] See, inter alia, Elson, D, *Budgeting for Women's Rights, Monitoring Government Budgets for Compliance with CEDAW,* [2006], available at, http://www.internationalbudget.org/.../ Budgeting-for-Women's-Rights-Monitoring-Government-Budget s-for-Compliance-with-CEDAW.pdf (last accessed 16 June 2016)

II. BACKGROUND TO SUB-THEMES CHOSEN

1. Women in (power and) decision-making

Following the logic of the definition we have chosen, *women's equal access to and full participation in power structures and decision-making',* it is reasonable to seek to ensure that women are facilitated in achieving the goals set out. The use of 'equal' and 'full' to qualify the actions set out in the definition, give a sense of the direction to be pursued. Taking the latest World Bank statistics for the period 2011-2015,[12] all countries listed indicate their female population as hovering around the 50 per cent level (high 40s to early 50s), with five exceptions.[13] This should indicate that female participation in (power and) decision-making roles should fall within the same percentages. Unfortunately this theory is not reflected in reality. This means that the voice of women, their needs and views, do not have full expression. There is extensive literature available which supports the arguments for greater female participation in power and decision-making structures. [14] However, quite apart from the human rights dimension, there is a solid business case to be made.[15] Women bring different experiences and outlook to tasks. This does not mean that they should automatically fit into neat, 'stereotypical' roles, as is often the expectation. In political and economic situations it means that their experience can enrich the policy and practice of the decision-making process, because women have to balance different demands arising from the potentially competing roles they have. This benefits society as a whole. It can also recalibrate the decision-making process. Even unwittingly, decisions can be taken on assumptions which have never been challenged. In sum, denying equal and full access to women to *contribute* to power and decision-making roles, robs the end result of potential benefits – as the literature shows. Finally, the goal (of *equal* and *full* access) has clear implications for potential cross-cutting issues (relating to the mandate of the ILA Committee).[16] Education is vital for empowerment – on a personal, and at the broader community level, and includes budgetary decisions.[17] The same applies to health, the environment (especially Climate Change),[18] and all that these imply; violence, unfortunately, continues to scar the life chances of many women – at a minimum. These are just some of the many issues where women's input at different levels of decision-making, must be provided for, in the interests of all.

Finally, for our purposes in this Report, power and decision-making in the broadest context fall into a number of categories, mainly political[19] (different levels, and aspects), and economic.[20] We attempt to provide some national examples in this Report.

---

[12] http://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS (last accessed 24 June 2016)

[13] Ibid, Bahrain 38 per cent, Oman 33.7 per cent, Quatar 27.4 per cent, Saudi Arabia 43.5 per cent and United Arab Emirates 26.7 per cent

[14] See, inter alia, for a range of sources, http://www.un.org/womenwatch/directory/women_and_the_economy_3006.htm (last accessed 24 June 2016)

[15] http://www.oecd.org/forum/oecdyearbook/push-gender-equality-economic-sense.htm (last accessed 24 June 2016)

[16] Some of which we hope to address in our fourth and final Report

[17] As noted by one of the contributors to this Report (Indian experience)

[18] http://www.mrfcj.org/wp-content/uploads/2015/11/MRFCJ-_Womens-Participation-An-Enabler-of-Climate-Justice_2015.pdf (last accessed 30 May 2016)

[19] For discussion on strategies as to how to bring this about, see, inter alia, https://www.ndi.org/files/Empowering-Women-Full-Case-Study-ENG.pdf (last accessed 24 June 2016)

[20] Op cit, OECD

2. Gender Responsive Budgeting

As noted at the outset there are myriad definitions of gender budgeting including (GRB). As noted above, there are variations of the budgetary process, using different nomenclatures. We will try to capture a broad range of these processes, but our preferred focus would be GRB, due to its comprehensiveness, and the responsibility of Governments to use it (we would say, in the service of fulfilling the aims of CEDAW).

Equality budgeting is a term in regular use, but not necessarily confined to a gender focus. It was first implemented in the form of gender budgeting in the 1980s, and has evolved over time to include other categories of potential disadvantage. The idea was pioneered in Australia where a women's budget was adopted in 1984. [21] By 2002, what is termed Gender Budget Initiatives (GBI) was to be found in all parts of the world, involving ca 50 countries.[22] That said, the intensity of the approach has been variable, including what is termed 'sensitization workshops' and some have faded. Gender budgeting[23] is a term also put to use.

UNIFEM has been involved in the development of the concept[24] of GRB, and its own publications and those of experts it has engaged (and others), provide a rich source of the theoretical and conceptual foundations. A key point made by a range of commentators (including UNIFEM) is that budgets are not gender neutral. What one could say is that, *at best*, they are gender blind.[25] Accepting this most benign assessment, it is clear that Governments have '*a central role in reducing gender inequalities and in promoting women's rights.*' There is also the efficiency argument – as touched on earlier. Finally, a frequently heard comment is that women's unpaid work is 'generally',[26] some might

[21] For a thorough discussion on the principles involved, and applying it to the Irish situation, see http://stephendonnelly.ie/wp-content/uploads/2013/10/20131003-Equality-Budgeting-Proposal-Stephen-Donnelly-and-Equality-Budgeting-Campaign.pdf (last accessed 16 June 2016)

[22] For an evaluation showing a wide geographical spread see, inter alia, http://www2.unwomen.org/~/media/headquarters/media/publications/unifem/unifemworkgrboverview.pdf?v=1&d=20140917T101024 (last accessed 16 June 2016)

[23] '*Gender budgeting is an application of gender mainstreaming in the budgetary process. It means a gender based assessment of budgets, incorporating a gender perspective at all levels of the budgetary process and restructuring revenue and expenditure in order to promote gender equality'* See, http://www.europarl.europa.eu/RegData/etudes/STUD/2015/490708/IPOL_STU(2015)490708_EN.pdf (last accessed 30 May 2016)

[24] Inter alia,'*GRB aims to raise awareness of the gendered impacts of budgets and to make governments accountable for ensuring their budgets promote the achievement of gender equality and women's rights, especially among the poor'* http://www.unwomen.org/~/media/ Headquarters / Media/Publications/UNIFEM/Evaluation_GRB_Programme_en.pdf See too, http://www.un.org/en/ecosoc/julyhls/pdf10/2-pager_on_grb_portal.pdf, *'GRB is government planning, programming and budgeting that contributes to the advancement of gender equality and fulfilment of women's rights. It entails identifying interventions to address gender gaps in government policies, plans and budgets. GRB initiatives seek to create enabling policy frameworks, build capacity and strengthen monitoring mechanisms to support women*' (all accessed 30 May 2016)

[25] https://www.ndi.org/files/Manual%20for%20Training%20on%20Gender%20Responsive%20Budgeting.pdf (accessed 30 May 2016) See too, Klatzer, E, 'With Gender Budgeting to more Gender Equality in Europa –Framework Conditions and Transformation Processes', presentation to conference on Gender Budgeting in the ESF: Opportunities, Examples and Limits, [2012 Berlin], cited in Op cit Keane et al, 6

[26] UN media, op cit

say 'rarely, if ever, recognised in conventional budgetary policy approaches. Thus the conventional budgetary process omits the contribution of this unpaid work to society at the micro and macro level.

The most effective approach found is to institutionalise the Gender Responsive Budgeting (GRB) approach in the budgetary process in some form or stage of the process. [27] GRB is seen as one tool among many available to policy makers to tackle inequality.[28] It is also seen as a tool for implementing gender mainstreaming when distributing financial resources. As we shall see, the Swedish, Austrian and emerging Irish approaches are informative in this regard.

Developments since the early days have seen a collaboration emerging between civil society and human rights activists. This collaboration provides invaluable 'shadow reports'. These contribute to the evaluation, inter alia, by Treaty Bodies, such as the CEDAW Committee, for compliance with CEDAW and can act as an incentive to States parties to 'improve their performance' (compliance).

III. INTERNATIONAL LAW

1. UN level

The States parties whose practices are being discussed here, have accepted, adhere to and/or have ratified a wide range of international instruments.[29] These include, *inter alia*, the Universal Declaration of Human Rights (UDHR),[30] the Vienna Human Rights Declaration (VHRD), CEDAW[31] (and the Optional Protocol). Some are parties to the Convention on the Political Rights of Women (CPRW), the International Covenant on Civil and Political Rights (ICCPR),[32] the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of Persons with Disabilities (CRPD).[33] Conventions of the International Labour Organisation (ILO) should also be borne in mind.

2. Regional level

Regional instruments ratified by some States discussed in this Report, include the African Charter on Human and Peoples' Rights,[34] and the Protocol to the African Charter on Human and Peoples' Rights, on the Rights of Women.[35] The African Charter is the primary

[27] See, inter alia, op cit, Elson

[28] Ibid

[29] Relevant Articles indicated

[30] Articles 21(3) and 2 (non-discrimination)

[31] Signed, but not ratified by the US

[32] Ratified by the USA, which is noteworthy given that it has not ratified CEDAW Note Articles 2, 3 (equality of rights between men and women), 25 (right to political participation), and 26 (non-discrimination), see the US's Fourth periodic report, especially paras 114 et seq, available at http://www.ushrnetwork.org/sites/ushrnetwork.org/files/iccpr_us_fourth_periodic_report.pdf (accessed 30 May 2016)

[33] Articles 6 (women with disabilities), 29 (Participation in Public and Political Life)

[34] Articles 2(non-discrimination), 13/2 (equal access to public service); 18/3(elimination of every discrimination against women)

[35] Also called the Maputo Protocol; it entered into force in 2005, Articles 2 (elimination of discrimination against women), 9 (right to participation in the political and decision-making process)

treaty providing a framework for human rights in the region, and is intended to promote and protect rights in line with the UDHR. However, its provisions on women's rights are largely seen as ineffective and inadequate, resulting in the need for the Protocol. Only one out of the more than sixty articles in the African Charter makes specific reference to women. One of the key shortcomings of the African Charter, as it pertains to women, is its failure to provide an explicit definition of discrimination against women. However, in line with CEDAW, the African Charter recognises and affirms women's rights in three provisions, namely Articles 2, 3 and 18(3).

Taking the example of *Nigeria*, advocates for women's rights recognised weaknesses (in the application of the Charter) and were motivated to address them by adopting an additional Protocol (as we have seen) that focused solely on women's rights. From the drafting of the Protocol to its eventual adoption took six years. The Protocol covers a number of areas of relevance to this contribution. It provides for the participation of women in decision-making and guarantees women's right to participate in the political and decision-making process without any discrimination. It requires States parties to promote women's effective and equal participation – by means of affirmative action, enabling legislation and other appropriate measures – in the political life of their countries, including the formulation and implementation of State policies.[36] The elimination of all forms of discrimination against women,[37] the right to education and training,[38] are provided for, as is participation in the planning, management and preservation of positive cultural context.[39] Finally, and importantly (also in the context of the SDGs), the Protocol provides for participation in the conceptualisation, decision-making, implementation and evaluation of development policies and sustainable development programmes.[40] Nigeria has not only ratified these regional instruments, but has gone a step further by recognising the regional treaty as part of Nigeria's fundamental human rights by virtue of the Fundamental Rights (Enforcement Procedure) Rules 2009, and in national jurisprudence.

There is no equivalent regional instrument in Asia; there is however, the American Convention on Human Rights[41], and the Treaties of the European Union,[42] including the Charter of Fundamental Rights[43] (and secondary legislation[44] as well as 'soft law'.)[45]

[36] Article 9
[37] Article 2
[38] Article 12 – education is vital to equip women to participate on equal terms with men
[39] Article 17 – the text (also) refers to participation in formulating/determining cultural policies
[40] Article 19
[41] Articles 23 (right to participate in government), 1 (obligation to respect rights without discrimination)
[42] Inter alia, TEU, Articles 2, 6, TFEU, Article 8, 10
[43] Articles 21, (non-discrimination), 23 equality between women and men, 39 (right to vote and to stand as a candidate at elections to the European Parliament and 40 ((Right to vote and to stand as a candidate at municipal elections)
[44] See in relation the proposed EU Directive on Board membership (no agreement reached 'yet'), http://ec.europa.eu/justice/gender-equality/ files/womenonboards/factsheet_women_on_boards_web_2015-10_en.pdf (accessed 30 May 2016)
[45] Inter alia, the Recommendation adopted by the Council of the European Union on balanced participation of women and men in the decision-making process, 96/694/EC, Brussels, 2 December 1996, and the European Commission's '*How to Create a Gender Balance in Political Decision-making'*, European Commission document V/1206/96-EN (March 1996), both referred to in GR 23

Some States are (also, with others,) Member States of the Council of Europe and have ratified, or at least signed,[46] treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms[47] (and some relevant Protocols),[48] the (Revised) European Social Charter, and the 'Istanbul Convention.'[49]

3. Other

The Beijing Platform for Action (BPf'A) and succeeding developments, are key to our topic, and continue to play an important role. In addition, the 2000 Millennium Development Goals (MDGs) [50] have been succeeded by the Sustainable Development Goals (SDGs), [51] the most recent measures adopted at the UN level, in 2015.[52] While acknowledging that they are not legally binding, the stated view is that each UN member state has committed to achieving the SDGs. The follow-up and review processes are to be country-led and voluntary, with specific guidance for national, regional and global processes. Apart from the specific gender Goal, Goal 5, all Goals have implications for gender equality. The SDGs are at the initial stages of influence, but represent an additional tool on the international level, to progress gender issues in general, including the focus of this Report.

In sum: The most relevant international (as opposed to regional) influences for our topic are CEDAW (and BPfA, as well as the ICESCR),[53] which Elson reminds us will often '*give us the substance of a right mentioned in CEDAW*; *it also has given rise to some*

See too, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0042+0+DOC+XML+V0//EN, http://ec.europa.eu/justice/gender-equality/, and http://ec.europa.eu/j ustice/gender-equality/gender-decision-making/index_en.htm (all last accessed 25 April 2016)

[46] For example, Ireland has signed the Convention– November 2015, but not yet ratified

[47] Article 14

[48] Article 3 of Protocol No 1, Article 1 of Protocol No 12 (non-discrimination)

[49] http://www.coe.int/en/web/istanbul-convention/home

[50] For one assessment of some weaknesses and strengths of the MDGs see J D Sachs, JD, http://peoplebuildingbettercities.org/wp-content/uploads/2013/04/MDGs-to-SDGs-Lancet.pdf (accessed 16 April 2016). See too Alston, P *A HUMAN RIGHTS PERSPECTIVE ON THE MILLENNIUM DEVELOPMENT GOALS, available at* http://www2.ohchr.org/english/issues/ *development/docs/millennium.doc* (last accessed 25 April 2016) and for criticisms of the approach taken see, http://www.mercyworld.org/mercy_global_action/view-post.cfm?id=818 (last accessed 25 April 2016)

[51] For background see https://sustainabledevelopment.un.org/post2015/transformingourworld (last accessed 25 April 2016) For some criticisms of the SDGs offered at CSW60 side event, see inter alia, https://twitter.com/finlandun/status/712341034223722496)(last accessed 26 June 2016) See too, ESQUIVEL, V, 'Power & The Sustainable Development Goals: A Feminist Analysis' in, GENDER & DEVELOPMENT – Volume 24, Issue 1, 2016, Special Issue: Sustainable Development Goals, 9-23 - Published online: 22 Feb 2016, http://www.tandfonline.com

[52] See http://www.upr.ie/Website/UPR/uprweb.nsf/page/DOJL-A97JFV1512120-en/$file/National% 20Report%20IE%20Cycle%202.pdf, para Q 166, https://www.irishaid.ie/what-we-do/post-2015-negotiations/ireland's-special-role/, and https://www. Irishaid.ie/what-we-do/post-2015-negotiations /follow-up-and-review-framework/ (all last accessed 4 June 2016)

[53] In particular Articles 2(2) and 3 (non-discrimination and equality For a comparison between CEDAW and ICECSR relevant articles see, IWRAW Asia Pacific and ESCR Network, *Claiming Women's Social and Cultural Rights* [2013], available at, https://www.escr-net.org/sites/default/files/Guide%20on%20Women's%20ESCR%20-%20Final.pdf (last accessed 24 June 2016)

relevant principles on resource allocation').[54] Other influences[55] may be mentioned, as appropriate, and as space permits.

Finally, the distinction between binding, and non-binding status of instruments establishing standards for women's economic empowerment should be borne in mind. At the same time sight should not be lost of the persuasive value of such mechanisms.

4. Reservations

As indicated above, while there are instances where there has been common ratification of international instruments, there are also instances where this is not the case. In addition, some States may have ratified a Treaty, but also entered a reservation.[56]

Some reservations could be seen as contrary to the wording and spirit of the Treaty (Bangladesh for example). It has been said that it is '*astonishing*[57] *that Bangladesh was allowed to ratify the Convention with a reservation on the most fundamental of its articles, namely Article 2*.' Reservations have not gone without criticism, inter alia, by other States parties. [58] In relation to Bangladesh and its reservation regarding Article 2, we are told that '*it is fair to say that, in spite of the fact that the Government has put a reservation on Article 2, it has done much to ensure the fulfilment of the provisions of the Convention*.'[59]

In other words, there are similarities and differences in the approach of States parties to be borne in mind.

5. Domestic transposition – examples from contributing jurisdictions

Some States take the dualist approach to international law.[60] In the case of *Bangladesh*, the provisions of international instruments are seldom mentioned or applied by the Courts. However, following the *Hussain Mohammad Ershad* [61] decision, the High Court Division delivered three other judgements, holding that the provisions of the Convention on the Rights of the Child (CRC), being beneficial provisions, should be applied by Courts in Bangladesh, particularly since Bangladesh is a signatory to the (particular)

---

[54] Elson, D, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW, '*Booklet*',* 2, based on report (same title) for UNIFEM, [2008] available at http://www.gender-budgets.org, (last accessed 30 May 2016)

[55] Regional, for example, from the European Union

[56] In relation to CEDAW see, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_ no=IV-8&chapter=4&lang=en, inter alia, Austria, para 9, Bangladesh, para 5 Brazil, para 8, Ireland, para 29

[57] Contrast this comment with the observation by Byrnes, A, in, Freeman et al, 97,who says that Article 2 '*has drawn a significant number of reservations in which States parties purport to limit their obligations under the article generally, or under its specific provisions'*

[58] In this case, inter alia, by Sweden, ibid. See too, ibid, Byrnes

[59] For example, including some aspects of discrimination as well as substantive provisions relating to mothers being able to pass on citizenship to their children A great deal has been done to bring the level of education for girls to that of boys, which in the context of Bangladesh is the most important development towards long term empowerment of women in a society which has heretofore kept women mostly within the residential compounds

[60] Bangladesh, Ireland Nigeria and Sweden for example

[61] *Hussain Mohammad Ershad v Bangladesh and others* 21 BLD (AD) 69

Convention.[62] In another case[63] specific reference was made to a number of Treaties[64] observing that '*Bangladesh is a signatory and has acceded to the above instruments making it obliged to implement those provisions*.' In a subsequent decision[65] reference was made to a range of instruments and how the Court was thereby influenced. It was observed by the Appellate Division that those provisions have been incorporated in Article 35(1) of the Constitution. [66]

There can be differences of opinion between a State party and the Treaty Body regarding transposition of Treaty concepts, and this can extend over several cycles of periodic reviews.[67] This would suggest a reluctance on the part of the State party to concede that its actions have not met its obligations, and on the part of the Treaty body, a conciliatory approach so that the end result is appropriate.

Nigeria has ratified CEDAW, but it has not been transposed into national law. '*This lack of transposition further appears to excuse Nigeria from observing CEDAW'*, we are told. An explanation (but not excuse) could be that custom is a vital source of law in Nigeria. The importance of these customs is so high that Nigerian law[68] accords it judicial recognition. Cultural practices like female genital mutilation (though declining), widowhood practices and others affect the right of women to self-determination (an integral part of decision-making).

In the case of *Sweden*, several international treaties of relevance for the focus of this Report have been ratified. These include CEDAW (and the ICESCR). As a dualist country, these are not directly applicable before domestic courts. Rather, Sweden sets out to interpret domestic norms in light of such international treaty obligations.

6. CEDAW – Overview

The role played by CEDAW in relation to the substantive[69] issues set out in the overall mandate of the (ILA) Committee cannot be exaggerated – hence it is our (main) instrument of choice for this Report. According to Freeman et al,[70] CEDAW '*is the result of the determination of international women's rights activists – inside and outside Government – to ensure that a comprehensive treaty setting out women's human rights*

[62] *State v Metropolitan Police Commissioner*, 60 DLR 660; *The State v Secretary, Ministry of Law, Justice and Parliamentary Affairs*, 29 BLD 656; and *BNWLA . Govt of Bangladesh*, 31 BLD 324

[63] *BNWLA v Govt of Bangladesh,* 31 BLD 324

[64] The UDHR, ICESCR, ICCPR and CEDAW

[65] *Government of Bangladesh v Sheikh Hasina and another,* V ADC (2008) 541

[66] Article 11(2) of the Universal Declaration of Human Rights, Article 15 of the ICCPR, Article 7 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, and the African Charter on Human and Peoples' Rights

[67] See for example, in relation to Ireland and the concept of 'discrimination' CEDAW/C/IRL/2-3,5.1 and CEDAW/C/IRL/4-5/CO, 23 As it happens, the question of transposition of Treaties is being examined by the Law Reform Commission, see, inter alia, http://www.ihrec.ie and its submission to the CEDAW Treaty Body, in relation to the combined sixth and seventh periodic reports from Ireland, 2016

[68] Hons, S T*, Law Of Evidence In Nigeria* VOL 2 2nd ed, [2013 Abuja], 1104

[69] We try to avoid restating well established fact, but offer some comment for the sake of completeness

[70] Freeman, M, Chinkin, C and Rudolf, B (eds), (Freeman et al), *The UN Convention on the Elimination of all forms of Discrimination Against Women, A Commentary,* [2012 Oxford]

and the obstacles to their full implementation is at the core of international human rights law'.[71] The emphasis on 'human rights' reflects the universality of these rights. Freeman et al noted that CEDAW was one of the first human rights treaties to include '*the idea of universality, indivisibility and interdependence of all human rights.*[72] CEDAW also bridges the divide between human rights and development, and includes specifically rural women.[73] Key to its efficacy is the focus on achieving *substantive*, not merely *formal*, equality (in law and policy).[74] Finally, by requiring States parties to take '*all appropriate measure to modify the social and cultural patterns of conduct of women and men to eliminate prejudices'* (and practices rooted in ideas of inferiority or superiority of either of the sexes) or '*stereotypes for them'*, CEDAW requires multilevel transformation in order to achieve full gender equality.[75] General Recommendations (GR) play an important role in the work of the CEDAW Committee: for example, GRs 23 and 24, elaborating as they do, on Treaty Articles of direct relevance to our subject, can be regarded as having been particularly important for the focus of this Report.

It is clear even from this brief overview that the transformative potential of CEDAW is considerable. The interaction between the Treaty Body and the States parties and the approach by the States parties to the obligations they have undertaken, can be a delicate exercise, but the very action of exchange (of views) can have beneficial impacts over time. The fact that the issues (and responses) are in the public domain can also have a wide impact.

7. Selected Articles of CEDAW

Having presented an overview of CEDAW[76], some particularly relevant[77] aspects for this Report will be touched on briefly.[78] The first 'step', which points us in the direction we intend to follow, is the Preamble, where the importance of equal participation is made clear. Discrimination, apart from representing a violation of human rights, is also an obstacle to the equal participation of women (in decision-making) *'in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and [ ] ….the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields.'* Article 1 gives us a broad definition of 'discrimination'. The application of such broad notions of discrimination and equality thus indicates that not only must laws not discriminate, directly or indirectly, but, relating to one of our sub-themes, GRB, States parties must *adopt* (we would say *institutionalise)* programmes

---

[71] Ibid, v

[72] Ibid

[73] A focus the (ILA) Committee hopes to address in its next Report

[74] See too GR 23, and Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), chap. I, resolution 1, annex I

[75] Op cit, Freeman et al

[76] For a detailed examination of CEDAW, on an Article by Article basis, see Freeman et al

[77] Selected to relate specifically to the two sub-themes addressed in this Report

[78] Although not addressed here, note should be taken of further non-discrimination and equality with regard to Article 10 (non-discrimination in education); Article 11 (non-discrimination in employment; Article 12 (non-discrimination in health); Article 13 (non-discrimination in other areas of economic and social life Article 14 (non-discrimination of women in rural areas)

and revenue systems with women as specific beneficiaries, for example, maternal health care. [79]

Article 2 is very carefully phrased. It sets out, inter alia, that *'States parties condemn discrimination in all its forms*' and the steps to be taken by States parties to *'eliminate discrimination'*, and incorporates some examples of policies aimed at this. Participation in decision-making is clearly addressed, as we have seen. However, while the text of CEDAW does not explicitly reference an obligation for States to undertake gender (responsive) budgeting (GRB), nor does the Convention directly mention the budgetary resources of a State required for its implementation, Article 2 (f) obliges States to take '*all appropriate measures to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'*. This includes budgetary means, as can be seen from the approach adopted by the CEDAW Committee in Concluding Observations (CO) and General Recommendations (GR).

As has been mentioned above, and as found in Article 3, CEDAW (additionally) requires States to ensure not only formal but also substantive equality.[80] The latter implies also non-identical treatment under certain circumstances, to acknowledge biological and socially constructed differences between the genders.[81] Article 4 allows for the adoption of '*temporary special measures aimed at accelerating de facto equality between men and women'*, but also other universal human rights treaties insofar as they are applicable.This requires States to employ both temporary and permanent special measures to achieve substantive equality, the former includes measures such as the application of quotas to promote hiring of female applicants in employment, and the latter relates to maternity health care services.[82]

Article 5 is very important in addressing the problem of stereotyping. Note the mandatory language 'States parties shall *take all appropriate measures:..(a) To modify the social and cultural patterns* of conduct of men and women, with a view to achieving *the elimination of prejudices and* customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or *on stereotyped roles for men and women.'* States must address relations and stereotypes that negate women's enjoyment of substantive equality.[83] Applied to GRB, this may entail, inter alia, that tax systems should not amplify traditional gender roles and inequalities. It also addresses the question of gender division of unpaid labour in the home, including childcare tasks.[84] Articles 7 and 8 address women's participation in decision-making by 'all *appropriate measures…*' (inter alia, public life, including official representation.) [85] It is noticeable that women continue to be under-represented within the higher levels of the UN Secretariat and that only seven

[79] See, inter alia, GR 24, para 17, relating to CEDAW Article 12 (Women and Health), para 17

[80] See too GR 23, and Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), chap. I, resolution 1, annex I

[81] GR 25, on Article 4(1), of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, CEDAW Committee, para 8

[82] Article 4 (1), Article 12 (2) CEDAW

[83] This is applicable also to women in power and decision-making

[84] This assessment is supported by GR 23

[85] See too GR 23, *Political and Public Life* , paras 35-40 Reinforcing both CEDAW and GR 23, see Resolution (S/RES/1325) '*Security Council resolution 1325 (2000) urges member states to include women at all levels in national, regional, and international bodies* In fact, there is a view that women

out of 44 Special Representatives of the Secretary-General (SRSGs)[86] are women. Is the appointment of the next Secretary-General an opportunity for positive action?

The CEDAW Committee has made specific comments regarding our sub-theme of G(R)B. The Treaty Body has commended States in its Concluding Observations (COs) for applying GRB in their national budgets,[87] addressing this under sections concerning '*national machinery for the advancement of women and gender mainstreaming'*.[88] At the same time the Treaty Body has criticised States parties for a lack of an '*overall integrated strategy for gender mainstreaming, including gender budgeting'*[89] as well as a lack of information about specific budgetary allocations in State reports regarding specific posts. An example would be in relation to implementing programmes to increase gender parity in primary schools.[90] It has also expressed concern when the amount of financial resources allocated to women's empowerment from the overall budget is limited, [91] as well as criticised States for allocating limited resources to specific posts, for example, activities to combat violence against women.[92]

Finally, there are currently 189 States parties to CEDAW, representing an overwhelming endorsement.[93] An obvious gap is the United States. Although the US was involved in the drafting of CEDAW, [94] and it was signed on 18 July 1980, during the Carter Administration, it has not yet been ratified (by the US).[95] We are told that the Obama Administration strongly supported ratification of CEDAW and included CEDAW as one of the multilateral treaties it identified as a priority.[96] However, ratification of international treaties by the US, albeit signed by 'a' President, requires the support of two-thirds of the Senators. CEDAW has not found such support (to-date).

IV. SUBSTANTIVE AREAS –WOMEN IN (POWER AND) DECISION-MAKING; AND GENDER RESPONSIVE BUDGETING

1. Women in (Power and) Decision-making

1.1 Major barrier – stereotyping

A major barrier to women's advancement, whether in economic or political spheres, or otherwise, which attracts widespread agreement on the need to tackle it, is the persistence

are more likely to be members of international delegations formed by civil society (NGOs) rather than representing States parties

[86] http://www.un.org/sg/srsg/africa.shtml (last accessed 18 June 2016) See also Beijing Declaration (paras 141, 134, equal access) See too, op cit, IHREC

[87] CO Sweden, UN Doc CEDAW/C/SWE/CO/8-9, 7 March 2016, CO Switzerland, UN Doc. CEDAW/C/CHE/CO/3, 7 August 2009, para 8

[88] CO Sweden, UN Doc CEDAW/C/SWE/CO/8-9, 7 March 2016, CO Switzerland, UN Doc. CEDAW/C/CHE/CO/3, 7 August 2009, para. 8, CO Korea, UN Doc CEDAW/C/KOR/CO/7, 29 July 2011, para 16

[89] CO Switzerland, UN Doc CEDAW/C/CHE/CO/3, 7 August 2009, para 21

[90] CO Tanzania, CEDAW/C/TZA/CO/6, 16 July 2008, para 33

[91] CO Korea, UN Doc CEDAW/C/KOR/CO/7, 29 July 2011, para 16

[92] CO Tanzania, CEDAW/C/TZA/CO/6, 16 July 2008, para 24

[93] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en, '*Signatories : 99. Parties : 189',* (last accessed 20 June 2016)

[94] http://www.cedaw2015.org/index.php/whats-in-it-for-us (last accessed 18 June 2016)

[95] Ibid

[96] Ibid, (last accessed 18 June 2016)

of stereotyping.[97] It is widely recognised that regardless of *de jure* equality (formal) between men and women, in the absence of *de facto* equality (substantive) women fail to achieve real equality, due to discrimination. During the drafting stage of CEDAW, the proposal to make it obligatory for States to prohibit incitement to discriminate against women was rejected.[98] However, States parties do have duties concerning the protection of women against damaging gender stereotypes produced by private parties. Holtmaat is of the view[99] that although CEDAW Article 1 does not mention gender stereotypes or fixed parental roles, and Article 5 does not speak of discrimination, these phenomena are closely related to discrimination against women.

1.2 Example of stereotyping - Ireland

A regular topic in the periodic reporting cycle between Ireland and the CEDAW Committee is the issue of 'stereotyping'. It is a topic to be addressed (again) in the forthcoming combined sixth and seventh periodic reports, in response to the issues and questions raised by the Treaty Body.[100]

While women were active during the revolutionary period[101] if we go back to the very early days of the new Irish State (pre-1937 Constitution), a report on the Civil Service, (quoted by Kettle in her minority report) refers to the cohort of women Civil Servants, '*The great majority of women Civil Servants are employed as Writing Assistants, Typists and Cleaners on duties, according to the report, 'peculiar' to women.*'[102] The terminology ('*peculiar to'*) accentuates the prism through which women were viewed. If we look at the occupational segregation in the modern Civil Service we can draw parallels in the sense of where women are grouped;[103] this is not to be understood as reflecting the sentiments referred to by Kettle, merely a fact of where women predominate numerically. Endeavours to bring about greater targeted opportunities for women to progress have also to be acknowledged.[104]

Many years after the foundation of the new State, the legal challenge by a civic minded woman resulted in women being able to function as equal citizens in terms of jury

---

[97] See, inter alia, on the difficulties of eradicating (or abolishing or 'even modifying'), Holtmaat, R, 'Article 5' in, op cit Freeman, Chinkin, Rudolf (eds), 141-167, 148 See too, (in general) http://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/ Gender_stereo typing.pdf, (last accessed 21 June 2016)

[98] Op cit, Holtmaat, 162

[99] Op cit, Holtmatt, 144

[100] CEDAW/C/IRL/QPR/6-7, para 10

[101] See, inter alia, Cullen, M, 'Women, emancipation, and politics, 1860-1984' in, Hill, J R, (ed), *A New History of Ireland, Ireland 1921-198,* [2010 Oxford] 826-891, 858 et seq

[102] Commission of Inquiry into the Civil Service *Final report of the commission of inquiry into the civil service: 1932-1935,* Vol 1 with Appendices [Dublin 1936], Kettle, M, Appendix D (Minority report)

[103] Case C-243/95 *Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of* Finance.ECR [1998] I-03739

[104] Inter alia, http://www.genderequality.ie/en/GE/Pages/WomenPublicSector and, http://www.nascireland.org/.../pq-national-womens-strategy-genderequality/ and, http://www.justice.ie/en/JELR/Pages/PB07000395 and, http://www.genderequality.ie/.../FINALJoint%20Progress%20**Report**%20for%202011.../... (all accessed 30 May 2016)

service, even if not property owners. The stereotyping of women can be seen reflected in the decision.[105]

However, the main concerns that have arisen relate to the reference to women (in the home) in the Constitution of Ireland, from1937. Any amendment to the offending Article (of the Constitution) will require a referendum, and the agreement of the electorate. The exchange between the State party and Treaty Body may have to continue for some time.[106]

> *'Article 41*
> *2.1 In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.*
> *2.2. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.'*

In his seminal work on the *Irish Constitution* Kelly's assessment of Article 41 (combined with Article 42 on Education) was that these were '*among the most innovatory in the entire Constitution.*'[107] Later editions refer to the suggestions that the '*articles were inspired*

---

[105] *De Búrca v Attorney General* [1976] IR 38 See too (Commission Report 1972), paras 466-472 which recommended a change in eligibility for jury service See (Commission Report 1993) , para 1 2 4 for commentary on the majority/minority decisions The Chief Justice felt that as jury duty takes the juror away from 'his' occupation and home 'special provision must obviously be made in respect of women'

[106] Some selected examples of women in leadership rolesin Ireland underline the breadth of ability available (*including* the maternal role); the first woman elected to the Westminster Parliament was Irish, but she did not take her seat; she subsequently became Minister for Labour (a European first for women) in *Dáil Éireann*– having actively sought the role. Of the nine Presidents of Ireland, two have been women. Three women have been heads of political parties; two were newly founded, and one was the oldest political party in the State, all three parties would have been in the 'small category'. It has been said that it is easier to make a mark as a member of a smaller party. Five women have been *Tánaiste* (Deputy Prime Minister). At the time of writing the *Tánaiste*/Minister for Justice, Attorney General, Chief Justice and President of the District Court are women. The Chief State Solicitor, Director of Public Prosecutions, Garda (Police) Commissioner, Head of the State Forensic Laboratory, Data Protection Commissioner and European Ombudsman (formerly Irish Ombudsman and Information Commissioner) are women. The former Chief Commissioner of the Revenue Commissioners is female, (subsequently – and currently appointed Chair of Policing Authority). The Chief Commissioner of the Irish Human Rights and Equality Commission (formerly the Children's Ombudsman) is a woman. Ireland has nominated women to be members of the Court of Justice of the European Union, European Commission and European Court of Auditors (one was a member of two of these institutions, and had also held several ministerial portfolios – at junior and senior level); the current and previous Irish members of the Court of Human Rights in Strasbourg are women. There are three women on the Central Bank Commission (10 members). The current Chair of the Board of RTE (State broadcaster) is a woman, as is the newly appointed Director-General. Although not a Government appointment, it should be noted that an Irish woman was (the only woman) Secretary-General of the European Commission. The General Secretary of the Irish Congress of Trade Unions (ICTU) is a woman, having previously been Vice-President of SIPTU, the biggest trade union in the country, and two women have been editors of two national newspapers. The first woman President of the Royal Irish Academy has been elected, and the CEO of Enterprise Ireland is also a woman.These individuals are neither representative of the female population, nor is the listing exhaustive. However, they are an encouragement to those who are responsible for such appointments, and to those who would like to be appointed, to take the appropriate steps.

[107] Kelly, J M, *The Irish Constitution,*(Kelly) [1980 Dublin], 483

in part by papal encyclicals and Catholic teaching,[108] *and also refer to a declaration in the German Constitution of 1919 of the special status of marriage and motherhood, as well as parents' rights and duties*.'[109] It is worth noting that *Kelly*[110] argues that '*one could infer from the reference in Article 45.2.i to the right of men and women equally to an adequate means of livelihood that the drafters of the Constitution did not envisage that the only role for women lay in homemaking.*' [111] This would be similar to the minority view held by Denham J (now CJ) in *Sinnott v Ireland* [2001] I. R. 545.

More than a decade before Ireland acceded to CEDAW in 1985 and prior to accession to the European Communities in 1973, the 1972 report of the Commission on the Status of Women (Commission Report 1972) offered stark conclusions on the dangers of stereotyping. These are particularly prescient comments in relation to the impact of stereotyping and are not in contradiction with the views of the CEDAW Committee. The Commission commented that: *'....[However], the removal of [these] discriminations leaves untouched a larger and more subtle area of discrimination consisting of those factors which limit women's participation even in the absence of formal discrimination, that is the* stereotyped *role that is assigned to women, the inculcation of attitudes in both boys and girls in their formative years that there are definitive and separate roles for the sexes and that a woman's life pattern must be predominantly home-centred while a man's will be predominantly centred on employment. It is from this type of cultural mould that formal discrimination arises and it is only by the removal of such traditional attitudes that women can hope to achieve self-fulfilment and equal participation in all aspects of the life of the community…'*[112]

---

[108] Referring to the then RC Archbishop of Dublin as saying '*nothing will change in law and fact of nature that woman's natural sphere is in the home'*, Constitutional Convention, Second Report, section 4 2, https://www.constitution.ie (last accessed 16 May 2016)

[109] Hogan G W and Whyte G F, (eds), *JM Kelly The Irish Constitution*, Fourth Edition, [Dublin 2003], para 7 6 01 et seq

[110] Op cit, Hogan and Whyte

[111] http://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/ (accessed 23 May 2016) op cit, Kelly, para 7 6 004, footnote 9

[112] Commission Report 1972, para 21 Paras 21-27 of the Report set out an enduring assessment of the dangers of stereotyping, and provide examples and possible actions to overcome the dangers, available at http://opac.oireachtas.ie/AWData/Library3/Library2/DL017466.pdf (last accessed 30 April 2016) A contribution to a symposium on the Commission's *Interim Report on Equal Pay,* commenting on para 128 of the Report (re State investment in education, and women at home rather than in the workforce) was to the effect that the Report ignored '*the possibility that much of Irish women's education is geared to fitting them for home duties and the State certainly should count as part of the social return on these outlays the improved quality of child-care etc*', see Geary, P T and Walsh, B M, *The Economics of Equal Pay,* in Journal of the Statistical and Social Inquiry Society of Ireland, 1972, 22 (4) 1972, 112-125, 118 This was an economic analysis and not a personal preference/view

The Commission Report was just one of many such reports.[113] However, there are signs that changes may be in sight.[114] In his Statement to the *Dáil* on the *Second Report of the Constitutional Convention*, the then Minister addressed the matter.[115] Among the many issues he highlighted was the original protective purpose of Article 41.2.1 and Article 41.2.2. '*It was part of the philosophy that resulted in women in the public service being required to give up their employment upon marriage'.* He expressed support for much of the Constitutional Convention's *Second Report*, including changed wording of the offending provisions, but cited a particular difficulty which will delay progress.[116]

Finally, looking specifically at the low level of female participation in national electoral politics,[117] what can be discerned is a change in the motivation for women for getting involved. An initial peculiarity of the Irish political involvement of women (especially, but not exclusively), was the preponderance of 'kith and kin' standing for (and winning) seats left vacant due to the death of the elected holder. This was described by the Commission Report 1972 as '… *common method of entry for women[is] by marriage or family relationship'*.[118] This was clearest where by-elections were concerned.[119] For example, in by-elections held during the 16th *Dáil* (1957) three women were successful, of whom two were widows; in the 17th *Dáil* (1961) all successful women (3) were widows, whereas in the 18th *Dáil* (1965) two women were unsuccessful, neither was a widow. The Commission Report 1972 notes that '*only 9 individual women were involved in the 22 successful candidatures of the four Dáil elections and by-elections'* (including 19th *Dáil*- 1969): ' *of these 8 were the widows of former Dáil Deputies.*'[120] A commentary on the 1977 General Election by an active participant noted that six women were returned to the 20th *Dáil* (then with 147 seats). This was one more than in the previous election. Of the six, three were widows, one a daughter and one a granddaughter of former members

[113] See the IHREC submission to the ICESCR Treaty Body, at http://www.ihrec.ie/publications/list/un-committee-on-economic-social-and-cultural-right/ Footnotes 273 and 182 (sic) provide a helpful listing of investigations and reports, including CEDAW exchanges, relating to Article 41.2 Para 5.2 of the submission, inter alia, regrets the perpetuation of stereotypical attitudes towards the role of women and See too the IHREC submission to the CEDAW Committee, http://www.ihrec.ie/publications/list/ ihrec-submission-to-the-un-cedaw-on-the-list-of-is in relation to the combined sixth and seventh periodic reports by Ireland (all accessed 30 May 2016)

[114] Op cit, Constitutional Convention, (last accessed 26 May 2016)

[115] http://www.justice.ie/en/JELR/Pages/SP13000352 (last accessed 5 June 2016)

[116] '*The inclusion of a reference by the Convention to the issue of 'carers' is the reason why it is not possible to offer a more specific timeframe for a Referendum to take on board the overarching Recommendation at this time.*'

[117] For comparison see http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-JusticeEDWR/Reports_2008/20091105.pdf (last accessed 27 May 2016)*'Women account for half of the Irish population, yet the proportion of women TDs has never exceeded 14 per cent. To put it another way, the Dáil has always been at least 86 per cent male. Since 1990, when Mary Robinson was elected as Ireland's first woman President, Ireland's rate of women's political representation has reduced drastically. In 1990, Ireland was in 37th position in the world classification of women's representation in the lower or single house of national parliaments'*

[118] Op cit, Commission Report 1972, para 489

[119] For comment and statistics on the historical practice see ibid, Commission Report 1972

[120] Op cit Commission Report 1972, para 488

of the *Dáil*.[121] While the practice remains (and includes the current –male- *Taoiseach*) it is no longer the recognised route for women's entry into politics.

A key factor identified by three female former politicians, two former ministers, and one a former minister of state, was the existence of, and support offered by, what became known as the Women's Political Association (WPA). This had been founded in 1971 and supported women candidates seeking to stand for election initially in the 1977 General Election.[122] Some of the key activists were successful in electoral politics – nationally and at European level over the subsequent years.[123] The 2016 General Election saw several similar groups mounting countrywide events and facilitating dissemination of information, and importantly, providing support in tangible and intangible ways. A common factor between the civil society organisations – in earlier years and now – is the non-party nature of the support; everyone, regardless of political views were involved. This support is part of the successful dual approach advocated (State funding tied to quotas, and civil society support). Family tradition continues, but it is no longer the main route for women.

1.3 Women in (power and) decision-making

1.3.1 Political -general

Political decision-making is multi-level; national, regional, local, communal and of course, international.[124] The Inter-parliamentary Union (IPU) maintains publicly available data on women parliamentarians worldwide which allows for comparisons to be drawn. Currently 193 parliaments are listed.[125] Of these 46 (less than 25 per cent) reach the critical mass level of 30 per cent).[126] It has to be borne in mind, that while female parliamentary representation is welcome, the main issue, as we have noted, has to be 'meaningful' participation.[127] As a co-decision-maker in the legislative process of the European Union (EU), the European Parliament (EU) can play an important role in the development of gender equality within the 28 Member States. The EP Committees play a very active role, including in relation to our sub-themes.[128] Prior to 1979, Members

[121] Fennell, N, *Political Woman A Memoir,* [Dublin 2009], 104 See too, Sub-Committee of the Joint Committee on Justice, Equality, Defence and Women's Rights (now Justice and Equality) (Sub-Committee), In relation to the role of sport and 'being well known and asked to stand, as a result' (male politicians) see same, available at http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-JusticeEDWR/Reports_2008/20091105.pdf (last accessed 27 May 2016)

[122] As noted op cit, Fennell, 95 et seq, of 375 party candidates selected in 1977 twelve were women See too Hussey, G, *At the Cutting Edge: Cabinet Diaries, 1982–1987* [1990 Dublin]

[123] See, op cit, Fennell, 97, and reference to Mary Bannotti who was elected an MEP 1984-2004 - http://www.europarl.ie/en/your_meps/irish_former_meps_1.html previously unsuccessfully in a by-election in 1983, and subsequently to be President of Ireland in 1997, showing that she was undaunted

[124] We will concentrate on national parliaments, with some examples from other levels (as available)

[125] As of 1 May 2016, see http://www.ipu.org/wmn-e/classif.htm, relating to 193 parliaments This applies to all parliaments being addressed in this Report Some of the States being discussed in this Report have federal systems of government In such instances, only the federal level is addressed here

[126] GR 23, para 16 See too, .Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), chap. I, resolution 1, annex I

[127] Op cit, *Mary Robinson Foundation – Climate Change*

[128] http://www.europarl.europa.eu/committees/en/femm/reports.html For a current example of the work of the FEMM and its contribution to one of the sub-themes of our Report, see, inter alia, http://

of the EP (MEPs) were nominated, and direct elections commenced only in 1979 (with the extension to nine Member States). In the interim the number of Member States has increased to 28. In the intervening years the level of female MEPs has increased from 16 per cent to 37 per cent. National examples show mixed results.

1.3.2 National examples – including political, public sector (broadly) and judiciary

i. Looking first at the *national Parliament*, some political parties in *Austria* have introduced (voluntary) political party quotas for women. These range between 50 per cent (the Green Party (GA), and 33.3 per cent (the Austrian People's Party (ÖVP), with the Social Democratic Party of Austria (SPÖ) at 40 per cent. Austria is bicameral and federal, and after the last election in September 2013, is currently ranked as number 44. It is one of the rare States which have achieved the critical mass of 30 per cent female members, (in fact, 30.6 percent), in the *Nationalrat* (Lower House) and just under the critical mass level, at 29.5 per cent, in the *Bundesrat* (Upper House). None of the proposed quota levels has been met.

The *European Parliament* elections in 2014 saw 56 per cent male MEPs, and 44 per cent women.[129] However, the Austrian parliamentary representation in the European Parliament *currently* [130] shows 50:50 (men and women) – nine men and nine women.

ii. There has been an improvement in the number of women parliamentarians in *Bangladesh*, elected in 2014 (20 per cent) compared to 1991 (12.73 per cent). Female parliamentarians hold some of the highest offices, including those of Prime Minister, Speaker, Leader of the Opposition, as well as Leader of the next biggest party.[131] Bangladesh, which is unicameral currently stands at number 89. At the same time, the country has achieved a better participation than the US, several EU Member States, and immediate neighbours. A positive assessment was reached when Bangladesh was placed in tenth place, out of 142 countries, in the political empowerment sphere, and was awarded the prestigious Women in Parliaments Global Forum award in 2015. The Constitution, article 65(3),[132] was amended in 2011 to ensure increased representation by women in national and *local government.*

---

www.europarl.europa.eu/committees/en/femm/home.html (European Globalisation Adjustment Fund (EGF) –and gender impact, where examples addressed include jurisdictions included in this Report

[129] http://www.europarl.europa.eu/elections2014-results/en/gender-balance.html (25 June 2015)

[130] http://www.europarl.europa.eu/meps/en/search.html?country=AT (25 June 2015)

[131] This is in addition to a number of Ministers. A very modest seven out of 104 Judges in the Supreme Court are women, although substantial numbers of female judges are to be found in the subordinate courts.

[132] Article 65(3): Until the dissolution of Parliament occurring next after the expiration of the period of ten years beginning from the date of the first meeting of the Parliament next after the Parliament in existence at the time of the commencement of the Constitution (Fourteenth Amendment) Act, 2004, there shall be reserved 2[fifty seats] exclusively for women members and they will be elected by the aforesaid members in accordance with law on the basis of procedure of proportional representation in the Parliament through single transferable vote: Provided that nothing in this clause shall be deemed to prevent a woman from being elected to any of the seats provided for in clause (2) of this article.] (3A) For the remaining period of the Parliament in existence at the time of the commencement of the Constitution (Fifteenth Amendment) Act, 2011, Parliament shall consist of three hundred members

In terms of *public office holders*, the National Human Rights Commission, Act 2009[133] provides for at least one woman as a Member, the Right to Information Act 2009[134] provides for at least one woman as Commissioner, and by law a fixed number of posts at the *local government* level are reserved for women.

iii. Currently *Brazil* is ranked 155 in terms of female representation in the national Parliament, and is a bicameral, federal state. After the last election in 2014 the female presence in the Chamber of Deputies (Lower House) stands at 9.9 per cent and at 16 per cent in the Federal Senate (Upper House). It is clear that female representation is a long way off reaching the recognised critical mass of 30 per cent. Despite this poor female federal parliamentary representation, the two most recent *presidential* elections have resulted in the successful female candidate being returned (twice). Dilma Rouseff was the first woman to reach this office in Brazil. However, for domestic legal reasons, the twice elected President was suspended in May 2016, and has subsequently been impeached,[135] (and replaced).

There are national provisions in Brazil establishing quotas for women candidates.[136]However, despite this legal obligation, the reality is different; women often are only recruited by the parties to fill empty positions in order to meet these legal provisions, but without being able to fill, and fulfill, the positions. In other words, it is said to be a sham.[137]

As regards *local government*, UN Women has confirmed that in the Executive Branch, women occupy only 10 per cent of municipalities and represent 12 per cent of municipal councils.[138] Looking more widely, we see that women make up fewer than 15 per cent of all current chairpersons in Brazilian *public bodies*.[139] In a ranking which assesses political penetration by gender in 146 countries, prepared by the Inter-Parliamentary Union, Brazil occupies the 110th place.[140]

---

elected by direct election provided for in clause (2) and fifty women members provided for in clause (3).]

[133] Section 5(3) 'Among the members at least one shall be [a] woman and one shall be from the ethnic group'. See <http://www.nhrc.org.bd/PDF/NHRC%20Act%202009_1_.pdf> (last accessed 20 April 2016).

[134] Section 12(1) 'The Commission shall consist of at least 1 (one) of whom shall be a woman.' See http://www.infocom.gov.bd/ic/forms/rti_english.pdf (last accessed 20 April 2016).

[135] See, inter.alia, http://www.bbc.com/news/world-latin-america-36028117 (accessed 8 September 2016)

[136] Initially, Law No 9 100/95 provided only for 20 per cent women in elected positions, now Law No 9.504/97, Article 10, para 3, sets down a 30 per cent threshold for women candidates, in compliance with affirmative actions provided in the international treaties ratified by Brazil

[137] UFRGS, *Cotas partidárias e sub-representação feminina na América do Sul: Um estudo comparado entre Brasil e Bolívia,* available at https://www.ufrgs.br/sicp/wp-content/uploads/2015/09/DIANDRA-MARTINI.pdf

[138] UN Women, *Brasil: Visão Geral*, http://www.onumulheres.org.br/brasil/visao-geral (accessed 17 April 2016)

[139] Portal Brasil, Mulheres na Política, http://www.brasil.gov.br/cidadania-e-justica/2012/02/mulheres-na-politica, (accessed 17 April 2016)

[140] Ibid

In the *Judiciary*, 35.9 per cent of national judges are women.[141] In the Federal Supreme Court (STF), in 2016, out of 11 Ministers, only two are women.[142] In the history of the Brazilian Supreme Court, only three women have served as Ministers.[143] In the Superior Court of Justice (STJ), seven Ministers are women, out of 33 judges (21 per cent). In 2016, it is expected that two women Ministers will assume the presidency of both Courts. If this happens, it will be the first time in Brazilian history that the Superior Court of Justice will be presided over by a woman.

iv. *Finland's national Parliament* is ranked at number 10, following the April 2015 general election. It is a unicameral State, with a female parliamentary representation of 41.5 per cent. This is clearly over the 30 per cent critical mass level, but below the goal of gender parity, of 50 per cent. After the 2014 EP elections, Finnish members of the *European Parliament* are at 45 per cent male, and 55 per cent women.[144]

v. *India*'s last general election was in 2014, resulting in a ranking of 144. It is a bicameral system. Coincidentally, both Houses of Parliament have the same percentage of female parliamentarians, namely 12 per cent in both cases.

vi. *Ireland* is currently ranked at number 76 by the IPU, having fluctuated (mainly downwards) over time. It is bicameral, with the *Seanad* (Upper House) partly elected, and partly appointed by the *Taoiseach* (Prime Minister). The *Seanad* electoral system is regarded as undemocratic; a referendum to abolish the *Seanad* was defeated in 2013, as the 'reform' option was considered preferable. This remains to be seen. Current ranking stems from the general election in February 2016, when the highest ever success rate for women parliamentarians was achieved. This is largely attributed to the introduction of candidate quotas linked to State financial support for political parties.[145] The support of active, apolitical civil society also played an important role.

The implications of the 2012 Act did not receive universal approval, particularly its potential negative impact on current, and potentially, future, male politicians. It has to be noted that some women politicians had also previously expressed opposition, or at best reservations, about quotas. A High Court challenge was mounted, unsuccessfully, by a would-be candidate.[146] The State had argued its entitlement to enact laws regulating elections included an entitlement to legislate to promote the '*constitutional guarantee of equality'*.[147] The Court[148] found that the challenger lacked standing; as it was the political

[141] Conselho Nacional de Justiça, available at http://www.cnj.jus.br/.

[142] Supremo Tribunal Federal, *Composição atual,* available at <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=sobreStfComposicaoComposicaoPlenariaApresentacao>, accessed 17 April 2016.

[143] Supremo Tribunal Federal, Composição plenária, available at <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=sobreStfComposicaoComposicaoPlenariaApresentacao> and <http://www.stf.jus.br/portal/ministro/ministro.asp?periodo=stf&tipo=alfabetico>, accessed 17 April 2016

[144] http://www.europarl.europa.eu/elections2014-results/en/gender-balance.html

[145] The Electoral (Amendment) (Political Funding) Act 2012 available at http://www.irishstatutebook.ie/eli/2012/act/36/enacted/en/html (last accessed 27 May 2016)

[146] *Mohan -v- Ireland and the Attorney General* [2016] IESCDET 41 – available at http://www courts ie Judgments nsf/0/A43F9562CF1945D780257FB50044BCA9 (last accessed 5 June 2016)

[147] Note, inter alia, op cit IHREC, op cit CEDAW/C/IRL/2-3 and op cit CEDAW/C/IRL/QPR/6-7

[148] Keane J noted in the *Mohan* case that taking the period 1918-1977 '*[T]he proportion of the* members *of Dáil Éireann who are women has never exceeded the current percentage of the whole,*

party which would have had standing to mount the challenge, and in fact the party had seemed to welcome the legislation when mooted.[149] In addition, the court held that the plaintiff '*had failed to prove his claim (that) a 50 per cent cut in funding for Fianna Fáil, if it did not meet the gender quota targets, would make it impossible for the party to function*.' He had also failed to show his exclusion from being considered for selection at the election convention '*was due to a decision imposed on the party as a result of the 2012 Act rather than a voluntary decision of Fianna Fáil*.' The judgment was an important legal hurdle to overcome. In the event, the 32nd *Dáil* saw the highest percentage of women ever elected (22.2 per cent).[150] This legislation had been included in the Programme for Government adopted in March 2011 (2011-2016) .

The 31st *Dáil* (166 members in total) ended with 16.3 per cent female members and the 24th *Seanad* had 30 per cent female members.[151] The 32nd *Dáil* (158 members in total), has 22.2 [152] per cent women parliamentarians, an increase of almost 6 per cent since the 31st *Dáil* election. Women candidates made up 30 per cent of the total.[153] 16 of the 40[154] constituencies returned no women (even though 15 of these had had women candidates); one constituency had no women candidates, despite the legislative imperative.[155] However, as we have noted, the outcome falls well short of the recommended 30 per cent (women), needed to form a critical mass. The 25th *Seanad* has 28.5 per cent female members (60 seats).

Ireland currently has 11 members of the *European Parliament*, of whom the majority (55 per cent), are women, thereby exceeding the EU average of 37 per cent.[156] This is an improvement from the previous election of 42 per cent women MEPs, against an EU average of 36 per cent.[157] The percentage of Irish women MEPs in the European Parliament elected in 2014 is one of the highest; similar to Sweden, 1 per cent more than Finland, and only Malta – with 67 per cent – has more. One of the current (women) Irish MEPs was elected Vice President of the Parliament. However, over the course of Ireland's EU membership, women have not always been so well represented. In the period 1973-2014

---

that is 16.3 per cent, having fallen as low as 0.7 per cent after both the second election of 1927 and the election of 1932.' In the period 1977-2011 '*…..the proportion of women* candidates *has never exceeded 20 per cent of the total (the high point being 19.8 per cent in the 1997 election).*

[149] See, *The Irish Times*, http://www.irishtimes.com/news/crime-and-law/courts/high-court/fianna-f%C3%A1il-activist-loses-challenge-to-gender-quotas-law-1.2519326 (last accessed 2 May 2016)

[150] As noted by Ireland's Deputy Permanent Representative to the UN, during CSW 60

[151] The *Seanad* is partly elected (by politicians – 43, -and two of the universities 3x2) and partly appointed (by the *Taoiseach* of the day - 11) A constitutional amendment in 1979 widened the university franchise for the *Seanad* but has not yet been legislative expression

[152] http://www.ipu.org/wmn-e/classif.htm (last accessed 19 May 2016)

[153] http://www.oireachtas.ie/documents/publications/201632DailElectionResults.pdf, 81, Table 6 (last accessed 25 May 2016)

[154] Reduced from 43, see Electoral (Amendment) (*Dáil* Constituencies) Act 2013 available at http://www.irishstatutebook.ie

[155] http://www.oireachtas.ie/documents/publications/201632DailElectionResults.pdf., 81 Table 6 (last accessed 25 May 2016)

[156] http://www.europarl.europa.eu/elections2014-results/en/gender-balance.html *(last accessed 23 May 2016)*

[157] http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/131011_women_men_leadership_en.pdf , Figure 22 (last accessed 24 May 2016)

a total of 31 of women and 112 men have been nominated/elected as MEPs for Ireland.[158] There were no quotas applied.

a. Government ministers

The Constitution (*Bunreacht na hÉireann*) restricts the numbers of *Government ministers* to a minimum of seven and a maximum of 15.[159] The first Cabinet Minister for Equality (and Law Reform) was appointed in 1993. Given that the Constitution restricts the numbers of members of the Cabinet to a maximum of 15, this was a very important development. In the 32nd *Dáil* four out of the 15 ministers are women – as was the case in the 31st *Dáil*, representing 27 per cent. Two are continuing as Ministers, albeit one in a differently configured Department; two are new to office (one of whom is an Independent, and one of whom was a first time backbencher in the 31st *Dáil*).[160] There had been mention – indeed a promise - of a 50:50 gender balanced Cabinet in the 32nd Dáil.[161] It is disappointing that this has not happened. Looking at the division of competences we see that the 2016 Government has Departments (Ministries) headed by a female Minister in one of the five basic functions (Justice and Equality); in one of the three economic function (Jobs, Enterprise and Innovation); two in two of the three socio-cultural functions (Regional Development, Rural Affairs, Arts and the Gaeltacht; and Children and Youth Affairs) and none in the infrastructure functions.[162] Out of the 18 Ministers of State, four women have been appointed, one of whom was appointed Government Chief Whip, with the status of Minister of State, - representing 22.2 per cent of the appointments.[163] The portfolios of her three female colleagues relate to Mental Health and Older People; Health Promotion; and Communities and the National Drugs Strategy. Health and Drugs are two areas of considerable difficulty, nationally, Health representing a particularly difficult funding area. Nonetheless, these could be seen as being 'female' areas of concern. There are

[158] The number of seats held by Ireland have changed over the years from 17 (15, 13, `12) to 11, as overall membership grew. The first elections to the European Parliament were in 1979; prior to then, MEPs were nominated, despite also holding a national mandate. In Ireland's case, all nominated MEPs were men Irish women MEPs have always been elected. The dual mandate was abolished in Ireland only 'from the general election after 2004' This could have been used to involve women, see http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2004012900010?opendocument (last accessed 20 May 2016) See also http://www.europarl.ie/en/your_meps/irish_meps_since_1973.html;jsessionid =E55DADDF520BD9C81DA1515BD4A3D3CE

[159] Article 25.1

[160] www.taoiseach.gov.ie/...Government/List_of_Ministers_Ministers_of_State/ (last accessed 17 May 2016) The four portfolios are Children and Youth Affairs; Jobs, Enterprise and Innovation; Justice and Equality (and Tánaiste); and Regional Development, Rural Affairs, Arts and the Gaeltacht. The constitutional numerical constraints are visible from the extended titles of the portfolios; the limit was set in a different era of the parliamentary process

[161] See, inter alia, http://www irishtimes com/.../taoiseach-wants-equal-number-of-men-and-women-in-next-cabinet-1.2477506 *,and* http://www.irishtimes *com/.../enda-kenny-pledges-to-appoint-women-to-half-of-cabinet-posts* www.irishtimes.com/.../gender-balance-and-the-next-cabinet-1.2478691

[162] http://ec.europa.eu/justice/gender-equality/files/database/024_map.pdf , Country BEIS type, A-4, (last accessed 24 May 2016)

[163] She is not the first female Government Chief Whip;this had been the situation in 2002-2004 However, it has been the norm to appoint men to this post, possibly arising from stereotyping

no constitutional numerical restrictions on ministers of state (junior ministers).[164] It is a purely political decision. It would be hard not to see the paucity of female appointees as an opportunity missed, particularly as the percentage of women elected to the Dáil was the highest ever, as noted. It is also difficult not to reflect on the fact – that since the foundation of the State (only) 17 women ministers have been appointed.[165]

The most recent Local Elections were held in 2014 (coinciding with the European Parliament Elections). Unlike the 2016 General Election there were no candidate quotas tied to State funding, although there was voluntary civil society activity, and at least a claim of voluntary party quotas. The results, taking all Councils into consideration (City and County), were that 21.65 per cent of the candidates were women, as were 20.76 per cent of the successful candidates. An interesting 'divide' can be seen between City (urban) and County Councils (rural, with towns and villages). Dublin City Council had 29.14 per cent women candidates, and 31.75 per cent of the successful candidates were women – thus exceeding the critical mass threshold. The second city (Cork), on the other hand had 18.46 per cent women candidates, and only 16.13 per cent of the successful candidates were women. This was slightly over 50 per cent of the percentage achieved in Dublin.[166] Given that Local Government is a well trodden route for entry into national politics these differences (achievements) are significant. In any event, there is still a long road to travel.

b.Civil Service/public sector

The *public sector*[167] *(including the Civil Service)* has always had a large female staff. Education and health are key employers for women – perhaps practical examples of (caring professions) stereotyping driving career choices. It has been noted that this occupational segregation had an impact during the recession post 2008, in terms of gender imbalance in the overall unemployment figures.[168] Gender imbalance has been very stark in the Civil Service, at all levels, but most acute in terms of career progression for women, the higher the level. Extensive efforts have been made to address this imbalance, and while progress is recorded, it is still a work in progress. For example, in the Civil Service, progress has been made in addressing gaps between male and female participation at different grade levels. In 2014, women accounted for 43 per cent of Assistant Principal Officers and for 35 per cent of Principal Officers. However, at the (next/two) most senior grades; women represent only 25 per cent and 24 per cent at Deputy/Assistant Secretary General level and at Secretary General[169] level respectively.[170]

---

[164] In accordance with the Ministers and Secretaries (Amendment) (No.2) Act 1977 (as amended), available at http://www irishstatutebook.ie The 31st *Dáil* had 15 Ministers of State; the post 2016 General Election number is said to relate to the political composition of the 32nd and Minority Government dependence

[165] Op cit (NWCI)

[166] Table F Women Candidates

[167] This contribution concentrates on the Civil Service, rather than the wider Public Sector, due to length constraints

[168] McGinty, F, Russell, H, Watson, D, Kingston, G and Kiely, E, *Winners and Losers? The Equality Impact of the Great Recession in Ireland*, [2014 Dublin] x, 7-8, also available at http://www.esri.ie and http://www.equality.ie/research

[169] See, inter alia, Bryson, A, *No Coward Soul A Biography of Thekla Beere,* [2009 Dublin 2009] The subject of the biography was the first woman appointed Departmental Secretary (Administrative Head of Ministry) (in 1959), and Chairman of the op cit 1972 Commission on the Status of Women

[170] http://www.genderequality.ie/en/GE/Pages/WomenPublicSector (accessed 30 May 2016)

vii. *Nigeria* is ranked at number 178, following the elections of March 2015. It is a *bi-cameral parliament* in a federal state. Female parliamentarians comprise 5.6 per cent in the Lower House, and 6.5 per cent in the Upper House. This is the weakest female parliamentary representation among the countries being discussed here, but is not the lowest female representation in parliaments, overall. It is an example of the challenge faced by those trying to increase the voice of women in relation to formulating a future moulded by a wider range of experiences, interests and needs.

From 2007 to 2011, the National Assembly had 24 members, which increased to 27 in the 2011-2015 Assembly. However, there are fewer women in the current Assembly following the March 2015 election.[171]

This lack of progress in terms of Nigerian women and their involvement with parliamentary decision-making is despite a range of legal mechanisms, as we have seen above. There is still work to be done to improve the participation of women in the parliament.

viii. *Sweden's national parliament* is unicameral, and has the highest international ranking of those countries being discussed in the Report, standing at number 5 in the IPU rankings. Parliament has 43.6 per cent female membership; this is well over the critical mass threshold, but still not at the 50:50 level. The European Parliament elections in 2014 resulted in 45 per cent male members elected and 55 percent women.[172]

ix. *The United States* is ranked 97 out of 193 parliaments in terms of female representation. It is a federal country without a parliamentary form of government. Thus, political control in the US Senate, the House of Representatives, and the Presidency can be split between the two (main) opposing parties. This can create barriers to decision-making including in relation to the ratification of international treaties; of particular interest to our topic is the lack of ratification of CEDAW. This is despite it having been signed during President Carter's tenure of the White House, and President Obama's expressed desire to see ratification of CEDAW during his Administration. There is no gender parity requirement in any of the branches of the US federal government. In the US House of Representatives, women members constitute 19.4 per cent, and in the Senate women comprise 20 per cent. [173] The last relevant elections were in November 2014. In the federal trial and appellate courts there are 17 per cent women judges in 2016.[174] The selection by a major party, of a woman candidate for the presidency, for the first time, raises the possibility of the first woman president being elected later this year.

US women, however, have been in positions to contribute to the economic empowerment of women, and to international law. Beginning in 1933, women have been appointed to powerful, Cabinet-level, policy-making positions in the US government Executive branch. There are currently 23 women with Cabinet and Cabinet-level positions, 35 per cent of the total positions.[176] Eleanor Roosevelt, a member of the US Delegation to the

[171] PremiumTimes, 7 January 2016, see, http.//www.premiumtimes.com/news/tops-news/18392-only-7-senetors-in-8th-national-assembly.html There are 20, according to http://www.ipu.org, 1 May 2016

[172] http://www.europarl.europa.eu/elections2014-results/en/gender-balance.html

[173] Rutgers Center for American Women and Politics, '*Current Women Officeholders in 2016*', (last accessed 16 February 2016)

[174] Foster-Long's, '*Gender Diversity Survey*' <www.americanbench.com> See too, Foster-Long's, '*American Bench*', <www.americanbench.com> (both last accessed 20 April 2016)

UN from 1945 to 1951, was elected chair of the UN Human Rights Commission in 1946. She was one of the drafters of the Universal Declaration of Human Rights. Four women have served as US Permanent Representatives to the UN since 1982, and, therefore, also represented the US in the Security Council. Three women have served as Secretaries of State since 1996. In the US legislative branch, a woman was Speaker of US House of Representatives: from 2005 to 2011. This is the most powerful position in the House. The first woman was appointed to the nine-member US Supreme Court in 1981, the second in 1993. Although from opposite political parties, they have jointly supported women's rights.[175] Since 2010, there have been three women justices on the Court, who all support women's equal rights based on the US Constitution and federal laws against discrimination based on sex.

The current Chair of the Board of Governors of the Federal Reserve (the US central bank) is the first woman to hold that post, having been appointed by the President and confirmed by the Senate in February 2014. The Attorney General[176] and Chair of the Securities and Exchange Commission are also women. All these posts held by women carry 'meaningful[177] decision-making powers'.

In the US federal system the State and local governments share power with the national government in areas that effect women's economic, health, political, and education rights, and social services. States each have their own criminal, social services, health, and education laws, in addition to some overriding federal laws in these areas. Marriage, divorce, and inheritance laws, however, are controlled by each of the States, exclusively, and vary among the States.[178] State courts are where most criminal cases and all family law cases are decided. In the State courts 31 per cent of judges are women.[181]

The State governments each have separate Executive, Legislative and Judicial branches. In 2016, women held 24.7 per cent of all the state wide Executive level positions throughout the 50 States. In 2015, six (of the 50) States had women Governors. The 50 State legislatures had 25.2 per cent women members.[179]

1.3.3 Summary

Only three (33 per cent) of the nine countries discussed in this Report have met the 30 per cent critical mass threshold of female members of their national parliaments. Two of the jurisdictions discussed are in single figures in terms of female parliamentarians. There is clearly room for improvement in all cases, although it has to be acknowledged that there are considerable differences in achievements. What we can agree is that there is no room for complacency.

---

[175] Hirschman, L., *Sisters in Law: Women Trailblazers Who Steered American Jurisprudence* [2015 New York]

[176] She is the second woman to hold this post as the chief prosecutor of the US

[177] Op cit, *Mary Robinson Foundation*

[178] There are no federal marriage, divorce, or inheritance statutes

[179] Rutgers Center for American Women and Politics, Statewide Elective Executive Offices

1.4 Economic decision-making

This very important area cannot be fully explored due to length constraints.[180] However, it can be said that there is still a lot of work to be done. In the economic field the Bangladesh Government has formed a National Women SME Forum under the SME Foundation of the Ministry of Industry to promote women's participation in formal economic sectors. The involvement of women (as decision-makers) in the economy is focused very much outside the large corporations.[181]

On the EU front the lack of progress on the EU's Directive to address gender balance on boards is disappointing. That said, there are some positive statistics – including Finland 29.5 per cent and Sweden with 29.4 per cent.[182] Ireland stands in contrast, at 13.2 per cent.[183]

We have seen that the US has a female Chair of the Federal Reserve; there is no question but that this is a meaningful decision-making role. There are three women on the ten person Central Bank Commission in Ireland.[184] An important State agency supporting industry in Ireland, has a female chief executive.[185]Brazil, Finland, India, Ireland, Sweden and the US are included in a report on the Forbes Global 500 companies.[186] Finland and Sweden are number two and three respectively.

2. Gender (responsive) budgeting

2.1 Introduction

It is clear that CEDAW is particularly important for our topic of G(R)B. This is despite no explicit textual reference to an obligation for States to pursue GRB. In addition, the Convention makes no direct mention of the budgetary resources of a State required for its implementation. However, as we have seen, Article 2 (f) obliges States to take '*all appropriate measures'* to eliminate discrimination, which include budgetary means, as can be seen from the approach adopted by the CEDAW Committee in Concluding Observations and General Recommendations. Several other provisions are also relevant in attributing obligations to adopt GRB. We have noted that Article 3 additionally requires States to ensure not only formal- but also substantive equality. This requires States to employ both temporary and permanent special measures to achieve substantive equality, the former includes measures such as the application of quotas to promote hiring of female applicants in employment, and the latter relates to maternity health care services.[187]

The application of such broad notions of discrimination and equality thus indicates that not only must laws not discriminate, directly or indirectly, but States must adopt programmes and revenue systems with women as specific beneficiaries, for example, maternal health care. With regards to Article 12 of CEDAW, concerning women's health,

[180] Treatment choice made by contributors hence understandable length constraints
[181] Which is the focus of our Report
[182] http://ec.europa.eu/justice/gender-equality/files/womenonboards/factsheet_women_on_boards_web_2015-10_en.pdf
[183] Ibid
[184] http://www.centralbank.ie/about-us/pages/thecommission.aspx
[185] https://www.enterprise-ireland.com/en/.../Julie%20Sinnamon.html
[186] http://www.oecd.org/gender/data/boardroommembershipbysex.htm
[187] Article 4 (1), Article 12 (2) CEDAW

the Committee has, inter alia, held that the duty to fulfill this article requires budgetary measures to the maximum extent of a State's resources to ensure gender equality in health care.[188] The Committee holds in relation to this that '*States parties should allocate adequate budgetary, human and administrative resources to ensure that women's health receives a share of the overall health budget comparable with that for men's health, taking into account their different health needs.*'[189]

Additionally, States must also act to transform relations and stereotypes that negate women's enjoyment of substantive equality.[190] Applied to GRB, this could include, inter alia, ensuring that tax systems do not amplify traditional gender roles (stereotyping) and ensuing gender inequalities. It also entails States actively addressing (unacknowledged/quantified) gender division of unpaid labour in the home, *inter alia*, rearing of children.[191]

As we have already noted, the CEDAW Committee has commended States parties, in Concluding Observations, for applying GRB in their national budgets,[192] addressing this under sections concerning '*national machinery for the advancement of women and gender mainstreaming'*.[193] It has also criticised States parties for a lack of an 'overall integrated strategy for gender mainstreaming, including gender budgeting.[194] Other criticism has related to a lack of information about specific budgetary allocations in state report regarding specific posts, e.g. for implementing programmes to increase gender parity in primary school.[195] It has also expressed concern when the amount of financial resources allocated to women's empowerment from the overall budget is limited, [196] and has criticised States parties for allocating limited resources to specific posts, for example, activities to combat violence against women.[197] We see here the valuable role played by the Treaty Body in commending *and* challenging States parties and thereby contributing to wider dialogue (and 'change').

Taking the definition – and objectives – of gender responsive budgeting (GRB), which we have addressed at the outset,[198] an assessment of the national examples provided by contributors to this (section of this) Report presents a mixed picture. As noted by one contributor, budgetary provisions for women's economic empowerment are often lacking in the budgets even of States which have ratified CEDAW. She is also of the view that States which have signed and ratified CEDAW are *obliged* to frame policies and programmes which aim at gender equality and to provide funds for such programmes. Her view is that it is therefore important to analyse the gender sensitivity displayed in the

[188] GR 24, Article 12 of the Convention (Women and Health), para 17
[189] Ibid, para 30
[190] This is applicable also to participation in power and decision-making
[191] This assessment is supported by GR 23
[192] CO Sweden, UN Doc CEDAW/C/SWE/CO/8-9, 7 March 2016, CO Switzerland, UN Doc CEDAW/C/CHE/CO/3, 7 August 2009, para 8
[193] CO Sweden, UN Doc CEDAW/C/SWE/CO/8-9, 7 March 2016, CO Switzerland, UN Doc. CEDAW/C/CHE/CO/3, 7 August 2009, para. 8, CO Korea, UN Doc. CEDAW/C/KOR/CO/7, 29 July 2011, para 16
[194] CO Switzerland, UN Doc. CEDAW/C/CHE/CO/3, 7 August 2009, para. 21
[195] Concluding Observation Tanzania, CEDAW/C/TZA/CO/6, 16 July 2008, para 33
[196] CO Korea, UN Doc. CEDAW/C/KOR/CO/7, 29 July 2011 , para. 16
[197] CO Tanzania, CEDAW/C/TZA/CO/6, 16 July 2008, para. 24
[198] See section 2 2

annual budget of a State, even when the State constitution or its laws guarantee equality and non-discrimination.[199]

2.2 Case for GRB – austerity - criticisms

The lack of G(R)B, or at the very least, the lack of positive vision, can be seen in the austerity measures introduced in those countries suffering from economic 'downturns'.[200] Their ensuing impact – particularly on women who are most affected, has been heavily criticised, inter alia, at an event organised at CSW59[201] in memory of the esteemed Finnish lawyer, diplomat, women's advocate, and the first female assistant secretary general of the United Nations. [202] The panel of women economists were critical of the lack of progress on women's rights and the goals of the Beijing Platform for Action (BPfA): '*Economic and social rights are not being turned into laws and policies. Austerity in Europe harms women most. This is apparent especially in reduced spending on public health, education, social services, and cash benefits for the disabled, migrant, and minority women*.' This is an argument heard in other countries. Several international instruments were identified as having been breached '*because they fall most heavily on women.*' On the positive side specific mention was made of the SDGs, which it was contended, '*expected.. financial investment in gender equality in all areas of government operation*.'

2.3 National (selected) examples

Drawing on the examples of different budgetary approaches adopted in those States chosen by the contributors we can see both similarities as well as stark differences.

i. Gender responsive budgeting enjoys a particularly strong legal basis in Austria, not least given that it can be traced back to the Austrian Federal Constitution (Articles 13, 51(8)).[203] Both gender responsive budgeting and gender impact assessment were introduced at the federal level in 2013, as an integral element of a major budget reform. From 2009 all levels of government (i.e. federal, states and municipalities) are legally required to aim at effective gender equality in budgeting. GRB at the federal level rests on two pillars: GRB in the multi-annual and annual regular budgeting process as one element of performance oriented budgeting; and gender impact assessment as one element of regulatory impact assessment within the policy-making and evaluation process. As one important element of the introduction of performance budgeting, regulatory impact assessment was reformed as of 2013.

---

[199] As an example from India, for gender analysis of the budget, see, Bhumika Jhamb, Yamini Mishra and Navanita Sinha 'The Paradox of Gender Responsive Budgeting', in Economic and Political Weekly, volume XLVIII No 20, May 18, 2013

[200] In relation to Ireland see, inter alia, Barry and Conroy, May 2012 *'Ireland 2008-2012, Untold story of the Crisis: Gender, Equality and Inequalities*' available at http://www.nwci.ie

[201] See, inter alia, 10th Helvi Sipila Seminar: *Gender, Power and Economy*, a side event organised by Finland, Finnish Federation of University Women, National Council of Women of Finland, Coalition of Finnish Women's Association and YWCA of Finland, at CSW59 See too, for background to inspiration for event, http://www.theguardian.com/politics/2009/aug/03/obituary-helvi-sipila

[202] http://www.theguardian.com/politics/2009/aug/03/obituary-helvi-sipila

[203] See, inter alia, https://www.bmb.gv.at/.../en_folder_genderbudgeting_oe_26205.pdf? (last accessed 18 September 2016), or Schratzenstaller, M, *The implementation of gender responsive budgeting as central element of a major budget reform, 2014*, available at https://www.wu.ac.at/fileadmin/wu/d/i/vw3/Session_4_Schratzenstaller.pdf

ii. In the case of *Brazil,* we are told that Brazil adheres to its international obligations (including regional instruments). In addition, 'Soft law' plays an important part; one example of this being the recent Addis Ababa Action Agenda, the outcome of the Third International Conference on Financing for Development that promotes measures to '*close the financing gaps that hinder progress towards gender equality and women's empowerment'*.[204]

More specifically, since 2004 Brazil, has developed a National Policy Plan for Women,[205] within the Special Secretariat of Policies for Women (Special Secretariat), a national institution with ministerial status established in 2003 and linked to the Presidency of the Republic. In 2013, the Special Secretariat issued the latest version of the National Policy Plan for Women, setting out actions for the years of 2013-2015.[206] In order to put the recommendations of the National Policy Plan for Women into practice, the Brazilian Institute of Geography and Statistics (IBGE) produced research[207] that concluded the following: in 2013, 40.7 per cent of Brazilian states had a specific secretariat to address gender policies. Eight states[208] had no specific budget for policies of gender responsive budgeting, reducing the quality of the intervention actions. Among those with a budget, the state of Pernambuco had the highest (R$ 21.7 million) and Pará, the lowest (R$ 60,100). Among national administrative structures for gender policies, the most used was the Police Specialized in Assistance to Women (DEAMs), responsible for the protection of women facing gender violence.[209] The absence in all states of Brazil of specific institutions to promote gender equality represents a barrier to the completion of Brazil's goals as set out in the instruments mentioned above.

iii. The situation regarding gender equality in *India* is described as challenging.[210] The Global Gender Gap Index 2014 ranked India at 114 out of 142 countries. The ranking is based on a country's ability to reduce gender disparities in four areas: economic participation and opportunity, education, political empowerment, and health and survival. The CEDAW Committee has emphasised the need for increased investments for the Ministry of Women and Child Development (MWCD) and for gender budgets across Ministries. On the other hand, some Ministries have either had monies withdrawn or not

---

[204] United Nations, *Outcome document of the Third International Conference on Financing for Development: Addis Ababa Action Agenda,* UN Doc. A/CONF.227/L.1, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.227/L.1 Accessed 15 April 2016.

[205] Brasil, Presidência da República, Secretaria de Políticas para as Mulheres, *Plano Nacional de Políticas para as Mulheres,* available at http://www.observatoriodegenero.gov.br/eixo/politicas-publicas/pnpm/i-pnpm/I%20PNPM.pdf. Accessed 16 April 2016

[206] Brasil, Presidência da República, Secretaria de Políticas para as Mulheres, *Plano Nacional de Políticas para as Mulheres, 2013,* available at http://www.mulheres.ba.gov.br/arquivos/File/Publicacoes/PlanoNacionaldePoliticasparaasMulheres20132015.pdf. Accessed 16 April 2016

[207] ftp://ftp.ibge.gov.br/Perfil_Estados/2013/estadic2013.pdf Accessed 16 April 2016

[208] These are Rondônia, Roraima, Sergipe, Minas Gerais, São Paulo, Paraná, Santa Catarina and Mato Grosso do Sul

[209] http://premiowepsbrasil.org/ibge-oito-estados-nao-possuem-orcamento-especifico-para-politicas-de-genero/ Accessed 15 April 2016

[210] See too, inter alia, Chakraborty, L, *A case study of Gender Responsive Budgeting in India,* [2013] available at https://consultations.worldbank.org/Data/hub/files/grb_papers_india_updf_final.pdf (last accessed 16 June 2016)

allocated any money and also funds for some schemes of the Ministry have been reduced or slashed.[211]

In 2014, following its review of the fourth and fifth periodic reports submitted by the Government of India, the Committee also reiterated the need to strengthen institutions such as the National Commission for Women and the State commissions. It is not unusual[212] for the CEDAW Committee to seek information on National Commissions for Women (or similar), including its financing, in order to be able to assess whether it can contribute to gender equality strategies in the States parties. Decisions on the financing of such bodies fall within the GBR remit.

What could be regarded as a cross-cutting issue, but for our purposes falls within the GRB discussion, is women's access to jobs, professions or business. Their promotions or success in their chosen area of work depend on educational qualifications and access to periodic training programmes. These need to be funded and to form part of the budgetary process. In this context the programmes in India relating to education of women and girls are important as they help to strengthen women's economic status. In India free and compulsory education up to the age of 14 is available to girls. The right to education is a fundamental right.[213] However, schools are not always within easy distance from their homes for girls in many rural areas. This may raise security concerns. Budgetary provision for more schools closer to villages, better schools and a programme to encourage girls to attend schools are being framed. Special financial aid or scholarship schemes are also required for women wanting to pursue higher education. A recent article under the aegis of the Inclusive Media-UNDP Fellowship 2015 dealt with a related topic.[214]

A positive trend over the past couple of years has been the pre-budget consultations organised by the Ministry of Finance, aimed at ensuring that the voices of women are also heard in the budget making process. This year, in addition to meeting women's rights organisations, the Ministry also held a dialogue with UN Women along with the MWCD to discuss key issues pertaining to GRB. So far, 57 government Ministries/departments

---

[211] The schemes which have been withdrawn are: Restorative Justice to Rape Victims; Rashtriya Mahila Kosh; and Assistance to States for Implementation of Protection of Women as in the Domestic Violence Act, 2005 The schemes which have seen reduction in their funds are: One Stop Crisis Centres; Women's Helpline; and Rajiv Gandhi Scheme for Empowerment of Adolescent Girls (SABLA) Even the BJP-led NDA government unutilised the money in the Nirbhaya fund, after coming to power in the recent past, although in the present Budget, they have allocated Rs 1000 crores for this fund, which today stands at a total of Rs 3000 crores

[212] See too, the contribution on Brazil (previous section) See too, the issues and questions to be addressed by Ireland in its combined sixth and seventh periodic reports, CEDAW/C/IRL/QPR/6-7

[213] Article 21A of the Indian Constitution, *'The State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine'*

[214] *Indian Express*, of 1 April 2016 reported that a West Bengal scheme 'Kanyashree Prakalpa' launched in 2013 has reportedly benefitted over two million girls whose parents earn less than Rs. 10,000/- per month Under the scheme adolescent girls get a grant of Rs. 25,000/- from the Government for higher education Such schemes require State sponsorship and the annual budget must allocate funds for these purposes

in India have set up Gender Budgeting Cells — a major step that could potentially impact the lives of scores of women in India. [215]

iv. GRB has not been a term in open circulation in official circles in *Ireland*, as we shall see. However, there has been a requirement for some time that any decision proposed to Government includes an indication of the *impact* of such a policy proposal on a range of identified groups or situations.[216] It has also become noticeable that in the last number of years, some members of the Oireachtas have been making reference to 'Equality Budgeting'.[217] This is a broader concept than Gender or Gender Responsive, Budgeting, but could include Gender as one of the categories being affected.

By coincidence of timing, the *Programme for Partnership Government*[218] agreed after the 2016 General Election and subsequent Minority Government arrangement[219] makes specific reference to '*equality and* gender proofing in *the budget process'*.[220] This is separate to other references to advancing 'equality *and reducing poverty and strengthening economic and social rights*.' In sum, the new political situation, including Ministers with backgrounds in equality, diversity and women's issues, have (perhaps?) led to this very recent development.

The recent recession and ensuing austerity resulted in changes in taxes (increased) and welfare systems (cuts) and the introduction of new taxes, levies and charges.[221] Barry and Conroy[222] refer to the '*indiscriminate early retirement scheme'* and the '*freeze on recruitment in the public sector'*. There has been, and continues to be, a widespread concern about poverty and economic disadvantage in general, in Ireland. As reported

[215] See, Chakraborty, L, *A case study of Gender Responsive Budgeting in India,* [2013] available at https://consultations.worldbank.org/Data/hub/files/grb_papers_india_updf_final.pdf (last accessed 16 June 2016)

[216] See, inter alia, http://www.parliamentary-questions.com/question/31872-13/ (last accessed 11 June 2016) Cabinet procedures require a range of impacts to be covered in every decision proposed to Government such as the impact of policy proposals on *gender equality*, rural communities, North-South/East-West Relations, employment, persons experiencing or at risk of poverty or social exclusion, people with disabilities and industry costs In addition, distributional analyses are carried out by the DSP including distributional analysis of Budget measures and social welfare changes, see https://www. welfare.ie/en/downloads /SocialImpact2016.pdf In addition, the Department of Finance carries out distributional analyses of budgetary options using the ESRI's (SWITCH) model which facilitates analysis of the impact of the Budget on the income distribution by equivalised household income quintile and family type On the ESRI's work, see too, op cit Keane et al

[217] See, inter alia, http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014070900004 The specific reference to 'gender' (Deputy Donnelly- Opposition member - Social Democrat Party) should be noted (last accessed 11 June 2016)

[218] http://www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_ Partnership_ Government.pdf (Partnership Programme) – May 2016 (last accessed 8 June 2016)

[219] See reference to this development, in relation to section III, 2 *Women in power and decision-making* in this Report)

[220] Op cit, Partnership Programme, 15

[221] See ESRI Report on minimum wage increases and household poverty, 15 June 2016, available at https://www.esri.ie/news/minimum-wage-increases-have-little-impact-on-household-poverty/

[222] Op cit, Barry and Conroy

by Barry and Conroy the rise in poverty levels did not go without criticism from the UN High Commissioner for Extreme Poverty.[223]

The list of issues and questions furnished by the CEDAW Committee to the Irish Government in relation to the combined sixth and seventh periodic reports includes a request for progress on gender budgeting to be indicated.[224] More precisely, the question seeks a response setting out *'the mechanisms in place to monitor and evaluate the implementation of any existing strategies, to ensure that the budget allocations to various sectors are consistent with their respect gender mandates and activities'*.[225] It is important to note that disadvantaged groups of women, those who experience multiple discrimination, are specifically mentioned.

Unlike the *Programme for Partnership Government*,[226] the *Programme for Government 2011-2016*[227] did not include any *reference* to gender budgeting; however, several areas were mentioned of relevance to women.[228] In addition the Government undertook to require all public bodies to take due note of equality (sic) and human rights when carrying out their functions.

The *Programme for Partnership Government*[229] marks a decided shift in approach to gender equality to that of its predecessor. There is to be greater scope for consultation (in the Budget process) and amendment. Most importantly there is an undertaking to '*develop the process of budget and policy proofing as a means of advancing equality (sic), reducing poverty and strengthening economic and social rights'*. There are two steps provided for of particular interest to this contribution. Institutional arrangements are to be put in place to support '*equality and gender proofing in the independent fiscal and budget office and within key government departments.*' Included in this process will be the facility to draw on the expertise of the IHERC to support the proofing process. Finally, a political perspective was added to the approach in that a new '*Dáil* Committee on Budget and Finance' (which has been established) will be '*tasked with looking at gender and equality proofing budget submissions and proposals with independent expertise (including the IHREC) to assist where necessary.*' This proposed, explicitly gender (and equality) related, process will therefore fit more into the GRB approach, in that budget and policy proofing are to proceed in tandem, including gender and equality proofing budget submissions and proposals. This is to commence for Budget 2017 and in fact has commenced with an initial meeting between the IHREC and the Select Committee on 21 June 2016.[230]

---

[223] Ibid

[224] CEDAW/C/IRL/QPR/6-7, 8

[225] Ibid

[226] http://www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf (Partnership Programme) – May 2016 (last accessed 8 June 2016)

[227] http://www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government/Programme_for_Government_2011-2016.pdf (last accessed 13 June 2016)

[228] For example, lone parents' allowance, and raising the minimum wage (majority in this category are women), and this was done, carers' strategy (mostly women)

[229] Op cit

[230] See, http://www.oireachtas.ie, (Select Committee on Arrangements for Budgetary Scrutiny Debate) for the exchange of views

The question arises: how has the composition of the new *Oireachtas*, specifically of the new Government, rendered this changed and more explicitly gendered approach? Can a relationship with international obligations, including CEDAW (and the forthcoming submission of the long overdue combined sixth and seventh periodic reports) be detected? Or, is it just fortuitous?

v. *Sweden* presents not merely a contrasting picture to most of the other examples (other than Austria) addressed in this contribution, but also sets the scene for the application of GRB. It should be remembered that Sweden has had an outspoken feminist Government since 2014. In the first instance gender equality is a central goal of the Government, which is understood to entail the practical capacities of both men and women to shape society and their own lives, through equal political and economic power.[231] It has been noted that State budgeting frequently builds on the premise of a certain traditional life style that is primarily male. Thus, the gendered nature of resource allocation must be exposed. In order to do so, similarities and differences in the life of men and women must firstly be clarified. This has led to affirmative steps to conduct gender-responsive budgeting. During 2015, the Government developed methods for conducting GRB analysis and adopting gender indicators to be used in statistical surveys.[232] In practical terms this means that the Ministry of Finance drafts a report, which is added to the Government Budget Bill each year, on the distribution of economic resources between women and men. Statistical indicators according to gender are included in the report. These include, inter alia, level of income, the number of individuals working full- or part-time, the extent to which women and men stay at home in order to care for a sick child or an elderly relative, division of time for unpaid work in the home, and, interestingly, the number of filed complaints on physical assault, in relationships as well as in other contexts.[233]

V. CONCLUSIONS

1. Structural change:

Perhaps one of the most important changes is the establishment of Women's 'Machinery' (in whatever form), to contribute to embedding gender issues in the official as well as the public and private discourse. Looking at our two sub-themes, we can see some increase in female participation in (power and) decision-making, and some developments in relation to gender (sic) budgeting. As regards the latter, other than in the Swedish and Austrian – and potentially emerging Irish – examples, there is little evidence of GRB being part of the embedded budgetary approach, on a wide scale. Very recent Irish experience raises at the very least, the suggestion that women in power and decision-making roles, who have a history of involvement in gender and diversity issues, can contribute to bringing about structural change.

---

[231] Prop. 2015/16:100 Bilaga 3, Ekonomisk jämställdhet mellan kvinnor och män, Government Budget Bill 2016, 7

[232] Ibid

[233] Prop 2015/16:100, fn 1

2. Women in (Power and) Decision-making:

Eight of the nine contributions to this Report reflect jurisdictions where CEDAW and ICESCR[234] have been ratified, and all respect BPfA objectives. If we take the role of women in (power and) decision-making, in the political sphere, despite improvements, it could not be said that the level of participation of women is satisfactory, or reflects the objective of BPfA[235] or obligations of CEDAW.[236] Apart from the level of participation, the question of 'meaningful' participation[237] remains open (not least given, inter alia, the Brazilian experience indicated). The experience in the Irish 2016 general election (State funding tied to obligatory quotas, aided by apolitical civil society support (grassroots) did have a positive impact, but the best ever general election outcome (22.2 per cent) is still a long way from the critical mass of 30 per cent (female parliamentarians), and was not translated into meaningful increased numbers of ministerial posts At the same time, a mere ca 25 per cent of the 193 parliaments on the IPU listing meet this minimum target. These are bleak figures. It would be difficult to do other than answer in the negative in terms of the general situation. On a more positive note, the Irish recent experience of involvement of women with a track record of involvement in gender and diversity issues, does raise the possibility of their being able to 'nudge' progress in this area, when they are in positions of decision-making and influence. It remains to be seen what transpires.

3. Increased female participation in the higher echelons of the Civil Service/Public sector (arising from those instances where we have had some discussion in this report):

This is 'a work in progress'. Structural change is still in the future, although efforts made are welcome and may contribute to changed practices as shared experiences of attempting work:life balance. However, as we have seen, when austerity measures were decided in the budgetary process as a response to the recession, the gender implications were not taken into account; GRB – or any variation of it – was not a factor.

4. Board membership/senior executives:

The failure of the EU Member States to agree on the proposed Directive[238] is an example of the failure of decision-makers to make use of the talents, education and experience of potential women Board members; at the very least, this is not a good economic or strategic decision. The low levels of females in senior positions we have seen in the discussions in this Report echo this lack of strategic vision. That said, there are some improvements. The appointment of a woman as Chair of the Federal Reserve in the US should act as a role model, and not as an 'exception'.

---

[234] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en – especially in relation to Bangladesh, and objections raised, para 18

[235] Beijing Platform for Action (BPfA) Strategic Objective 1

[236] of *women's equal access to and full participation in power structures and decision-making.*'

[237] http://www.mrfcj.org/wp-content/uploads/2015/11/MRFCJ-_Womens-Participation-An-Enabler-of-Climate-Justice_2015.pdf (last accessed 30 May 2016)

[238] http://ec.europa.eu/justice/gender-equality/files/womenonboards/factsheet_women_on_boards_web_2015-10_en.pdf (last accessed 30 May 2016)

5. Influence of international law (specifically CEDAW, but also other measures):

The importance of CEDAW is as a constant presence, in the form of the Treaty Body and the periodic reports and ensuing exchanges. These also act as a guide for civil society and different actors in the State apparatus to draw on. Although there are mixed views on the 'success' of the MDGs (as we have noted above), the SDGs give hope for the future. Perhaps by the time this Committee's next report is drafted, we will be in a position to give some positive, empirically based, assessments. An unequivocal assessment is not yet possible.

Dr Patricia Conlan
Chair and Acting co-rapporteur

Professor Christina Binder
Co-rapporteur

Contributions were received from:

Mr Justice Muhammed Imman Ali
Ms Ugochi Vivian Anozie
Professor Christina Binder
Advocate Ms Shrabani Chakrabarty
Dr Patricia Conlan
Hon Marjory Fields
Dr Oluwabunmi Lar
Mrs Justice Sujata Manohar
Dr Ana Claudia Ruy
Dr Maria Sjoholm

Additional material was received from Dr Anja-Riitta Ketokoski-Rexed

COMMITTEE ON FEMINISM AND INTERNATIONAL LAW

WORKING SESSION

Thursday, 11 August 2016, 9.00am

Chair: Professor Hélène Ruiz-Fabri (France)

Dr Patricia Conlan (Ireland), the Chair of the Committee, welcomed attendees to the session and introduced the Session Chair.

The Chair said that she was happy to preside over the session. The panel would report on the empirical data that the Committee had gathered.

Dr Conlan started by saluting South African women for celebrating Women's Day on 9 August before going on the present a short background of the Committee. The Committee was first established in the 1990s and had since then gone through different stages. The focus of the Committee in its current form was the economic empowerment of women and the contribution of international law, which could be found in the third report of the Committee. The Committee would finish its work at the next ILA conference. The topic of the Committee had been broken down into different subthemes for the 2016 report. The first subtheme was *women in power and decisionmaking* and the second subtheme was *gender responsive budgeting*. These two themes were linked to the work of the Committee on the Elimination of all Forms of Discrimination against Women (CEDAW Committee). The 2016 report did not attempt to repeat what was already well established. The dialogue between the CEDAW Committee and States Parties, arising from the periodic reports (and responses), including national measures and the implementation of *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW) had been specifically useful. In terms of the influence of CEDAW, the open dialogue (with States Parties) can be seen as providing guidance and indirect influence – over time, rather than directly. The open dialogue also serves to inform civil society, other States Parties and all those interested in progressing the issues raised.

Dr Conlan noted that "women's economic empowerment" was defined in paragraph 2.1 of the 2016 report to mean "increasing the ability of women to bring about change that drives valuable outcomes as result of their increased economic capabilities and agency". The concept should act as a platform for action.

The empirical research provided in the various contributions of the members of the ILA Committee on Feminism and International Law and reflected in the report provided a snapshot of the progress (or otherwise) of the subject matter of the report. Equal access and full (and meaningful) participation by women (in power and decision-making) are the focus. Tokenism, or a mere increase in the numbers of women participating, did not comply with full and equal access. The definition of "gender responsive budgeting" (GRB) in paragraph 2.3 of the 2016 report was an allencompassing definition. It identified the "government" as the key actor, responsible for the actions laid down in the definition. In this regard, for example, while tax policy was said to be gender neutral, it was not the case in practice. Drafters might be gender blind but there were negative impacts, as any change in income levels affected women.

Dr Conlan drew attendees' attention to a range of instruments at the UN and regional level that were applicable and considered in the report. At a regional level, the contribution of Nigeria and of the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was noteworthy. There was no equivalent regional instrument in Asia. There was, however, the InterAmerican Convention on Human Rights, and the treaties of the European Union, including the Charter of Fundamental Rights of the European Union, as well as the Council of Europe instruments. She emphasised that one should not lose sight of the Beijing Platform for Action and the 2000 Millennium Development Goals, which had been succeeded by the Sustainable Development Goals adopted in 2015. While Goal 5 of the Sustainable Development Goals specifically addressed women, all of the goals had an impact on women in some form or other. The report drew attention to how States took different approaches to the implementation of CEDAW. Domestic transposition of CEDAW was especially interesting in dualist countries such as Ireland, which had ratified CEDAW (and the Optional Protocol) but not transposed specifically into domestic law. The US had signed CEDAW but ratification had not yet followed, for domestic political reasons.

The report focused on CEDAW as the main instrument because of the role played by the CEDAW Committee in relation to the substantive issues set out in the overall mandate of the (ILA) Committee; this role could not be overstated. Key to CEDAW's efficacy was the focus on achieving substantive, not merely formal, equality (in law and policy).

After the providing an overview of the introductory part of the report, Dr Conlan handed over to Professor Christina Binder to discuss the first subtheme of the report, *women in power and decision-making*.

Professor Christina Binder (Austria) explained that *women in power and decisionmaking* was a broad notion that looked at representation at all levels of government as well as economic participation. The Committee looked at international law and nine national examples, based on country reports. The reason for the focus on women in power and decisionmaking was because there was a human rights dimension of non-discrimination, as well as a business case to be made. The critical mass level of meaningful participation of women was 30 per cent.

Professor Binder drew attendees' attention to international law relevant to women in power and decisionmaking. The preamble to CEDAW made reference to participation of women and the core provisions were Articles 7 and 8, which dealt with equal political participation. Article 4 was also key, in that it mandated States Parties to adopt temporary special measures aimed at accelerating substantial equality between men and women. General Recommendation 23 of the CEDAW Committee focused on political and public life of women and made specific reference to political power.

Regarding the national examples, Professor Binder pointed out that the focus was on representation in parliament and economic decision makers. The Inter-Parliamentary Union (IPU) maintained publicly available data on women parliamentarians worldwide, which allowed for comparisons to be drawn. Currently, of the 193 parliaments listed, only 46 (i.e., less than 25 per cent) reached the critical mass level of 30 per cent. Professor Binder used Ireland as an example of increased participation.

Dr Conlan interjected to note that it was still lower than 30 per cent.

Professor Binder acknowledged this, and added that in some countries, the political representation of women was furthered by gender quota either required by law, as in Brazil; or on a voluntary basis, such as in Austria, where political parties committed to include a minimum of women in their lists..

Dr Conlan drew attendees' attention to the fact that Brazil and Austria did not actually meet these quotas.

Professor Binder emphasised that one should not underestimate civil society, which had pushed for participation. Sweden and Finland represented examples of exactly this. Only three of the nine countries discussed in the report had met the 30 per cent critical mass threshold in the composition of their national parliaments, and, notably, Brazil and Nigeria had only single figure representation in parliament.

Dr Anja-Riitta Ketokoski-Rexed (Finland) pointed out that there had been a dramatic global change, not only in the Western world, but also in countries such as Rwanda.

Professor Binder agreed, adding that women represented 63 per cent of parliament in Rwanda. Rwanda actually reserved seats for women. The country also represented the positive effect of role models. Unfortunately, the Committee had not received a country report from Rwanda (as there are no Committee members from Rwanda). Another positive example was the increase of women's participation in Bangladesh, but a lot still needed to be done. In terms of the influence of international law, Professor Binder pointed out that CEDAW was there as a yard stick and presented guidelines for civil society. CEDAW had been very successful as a form of soft power due to the work of the CEDAW Committee. In fact, (she was of the view that) the soft power of CEDAW had been more powerful than the binding obligations contained therein.

Dr Conlan then turned to the second subtheme of the report, namely *gender responsive budgeting*. She noted that Australia led the way in the mid-1980s. The issue was not mentioned specifically in CEDAW, but the inference could be drawn. There was a lack of recognition of GRB in (many of) the national examples. The lack of GRB, or at the very least, the lack of positive vision, could be seen in the austerity measures introduced in those countries suffering from economic "downturns". The unintended consequence was that it had had the greatest negative impact on women. In terms of the national examples, Dr Conlan referred to Austria, where GRB enjoyed a particularly strong legal basis, not least due to it being based in the Austrian Federal Constitution (Article 13). Both GRB and gender impact assessment were introduced at the federal level in 2013. It had formed an integral part of national reform. It sent a message for budgetary equity. The national reports showed that Brazil adhered to international obligations and was influenced by soft law. Since 2004, Brazil had developed a National Policy Plan for Women aimed at closing financial gaps.

Mrs Justice Sujata Manohar (India) presented a newspaper article from India that showed the effect of gender budgeting. There was a scheme in India under which people who could not open bank accounts previously could now do so if they had a mere 500 Rupees. These people in turn became eligible for loans. The effect had been that, of those that took advantage of the scheme, 23 per cent were women. These women could now get capital loans to start small enterprises. This micro-financing scheme has spread throughout the whole country and had made a difference to women's capacity.

Dr Conlan asked whether this scheme was specially targeted at women.

Mrs Justice Manohar replied that the effect on women was not specifically in mind.

Dr Conlan noted that, while it could be difficult to trace back developments to international norms, good national practice could have a great impact.

Mrs Justice Manohar noted that, instead of an NGO introducing plans, you now had a national scheme.

Dr Conlan said that she had noticed in India that there was pre-budget consultation between relevant bodies (including ministries), which had had a positive effect in bringing about change. In addition, she noted that there were currently women in parliament in Ireland who had been active feminists prior to entering formal politics. Research showed that tax policies had had a massive impact due to income distribution. The Programme for Partnership Government of 2016 (in Ireland) now made reference to gender proofing the budgetary process. This was an important development. Previously, there was (only) reference to equality, frequently linked to a reference to poverty.

Mrs Justice Manohar presented another newspaper example from India which illustrated the indirect effects of gender budgeting. There were grants available for girls who came from households with an income of less than 10,000 Rupees. Two million girls had been able to pursue higher education in India because of this, which in turn led to more gainful employment.

Dr Conlan informed attendees that this example was referred to in the Committee's report. Research showed that GRB was very effective. Sweden set the scene for GRB in a formal way for the application of GRB. Sweden had had a feminist government since 2014, where equality was at the forefront. In the first instance, gender equality was a central goal of the government, which was understood to entail the practical capacities of both men and women to shape society and their own lives, through equal political and economic power. The government was cognisant of the traditional approach that men were the breadwinners and tried to bridge this gap, which led to affirmative steps to conduct GRB. In 2015, the government developed methods for conducting GRB analysis and adopting gender indicators to be used in statistical surveys. In practical terms this meant that the Ministry of Finance drafted a report, which was added to the Government Budget Bill each year, on the distribution of economic resources between women and men. This was a detailed approach which was not just motivated by ideas, but by hard data. The statistical indicators included the division of unpaid work in the household as well as the number of physical assaults on women, which was unusual.

Dr Conlan presented the conclusions reached by the Committee in the report. First, perhaps one of the most important changes was the establishment of Women's "Machinery" (in whatever form) to contribute to embedding gender issues in the public and official discourse. If one looked in general at States in empirical studies, there was regular reference to Women's Machinery. The question however, was whether Women's Machinery was given adequate budgetary support. The report suggested that reference to, and providing funding for, Women's Machinery, did bring about (structural) change.

Second, in terms of women in power and decisionmaking, of the nine national examples, only three met the 30 per cent critical mass threshold (in parliament). There had been no

huge impact from international law to bring about greater representation. The Committee was, however, of the view that ongoing dialogue between the CEDAW Committee and States Parties could bring about change. There was more discussion and awareness raising needed.

Third, the increase of female participation in the higher echelons of the civil service/public sector was still "a work in progress". When austerity measures were decided in the budgetary process as a response to recession, the gender implications were not taken into account. GRB – or any variation of it – was not a factor. Women represented roughly 50 per cent of the population but did not benefit 50 per cent. Dr Conlan was of the opinion that, from an EU standpoint, one should hang one's head in shame with regard to the failure to reach consensus on female representation on boards.

Lastly, the influence of CEDAW was through its constant presence, in the form of the CEDAW Committee and the exchanges brought about through periodic reporting. These acted as a guide on which civil society and different actors in the State apparatus could draw. There had, however, been very little actual progress directly influenced by CEDAW (or other instruments).

The Chair thanked the panel and noted that, in France, quotas had increased female representation. It had shaken political parties, which, in previous years, had preferred to pay fines rather than appoint women. Fortunately, the debate now continued, even though participation was still far below the 30 per cent threshold.

Ms Melody Hui queried the meaning of, or criteria for, meaningful participation. Did it mean the number of women participating in the decisionmaking process, and if not, how would the Committee quantify "meaningful"?

Dr Conlan responded that it was not a numbers game; it was not just a box ticking exercise. Meaningful participation meant that women must have some real power. This power was not necessary linked to financial power but rather to decisionmaking power.

Professor Binder added that the empirical evidence and analysis showed that it was not just a numbers exercise but also about strong voices. Women must consider themselves as making a change.

Ms Emelia Kamena commended the panel on the discussion, which she found to be very empowering. She pointed to the fact that the panel had mentioned that public participation should be encouraged at a domestic level. In terms of the Oscar Pistorius case in South Africa, where Judge Masipa had been criticised for being too emotional as a woman when she sentenced Oscar Pistorius to a five year prison sentence, even though the Supreme Court of Appeal had found him guilty of the murder of his girlfriend; Ms Kamena wanted to know whether this criticism was correct.

Dr Conlan responded that Ms Kamena, being a South African, was in a better position to comment.

Ms Kamena expressed the view that the judge did make an emotional decision, but that it was not necessarily a bad thing.

Mrs Justice Manohar interjected that, as a judge, Judge Masipa was entitled to exercise her discretion in sentencing, and should not be criticised for how she acted.

The Chair noted that, all around the world, women's decisions were being attacked on the basis of gender.

Dr Oonagh Fitzgerald (Canada) commented that Canada's Bill of Rights (1960) enshrined equality but the language of the provision was interpreted in a sterile manner. This led to formal equality but not substantive equality. The law applied equally to men and women and did not take differences into account. Ms Fitzgerald proceeded to present a couple of examples from Canada demonstrating a shift in thinking which had affected the law and had brought about more substantive equality. She further presented an example of how indigenous women in Canada were doubly discriminated against.

Mrs Justice Manohar noted that equality before the law and non-discrimination provisions should be supplemented by special provisions for extra protection of women.

Dr Ketokoski-Rexed added that Canada celebrated Person's Day on 18 October as it was on that day in 1929 that the Judicial Committee of the Privy Council determined that women were also "persons". The problem with the legal profession was that when the law said something, it became. She provided the example of the Finnish language, which had no gender. In GRB, this became a problem. When looking at the status of women in a particular society, it was necessary to ask why the situation was what it was and one had to be aware of context and history. Sweden was the most progressive with GBR.

Dr Conlan asked the audience if there were any Swedes present that could comment on this.

Mr Martin Ratcovich (Sweden) said he was not aware of GRB in Sweden but in the analysis of legislation, they have to look at gender impacts.

Dr Conlan asked what international instrument influenced this decision.

Mr Ratcovich replied that he was not sure, but that it was enacted in domestic Swedish legislation. He added that Sweden had recently been elected as a non-permanent member of the United Nations Security Council, and that the Swedish government had repeatedly declared that it had a feminist foreign policy. It would be interesting to see how this manifested into practice within the Security Council. He further asked whether the Committee had also studied the negative effects of international law.

Dr Conlan responded that they had not, but that she would make a note of it and discuss it with the Committee members as it would be interesting to look at the negative impacts of international law.

Dr Fitzgerald held that Canada had come a long way since women were also held to be persons. Canada now had a Prime Minister who was a feminist and the Cabinet was made up of 50 per cent men and 50 cent women. Gender analysis had been a requirement for federal policy for about 15 years.

Dr Conlan asked in turn whether these impact studies of legislation and policy only looked at gender or whether there were other boxes/criteria that were looked at.

Dr Fitzgerald replied that gender was not the only criterion in Canada.

Mr Ratcovich responded that, in Sweden, the criteria were quite wide in scope and a lot of boxes had to be ticked. He added that the gender analysis was applicable to new as well as old legislation.

Mrs Justice Manohar suggested that, in terms of 'Women's Machinery', national human rights commissions should have a special women's wing to examine policies and impacts. Another option was to have a separate women's commission. There was a need for some machinery as a matter of routine to examine laws and policies to see if improvements could be made. She asked whether a systematic process to push for changes rather than ad hoc machinery would be workable.

Dr Conlan responded that it was an interesting suggestion to have a women's wing in human rights commissions. Due to austerity measures, Ireland combined its Equality Authority and Human Rights Commission. There had been concern that the new combined body would not be effective; this formed part of the Questions and Issues sent by the CEDAW Committee to Ireland. However, the contribution of the Irish Human Rights and Equality Commission to the periodic reporting cycle relating to CEDAW showed that the Irish Human Rights and Equality Commission was a body which adopted a rigorous approach to its task. Therefore, it was not necessary to have one size fits all approach.

Mrs Justice Manohar agreed with Dr Conlan's conclusion and added that, as long as the job got done, it did not matter what form the machinery took.

Professor Binder referred to the Austrian example where consistency of women's machinery was part of the portfolio.

Dr Ketokoski-Rexed added to the discussion on women's machinery by noting that, in Finland, they cut the Equality Ombudsman and moved the Equality Commission. This was a dangerous move, but there was a strong system to fall back on. She pointed out that CEDAW was a women's convention and not about general equality. A patriarchal culture was still prevalent. It was important not to abolish equality commissions but it was possible to combine them. One should not lose sight of the Sustainable Development Goals, which provided enough of a framework. A vigorous women's perspective should be developed in all 17 goals.

Dr Fitzgerald pointed out that there was the good and the bad of international law. She pointed to a case in Canada where the Human Rights Commission had ruled that indigenous women who lost their status in their community if they married outside it amounted to discrimination. This case illustrated that racial and gender issues were linked. In terms of austerity, Dr Fitzgerald said that, despite a national court decision that women must receive back-pay for being paid lower salaries than men over many years, one Canadian province did not have to implement the reward as it would bankrupt them. This decision showed that, even if there were good laws, it did not mean that equality was rife. She presented another two examples in Canada that illustrated that, if one was at the edges of disadvantage, there was no protection available.

Dr Conlan agreed that there was often multiple discrimination, and that gender and sex was only one category.

Professor Photini Pazartzis (Greece) noted that the basic work of the report was based on CEDAW, and that there was a parallel between the work of the Committee and the work of the CEDAW Committee. How States reacted to the questions that were raised by different human rights treaty bodies in the reporting process, and the questions asked of and the responses given by government, and by civil society provided a lot insight. It was clear that good legislation did not always translate into practice. She suggested that the Committee consider material on other treaty bodies.

Dr Conlan responded that a more general approach was taken in the two previous reports of the Committee. The national reports received for the latest report were from Committee members who presented more empirical evidence and the members were therefore more involved.

Professor Binder added that, in Rwanda, there was very strong legislation for protection of women. When the legislation was first introduced there were no women campaigning, but four years later, it was a completely different picture.

The Chair noted that the report identified GRB as a positive tool but the question was how to implement it.

Professor Binder responded that, of the nine national reports, four or five had GRB programmes. Budgetary programmes that did have an impact on quality of life in all sectors of the community were a very effective tool to bring about equality and equity. It was very much a political action, and it was therefore necessary to convince political decisionmakers. As a political tool towards equity and equality, GRB was a subtle tool and had a low financial impact on government resources. What was needed was a call to action for governments and for political will.

Dr Ketokoski-Rexed noted that Ireland had all the measures needed, but it would still be necessary to train the civil service successfully to implement GRB, such as in Sweden, which had a programme to train civil servants in human rights. Equality and equity did not happen by itself.

The Chair queried whether it was suggested to promote education first.

Dr Ketokoski-Rexed responded affirmatively, adding that there was also a need for good governance.

Professor Christina Cerna (US) noted that the report was thin on regional bodies and that she would like to submit information on the work done on women's rights under the auspices of the inter-American human rights system.

Dr Conlan thanked Professor Cerna for her input.

Mrs Justice Manohar noted that, in India, women judges had discussions among themselves about women's rights. These discussions were very useful.

The Chair agreed that this could be a strong tool.

Mrs Justice Manohar added that many universities promoted such discussions. There was a Yale University study group on constitutionalism for judges, which encouraged

international harmonisation. Those who enforced rights in domestic courts should have an international outlook.

The Chair agreed that domestic judges faced the same issues as international ones and that programmes such as the one at Yale were open for a wide range of exchanges.

Professor Spyridon Flogaitis (Greece) expressed the opinion that the key to the issues discussed was education, and especially free access to education. If free education was available to all then it would never be necessary to take affirmative actions in other areas. He presented the example in Greece where the law regulated dowries until 1982. In 1963, the government offered free education for all in universities. The more educated a woman was, the less her parents had to pay in dowry as they had already spent the money on her education. Therefore, in an attempt to get rid of the dowry obligations, parents pushed women to universities. This changed Greek society and it was never necessary to change other laws. 80 per cent of university students were women.

The Chair interjected by saying that there was still a glass ceiling regarding salaries in most European countries

Professor Flogaitis responded that, in Greece, there were no difference in salaries, and many people in high positions were female. This happened because women tried to find secure jobs. By promoting free education, the rest would follow.

Dr Conlan noted that while there was 'free education' in Ireland, due to austerity measures, there were now financial 'contributions' at all levels, with different names – including 'voluntary contributions' (at the first cycle); at the third level the term 'registration fees' was used. It is currently a topic of widespread debate. Dr Conlan subscribed to the view that education was vital for change. Evidence showed that investment in the early stages of education had considerable benefit. This was where GRB came in.

Dr Ketokoski-Rexed emphasised that it was not just about free education, but also a question of the content of education. Effective education could not be patriarchal and gender blind.

Dr Ioana Cismas (US) pointed out that the report's discussion on regional law made no mention of Islamic conventions and that she would be happy to submit information on the instruments on women concluded by the Organisation of Islamic Cooperation.

Mrs Justice Manohar argued that, unlike in Greece, if a woman in India were educated then she had to find an educated husband who would ask for an increased dowry. Increased access to education had not led to fewer dowries in India. It was necessary to distinguish between education for economic empowerment and education for the abolishment of inequality.

Mr Mohan Katarki (India) concurred with Mrs Justice Manohar on the dowry issue in India. Education of women in India nevertheless had made a big difference in other ways, but certain social elements had not been eradicated by education.

Dr Oluwabunmi Lar (Nigeria) pointed out that education was not about being marketable for marriage but about being more profitable in a business market. In the Nigerian civil service, salaries were the same for women and men. Education was critical for

empowerment. It was not just about educating the women but the whole family as it would have a trickle-down effect.

The Chair summed up the discussion by noting that it was clear that education had a big impact on many aspects, and that the impact on society differed from one country to the next.

Dr Conlan offered some concluding remarks. The discussion during the session had been enlightening, from which she had made many notes for further consideration. The Committee would definitely explore the question about the negative impact of international law. The idea of going beyond CEDAW and looking at other treaties and treaty bodies was a very interesting suggestion. The reason the Committee focused on CEDAW was because it was so specifically geared at substantive equality for women. The question of implementing GRB would also be considered more closely. The Committee had focused on certain countries only because these were the countries subject to national reports received from Committee members. Dr Conlan concluded by acknowledging the general consensus that education was empowering for all.

The Chair closed the session and thanked the panel and attendees for their attendance and their contributions.

Dr Conlan expressed thanks to the reporter, Ms Clea Strydom for her diligence.

Reporter: Clea Strydom

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

ISLAMIC LAW AND INTERNATIONAL LAW

Members of the Committee

HE Judge Awn Al-Khasawneh (Jordan): *Chair*
Dr Hossein Esmaeili (Australia): *Co-Rapporteur*
Professor Irmgard Marboe (Austria): *Co-Rapporteur*
Professor Javaid Rehman (UK): *Co-Rapporteur*

Dr Ibrahim Aljazy (Jordan)
Dr Freya Baetens (Belgium)
Alternate: Mr Matthias Vanhullebusch
Dr Alejandro Carballo (Spain)
Professor Konrad Dilger (Germany)
Ms Marija Dordeska (Slovenia)
Mr Sameer Jarrah (HQ)
Mr Ioannis Ktistakis (Hellenic)
Dr Andreas Mueller (Austria)
Professor Salem Hikmat Nasser (Brazil)
Dr Susan Rutten (Netherlands)
Dr Leopold von Carlowitz (Germany)
Ms Rabab Yasseen (Switzerland)

"Islamic law and Freedom of Expression: Challenges and Prospects"

Report 2016

The following report has been prepared by members of the ILA Committee on Islamic Law and International Law, Hossein Esmaeili (Section I: The Rule of Law and Freedom of Expression in (*Fiqh*), Javaid Rehman (Section II: Freedom of Expression: Domestic Blasphemy Laws and Politicisation of Debates around 'Defamation of Religions'), and Irmgard Marboe (Section III: Freedom of Expression in Islamic, Arab and Asian Organisations). The Committee members remain thankful for the generous support and excellent guidance of the Chair of the Committee, His Excellency Judge Awn Al-Khasawneh and to Marija Đorđeska in the completion of this report.

The Rule of Law and Freedom of Expression in Islamic Jurisprudence (*Fiqh*)

Introduction

1. In the previous reports of the International Law Association Committee on Islamic law and International Law[1] the nature of law in the legal system of Islam as well as the concept of the rule of law were discussed in some detail. The Report of 2014 focused on

[1] See the Report of the Committee on Islamic Law and International Law, 74th Conference in The Hague (2010); the Report of the Committee on Islamic Law and International Law, 75th Conference in Sofia (2012), and the Report of the Committee on Islamic Law and International Law, 76th Conference in Washington (2014), all are available at http://www.ila-hq.org/en/committees/index.cfm/cid/1006.

the freedom of expression under the original sources of Islamic law. It was important to provide a basis for an understanding of how the rule of law can be upheld within the legal system of Islam and of how the freedom of expression can be strengthened within the law of Muslim countries. This section of the report summarises the previous reports discussion of the nature of law and the rule of law under Islamic law as well as the concept of freedom of expression and opinion within the Islamic jurisprudence (*Fiqh*). In the previous reports, particularly in the 2010 report, a number of very important aspects of Islamic law such as its sources, divine origin of the system, sacredness of certain principles, the principle of *Ijtihad*, and the relationship between Islamic law and state made law were discussed. One of the fundamental questions in relation to Islamic law is its compatibility, not with other legal systems, but with state made law within a Muslim country. In other words, how the law which is made by states in Muslim majority countries can be considered in relation to the framework of Islamic law. The rule of law principles could be better accommodated within the public laws of Muslim majority states if it was possible to reconcile the principles of Islamic law and modern state constitutions.

The Nature of the Islamic Legal System

2. While many scholars consider Islamic law as a divine and sacred legal system,[2] only a limited number of Islamic law principles are generally regarded as having this particular quality. Overwhelmingly, the majority of Islamic law principles are the product of the study of sources of Islamic law known as Islamic jurisprudence or *Fiqh*. The Islamic *Fiqh*, while undoubtedly commanding the respect and authority that comes with an old venerable tradition, is nevertheless not sacred or immutable. It is a product of interpretation and experience of Islamic jurists from around the seventh century up until now. The body of Islamic law based on the Qur'anic verses as well as on other original sources of Islamic law, is also limited. The original sources of Islamic law provide legal principles in relation to certain core areas of law, such as some aspects of family law, contract law, property law, torts, and limited areas of criminal law. A large number of these legal principles are what is known in Islam as *imzaei* or *imdaei* (confirmed) rules against *tasisi* (established) rules. The former are the practice and customs of early seventh century Arabian societies.[3] For example, while the Qur'an consists of approximately 6,600 verses, less than ten percent of the Qur'anic verses are concerned with both religious and legal duties of Muslims.[4] This means that, in the modern world, while certain principles

[2] See, for example, Noel J Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 75; Seyyed Hossein Nasr, *The Heart of Islam: Enduring values for Humanity* (HarperCollins 2002) 117-119; Bernard G Weiss, *The Spirit of Islamic Law* (University of Georgia Press 1998) 24.

[3] On development of Islamic law, see generally Norman Calder, *Studies in Early Muslim Jurisprudence* (Clarendon Press 1993); Wael B Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press 2005); Kamil Musa, *Al Madkhal Ila Al Tashira Al Islami, [The Genesis of Islamic Law Making]* (1989); Majid Khadduri and Herbert Liebesny (eds), *Law in the Middle East. Volume One, Origin and Development of Islamic Law* (The Middle East Institute 1955); Muhammad Al Khirzry, Tarikh Al Tashira Al islam [History of Law making in Islam] (1994); Abdullah Saeed, *Interpreting the Qur'an. Towards A contemporary Approach* (Routledge 2006); Chibli Mallat, 'From Islamic to Middle Eastern Law, A Restatement of the Field (part I)', 51 *American Journal of Comparative Law* (2003) 699; idem, 'From Islamic Law to Middle Eastern Law, A Restatement of the Field (part II)', 52 *American Journal of Comparative Law* (2004) 209.

[4] Muslim theologians consider the Qur'anic verses under five main headings namely preaching, polemics, stories, allusions and legislation. Sholmo D Goitein, 'The Birth-Hour of Muslim Law? An Essay in Exegesis', in Wael B Hallaq (ed), *The Formation of Islamic Law* (Ashgate 2004) 69-70.

of family law inheritance law, contract, and criminal law may be based on primary sources of Islamic law, many other new or emerging areas of law such as corporations law, commercial law, environmental law, administrative law, immigration law are regulated by states and parliaments in Muslim countries. The body of law known as Islamic law (or Sharia), the study of Islamic law (*Fiqh*), or Islamic jurisprudence, is indeed much wider than the limited numbers of legal principles based on original or divine sources. Therefore, a review of Islamic law literature proves that Islamic law can accommodate modern international and national legal principles which are developed based on human experience and rational principles.[5]

The Rule of Law and Islamic Law

3. As demonstrated in previously in the ILA Committee Reports,[6] while certain characteristics of Islamic law, such as sacredness of certain Qur'anic legal principles (in view of some Muslim jurists), may not be flexible, many other principles are fairly adaptable to the modern international law standards. Furthermore, many elements of the rule of law can be found in the system of Islamic law. To support the establishment of the rule of law in Muslim societies and Islamic countries, three characteristics and approaches to Islamic law can be considered.

4. Firstly, certain traditional Islamic law principles and presumptions indeed promote establishing the rule of law. The principles of non-retroactivity, presumption of innocence, prohibition of unlawful detention, property rights of individuals (including women), the prohibition of collective punishment, and the injunction against disproportionate or excessive reactions, are examples of traditional principles of Islamic law which may support the establishment of the rule of law. These principles were established in early stages of Islamic law development (seventh century AD) at the time when the common law system (originated late eleventh century AD) even did not exist. Under traditional Islamic law, law should not be applied retroactively.[7] The principle of legality, which provides that no one can be persecuted or found responsible in the absence of a law which is clearly communicated to people, is also recognised under traditional Islamic law.[8] Also,

[5] See for example Muhammad al-Ghazali, *The Socio-Political Thought of Shah Wali Allah* (Islamic Research Institute Press 2001); Wael B Hallaq (ed), *The Formation of the Classical Islamic World: The Formation of Islamic Law* (Ashgate 2004); Wael B Hallaq, *Sharia: Theory, Practice Transformations* (Cambridge University Press 2009); Hossein Esmaeili, 'The Nature and Development of Law in Islam and the Rule of law Challenge in the Middle East and the Muslim World' 26 *Connecticut Journal of International Law* (2011) 262.

[6] See the Report of the Committee on Islamic Law and International Law, 74th Conference in The Hague (2010); the Report of the Committee on Islamic Law and International Law, 75th Conference in Sofia (2012), and the Report of the Committee on Islamic Law and International Law, 76th Conference in Washington (2014), all are available at http://www.ila-hq.org/en/committees/index.cfm/cid/1006.

[7] Qu'ran 17:15 '…We do not punish people before We send a messenger," and Qu'ran 17:16 '…and when We intend to destroy a town We first send Our commandment to its transgressors and when they turn away from Our commands then We punish them…'; further see the Qu'ran 28;59; Qu'ran 5:95; Qu'ran 4: 22-3. For a discussion of the principle of non-retroactivity, see Gamil Muhammed Hussein, 'Basic Guarantees in the Islamic Criminal, Justice System', in Muhammed Abdel Haleem et al (eds), *Criminal Justice in Islam: Judicial Procedure in the Sharia* (Tauris 2003) 35.

[8] Ibid.

unlawful detention is prohibited under Sharia and, based on a Hadidh of the Prophet, pre-trial detention must be limited to a day and a night, or at most to three days.[9]

5. Secondly, there is a large number of legal concepts which have been developed within Islamic jurisprudence in order to meet modern socio-economic challenges. These concepts include the use of *Ijtihad, masaleh* (public policy considerations), *istihsan* (equity, or juristic preference), and *urf* (custom and experience).

6. Thirdly, there are modern interpretations and the rational development of legal principles, which are based on international law and contemporary requirements of modern societies. This does not only encompass Islamic legal scholarship and Islamic jurists, but also the practice of states, the legislative process, and rational interpretations of Islamic texts.

7. In the last few years, this reasoned approach to Islamic law has been taken up in countries such as Tunisia, Malaysia, and Indonesia. The 2015 Rule of Law Index produced by the World Justice Project[10] places the United Arab Emirates, Malaysia, Jordan, Tunisia, and Indonesia within the top rankings among Muslim countries with respect to the development of the rule of law. Afghanistan, Pakistan, Bangladesh, Iran, and Egypt occupy the lowest ranking.[11]

Freedom of Expression in Islamic Jurisprudence

8. As demonstrated in more detail below, the freedom of expression is an important aspect of the rule of law, and is protected by various international instruments. The Islamic Sharia, both in its traditional version as well as in its modern interpretation, recognises certain aspects of freedom of expression. With some reformation and adjustment, freedom of expression may be accommodated within modern interpretations of Sharia. However, there are aspects of Sharia law, particularly certain legal principles relating to apostasy and blasphemy laws, which contradict international human rights treaties, which have been ratified by many Muslim counties.

9. In the ILA Committee Report of 2014, a large number of Qur'anic verses, as well as some examples of *hadiths,* were cited to state that even the traditional sources of Islamic law may potentially support and adopt basic principles of freedom of expression, as articulated in international instruments. Nevertheless, in the same sources, there are principles which would seem to be in contradiction with international law and freedom of expression.

10. While both apostasy and blasphemy are punishable under Islamic jurisprudence, or *fiqh*, the punishment prescribed for both offences is not mentioned in the Qur'an. While the Qur'an discourages and condemns apostasy, it does not prescribe any punishment for committing apostasy. Contemporary Muslim scholars and jurists, based on the lack

[9] For Example, Abu Huraya (A companion of the Prophet and a hadith authority) narrates that the Prophet of Islam put an accused in detention for only a day for investigation. See Al-hakim Al Naysapouri, Al-Mustadrak Alal Al-Sahihayn, Vol. IV [The Understanding of Two Hadidh Books] 102 (Yusuf Mar'ashli ed., n.d.).

[10] World Justice Project*, World Justice Project Rule of Law Index 2015*, 2016, available at http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf.

[11] Ibid, 6.

of prescription of punishment for apostasy in the Qur'an, argue that apostasy may not be a *hudud* punishment, and hence can be subject to modern legislation. Even the Sunna of the Prophet Muhammad, the second source of Islamic law, does not strongly support punishing apostasy and blasphemy in all circumstances.

11. This means that the punishment for apostasy in the Sunna was prescribed because at the time, apostasy was considered to be a form of treason. The offence of treason is subject to severe punishment under the criminal laws of most counties throughout the world. However, in the contemporary world where there are diverse religions and cultures, and most political and legal systems of the world are based on secular principles, changing one's religion is not equal to treason, and hence may not be punishable at all.

Freedom of Expression: Domestic Blasphemy Laws and Politicisation of Debates around 'Defamation of Religions'

Introduction

12. The previous Reports of the Islamic Law and International Law Committee explained in considerable depth, aspects of rule of law within international law.[12] This concluding Report also highlights the rule of law and its nexus with freedom of expression, while retaining a focus on Muslim State practices. The right to freedom of expression represents a right within international law–arguably a right that represents the core of human rights values.[13] Freedom of expression is also regarded as the foundational stone for all democracies.[14] The right to receive uninhibited information and to exchange ideas provides the essential element which enables citizens to make informed decisions to build and sustain democratic frameworks. Notwithstanding the numerous positive elements in the right to freedom of expression, there are also considerable concerns that emerge with the granting of this right. One of the key areas for our consideration is the extent to which the right to freedom of expression can coexist with other rights, in particular the right to freedom of religion or belief? An essential component of the right to freedom of religion or belief is the right of expression and manifestation of this religion or belief. Thus according to Article 18(1) of the ICCPR, the right to freedom of religion or belief includes freedom

[12] See, in particular, the ILA Committee Report of 2012 on 'The Rule of Law and Islamic Legal System' (Sofia Conference, 2012) and of 2014 on 'Rule of Law and Freedom of Expression' (Washington Conference, 2014), available at http://www.ila-hq.org/en/committees/index.cfm/cid/1006.

[13] The right to opinion and expression is most prominently crystallised in Art. 19 (ICCPR) with parallel rights contained in Art. 19 (UDHR). See also Art. 10 (ECHR) and Art. 13 (ACHR). The right to hold opinions, as determined by Article 19 of the ICCPR, is assured to be held without interference whereas expression can be subjected to restrictions and restraints. Article 19(1)(2)(3). Freedom of expression can be restricted inter alia for ensuring respect for the rights or reputations of others, for protecting national security, public order, public health or morals. Propaganda for war is to be prohibited. Article 20(1), ibid. Expression is also to be harnessed where it leads to 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. Article 20(2) International Covenant on Civil and Political Rights of 16 December 1966, in force since 23 March 1976, UNTS 171.

[14] Human Rights Committee, General Comment No 34 (Article 19: Freedom of Opinion and Expression), UN Doc CCPR/C/GC/34 (12 September 2011) para 2.

'either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'. [15]

Expression and Anti-Blasphemy Laws

13. The limitations on expression are restricted only in so far as these are 'are necessary for respect of the rights or reputations of others or for the protection of national security or public order (order public) or of public health or moral'.[16] Furthermore, any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited.[17] Religion and religious expressions can provide significant challenges to international law and international human rights law, when they claim to have a complete monopoly over truth and to determine the path to salvation. It is problematic, if religions are critical of other competing philosophies or ideologies. The domineering force of a particular religion or ideology when combined with the authority of the State can result in discrimination against other religions or religious expressions. Such discrimination can be manifested in the control of expressions and manifestations through substantial and draconian anti-blasphemy laws. As has been pointed out by a former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Arcot Krishnaswami,

> 'Unfortunately, in some cases the laws against blasphemy have been framed in such a manner that they characterize any pronouncement not in conformity with the predominant faith as blasphemous. Under such laws, censorship of books, pamphlets and newspapers, as well as control of the media of mass communications such as films, radio, television and the like, have sometimes been used to limit unduly—or even to prohibit altogether—the dissemination of beliefs other than those of the predominant religion or philosophy'.[18]

14. The concept of blasphemy and anti-blasphemy laws is *per se* not endorsed by international law. Neither is there a complete and absolute prohibition. In its most recent General Comment, the Human Rights Committee notes:

> 'Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.[19]

15. Notwithstanding this apparently restrictive interpretation provided by the Human Rights Committee, the continued applicability of blasphemy laws in all continents and amongst many jurisdictions raise deeply troubling issues. The application of

---

[15] Article 18(1) ICCPR.
[16] Article 19(3)(a)(b) ICCPR.
[17] Article 20 ICCPR.
[18] See Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices* (United Nations New York 1960), available at http://www2.ohchr.org/ENGLISH/ISSUES/RELIGION/docs/Krishnaswami_1960.pdf, 41.
[19] General Comment No 34, above n 14, para 48.

anti-blasphemy laws is not exclusively a preoccupation of States with Muslim majorities, as according to research conducted by the Pew Research Centre, as of 2012, anti-blasphemy laws existed in nearly a quarter of all of the world's States.[20] Nevertheless, it also remains the case that anti-blasphemy have been applied by a number of States that belong to the Organisation of Islamic Cooperation (formerly Organisation of the Islamic Conference, hereinafter OIC).[21] According to the aforementioned Pew Research Centre, anti-blasphemy laws are applicable in 14 out of 20 (nearly 70%) of all States from the Middle-East and North Africa, as well as in 12 out of 50 States from Asia Pacific. Nigeria and Somalia also have anti-blasphemy laws.[22]

Expression and the Prohibition of Defamation of Religions

16. Several member States of the United Nations (led by States belonging to the OIC) consider it insufficient to have anti-blasphemy laws at the domestic, constitutional level. Rather, efforts have been made to elevate anti-blasphemy as an offence within international law. There began a campaign at the end of the previous millennium to establish a norm prohibiting defamation of religions and protecting Islam from insults and ridicule. Ever since 1999 – when the official campaign was launched with the adoption of Human Rights Commission Resolution 1999/82, entitled 'Defamation of Religions'[23] member States belonging to the OIC have campaigned for the prohibition of defamation of religions. In addition to resolutions passed by the Human Rights Commission (replaced by the Human Rights Council in March 2006) and the UN General Assembly, various human rights Special Rapporteurs, the UN High Commissioner on Human Rights as well as the UN Secretary General also participated in establishing a normative framework for the prohibition of 'defamation of religions'.[24]

17. As these efforts to introduce the international norm of prohibition of 'defamation of religions' were being conducted in the United Nations, innumerable conceptual and substantive complexities emerged. The phraseology that focuses upon, inter alia, 'the negative stereotyping of religions'[25] and the association of Islam with human rights violations and terrorism,[26] highlights the complex debate as to whether religions could seek protection of human rights law. National laws may provide for the protection for the reputation of individuals. However, it is difficult to see how national norms could protect religions or religious ideologies from insults, offence or ridicule. As the former UN Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir has noted '[t]he

[20] Pew Research Centre, 'Which Countries Still Outlaw Apostasy and Blasphemy?' 28 May 2014. http://www.pewresearch.org/fact-tank/2014/05/28/which-countries-still-outlaw-apostasy-and-blasphemy (last accessed 30 September 2016).

[21] Robert C Blitt, 'The Bottom up Journey of "Defamation of Religion' from Muslim States to the United Nations: A Case Study of the Migration of Anti-Constitutional Ideas, in Austin Sarat (ed.) *Special Issue Human Rights: New Possibilities/New Problems* (Emerald 2011) 121-211.

[22] Anti-Blasphemy laws can also be found in found in Europe (16%) and the Americas (31%). Pew Research Centre, above n 19.

[23] Commission on Human Rights Resolution, Defamation of Religions, UN Doc E/CN.4/RES/1999/82 (30 April 1999).

[24] Robert C Blitt, 'Defamation of Religion: Rumors of Its Death are Greatly Exaggerated' 62 *Case Western Reserve Law Review* (2011) 347, 349.

[25] Resolution on Defamation of Religions, above n 23, para 1.

[26] Ibid, para 2.

right to freedom of expression can legitimately be restricted for advocacy that incites to acts of violence or discrimination against individuals on the basis of their religion. Defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion'.[27]

18. Notwithstanding the observations of the Special Rapporteur, the OIC members not only actively propagated the prohibition of defamation as an international offense analogous to domestic anti-blasphemy laws, but also conflated the subject of insult of religions with that of persecution and intolerance towards Muslim minorities in the Western world. This was particularly evident in the resolutions that were adopted after the tragic events of 9/11 to address the ensuing growth of Islamophobia and hatred against Muslim. Thus a number of post 9/11 resolutions on defamation of religions conflate the subject by raising concern over inter alia 'the ethnic and religious profiling of Muslim minorities the ethnic and religious profiling of Muslim minorities';[28] 'physical attacks and assaults on businesses, cultural centres and places of worship of all religions, in particular of Muslims in many parts of the world';[29] hatred and discrimination;[30] 'laws or administrative measures that have been specifically designed to "control" and "monitor" Muslim and Arab minorities';[31] and the 'deliberate stereotyping of religions, their adherents and sacred persons in the media and by political parties and groups in some societies'.[32]

19. The campaign led by the OIC and its allies was played out for many years within the UN General Assembly as well as the UN Human Rights Council. The ideal of the universal prohibition of defamation of religions was also supported by various UN Special Rapporteurs and UN bodies to the extent that every year numerous resounding resolutions were passed upholding the principle of the prohibition of defamation of religions. The high-water mark of this phenomenon can be envisaged by the UN General Assembly Resolution 65/224, entitled 'Combating Defamation of Religions' and adopted on 21 December 2010. In this resolution, the General Assembly, *inter alia*:

> 2. Expresses deep concern at the negative stereotyping of religions and manifestations of intolerance and discrimination in matters of religion or belief still evident in the world; […]
> 5. Notes with deep concern the intensification of the overall campaign of vilification of religions, and incitement to religious hatred in general, including the ethnic and religious profiling of religious minorities; […]

---

[27] Report of the Special Rapporteur on freedom of religion or belief, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, UN Doc A/HRC/2/3 (20 September 2006) para 38.

[28] See, for example, Commission on Human Rights Resolution 2002/9, Combating Defamation of Religion, E/CN.4/RES/2002/9 (15 April 2002); General Assembly Resolution A/RES/60/150 (16 December 2005) para 3.

[29] See, for example, Commission on Human Rights Resolutions 2002/9 (n 28) para 7; General Assembly Resolution A/RES/60/150 (n 28) para 2; General Assembly Resolution A/RES/61/164 (19 December 2006) para 2.

[30] Commission on Human Rights Resolution 2002/9 (n 28) para 6; General Assembly Resolution A/RES/60/150 (n 28) para 10; General Assembly Resolution A/RES/61/164 (n 29) para 11; General Assembly Resolution A/RES/62/154 (18 December 2007) para 12 etc.

[31] Human Rights Council Resolution A/HRC/RES/4/9 (30 March 2007) para 5.

[32] Human Rights Council Resolution A/HRC/RES/7/19 (27 March 2008) para 4.

> 16. Urges all States to provide, within their respective legal and constitutional systems, adequate protection against acts of hatred, discrimination, intimidation and coercion resulting from vilification of religions, and incitement to religious hatred in general;

20. To fully appreciate the contents of Resolution 65/224, it is important to be aware of its context and background. This Resolution was adopted at a time when many member States of the UN were active in the domestic application of anti-blasphemy laws. The primary organisation supporting the subject of prohibitions on defamation of religions, the OIC had in its revised Charter of 2008 stated 'combating defamation of Islam' as one the organisation's primary objectives.[33] By 2009, the OIC and its members had been emboldened to make a declaration that the defamation of religions as a norm had

> '[r]epeatedly been observed to command support by a majority of the UN member states–a support that transcended the confines of the OIC Member States. The succession of UNGA and UNHRC resolutions on the defamation of religions makes it a standalone concept with international legitimacy. It should not be made to stand out by creating the impression that it somehow encroaches upon freedom of expression.
> […]
> Any denial of these facts constitutes a contradiction of the established position of the international community, the international legitimacy and above all the main provisions of international law and international humanitarian law [sic].[34]

21. At that time, OIC members States had also been embroiled in a number of controversies surrounding defamation of religions. This included, for example, the *Jyllands-Posten* Muhammad cartoons controversy emergent after the publication of cartoons of Prophet Mohammad in Denmark and republished in other parts of the world,[35] Pope Benedict's quotation of a fourteenth-century Byzantine emperor's allegation that Mohammed was 'bad and inhuman' for commanding his followers to spread Islam by the sword, and comments critical of Islam,[36] naming non-humans after holy personalities,[37] desecration or destruction of holy scriptures or documents.[38] Pakistan had invoked international

[33] According to Article 1 'The objectives of the Organisation of the Islamic Conference shall be […] to protect and defend the true image of Islam, to combat defamation of Islam and encourage dialogue among civilisations and religions'. See Article 1(12) of the Charter of the Organisation of Islamic Conference of 14 March 2008, available at http://www.oic-oci.org/is11/english/charter-en.pdf.

[34] Second Report of the OIC Observatory on Islamophobia, 36th Session, 23–25 May 2009, 4–5, OIC Doc OIC-CS-2nd OBS-REP-FINAL (10 May 2009).

[35] See e.g. Jytte Klausen, The Cartoons that Shook the World (Yale University Press 2009); Ronald Dworkin, 'The Right to Ridicule', The New York Review of Books (23 March 2006), available at http://www.nybooks.com/articles/2006/03/23/the-right-to-ridicule/; David Keane, 'Cartoon Violence and Freedom of Expression' 30 Human Rights Quarterly (2008) 845; 'France Boost Embassy Security after Muhammad Cartoons', CBC News (19 September 2012), available at www.cbc.ca/news/world/story/2012/09/19/france-embassies-cartoon-muhammad.html.

[36] See Fox News, 'Pakistan's Parliament Condemns Pope Benedict XVI' (15 September 2006), available at http://www.foxnews.com/story/2006/09/15/pakistan-parliament-condemns-pope-benedict-xvi.html; Observatory Report on Islamophobia, UN Doc A/HRC/9/G/2 (24 July 2008).

[37] See, for example, CNN, 'Reports: Sudan Arrests UK Teacher for Teddy Bear Blasphemy'(26 November 2007), available at edition.cnn.com/2007/WORLD/africa/11/26/sudan.bear/index.html.

[38] See, for example, The Guardian, 'Pentagon urges controversial Florida Pastor to Stop Qur'an Burning Plans", (20 April 2012), available at www.guardian.co.uk/world/2012/apr/20/pentagon-florida-pastor-quran-burning; BBC News, 'Nigeria Teacher Dies "Over Koran"' (21 March 2007), available at news.bbc.co.uk/1/hi/6477177.stm.

criticism for draconian punishments for anti-blasphemy laws as exemplified by the Aasia Bibi case. In November 2010, the case of Aasia Bibi, a Christian woman, gained international attention after she was sentenced to death for blasphemy under article S.295-C of the Pakistan Penal Code for insulting the Prophet Mohammad. The impact of this incident has been dramatic since both the Punjab Governor, Salman Taseer and Shahbaz Bhatti, the Christian Federal Cabinet Minister of Minority Affairs, who defended her case (and campaigned for the reform of Pakistan's anti-blasphemy laws) were assassinated. [39]

22. Notwithstanding the substantial emphasis on anti-blasphemy laws to curb freedom of expression domestically, the official campaign to fully develop an international norm on the prohibition of defamation of religion came to a hiatus in 2011 – at least within the United Nations. Many possible political and diplomatic reasons have been given. Intense efforts were made by the United States administration to reach a consensus between the OIC and Western countries. With the adoption of Human Rights Council Resolution 16/18 (which omitted any explicit references to the defamation of religions), the United States and a number of Western liberal democracies were able to claim 'historic'[40] success with the 'pledge to protect the freedom of religion for all while also protecting freedom of expression'.[41] Human Rights Council Resolution 16/18 '*[e]xpresses deep concern* at the continued serious instances of derogatory stereotyping, negative profiling and stigmatization of persons based on their religion or belief'.[42] Yet, Resolution 16/18 also

> *'Recognizes* that the open public debate of ideas, as well as interfaith and intercultural dialogue, at the local, national and international levels can be among the best protections against religious intolerance and can play a positive role in strengthening democracy and combating religious hatred, and convinced that a continuing dialogue on these issues can help overcome existing misperceptions.'[43]

23. Resolution 16/18 thus recognises that stifling legitimate criticism of religions does not protect religious groups and that, instead, the open discussion of contentious issues is to be encouraged as a method of protecting individuals and minorities from religious intolerance. By legitimising 'open public debate of ideas' the UN Human Rights Council can be seen to move away from the controversial concept of 'defamation of religions' which seeks to restrict freedom of expression in order to protect religions from criticism. On the other hand, members of the OIC have continued to interpret Resolution 16/18 and subsequent resolutions as an endorsement of the organization's efforts to prohibit

---

[39] Salman Taseer was assassinated by his own guard for defending her case and as a punishment for his campaign to reform Pakistan's blasphemy laws, as it was the case two months later also for Shahbaz Bhatti, the Christian Federal Cabinet Minister of Minority Affairs. See also Navi Pillay, 'UN Human Rights Chief Condemns Pakistan Assassination, Urges Reform of Blasphemy Laws' (2 March 2011), available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10784&LangID=E.

[40] Hilary Rodham Clinton, Secretary of State, 'Remarks at the Istanbul Process for Combating Intolerance and Discrimination Based on Religion or Belief' (14 December 2011), available at http://www.state.gov/secretary/20092013clinton/rm/2011/12/178866.htm.

[41] Ibid.

[42] Human Rights Council Resolution 'Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief' A/HRC/RES/16/18 (27 March 2011) para 1.

[43] Ibid, para 4.

'defamation of religions.'[44] HRC Resolution 16/18 was presented by Pakistan on behalf of the OIC.[45] The sponsoring state, Pakistan, has argued forcefully that Resolution 16/18 does not replace the previously adopted resolutions on 'defamation of religions'. After the adoption of Resolution 16/18 on March 24, 2011, Pakistan's Ambassador and representative to the OIC, Zamir Akram, made an unequivocal assertion that 'this resolution does not replace the OIC's earlier resolutions on combating defamation of religions which were adopted by the Human Rights Council and continue to remain valid'.[46] Similar views were echoed by other members of the OIC.[47] Whilst acknowledging Resolution 16/18 as an arrangement to explore an 'alternative approach' members of the OIC appear to have conveniently side-stepped from a confrontational agenda. The OIC and its members states (within the OIC as well within the various regional blocks) continue to vigorously pursue to legitimise an international ban on the defamation of religions. Professor Blitt makes a valid comment that:

> '[b]y shifting this debate to an ambiguous and under-theorized area of law in the name of pursing and validating 'international consensus,' these new resolutions risk creating an opportunity for certain states to prosecute perceived affronts to religious belief with renewed vigor under the imprimatur of international law. The likelihood of such a scenario is only heightened by the fact that the OIC – the world's largest international organization after the UN – continues to actively identity and endorse defamation of religion as a lawful and recognised international norm inexorably and legitimately linked to the goal of combating intolerance'. [48]

24. Events, subsequent to the adoption of the Human Rights Council Resolution appear to have vindicated the doubts of critics as to whether 'defamation of religions' was passé?[49] The considerable unrest and violence that ensued after the release of the 14-minute trailer, Innocence of Muslims (2012)[50] and more recently, the tragedy in the aftermath of the *Charlie Hebdo massacres* in January 2015 (and the support for the murderers in many parts of the world)[51] reconfirms the deep divisions in the Western world and in Muslim majority societies as to the extent and limits of free expression.

The Right to Freedom of Expression: The Islamic Regional Human Rights Models

25. Having considered the debacles on freedom of expression that have pervaded the UN General Assembly and the Human Rights Council, it is instructive to establish the position on this subject as espoused by regional Islamic human rights models. This section

[44] See Robert C Blitt, 'Defamation of Religion: Rumors of Its Death Are Greatly Exaggerated', 62 *Case Western Reserve Law Review* (2012) 347, 359–63.
[45] See Patrick Goodenough, 'U.N. Religious 'Defamation' Resolution Is Not Dead, Says Islamic Bloc', CNSNews.com (30 March 2011), available at http://cnsnews.com/news/article/un-religious-defamation-resolution-not-dead-says-islamic-bloc.
[46] Ibid.
[47] Ibid.
[48] See Blitt above, at 351.
[49] Javaid Rehman and Stephanie Berry, 'Is "Defamation of Religions" Passé?' 44 *George Washington International Law Review* (2012) 431–472.
[50] Javaid Rehman, 'The *Sharī'ah*, International Human Rights Law and the Right to hold Opinions and Expression' Marie-Luise Frick and Andreas Müller (eds), *Islam and International Law* (Martinus Nijhoff 2013) 244–268.
[51] See Emmanuel Todd, *Who is Charlie? Xenophobia and the New Middle Class* (Polity 2015).

therefore briefly assesses the position adopted by three organisations that have been at the forefront of advancing Islamic human rights law. These are the Islamic Council of Europe, the League of Arab States and the OIC. They articulate the normative approaches in relation to the right to freedom of opinion and expression within the *Sharia*. Having been particularly active since the last quarter of the twentieth century, they have attempted to present an 'Islamic response' to international human rights norms, especially the International Covenants. Within these responses, however, there are noticeable differences over key controversial areas: these include, inter alia, the limits of the right to freedom of opinion and expression, the right of individuals to hold adverse opinions about religions, and the boundaries of freedom to expression towards religions, religious leaders, and Prophets of religions.

The Islamic Council of Europe

26. The Islamic Council of Europe was formally established in London in 1973 with strong affiliations with the Muslim World League, a conservative State-led Saudi organisation.[52] The Islamic Council of Europe is accredited with drafting two instruments, *The Universal Islamic Declaration of Human Rights* (UIDHR), adopted in 1981, and *A Model of an Islamic Constitution* produced in 1983.[53] The apparent rationale of the UIDHR was to prepare and develop an indigenous Islamic document providing a response to the Universal Declaration of Human Rights of 1948. The *Model of an Islamic Constitution* was aimed at incorporating and advancing Islamic principles in association with democratic principles of governance of modern States.[54] As a product of the same psyche, the UIDHR and the *Model of an Islamic Constitution* characterise similar shortcomings and limitations. In relation to freedom of expression, Article 8 of *A Model of an Islamic Constitution* provides '[e]very person has right to his thought, opinions and beliefs. He also has the right to express them so long as he remains within the limits prescribed by law'.[55]

27. The working group that drafted UIDHR included the former Sudanese Prime Minister Sadiq Al-Mahdi, two prominent Pakistani constitutional lawyers, AK Brohi and Khalid Ishaque, and the Egyptians Dr Kholi and Judge Midhat Azzam. The Declaration, was presented as the preeminent Islamic human rights instrument to UNESCO in Paris on 19 September 1981.[56] The Secretary General of the Islamic Council of Europe, Salem Azzam, in presenting a foreword to the text noted that the Declaration was 'compiled by eminent Muslim scholars, jurists and representatives of Islamic movements and thought'.[57]

28. The attendees of the ceremony included such important figures from the Muslim world as Prince Muhammad al-Faisal of Saudi Arabia, Ahmad Ben Bella the first elected President of Algeria and Mukhtar Ould Daddah the former President of Mauritania, and

[52] See http://www.salaam.co.uk/knowledge/muslim_community.php#ice.
[53] Ibid.
[54] Ibid.
[55] See http://www.salaam.co.uk/knowledge/islamic_constitution_part2.pdf.
[56] See Javaid Rehman, *International Human Rights Law* (Longman 2010) 362.
[57] Eva Brems, *Human Rights: Universality and Diversity* (Brill 2001) 242.

an advisor of General Zia-ul-Haq of Pakistan.[58] The ceremony and the pomp accompanied by the presentation betrayed the context and content of the Declaration. Ostensibly, the UIDHR provides rights that parallel the provisions of UDHR and provide an Islamic response to Western, secularised versions of human rights. Closer examination of the two documents, however reveal, significant differences. There are also differences in the English and the Arabic versions. The considerable equivocation and ambiguity in the various provisions of UIDHR have allowed critics to suggest that the drafters of the Declaration were not able to agree on many of the provisions and therefore sought to resort on ambiguous terminology.[59]

29. Amidst the numerous ambiguous provisions, none are more problematic than those relating to freedom of expression. The UIDHR, in engaging with the right to freedom of expression, conflates this right with other rights and freedoms, such as the freedom of belief. Article XII provides as follows:

> 'Right to Freedom of Belief, Thought and Speech
> a) Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons.
> b) Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim.
> c) It is the right and duty of every Muslim to protest and strive (within the limits set out by the Law) against oppression even if it involves challenging the highest authority in the state.
> d) There shall be no bar on the dissemination of information provided it does not endanger the security of the society or the state and is confined within the limits imposed by the Law.
> e) No one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims.'

30. The provisions vividly capture the ideology and mentality of the architects of the right to freedom of expression within UIDHR. Everyone, according to the Declaration, has the right to expression so long as expression is within the remit of legal limits which is prescribed by the public authorities. In making it impressible to 'hold in contempt or ridicule the religious beliefs of others' the UIDHR represented the initial though significant steps towards legitimising the criminal offence of blasphemy laws within domestic legislations. Although initially the work of private actors, the UIDHR was subsequently embraced by several Islamic States, including Pakistan, Saudi Arabia and Egypt, as a document symbolising human rights within Islam.

The Organisation of Islamic Cooperation (OIC)

31. As noted earlier, the OIC is constituted and operational on the basis of a revised charter adopted in 2008. Before the incorporation of the revised charter, the OIC had adopted the Cairo Declaration on Human Rights in Islam at the 19th Islamic Conference of Foreign Ministers in Cairo on 5 August 1990, which continues to represent the guiding

[58] See David G Littman, 'Universal Human Rights and Human Rights in Islam' Europe News (1 December 2007), available at http://en.europenews.dk/Universal-Human-Rights-Human-Rights-in-Islam--78273.html.

[59] Ann E Mayer, *Islam and Human Rights: Tradition and Politics* (5th edn, Westview Press 2013) at 30.

principles on human rights for the OIC member States.[60] The Declaration was adopted by 45 Foreign Ministers of the OIC subsequent to the dissemination of a report of the Committee of Legal Experts conducted in December 1989. The primary objective of the Declaration was to provide guiding principles on issues of human rights. Even though the Declaration is non-binding, it nevertheless constitutes an important document in the armoury of members of the OIC. According to its Article 24, in ensuring human rights within Islamic constitutional systems, the exclusive yardstick is *Sharia* law as 'the only source of reference'. The Declaration engages with the right to freedom of expression in Article 22, according to which:

> '(a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.
> (b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.
> (c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical Values or disintegrate, corrupt or harm society or weaken its faith.
> (d) It is not permitted to excite nationalistic or doctrinal hatred or to do anything that may be an incitement to any form or racial discrimination.'

32. The Declaration carefully sets out the parameters of free speech. The limits of expression are defined by the Islamic Sharia and any form of exploitation or misuse in such manners as violating 'sanctities and the dignity of Prophets, undermine moral and ethical Values or disintegrate, corrupt or harm society or weaken its faith' should be prohibited.[61] The Declaration thus forcefully asserts the prohibition of defamation of religion in so far as the OIC member States are concerned.

The League of Arab States

33. Stretching over a regional landscape of predominantly Arabic speaking States of North Africa, the Levant and the Arabian Peninsula, the common cultural, language and religion betrays the deep divisions over human rights psychology of the Arab League (also known as the League of Arab States).[62] In May 2004, the League adopted a revised version of the Arab Charter on Human Rights that entered into force in March 2008.[63] It was the second attempt by the League to adopt such a document since 1994, when the Arab League attempted to adopt the first Arab Charter of Human Rights. There are significant differences between these two versions, reflected in differences in provisions and the expanded nature of the revised Charter (with its 53 Articles as opposed to the previous 43 Articles).[64] To its credit, the Arab League, in drafting the Charter, adopted an inclusive process actively engaging in consultative process both with NGOs as well as Inter-governmental organisations. The revised Charter was a product of efforts on the

[60] The Cairo Declaration on Human Rights in Islam of 5 August 1990, Annex to Resolution No 49/19-P, available at http://www.oic-oci.org/english/article/human.htm; see also UN GAOR, World Conference on Human Rights, 4th Session, UN Doc A/CONF.157/PC/62/Add.18 (1993).
[61] Ibid, Article 22(c).
[62] Abdullahi An-Na'im, 'Human Rights in the Arab World: A Regional Perspective', 23 Human Rights Quarterly (2001) 706.
[63] 12 International Human Rights Reports (2005) 893.
[64] Mervat Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?' 5 Human Rights Law Review (2005) 361, at 363.

part of the League to 'modernise' existing institutions.[65] While the ideal of establishing additional institutions and revamping the human rights systems appears attractive, in reality many of these proposals have not been welcomed by members of the League. Hence, it is not surprising to note that, thus far, the only concrete achievement is the production and the enforcement (since March 2008) of the revised Arab Charter. The Arab Charter contains the right of information and liberty of opinion, expression and research in its Article 32:

> '(1) The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.
> (2) Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.

34. The provisions within Article 32 tend to follow Article 19 of the ICCPR. The Article guarantees the freedom of opinion and expression to everyone. There are, as such, no specified limitations of respecting religions or ensuring respect for religious feelings of others. Yet, the possible interpretation and subsequent applicability of 'morals' and 'public order' is likely to result in restricting freedom of expression especially in cases where such expression is critical of religions or religious-based practices.

Conclusions

35. This section of the ILA report has examined a number of issues regarding the freedom of expression within the Muslim world. Having largely accepted the provisions of Article 19 and Article 20 of the ICCPR, Muslim majority states generally adhere to the accepted norm on freedom of expression. There are nevertheless substantial disagreements on various facets: sensitivities and concerns abound. The controversial issues include, inter alia, aspects of public morality, public order and national security. More significantly, as this discussion has elucidated, the Muslim-majority States have a sensitive approach towards the protection of religion. Domestic anti-blasphemy laws have been deployed to curb expressions that oppose the main-stream religious narrative. Furthermore and notwithstanding the apparent hiatus to the subject of defamation of religions within the United Nations, members of the OIC insist on the continuing validity of the concept of the prohibition of defamation of religions as norm of international law.

Freedom of Expression in Islamic, Arab and Asian Organisations

Introduction

36. The importance of the freedom of expression, as one of the fundamental human rights, is recognised in most countries in the Islamic, Arab and Asian realm as matter of principle. Most governments have ratified without any specific reservation the ICCPR which guarantees in its Article 19 that everyone shall have the right to freedom of expression. However, as this right is not absolute and is subject to limitations,[66] the challenge

[65] See the Statement by Amr Mousa, the then Secretary-General of the Arab League in Resolution of the Council of Ministers of the Arab League 6184, March 2002, and 6243, September 2002 (available in Arabic).

[66] In particular Article 19 (3) and Article 20 ICCPR.

has always been of how to determine permissible restrictions and still safeguard the core of this important human right. This is not only the case in the above-mentioned countries, but in view of the particular qualities of Islam, which is the dominant religion in the region and at the same time a normative system, becomes particularly sensitive. In the following the approach taken in regional organisations, such as the OIC, the Arab League and ASEAN, in particular through their newly established human rights institutions, will be examined.

The OIC and its new Independent Permanent Human Rights Commission

37. As part of its 'Ten-Year Programme of Action', aimed at the reform and modernisation of the organisation,[67] the OIC decided to establish an 'Independent Human Rights Commission (IPHRC)' in 2005. Its main scope and objectives are contained in Article 15 of the revised OIC Charter of 2008:

> 'The Independent Permanent Commission on Human Rights shall promote the civil, political, social and economic rights enshrined in the organisation's covenants and declarations and in universally agreed human rights instruments, in conformity with Islamic values.'[68]

38. The new Commission is thus entrusted with the promotion of human rights 'in conformity with Islamic values'. Whether this should be a restriction or, on the contrary, an affirmation of the aforementioned human rights is not entirely clear and needs interpretation. The enumeration of various human rights texts, OIC's covenants and declarations as well as the universally agreed human rights instruments, without any order of priority, does not provide an unequivocal answer to this question.

39. The Statute of the IPHRC, which was adopted in 2011 in Astana, Kasakhstan, also reflects the dual foundation of its work, when it recalls the Cairo Declaration on Human Rights in Islam adopted in 1990 and the relevant international instruments, charters and conventions in its preamble.[69] It therefore depends to a large extent on the Commission itself and its practice to assess the relationship between the various normative frameworks.

Practice of the IPHRC on the interpretation of Islamic human rights documents

40. In the first years after its creation, the IPHRC appeared to favour an interpretation of human rights documents which could be described as a combined and universalist approach, focusing on the compatibility of Islamic and international human rights. The then Secretary General Ekkmeledin İhsanoğlu stated at the Commission's first session that the establishment of the IPHRC 'reflects the ongoing process of "moderation and

[67] In order to meet the challenges in the 21st Century, the Islamic Summit called upon member States to take joint actions within the framework of the OIC 'to revive the Muslim Ummah's pioneering role as a fine example of tolerance and enlightened moderation and a force for international peace and harmony.' See OIC, 'Ten-Year Programme of Action to Meet the Challenges Facing the Muslim Ummah in the 21st Century', http://www.oic-oci.org/ex-summit/english/10-years-plan.htm.

[68] Charter of the Organisation of Islamic Cooperation, adopted on 14 March 2008, available at http://www.oic-oci.org/is11/english/charter-en.pdf.

[69] Statute of the OIC Independent Human Rights Commission, adopted by the 38th Session of the Council of Foreign Ministers (CFM) held in Astana, Kazakhstan, on 28-30 June 2011, available at http://www.oic-iphrc.org/en/data/docs/about/Statute/IPHRC%20Statute%20EV.pdf.

modernization" at the Organization."[70] He noted that Islam was being wrongly associated with human right violations and as being inherently incompatible with international human rights norms and standards. Yet, according to his 'firm belief', exactly the opposite was true:

> 'Islam is not incompatible with human rights standards. It placed Human Rights places a premium on "hukook ul ibad" or "rights of the people" centuries before the Human Rights acquired currency in contemporary human existence. The concept of "ijtehad" lends a dynamism that is unparalleled. Islam in fact has the normative potential to add to the modern values and standards and push for better implementation, both at the social and political levels.'[71]

41. This approach can be regarded as a 'moderate universalist' approach, which argues for the compatibility of Islamic and universal human rights, but prioritises universal human rights and is willing to interpret Islamic value in a way to make them conform to universal rights in case of conflict.[72] In this direction went also İhsanoğlu's vision for the first years of the Commission's work. He noted that the Commission would be complementary to the existing Human Rights mechanisms and providing an added value by bridging gaps. The Commission should use its expertise also to review and update OIC instruments, including the Cairo Declaration and the Covenant on the Rights of the Child in Islam.[73] In a similar vein, the first chairwoman of the IPHRC was Siti Ruhaini Duhayatin, a university professor and human rights activist from Indonesia,[74] also seemed to underscore the universality of human rights, in particular in relation to women's rights.[75]

42. Yet, more recent developments seem to point to another direction. The new OIC Secretary General, Iyad Ameen Madani, said at the opening of the 4th session of the IPRC in 2014 that current human rights law was based on Western values.[76] While many OIC countries had willingly adopted international human rights norms, he noted a number of issues 'that go beyond the normal scope of human rights and clash with Islamic

---

[70] Opening Statement by H.E the Secretary General of the OIC at the First Session of the OIC IPHRC, available at http://www.oic-iphrc.org/data/sessions/SG%20Statement%20-%20IPHRC%20-%201st%20Session%20-%20Jakarta%20-%20EV.pdf.

[71] Ibid.

[72] See Turan Kayaoglu, 'The OIC's Independent Permanent Human Rights Commission: an Early Assessment', in: Matters of Concern. Human Right's Research Papers, No 2015/3, 13. The categorisation is based on Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2003). Kayaoglu notes, however, that, according to Ann E Mayer, İhsanoğlu's human rights messages were not always consistent with universal human rights.

[73] See Opening Statement by the Secretary General of the OIC at the First Session of the OIC IPHRC mentioned above.

[74] According to her CV on the OIC's website, Prof. Siti Ruhaini Duhayatin is the Vice-Rector for Student and External Relation Affairs and senior lecturer on the Sociology of Law in the Faculty of Syariah and Law at the Islamic State University 'Sunan Kalijaga' Yogyakarta, Indonesia. In 1994, she initiated the First Women' Crisis Center in Indonesia. See http://www.oic-iphrc.org/data/cvs/18.pdf.

[75] Kayaoglu, above, n 72, 13.

[76] Statement of His Excellency Iyad Ameen Madani Secretary General of the Organisation of Islamic Cooperation at the Fourth Session of the OIC Independent Permanent Human Rights Commission (IPHRC), 2 February 2014, quoted by Kayaoglu, above, n 72, 14 (not any more available online).

teachings.'[77] In relation to 'freedom of expression' he criticised that despite repeated incidents of hatred and violence resulting from discrimination based on stereotyping and stigmatization of individuals, communities and religions, some countries continue to refuse any limitations or responsible use of this right. On the other hand, Muslim countries enacting laws to ensure respect for the sanctity and reputation of religious values, scriptures and personalities for promotion of peace in society were blamed for limiting this freedom through blasphemy laws.[78]

43. This presentation of controversies between alleged abuses and the protection of Islam against defamation is representative for the challenge the Commission will be facing with regard to the issue of freedom of expression. Another challenge for the Commission will be that all references to human rights in the OIC documents stipulate that they should be applied in accordance with the member States constitutional and legal systems. This shows a rather traditional understanding of the role of State sovereignty in relation to human rights. The approach to submit universal human rights to Islamic teachings and/or the constitution of States would rather qualify as a 'relativist' approach.[79]

Evaluation

44. While it is still rather early to evaluate the work of the IPHRC, one could raise the question whether it lives up to the promise of a modern and moderate picture of Islam. Some recommendations to improve this situation have been discussed by international human rights experts and presented to the IPHRC.[80] These include:

- Recognition by Commissioners that OIC member states are bound by international human rights obligations;
- Agreement among Commissioners that international human rights treaties constitute minimum standards and that regional human rights instruments must always meet or exceed these minimum standards.
- Agreement among Commissioners to use only international human rights law as the benchmark in assessing all human rights issues, and clarification of the status of the Cairo Declaration to this end.
- Review of existing member states' reservations to international human rights treaties, and an elaboration of recommendations to remove reservations that undermine the object and purpose of the treaty in question.
- Affirmation of Sharia as consistent with international human rights law by rejecting interpretations of Sharia that violate or undermine international human rights law and by elaborating alternative interpretations that respect and further international human rights law.

45. In order to foster a human rights discourse, coordination and cooperation with international and regional governmental and non-governmental human rights institutions

[77] Ibid.
[78] Ibid.
[79] Kayaoglu, above, n 72, 14.
[80] In September 2013, the Danish Institute for Human Rights invited a group of international human rights researchers to a conference focused on the IPHRC which also formulated a number of recommendations for the Commission. See Kayaoglu, above, n 72, 20 f.

should be enhanced. This could also help to move away from the traditional focus on the situation of Muslim minorities in non OIC countries, such as in Palestine, Myanmar and in Western countries, to more introspection.[81]

Independence and Mandate of Commission

46. From the rule of law perspective, it would be important to ensure that the Commission is truly independent and has a mandate that allows it to address existing human rights problems also within OIC member countries. As regards independence and objectivity, the Statute of the IPHRC does not contain any reference to it. Yet, its Rules of Procedures provide:

> 'Rule 6 – Independent status of Commissioners:
> 1. Commissioners shall act in their personal capacity and shall express their own convictions and views.
> 2. In exercising their function, commissioners shall at all times uphold utmost professionalism, truthfulness, independence, impartiality and integrity whilst enhancing their moral authority and credibility, free from any kind of extraneous influence.
> 3. Commissioners shall not receive instructions from any state, including their own, or any other third party.'[82]

47. True independence and impartiality would be necessary to achieve progress in examination of the human rights situation in OIC countries. So far, the Commission consists of persons with different human rights background, diplomats, university professors, lawyers and human rights practitioners. The nomination by governments and the election by the Council of Ministers certainly do not prevent independence. Once the members of the Commission are elected they are protected by their office and are free and flexible to raise issue they find important themselves.

48. The mandate of the Commission as determined by its Statute is, however, so far rather limited. It confines the IPHRC largely to a consultative body for the Council of Ministers.[83] The Commission does not yet have the right to receive complaints by States or individuals or to request reports from member States. The Council may, however, assign to it particular other tasks,[84] which leaves the possibility open to define the mandate more broadly and also to start acting like other regional or universal human rights institutions.

49. A limitation to the independence of the Commission might be its mandate to support 'the OIC's position on human rights at the international level'.[85] It depends whether this is meant to be a lobbying mandate, despite the independent opinion of the Commissioners themselves. A focus of the activities shall be apparently to provide technical cooperation in the field of human rights and awareness-raising about these rights in the OIC countries,

[81] See Marie Juul Petersen, 'Islamic or Universal Human Rights? The OIC's Independent Permanent Human Rights Commission', DIIS Report 2012:03, 31ff.

[82] Rules of Procedure of the OIC Independent Permanent Human Rights Commission (IPHRC), available at http://www.oic-iphrc.org/en/data/docs/about/IPHRC%20-%20RULES%20OF%20PROCEDURE%20-%20FINAL/IPHRC%20-%20Rules%20of%20Procedure%20-%20Final%20-%20Adopted%20by%2039th%20CFM%20-%20EV.pdf.

[83] See Article 12 of the Statute of the IPHRC, supra n 5.

[84] Ibid.

[85] Article 13 of the Statute of the IPHRC, supra n 5.

and to offer consultancy on human rights issues.[86] The Commission shall promote and support the role of national institutions and civil society organisations active in the area of human rights[87] and shall conduct studies and research on priority human rights issues.[88]

Recent developments

50. While in the first years, the Commission had a majority of topics addressing countries outside the OIC,[89] topics relevant within OIC member countries have come to the focus of its work rather recently. Furthermore, cooperation with international human rights institutions has increased. Commissioners regularly attend the meetings of the Human Right Council, and human rights experts from UN institutions are invited to participate in events organised by the IPHRC. With regard to the topic of freedom of expression, the IPHRC organised a Thematic Debate on 'Freedom of Expression and Hate Speech' in November 2015. In this Thematic Debate also the UN Special Rapporteur on Freedom of Expression (although only through video link) and the former UN Special Rapporteur on Racism participated.[90]

51. The Outcome Document of this Thematic Debates provides an insight into the current state of affairs with regard to the interpretation of the topic of freedom of expression. It starts by acknowledging that freedom of expression is a key human right, which is vital for development of stable, peaceful and progressive democratic societies.[91] However, it also emphasises that the freedom of expression is not 'absolute' but that its exercise is subject to 'special duties and corresponding responsibilities' based on 'avoidance of harm to others' to ensure societal cohesion. It points out that also in Islam freedom of expression is guaranteed, but that Islam 'makes distinction between criticism or constructive discussion and sheer disrespect, defamation, insult and negative stereotyping that fall into the category of inciting religious hatred.'[92]

52. There is emphasis on 'hate speech motivated by racism, xenophobia and intolerance, coupled with impunity for perpetrators'[93] which create a climate of fear and social exclusion of the targeted persons and groups. Yet, this condemnation is not only directed against the Western countries, but also against terrorist groups, such as Daesh and Boko Haram, who use incitement to hatred and discrimination based on race or religion resulting in devastating and despicable killings of non-Muslims. However, in the same sentence, 'the printing of senseless caricatures of Prophet Mohammad (PBUH)' is also condemned and thereby arguably put on the same level as the killings by Daesh and Boko Haram.[94]

---

[86] Article 14 of the Statute of the IPHRC, supra n 5.
[87] Article 15 of the Statute of the IPHRC, supra n 5.
[88] Article 16 of the Statute of the IPHRC, supra n 5.
[89] Kayaoglu, above, n 72, 14, 16.
[90] IPHRC, 8th Session Outcome Document of Thematic Debate on 'Freedom of Expression and Hate Speech', 23 November 2015, available at http://www.oic-iphrc.org/data/sessions/8th_iphrc_thematic_debate_outcome_en.pdf.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.

53. With regard to Resolution 16/18 of the Human Rights Council, the Outcome Document expresses its

> 'confidence in OIC sponsored HRC Resolution 16/18 (entitled Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against persons based on religion or belief), repeatedly adopted by the Human Rights Council and UN General Assembly by consensus, which includes substantive, administrative, political and legislative actions to be taken at the national and international levels to address the concerns relating to incitement to religious hatred and discrimination.'[95]

54. The Outcome Document urges the States to address the implementation gaps and provide regular reports on its implementation to the Human Rights Council well as re-dedicate to the agreed ideals in a comprehensive manner involving inclusive approaches provided in the 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.'

55. The emphasis on limitations of the freedom of expression in this very recent document is striking, because the anti-defamation of religion strategy has allegedly been replaced by the "Istanbul-process" initiated by the above-mentioned Resolution 16/18 which does not focus any more on the need for defamation of religion laws to combat blasphemy, but instead on hate and violence inciting speech – in accordance with the Western grounds for limitations of freedom of speech. The continuing emphasis on limitations is even more troublesome as the Outcome Document is not an official statement of OIC governments, but the result of a Thematic Debate under the auspices of the IPHRC. From the perspective of safeguarding freedom of expression this raises the question whether the Commission exercises its function in a sufficiently independent and impartial manner and whether it is eventually ready to engage also in introspection. Independence and impartiality would be all the more necessary as limitations of freedom of expression are often implemented by governments to limit critical opinions by citizens. It would be an important role for the Commission to carefully analyse the different purposes and means of limiting free speech and their compatibility with human rights standards, in particular also in OIC member countries.

56. There are also some promising outlooks which provide hope for a standardised and rationalised approach, which would reach towards the rule of law concept the ILA Committee has been working with in the last years. For example, the Outcome Document recommends that the OIC commissions a study that analyses the existing legal practices used to combat hate speech and incitement to hatred in different parts of the world. This should be done with a view to suggesting parameters for hate speech and incitement to hatred based on one's race or religion as well as practical steps, in accordance with international human rights law. A comparative analysis of national laws through the lens of international human rights contains the potential of showing the differences and rationalising their bases and goals.

57. Furthermore, the Council of Ministers at its 42nd Meeting in 2015 mandated the IPHRC to Review the Cairo Declaration on Human Rights in Islam.[96] The Commission

[95] Ibid.

[96] See Resolution No 1/42 – Legal Follow-Up and Coordination of Action in the Field of Human Rights, OIC/CFM-42/2015/LEG/DR.RES.1 of 27-28 May 2015, para 12: "[…] request OIC IPHRC

immediately constituted a Committee that met in February 2016 for the first time and formulated preliminary suggestions. An initial report was supposed to be submitted to the next Meeting of Foreign Ministers of the OIC. With this new mandate, a perspective is taken up again that has been formulated by the former SG İhsanoğlu, when he inaugurated the first session of the IPHRC, and alluded to the human rights expertise gathered in the Commission which should be used to review and update OIC instruments, including the Cairo Declaration and the Covenant on the Rights of the Child in Islam. It remains to be seen to what extent this new mandate will be taken up to consolidate the formulations of Article 22 of the Cairo Declaration with the formulation of the freedom of expression in Article 19 of the ICCPR and in several regional human rights documents.

The Arab Human Rights Committee

58. The Arab Human Rights Committee was established in 2011 pursuant to Article 45 of the Arab Charter on Human Rights. It consists of nationals of the States parties who must be highly experienced and competent in the area of human rights. The members of the Committee serve in their personal capacity and shall be fully independent and impartial. The Committee considers reports by State parties that are submitted on the measures they have taken to give effect to the rights and freedoms recognised in the Charter and on the progress made towards their enjoyment. While the first version of the Arab Charter on Human Rights of 1994 has never been accepted by members of the League of Arab States,[97] after an update and amendment by the Arab summit in Tunis in 2004, which was part of an effort to modernise the League of Arab States, it was ratified by a sufficient number of member States and entered into force in 2008.

59. The Arab Charter on Human Rights only contains scarce references to Sharia, in particular in connection with "positive discrimination established in favour of women by the Islamic Sharia, other divine laws and by applicable laws and legal instruments."[98] Otherwise, it contains a rather restrictive "emergency clause" which allows derogation from the obligation of the Charter only in situations that threaten the life of the nation and the existence of which is officially proclaimed, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.[99] With regard to freedom of expression, the Arab Charter on Human Rights provides:

> 'Article 32
> The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.
> Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.'

---

to review OIC Human Rights Declaration against existing universal human rights instruments and make suggestions for its improvement, if and where necessary."

[97] The League of Arab States was founded in Cairo in 1945 by Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Jordan and Yemen. It has currently 22 member States.

[98] Article 3 (2) of the Arab Charter on Human Rights.

[99] Article 4 (1) of the Arab Charter on Human Rights.

60. While emphasising the importance of the freedom of expression, the limitations are expounded in a manner that mirror the formulations contained in international and other regional human rights treaties, most importantly Article 19 ICCPR. Yet, it is noteworthy that Arab Charter on Human Rights does not contain a provision similar to Article 20 ICCPR directed against 'hate speech'.

61. The Arab Human Rights Committee makes reference to international standards in its work.[100] A remarkable provision in contained in Article 43 of the Charter which even explicitly submits the interpretation and application of the Charter under international and regional human rights instruments which the State parties have adopted or ratified, including the right of women, the right of the child and the rights of persons belonging to minorities.[101]

62. The mandate of the Arab Human Rights Committee is so far, however, limited to discussing the State reports, comment thereon and to make the necessary recommendations in accordance with the aims of the Charter through the intermediary of the Secretary-General.[102] It does not accept complaints by States or by individuals. Yet, some further progress might be observed once the Arab Court of Human Rights, whose establishment was decided at the 2013 Doha Summit.[103] Due to the similarity of formulations and approaches in the Arab Charter on Human Rights with its regional counterparts, for example in Europe, raises high expectations. There is, however, concern that, if the Arab League does not provide adequate resources to the Arab Human Rights Committee, it may become increasingly dependent on donations. This may affect the stability of the Committee's work, its durability, and importantly, its independence.[104]

The Human Rights Mechanisms of the Association of Southeast Asian Nations

63. The Association of Southeast Asian Nations (ASEAN) established the ASEAN Intergovernmental Commission on Human Rights to promote human rights in its member countries, in addition to its goal of regional economic integration.[105] After the Commission's establishment in 2009, its first task was to draft an ASEAN Human Rights Declaration.[106] This Declaration was eventually presented to the ASEAN member countries in Phnom Penh and unanimously adopted in 2012. As a Declaration, it is non-binding and only a first step towards a more effective mechanism for the protection of human rights. The fact that it had been elaborated with little involvement of civil society organisations was criticised, as were some principles and articles that could weaken

[100] Mervat Rishmawi, 'The League of Arab States. Human Rights Standards and Mechanisms' (Open Society Foundations and Cairo Institute for Human Rights Studies 2015) 43.
[101] Article 43 of the Arab Charter on Human Rights.
[102] Article 48 of the Arab Charter on Human Rights.
[103] See the website of the League of Arab States, http://www.lasportal.org/en/Pages/default.aspx.
[104] Rishmawi, above, n 100, 43.
[105] The member State of ASEAN are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. ASEAN was founded in 1967 to promote economic growth, social progress and socio-cultural evolution. See also the amended version of the Charter of the Association of Southeast Asian Nations of 2007, http://asean.org/asean/asean-charter/charter-of-the-association-of-southeast-asian-nations/.
[106] See the website of the Intergovernmental Commission on Human Rights , http://aichr.org/about/.

and erode universal human rights.[107] Concerning freedom of expression, Article 23 of the ASEAN Human Rights Declaration provides:

> 'Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice.'

64. This very general formulation reflects the words of Article 19 of the Universal Declaration on Human Rights. Yet, some general provisions and principles may limit and qualify this ample formulation. In particular, Article 6, under the heading of "General Principles", raises some concern:

> 'The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms.'

65. This principle seems to condition the enjoyment of human right on the performance of duties. In addition, it also appears to indicate that the individual rights and freedoms might be depending on domestic laws. This has been identified as another attempt to use the concept of 'cultural relativism' to suggest that international human rights do not apply everywhere and that individual rights might be subject to group veto.[108]

66. It remains to be seen to what extent the ASEAN Intergovernmental Commission on Human Rights will include the discussion of the issue of freedom of expression in its work. It is notable that in the Five-Year Work Plan 2016-2020, this topic is not explicitly mentioned, for example as an issue on which thematic studies shall be prepared.[109]

Conclusion

67. The recent establishment of human rights bodies within regional organisations in the Islamic, Arab, and Asian realm shows that human rights are increasingly regarded as a matter of importance which needs specific attention and dedication. Human rights therefore are not any more regarded as a Western or imperialistic concept, but rather considered as well embedded within the Islamic tradition and culture. However, many challenges remain with respect of implementation and enforceability of human rights in the respective countries. The challenges are both substantive and procedural. The substantive challenges are particularly pertinent with respect to the freedom of expression. The permissible limitations under the pertinent human rights documents on this freedom, arguable necessary for the protection of the rights of others and the protection of certain public interests, leave a wide margin of interpretation. While this is also the case in other regional and international human rights documents, there is a need to monitor the possible

[107] See the statement by UN High Commissioner for Human Rights, Navi Pillay (19 November 2012), http://www.un.org/apps/news/story.asp?NewsID=43536#.V0ysUEbBFv1.

[108] Victoria Nuland, ASEAN Declaration on Human Rights, Press Statement (20 November 2012), U.S. Department of State, available at http://www.state.gov/r/pa/prs/ps/2012/11/200915.htm.

[109] See the AICHR Five-Year Work Plan 2016-2020, adopted on 15 June 2015, endorsed at the 48th ASEAN Foreign Ministers' Meeting (AMM) on 3 August 2015, available at http://aichr.org/documents/.

interpretations by a competent human rights body which is independent from the States. Here the procedural challenge comes in. The human rights bodies analysed above do not yet have sufficient independence. Despite its name, the new Independent Permanent Human Rights Commission does not have a mandate to allow it to monitor independently the implementation of human rights obligations within the member States of the OIC. The current mandate is basically limited to give advice to the Council of Ministers, to provide assistance to civil society organisations, and to conduct studies and research on human rights issues. While this is certainly a welcome development, a much stronger mandate would be necessary to effectively ensure that human rights are respected and protected. In the case of the Arab Human Rights Committee, its independent functioning is currently in question due to the limited commitment of the member States of the Arab League to provide sufficient funding. Finally, the ASEAN Human Rights Mechanism, is currently also limited to prepare thematic studies and not to act as an independent human rights monitoring body. It follows that, despite the welcome recent developments within the Islamic, Arab, and Asian organisations recognising the importance of human rights, the establishment of the current institutions can only be regarded as a first step towards a more independent and effective monitoring the implementation by the respective member States.

Summary and Outlook

68. This latest Report of the ILA Committee on Islamic Law and International Law has focused on the implementation of the concept of the rule of law and the freedom of expression in Muslim state practice. It argued with reference to Islamic law sources that both are in principle compatible with Islamic law, or *Sharia*. It depends on the interpretation of the Islamic sources and the use of legal methods and concepts, whether this compatibility is maintained. It has been shown that this is not a merely academic question. The selection of one interpretation over the other is more often than not influenced by political considerations as wells as by historical and social traditions. These do not represent an easy challenge for the respect and the protection of human rights, either. They represent today's reality in which the discourse on the rule of law and freedom of expression takes place, but the challenge can be addressed in a reasoned and rational way and not necessarily by reference to religion. Nevertheless, it has been pointed out that several States use religion and religious arguments to suppress freedom of expression. It seems to be an important task for the future, both in academia and practice, to analyse and distinguish more carefully the different arguments.

69. It has been pointed out in the present Report that the freedom of expression is not unlimited. Limitations are necessary and recognised in the pertinent international human rights documents. States have not only the right but even the duty to protect the rights of others, such as privacy and reputation. They may also limit the freedom of expression to protect certain public interests, such as national security, public order, public health or moral. In addition, limitations to prevent incitement to violence are mandatory (under Article 20 ICCPR). The art of finding a balance between the different obligations of the State is delicate in particular in the realm of the freedom of expression. This Report argues that this task can best be fulfilled within a functioning rule of law system in which the decisions of public authorities are transparent, foreseeable, based on generally published laws and regulations, and subject to accountability.

70. The analysis of several regional human rights bodies recently established in the Islamic, Arab, ad Asian realm has shown that they create the potential for improving the situation of human rights in the respective countries. However, at this point their mandates still remain rather limited and do not allow receiving complaints of human rights violations, including the freedom of expression, in the member countries. They primarily serve as advisory bodies to the respective organisations and their member States. In addition, they engage in conducting research and studies on various issues of human rights, including the freedom of expression. The fact that close cooperation is sought with international human rights monitoring institutions, such as the UN Special Rapporteur on the Freedom of Expression, provides an important signal towards a more independent and universalist approach on this issue in the future.

COMMITTEE ON ISLAMIC LAW AND INTERNATIONAL LAW

WORKING SESSION

Thursday, 11 August 2016, 9.00am

Chair: Professor Nicolaas Schrijver (Netherlands)

The Chair welcomed attendees and thanked the Chair of the Committee for his outstanding work with the Committee.

HE Judge Awn Al-Khasawneh (Jordan) thanked the Chair for facilitating the meeting. He proceeded to thank the Co-Rapporteurs present, Professor Irmgard Marboe (Austria) and Dr Hossein Esmaeili (Australia), as well as Professor Javaid Rehman (UK), who was absent. The report prepared by the Co-Rapporteurs would be presented to the floor for their comments and questions.

Judge Al-Khasawneh mentioned that the Committee was amongst the longest standing committees of the ILA. It began with an attempt to study the primary sources of Islamic Law. The bulk of Islamic Law had largely been, for many reasons, a daunting task to translate. For example, there were some treaties that were written in Arabic script but in the Malagasy language. The Committee would now focus on the rule of law in Islamic law with specific focus on freedom of expression. In addition, the Committee hoped to reach a resolution by the next biennial conference in Sydney, after which the Committee hoped to move to more things, like arbitration in Islamic States and the view of the adoption of treaties and the ideas of trade in Islamic States.

He went on to emphasise that Islamic law, especially today, was pertinent because of the various misconceptions of Islamic law that had taken centre stage. It was unfortunate that a discussion could not be held without referring to these misconceptions. The report was not novel but contained several contemporary issues.

Dr Hossein Esmaeili (Australia) thanked attendees for their interest in the work of the Committee. The Committee was one of the oldest of the ILA and the report to be presented today would be a concluding report. The report focused on the nature and concept of Islamic law and how it worked in over 50 majority Muslim countries and some non-Muslim majority countries like India and Israel. The Committee's report also discussed the concept of the rule of law under Islamic law and then shifted its focus to freedom of expression in Islamic law in particular. Dr Esmaeili explained that at the next conference in Sydney in 2018, there would be a concluding session and further discussion on issues of arbitration under Islamic law.

The draft report was divided into three sections. Dr Esmaeili would present the first two, and the remaining section would be presented by Professor Marboe. The title of the report was "Islamic Law and Freedom of Expression: Challenges and Prospects". The issues covered in this report were contentious issues under international law; however, the CoRapporteurs had attempted to consolidate all the issues together within the context of Islamic law. One of the issues that had to be addressed was the nature of the Islamic law system. Most countries had a system of law which could be a civil or a common law system. Islamic law was the third largest legal system in the world and was applicable in 57-60 countries.

Dr Esmaeili raised questions as to whether Islamic law was a customary law or a religious system, whether it was a comprehensive system of law, and whether it was rigid and fixed, or whether it was civil/written law or common law. The Committee had sought to address these questions in its investigations.

In brief, Islamic law was generally perceived to be rigid and inflexible. This perception was however, far from the truth. Although some principles and sources of law were religious and divine, the system itself was like any other legal system which had gradually developed and matured over the years. In fact, Islamic law used to be the most advanced system of law and predated some of the most prominent systems of today. For example, England did not have a legal system before the 10th Century, yet Islamic law was well developed by then.

He then proceeded to comment that in South Africa, for example, the iconic former President Nelson Mandela changed South African and the world and yet the social injustices that existed before the end of Apartheid were still the same today with the economic structures that were developed during that unjust era remaining intact even today. The same could be said about India who had Mahatma Gandhi and yet the injustices of the colonial period were still evident today. By the same token, Islamic law came from the Qu'ran and the Prophet Muhammed; however, since then, Islamic law had developed.

An important distinction was made between Shari'ah and Islamic law. Shari'ah was broader than Islamic law, because it included religion, rituals and belief. Fiqh was the study of Islamic law jurisprudence. Islamic law, on the other hand, was a system like any other legal system and had a specific function which was not sacred or rigid; it was diverse and its nature was changeable.

The rule of law principle was discussed in the report, which noted that a large number of Muslim countries did not have effective rule of law systems. The Islamic legal system was compatible with conventional rule of law systems. In any case, each country had a system that was different and it was inconceivable that the same system could exist in all countries. Islamic law was compatible with the rule of law principle, albeit in its own distinct way. Dr Esmaeili gave the example of countries such as the United Arab Emirates, Tunisia and Malaysia, which ranked high on the 2015 Rule of Law Index as opposed to Pakistan and Afghanistan, which ranked among the lowest. This example proved that Islamic law was potentially compatible with the rule of law system.

The previous report of the Committee concluded that Islamic law in theory and practice was compatible with the rule of law. For instance, it included the basic principles of property rights of women and the presumption of innocence, just as any other conventional legal system.

Dr Esmaeili gave an illustration of what the Prophet Muhammed did for the rights of women, and stated that this even superseded what President Mandela did for black people in South Africa. These prominent individuals did not completely change the existing legal systems *per se*. An example was that Islam started giving property rights to women by the 14th century yet this did not exist in common law legal systems until recently.

The CoRapporteurs did note, however, that the practice of some Muslim countries was incompatible with rule of law principles, especially freedom of expression. Freedom of

expression was an important aspect of the rule of law and was a principle of customary international law. The Committee even noted that it could be suggested that freedom of expression had obtained the status of *jus cogens*.

The Committee had studied Islamic texts, jurists, history, and caliphate, and had drawn the conclusion that Islamic law and civilisation was not against the freedom of expression. By the same token, Islamic law had several sensitive concepts that were inconsistent with the freedom of expression, such as apostasy and blasphemy.

The second section of the report was concerned with freedom of expression and blasphemy. As a general rule, under international human rights law and customary international law, freedom of expression and freedom of religion were well established. Some limitations were permissible. In the 13th century, moving from one tribe to another was regarded as treason in Islam unless there was a treaty or agreement that allowed it. The apostasy rule was developed to protect Islamic tribes. In the modern age, apostasy had mellowed because of the increase of people who had converted to Islam.

The Committee observed that in several countries, both Muslim and non-Muslim countries, there were anti-blasphemy laws. There had been efforts to make anti-blasphemy a principle of international law. In international law, there was no clear position in this regard, but recently there had been a movement initiated by the Organisation of Islamic Cooperation (which represented 50 Islamic countries) to make anti-blasphemy a principle of international law. In addition, there had also been attempts to make freedom of religion a principle of international law.

Western countries had attempted to make freedom of expression a principle of international law. The concept of freedom of expression was very important and a leading aspect to most democracies in the world and was central to a modern society.

Most importantly, defamation of religion, especially in the context of Islam, had increased over the years and had resulted in what was now known as Islamophobia. Islamophobia presented one of the most sensitive topics today. An example to illustrate the dangers of Islamophobia could be that the Holocaust was a direct result of defamation of religion, specifically the Jewish religion, and the same could be said for the future of Islam.

Dr Esmaeili gave the example of how the current Australian Prime Minister, who used to refer to ISIS as Daésh but had recently changed it to Islamic terrorism for political popularity. The reference to Islamic terrorism did not particularly affect Dr Esmaeili, but it may affect the youths of today as this was a sensitive issue. The use of Islamic terrorism as a term of reference to criminal acts carried out by ISIS had made the subject of defamation of religion very controversial today. Dr Esmaeili referred to a 2010 resolution of the Human Rights Commission that attempted to address and deal with defamation of religion. From 2011 onwards, there had been a break on the issue and, while it appeared that the UN, the Human Rights Commission and Muslim countries had a good initiative, current issues in the world (cartoons of the Prophet Muhammed, Charlie Hebdo, ISIS) had delayed this development.

Generally, many Muslim countries and their regional organisations had tried to promote human rights whilst considering Islamic law as well. Most Muslim countries had, however, been quite vague in their attempt to implement international law within the bounds

of Shari'ah or Islamic law. This was a step in the right direction and was an optimistic view of trying to incorporate international law with Shari'ah and Islamic law.

The principle of equity in the common law system was about justice, yet equity did not apply where a person had dirty hands and did not practise equity themselves. Unfortunately, the reality was that most Muslim countries did not have clean hands with respect to human rights. So when those countries argue in favour of international law, they did not receive as much sympathy or reprise from the international community because of their bad record on international law and human rights. This was very problematic.

Professor Irmgard Marboe (Austria) thanked Dr Esmaeili for his thought-provoking presentation of the first two sections of the report, and proceeded to present the final section. This section covered a new topic, which was not dealt with in previous reports of the Committee. It gave an analytical overview of the human rights work of Muslim or Arab organisations. She identified three Islamic regional human rights models: first, the Organisation of Islamic Corporation (OIC), which had recently established an independent Human Rights Commission; second, the Arab Human Rights Committee; and third, the human rights mechanism of the Association of South East Asian States (ASEAN).

With regards to the *OIC*, Professor Marboe noted that Art 22 of the 1990 Cairo Declaration on Human Rights in Islam provided a mixture of freedom of expression and protection of religious belief. In 2005, the OIC started a reform program (10 year programme of action) aimed at reforming the OIC, in which it was decided to establish a Human Rights Commission (HRC). The HRC would be tasked with the promotion of human rights in conformity with Islamic values. It was unclear whether this was an affirmation of human rights or a limitation of them. On one hand, all the universal human rights treaties were noted by the OIC; on the other hand, it was unclear whether these treaties would take precedence in the event of conflict.

The thenSecretary General of the OIC combined a universal approach and focused on the compatibility of Islam with international human rights law. He noted that there was a common misconception that Islamic law did not function in tandem with international human rights law, but this was untrue. Islam could enrich and supplement international human rights law. The thenSecretary General also stated that, in the event of a conflict between Islam and international human rights standards, an interpretation that favoured universal human rights was to be preferred.

The pertinent question that then arose was whether this still existed in the OIC given the election of a new Secretary General from Saudi Arabia from 2014. From the outset, the new Secretary General criticised the absolute and unlimited implementation of universal human rights. There had been a call for the Human Rights Commission to reform and rewrite the Cairo Declaration, which was a very interesting development for the OIC. It could be deduced that the OIC no longer intended to abide fully by the Cairo Declaration. The OIC had been working with the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, which showed a growing commitment for this concept and human rights.

With respect to the *Arab Human Rights Committee*, the Arab Charter on Human Rights (pursuant to which the Committee was established) was underfunded and a rather weak body. It did not accept individual complaints against human rights violations. The Charter

made no mention of Shari'ah or any form of religion, and evidenced more of a secular approach to freedom of expression.

With respect to *ASEAN*, Professor Marboe noted that the organisation was primarily aimed at economic cooperation. It promulgated a Human Rights Declaration in 2012, Art 23 of which guaranteed the right to freedom of expression. The only problem was that ASEAN was rather weak, and delegated the protection of human rights to the constitutions of individual members. Each member was therefore left to its own devices in so far as the protection of human rights was concerned.

The Chair commented that this was a very interesting discussion of the three regimes and how each organisation had a unique take on the concept of human rights.

Mr Dipak Bhattacharyya (India) noted his disappointment at the low attendance of the session. He stated that Indian lawyers wanted to attend this kind of session to express their views and to clarify their impressions of this topic. Mr Bhattacharyya was highly impressed with Dr Esmaeili's presentation and commended his objective approach in the report.

He then went on to give a brief background on India from the time of Mahatma Gandhi until independence. India declared itself a secular country in its constitution in 1950. India was divided into India and Pakistan based on religious differences. Many laws from the Indian constitution had since changed, however, out of respect for the minority Muslim population, Muslim laws in India had not been changed and 25% of Indians were now Muslim. It was projected that by 2050 there would be an equal number of Muslims and Hindus in India. The issue of religion, especially regarding Islam, was a very sensitive issue in India. The Indian Supreme Court was to consider setting aside religious scriptures as it was no longer applicable to a secular country in 2016.

Mr Bhattacharyya inquired whether there was a study as to why there was a move to create a bad image of the Muslim population. He also raised the question as to whether the so-called "terrorism" was propaganda or not. In addition, he asked if there was a study to determine why there was a deliberate move to misinterpret Islamic laws and create division in the world. He asked if the current situation in Syria and Iraq was used to create a bad image of Muslims, that all Muslims were bad and the rest of the world was good. He disagreed with this common misconception and knew that Muslims were good people.

In India, there were different hierarchies of Islamic representative bodies and he wanted to inquire if there was a need for a universal Muslim representative body to be the voice of Muslims across the globe. Furthermore, he inquired as to whether the interpretation of Islamic human rights was binding.

Lastly, he suggested that, instead of having several Islamic representative bodies with several Islamic human rights declarations, there be one universal Islamic representative body with one universal Islamic human rights declaration.

Professor M Said El-Dakkak (Egypt) thanked the Co-Rapporteurs for their thorough presentation. The report only dealt with specific and confined aspects of the rule of law, ie, equity and freedom of expression. It must be broader and more wideranging to deal with all the phenomena that might occur especially in the world of today.

Dr Kamal Hossain (Bangladesh) also expressed his concern at the low attendance at the session. He went on to question if it was possible to fulfil Islamic law whilst breaching international law.

He then proceeded to note that there was no established authority in Islam. Conversely, Catholics could turn to the Pope as the authority of the Church; if someone failed to abide by the rules of the Church, they were excommunicated. The same could not be said about Islam.

There was no society that lacked intolerance. There was no basis for distinguishing between religions saying one intolerant the other was not. It was humans who were intolerant not religion. It was therefore unfair to isolate Muslim or Islam and to label it as intolerant.

In today's world, Muslims had been defamed and continued to be defamed. The media played a very big role in shaping perceptions on Islam and Muslims. There were currently a billion Muslims on Earth and there was no media that tried to show what true Muslims are. ISIS was not a Muslim body and yet it received the most media coverage as if it represented the whole Muslim community. To make matters worse, the UN had not spoken against ISIS authoritatively. There was wide scale defamation of Muslims because of a mere 30,000-40,000 ISIS fighters. This was unacceptable because ISIS could not possibly represent a billion Muslims. There should therefore be a new media narrative on what Muslim was and a re-education of society in this respect.

Dr Hossain expressed concern at the sentiments expressed by the US conservative Presidential nominee, Donald Trump, to essentially ban all Muslims. He shuddered to think what the future of Muslims in the US and the world will be. Donald Trump's presence in the US presidential race showed how much money impacted democracies. What needed to be discussed was the unlimited use of money to change political outcomes and to look at ways to save democracies from money.

There must be an effort by all countries to conduct a global study, with all Muslim countries taking the forefront, on how terrorism and extremism had developed, how it was funded, and the causes of what was being called Muslim extremism. These were the burning issues of today and were the issues that the Committee should definitively address. This was because the use of violence was the biggest threat to our society today. We had an obligation to the international community to find the root cause of extremism and terrorism.

Judge Al-Khasawneh responded to Mr Bhattacharyya's intervention by stating that he understood the Indian frustration over the establishment of Pakistan and it being a secular country. The role of religion should not be underestimated. He noted his admiration for the Indian judiciary, which had played a significant role in developing jurisprudence and protecting the rights of Indians beyond what was granted in the Indian constitution. The law relating to the status of Muslims in India had not changed out of respect for the rights of the Muslim minority. This had led to the inevitable consequence that Indian Muslim law was behind the Muslim law jurisprudence of other countries.

With regard to terrorism, the reality was that it had affected Muslims more than anyone in the world. This was without exception in India, Pakistan, Jordan and many other countries.

With regard to the idea of having one body to capture all Muslims, Judge Al-Khasawneh noted that having one universal body was not feasible because Islam and Muslims were diverse and there was a need for more than one point of view. He questioned whether passing laws, treaties and conventions was that important, given that, in most instances, better societies had fewer laws and better traditions because it was so difficult to determine the source of obligations for law as opposed to traditions. He questioned why people felt obliged to follow laws. An example was if people perceived international law as a product of Western culture that was imposed on other cultures, there would be no sense of obligation by other cultures; but if international law was seen as universal law (representing all cultures), there would be a greater sense of following it.

Professor Marboe noted that the report was still in its drafting stage and therefore that there was room for editing. She also added that one of the CoRapporteurs had stated that freedom of expression could not be viewed as *jus cogens* because it did not fit the technical requirement of what a *jus cogens* norm was under international law. The use of the term "*jus cogens*" might have to be changed.

Dr Esmaeili welcomed the interventions from the floor.

With regard to Mr Bhattacharyya's suggestion for a single authority for Islam, Dr Esmaeili echoed the reaction of Judge AlKhasawneh that it would not be practicable given the diversity among Muslim countries.

In response to the intervention by Dr Hossain, a global study on the funding of terrorism was a great initiative. The study however, was easier said than done, especially so far as the financial and intellectual support of extremism was concerned. No one knew definitively whence it came. Trying to find this out was like the proverbial belling of the cat.

The Chair added that it might be important to have a final section on what should be done at the next working session in Sydney.

Dr Esmaeili responded that there would be, hopefully in the next two years, a new report in which the CORapporteurs would look at issues like arbitration, dispute settlement and international trade and investment for Muslim countries. He observed that the Persian Gulf was the fastest growing legal area in the world.

The Chair commented that the 2018 conference was definitely one to look forward to due to all of the issues that were yet to be addressed.

Mr Steven van Hoogstraten (Netherlands) asked if the Panel felt that freedom of expression in Islamic law was comparable to freedom of expression in the Western law and culture. In addition, he inquired whether freedom of expression in Islamic law was more collectively based or individually based.

Dr Esmaeili responded that the reality was that there could never be similar rights in any two countries. There were differences between Islamic law and Western law insofar as freedom of expression was concerned, but such differences were not matters of substance but rather of approach.

The rule of law and freedom of expression were principles that individuals should enjoy subject to limitations. This should be the same everywhere else but there could be differences and this was acceptable. Freedom of expression itself was evolving like any other

norm under a system of law. There were also different views on it within Islamic law and vast differences within Muslim countries. It was therefore difficult to discuss definitively if freedom of expression under Islamic law was different to that in the West. However, the concerted effort of the Committee was to bring the principles of international human rights law within Islamic law.

Professor Marboe stated that the answer to Mr van Hoogstraten's question on the existence of individual human rights under Islam and Muslim could be answered definitively because it depended on who you asked and which organisation you looked at within the Muslim world. The Arab Charter, for example, advocated for individual rights. There was a strong argument that individual and collective human rights were available in Islamic law; whether or not they were applied in practice was a separate inquiry.

Judge Al-Khasawneh thanked attendees for the stimulating debate.

The tension of collective versus individual rights was not peculiar to Islamic law. For example, elsewhere there had been recent debate over the tension between bilateral/multilateral agreements versus community interest in the area of environmental protection. International law is essentially a decentralised system quite like Islamic law. Even the UN Security Council had five permanent members who all had a voice instead of a sole voice. By the same token, a single authority could be expected of Islamic law.

Most importantly, the core values of international law were also evolving and dynamic. For example, homosexuality used to be a crime in most of the Western democracies but was now legal, and Western countries had ample time to evolve and adapt their laws accordingly. It was therefore unfair for Western and European systems, which were evolving and dynamic, to impose their values on Islamic law, which was in the process of evolving at its own pace.

In addition, he clarified that there was no such thing as an "Islamic State" and that it was incorrect to refer to "ISIL" as such.

Professor El-Dakkak stated that the constitution of Iran gave some authority to jurists and questioned to what extent this was binding.

Dr Esmaeili responded that, since 1979, the constitution of Iran had given power to jurists. This was sanctioned by legislation.

Judge Al-Khasawneh thanked the Chair and thanked attendees for their interest.

The Chair closed the meeting and thanked the presenters and attendees for their participation.

Reporters: Azhar Aziz Ismail Sakoor and Rutendo Muchinguri

CONTENT & EVOLUTION of the RULES of INTERPRETATION

PRELIMINARY REPORT

7–11 August, Johannesburg 2016

Chairs: Professor Photini Pazartzis (Hellenic) & Professor Geir Ulfstein (Norwegian)
Rapporteurs: Dr Panos Merkouris (Hellenic) & Dr Daniel Peat (British)

Members

Dr Eirik Bjorge (Norwegian); Dr Valerie Bore Eveno (French); Professor Laurence Burgorgue-Larsen (French); Professor Jean d'Aspremont (Belgian); Dr Olufemi Elias (HQ); Professor Malgosia Fitzmaurice (British); Professor Andreas Follesdal (Norwegian); Professor Richard K Gardiner (British); Dr Andreas Kulick (German); Professor Joost Pauwelyn (Belgian); Professor Helene Ruiz Fabri (French); Professor Kirsten Schmalenbach (Austrian); Professor Akiho Shibata (Japan); Professor Joel Trachtman (American); Professor Albrecht Weber (German)

I. MANDATE OF THE STUDY GROUP

According to McNair, interpretation is a topic that is approached with the greatest of trepidation,[1] which it is perhaps why it has never formed in and of itself a topic of study of the *Institut de Droit International*, the International Law Association (ILA), or the International Law Commission (ILC). It is always raised in connection with another topic which forms the basis of analysis. Yet, despite the fact that one would be hard pressed to find an international case in which no issue of interpretation has been raised, and that myriad articles and books are written each year on the topic, interpretation still raises complex and unresolved issues.

The present Study Group aims to fill this lacuna. It aims to put the rules of interpretation in the spotlight and research relatively unexplored areas regarding their scope and application. The Study Group will aim for completion of its work by 2018.

Six areas of research were identified as the most apposite for producing meaningful results. These issues were outlined in a document prepared by the *Rapporteurs*,[2] and were the following (hereinafter referred to as topics 1 to 6):

1. Evolution of the Rules of Interpretation
2. Content of the Vienna Convention of the Law of Treaties (VCLT) & Customary Rules of Interpretation: Elements in Need of Clarification & Points of Divergence
3. The Rules of Interpretation Across Regimes
4. Interpretation of Customary International Law
5. Interpretation of Unilateral Acts and Declarations
6. Interpretation of Acts/Secondary Instruments of International Organisations.

These points will be elaborated below in the relevant sections of this Report.

---

[1] Arnold D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), at 364.
[2] Hereinafter referred to as the 'ILA Study Group Road Map'.

II. THE ROAD SO FAR

The ILA Study Group on Content and Evolution of the Rules of Interpretation was established in May 2015, upon approval by the Executive Council of the ILA. The Study Group held its inaugural meeting on 13-14 May 2016 in Athens, with the generous financial contribution of the *Athens Public International Law Center* (*AthensPIL*) and *PluriCourts - Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order*. It took place at the premises of the European Public Law Organization (EPLO). The following members participated in the meeting: Professor Photini Pazartzis, Professor Geir Ulfstein, Dr. Panos Merkouris, Dr. Daniel Peat, Dr. Eirik Bjorge, Professor Andreas Føllesdal, Dr. Andreas Kulick, Professor Albrecht Weber.[3] The other members of the Study Group offered in advance thoughts and comments on the topics in discussion.

During the Study Group's inaugural meeting, the *ILA Study Group Road Map* was presented and discussed. The members present showed particular interest in certain topics, but it was decided that finalisation of the work agenda of the Study Group should occur after the input of all members of the Study Group and other ILA members at Johannesburg. This Preliminary Report summarises the proposals made in the *Road Map* and the comments of members made at the first meeting of the Study Group in Athens or *in absentia.*

III. RESEARCH POINTS IDENTIFIED IN THE ROAD MAP

1. Evolution of the Rules of Interpretation

i. 'Rules'

One of the first topics of discussion during the first meeting of the Study Group was the use of the term 'rules' in the title of the Study Group. The principal issue discussed was whether the Study Group should take a position on whether the 'rules' of interpretation are in fact rules, or rather whether they are 'principles', 'maxims', 'canons' or the such. Despite different views as to the nature of the 'rules' of interpretation, there was consensus that such a theoretical enquiry was not fruitful at this stage in the project and that, for pragmatic reasons, it would be best to remain 'agnostic' on the matter and use the term 'rules' until the project had progressed.

ii. 'Evolution'

Despite the existence of extensive literature surrounding the role and content of the rules of interpretation of treaties, very little attention has been given to the potentially evolving nature of these rules. International courts and tribunals pay lip service to the customary nature of the rules of interpretation,[4] yet they approach the rules as if they are frozen in time with a clearly defined and unchangeable content. This is somewhat surprising

---

[3] In this context, the authors of this preliminary report would like to thank the research fellows and junior researchers of the *Athens PIL* who took upon themselves the laborious task of keeping the minutes of this meeting: Dr. Nikolaos Voulgaris, Mr. Orfeas Chasapis Tassinis, and Ms. Aikaterini Pitsoli.

[4] *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999, [1999] *ICJ Rep.* 1045, para. 18; *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment of 3 February 1994, [1994] *ICJ Rep.* 6, para. 41; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment on Preliminary Objections of 12 December 1996, [1996] *ICJ Rep.* 803, para. 23

considering that, with respect to treaties, considerations of time and change frequently factor into judicial and academic writing, such as the tug-of-war between the principle of contemporaneity and dynamic/evolutive interpretation. A similar process has not been examined with respect to the rules of interpretation themselves. This *lacuna* becomes even more critical since international courts and tribunals often have to interpret 19th and early 20th century treaties.[5] In doing so they apply the customary rules of interpretation as enshrined in Article 31-33 VCLT. This, however, may raise concerns as to the conformity of this practice with the principle of non-retroactivity,[6] as pointed out in academic writing.[7]

A number of questions could fall within this area of research, such as:

- can the rules of interpretation evolve through time, and have they done so?
- what are the critical changes that have occurred through time?
- when interpreting a pre-VCLT treaty (or a treaty where a non-VCLT party is involved), which rules of interpretation are applicable - the rules at the time of the conclusion of the treaty or the rules at the time of the interpretation of the treaty?

The members of the Study Group agreed that this was an interesting topic. Members debated the use of the term 'evolution'. Some members considered that the term 'evolution' had inherent connotations related to the nature of the 'rules'.[8] Others noted that the 'evolution' of the rules of interpretation could also be seen as a matter of divergent 'practice' in the interpretation and application of the rules. Finally, others felt that the term 'evolution' was an apt description as it 'will produce different species of interpretation filling different ecological niches'. Bearing in mind the position of the Study Group to remain 'agnostic' as to the nature of the 'rules of interpretation', it was felt that the term 'evolution' could be retained as a working term for the time being. Discussion on its appropriateness could be revisited once the work of the Study Group had progressed and produced concrete results that would allow it to take a position on the matter.

The ideal structure for this topic of research, as proposed by the Co-Chairs, was to split it into two eras: pre-VCLT and post-VCLT. The former could function as a historical introduction to the body of the research of the Study Group. The post-VCLT research could be integrated into other topics of the *Road Map,* notably topics 2 and 3. All members were in agreement that this was the optimal course of action.

---

[5] See for instance: *Kasikili/Sedudu Island* (n4); *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), Judgment of 17 December 2002, [2002] *ICJ Rep*. 625.

[6] *Kasikili/Sedudu Island* (n4) Declaration of Judge Oda, para. 4.

[7] H. Fox, 'Article 31(3)(a) and (b) of the Vienna Convention and the Kasikili/Sedudu Island Case," in: M. Fitzmaurice *et al* (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff 2010), 59; P. Tavernier, 'Observations sur le droit intertemporal dans l'affaire de l'île de Kasikili/Sedudu (Botswana/Namibie)' (2000) 104 RGDIP 429; P. Merkouris, '(Inter)Temporal Considerations in the Interpretative Process of the VCLT: Do Treaties Endure, Perdure or Exdure?' (2014) 45 NYIL 121; U. Linderfalk, 'The Application of International Legal Norms Over Time: the Second Branch of Intertemporal Law' (2011) 58/2 NILR 147.

[8] See previous discussion on 'rules', 'principles' or 'maxims'.

2. Content of the VCLT & Customary Rules of Interpretation: Elements in Need of Clarification & Points of Divergence

There has never been a shortage of publications regarding the content of the rule of interpretation as enshrined in Articles 31-33 VCLT. Despite this, to argue that there is nothing further to be clarified with respect to these rules would be far removed from reality. The ILC, for instance, is currently examining the topic 'Treaties over Time / Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation'.[9] To attempt an exhaustive examination of all 'grey' areas of treaty interpretation would be an exercise in futility. In the *ILA Study Group Road Map*, the authors suggested that this topic could be divided into several sections, such as:

- examining whether various principles of interpretation,[10] such as the principle of effective interpretation, fit within Articles 31-33 VCLT (e.g. 31(3)(c) or 32 VCLT), or whether they are separate rules of customary international law;
- examining whether the VCLT rules of interpretation and their customary law counterparts have identical content or whether there are points of divergence;
- examining what approaches/solutions have been adopted when textual interpretation conflicts with an interpretation based on the object and purpose of a treaty, or conflicts with the intention of the parties or the preparatory work (as well as any other permutation of these interpretations); and
- whether the structure of Articles 31 and 32 of the VCLT reflects the practice and *opinio juris* of states.

Despite the undeniable utility of this topic, the members of the Study Group were in agreement that three points should be borne in mind.

- Firstly, the members noted that the exact areas of interest of this topic must be clearly delineated prior to inclusion in the Study Group's research agenda.
- Second, instead of focusing on this as a separate point of research, the members felt that it would benefit the Study Group's work if the aforementioned questions were subsumed in the research to be conducted in the context of topics 1 and 3, i.e. pre-VCLT historical research and regime-specific and cross-regime interpretative methods respectively.
- Finally, all the members noted the importance of ensuring the originality of the research and avoiding replication of existing analysis.

3. Evolution of the Rules of Interpretation

Recent work, both within the ILC and the academy, has addressed the topic of treaty interpretation over time.[11] This topic raises myriad questions of interest: why, for example,

[9] G. Nolte, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation', (19 March 2013) UN Doc A/CN.4/660; see also the second and third reports: (26 March 2014) UN Doc A/CN.4/671; (7 April 2015) UN Doc A/CN.4/683 respectively.

[10] Other principles that fit within this category include *in pari materia* interpretation and *ejusdem generis,* to name but a few.

[11] See for example, E. Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014); C. Djeffal, *Static and Evolutionary Treaty Interpretation: A Functional Reconstruction* (CUP 2015); G. Nolte (ed.), *Treaties and Subsequent Practice* (OUP 2013); and the work of the International Law

is evolutionary interpretation adopted in relation to some treaties but not others? How might this be justified within the rubric of Articles 31 and 32 of the Vienna Convention? Most importantly, 'faced with the familiar paradox of accounting for difference under the sign of equality, the question of the day is how to *explain* such differential treatment within the law of treaties. What justifies weighing some rules of interpretation more strongly than others (*i.e.* emphasizing object and purpose over text, or vice versa)?"[12]

Whilst evolutive interpretation has been the object of sustained academic commentary in recent times, the broader question of how and why different international legal regimes interpret in different ways has not been subject to the same scrutiny.[13] Interpretation by the Appellate Body of the WTO, for example, is frequently characterised as textualist, whilst that of the European Court of Human Rights is generally seen as teleological. One fruitful avenue for enquiry could be to examine not only how interpretive approaches differ across legal regimes, but also why this occurs. Moreover, if such difference is not only rife, but also inevitable, do the provisions of the Vienna Convention actually tell us anything about how international law is, or should be, interpreted? If we acknowledge that their utility is limited, how are we then to approach the assessment of interpretation?

This proposal was well received by both those present at the Athens conference and those that had submitted comments *in absentia,* with many suggesting that this topic seemed to be the most promising avenue of research for the Study Group. The members present particularly noted that it could be a useful framework within which to also address topics one and two.

The main point of discussion in relation to the third topic was how to define the regimes that the Study Group could compare. Members considered that division by substantive treaty regime was the best approach to take, focusing predominantly – for reasons of practicality – on the practice of judicial bodies. Should the practice of other interpreters (States, international organizations, etc.) be readily available, it was agreed that these too should be examined. Specific regimes that members noted would be of interest include: the law of the sea, international trade law, human rights (national, regional, and international bodies), international investment law, international criminal law, international humanitarian law, environmental law, boundary disputes, international organizations law, and the law of the European Union. Members understood that this list would have to be narrowed down as the work of the Study Group progressed, but that the final selection of case studies was something that could be made with the input of the full membership at the Johannesburg meeting.

4. Interpretation of Customary International Law

From the early writings of Grotius, Vattel and Pufendorf interpretation has always been at the epicentre of academic research and case-law. However, analysis of interpretation has focused mainly on treaties and ignored customary international law. The question

Commission on 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties'.

[12] J. Arato, 'Accounting for Difference in Treaty Interpretation Over Time', in A. Bianchi, D. Peat, & M. Windsor, *Interpretation in International Law* (OUP 2015) 206.

[13] As pointed out by one member of the Study Gro-up present in Athens, a notable exception is the symposium published in the *Revue Générale de Droit International Public* (2011, No. 2).

that arises, then, is whether rules of customary international law can also be subject to interpretation. This issue has not been the subject of any extensive analysis. In fact, the current work of the ILC, although undoubtedly critical in the discourse surrounding the process of formation of customary international law, focuses on the two elements of customary law: *practice* and *opinio juris*.[14]

This leaves an entire stage in the 'life-cycle' of customary international law completely unexplored. Once a customary rule has emerged, and when it is considered for application within a particular case, should it not be open to interpretation similar to any treaty rule? The issue has been debated in academic discourse.[15] It is interesting to note, however, that even in the discussions in the Advisory Committee of Jurists, responsible for drafting the PCIJ Statute, the members clearly acknowledged the interpretability of customary international law.[16] Similarly, Art. 21(2) of the Rome Statute provides that '[t]he Court may *apply principles and rules of law as interpreted* in its previous decision',[17] although a member of the Study Group raised the point that this perhaps is not an acknowledgement of the interpretability of customary international law but rather a linguistic expression without any underlying connotations as to the issue at hand.

In addition to the above, *dicta* on the interpretability of customary international law seem to be contained in several landmark cases.[18] Perhaps the most express recognition of the interpretability of customary international law can be found in Judge Tanaka's Dissenting Opinion in *North Sea Continental Shelf*, where in no uncertain terms he opined that '[c]ustomary law, being vague and containing gaps compared with written law, requires

[14] M. Wood, 'First Report on Formation and Evidence of Customary International Law' (17 May 2013) UN Doc A/CN.4/663; see also the second and third reports: (22 May 2014) UN Doc A/CN.4/672; (27 March 2015) UN Doc A/CN.4/682 respectively.

[15] In favour: R. Kolb, *Interprétation et création du droit international: esquisses d' une herméneutique juridique moderne pour le droit international public* (Bruylant 2006), 219 ; D. Alland, 'L interprétation du droit international public' (2014) 362 RdC 41, 82-8 ; P. Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Martinus Nijhoff 2015), Chapter 4; A. Bleckmann, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht', (1977) 37 ZaöRV 504. Against: M. Bos, *A Methodology of International Law* (North-Holland 1984), 109; R. Bernhardt, 'Interpretation in International Law', in: R. Bernhardt and R. L. Bindschedler (eds.), *Encyclopedia of Public International Law*, Vol. II (North-Holland 1992), 1417; T. Treves, 'Customary International Law', MPEPIL 1393 (November 2006), para. 2, available at: <www.mpepil.com> (last accessed on 15 July 2016).The issue has also been raised indirectly from a methodological angle, in: S. Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26/2 EJIL 417; S. Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26/2 EJIL 417.

[16] Advisory Committee of Jurists, *Procès Verbaux of the Meetings of the Advisory Committee of Jurists* (1920), 275 (emphasis added).

[17] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art. 21(2) and (3). Emphasis added.

[18] Indicatively: *North Sea Continental Shelf (Germany v. Denmark and the Netherlands)*, [1969] ICJ Rep 3, Dissenting Opinion of Judge Tanaka, 181; *Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v. United States of America)*, Judgment of 27 June 1986, [1986] ICJ Rep 14, para. 178; *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WTO, Panel Report adopted on 21 November 2006, WT/DS291R, WT/DS292R and WT/DS293R, paras. 7.68-7.72.

precision and completion about its content. This task, in its nature being interpretative, would be incumbent upon the Court. *The method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law*'.[19]

Most members of the Study Group agreed that this was a fascinating topic that raised many questions, such as how interpretation of customary law differs from treaty interpretation, whether there is enough evidence on which to base a clear set of rules/principles of interpretation of customary law, and where formation of customary law ends and interpretation begins.[20] However, the main concern raised by members was that, because of the unchartered waters of this research, if this topic was selected it would monopolise the time and resources of the Study Group to the detriment of the remaining points of research.[21] The time-frame of the Study Group's mandate, i.e. until 2018 seemed too restrictive to tackle this broad topic.

An additional point that needs clarification is why the *Road Map* referred only to the interpretation of customary international law. This was not meant to suggest that general principles as a source of international law are not open to interpretation. It was rather a strategic choice on the part of the authors of the *ILA Study Group Road Map* to propose a topic that was feasible within the Study Group's allotted time-frame. It was considered that it made more sense logically and substantively to tackle first the issue of interpretation of customary international law, before attempting to embark on examining the interpretability of the 'general principles'.

On the basis of the above, the Study Group was of the view that on the one hand the topic merited research, but on the other it was too complex for the limited time and resources of the Study Group. It was decided that the issue should be left on the table, awaiting the comments and discussions in Johannesburg, at which time a final decision on its future would be taken. In any event, it was felt that if the Study Group's research was devoted to other areas, a small section in the final report of the Study Group should outline that the importance of the interpretation of customary international law had been identified, but that for practical reasons it may be better suited for future research by another Study Group or Committee.

5. Interpretation of Unilateral Acts and Declarations

The interpretation of unilateral acts is a topic that has attracted scant attention in the literature. Unilateral acts were the focus of a Working Group of the International Law Commission from 1996 to 2006, which culminated in the adoption of ten 'guiding

[19] *North Sea Continental Shelf* (n18), Dissenting Opinion of Judge Tanaka, 181 (emphasis added).

[20] A member of the Study Group was of the view that the 'interpretation' to which the Study Group referred applied only to words, consequently customary international law was not open to interpretation; rather any purported act of interpretation of customary international law is better understood as an act of elaboration, referring to: C.A. Bradley, 'Customary International Law Adjudication as Common Law Adjudication' (*SSRN*, 9 February 2015), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559190 (last accessed on 15 July 2016).

[21] Another issue raised was the fear of ending up with an infinite regression argument. The Co-rapporteur suggested that such concerns were not unique to the interpretation of customary international law but were part and parcel of the entire process of interpretation. In addition, he suggested, that in any event the concept of 'constructive rules' of Anzilotti could offer a theoretical foundation to tackle any such concerns.

principles' applicable to unilateral acts,[22] largely focussed on examining when such acts are to be considered as binding.[23] The ILC addressed the interpretation of such acts, notably in Principle 7, which states that "in interpreting the content of such obligations, weight shall be given first to the text of the declaration, together with the context and the circumstances in which it was formulated."[24] The Commentary to this Principle endorses the statement of the ICJ in the *Nuclear Tests* cases, according to which "when States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."[25] However, whilst the ILC did touch on the interpretation of unilateral acts, its work was mainly based on a handful of cases before the ICJ; an examination of the treatment of unilateral acts outside of judicial proceedings could yield different conclusions.

Rarely, however, are claims brought against States on the basis that they breached a unilateral statement to be legally bound to a certain course of action. The utility of examining the interpretation of unilateral acts in general is therefore questionable, and is likely to be based on sparse practice if pursued. The Co-Rapporteurs suggested that it may be useful to examine the interpretation of two specific kinds of unilateral acts: optional clause declarations made pursuant to Article 36(2) of the ICJ Statute, and schedules of commitments of WTO members. Both have been referred to in the literature as having a 'hybrid' character – they are unilateral acts that gain legal normativity because of (in the case of optional clause declarations) compliance with a conventional procedure, or (in the case of schedules of commitments) the agreement of other States Parties to the treaty. The main question regarding interpretation in this context is whether it is justifiable to accord more importance to the intention of the 'declaring' State than otherwise would be the case for treaty interpretation. A further line of enquiry might be to examine what reasons exist – if any – to differentiate between interpretation of an optional clause declaration and a schedule of commitments, and what this might tell us about the interpretation of unilateral acts more generally.

On the basis of the *Road Map* and presentations by the Rapporteurs, the members present at the Athens meeting noted that this topic was underexplored but generally felt that it was less pressing than the abovementioned topics of treaty interpretation. Some members queried whether acts that were made pursuant to multilateral treaties, such as WTO schedules of commitments, could truly be called unilateral acts. The consensus view was that this topic could not form the focus of the Study Group's work.

6. Interpretation of Acts/Secondary Instruments of International Organisations

Whilst the interpretation of treaties has remained the main focus of academic study, the proliferation of treaty regimes that endow international organizations and treaty bodies with the power to adopt resolutions, decisions, or recommendations suggests that the interpretation of such secondary instruments is growing in importance. The paradigm example – and the one which has attracted most academic commentary – is of

[22] Yearbook of the International Law Commission, 2006, vol. II, Part Two, 369.
[23] *Nuclear Tests case (Australia v. France; New Zealand v. France)*, [1974] ICJ Rep 457.
[24] Yearbook of the International Law Commission, 2006, vol. II, Part Two, 377.
[25] Nuclear Tests case (n23), para. 47.

course the interpretation of UN Security Council Resolutions.[26] But this is clearly not the only example: resolutions of the International Maritime Organization, regulations of the International Seabed Authority, as well as resolutions adopted by conferences or meetings of the Parties to multilateral environmental agreements, the internal practice and rules of an organization, all provide illustrative examples of instruments adopted by an international body which may require interpretation. Considering that international activities are regulated to a significant extent by such secondary instruments, one possible avenue of enquiry for the Study Group would be to explore how these instruments are interpreted and if one could formulate any general principles (or customary rules) that regulate their interpretation.

The general presumption has been to approach the interpretation of secondary instruments by analogy to the rules governing the interpretation of treaties, basing interpretation on Articles 31 and 32 of the VCLT.[27] However, this has been quite rightly called into question. For example, is it appropriate to adopt the Vienna Convention's focus on the intention of the Parties when interpreting secondary instruments? How could the mechanical transposition of the rules of treaty interpretation account for the variations in the institutional, procedural, and legal context in which secondary instruments are adopted? Should the interpretation of constitutive instruments (such as the Statute of the ICTY) differ from the interpretation of other instruments?

Whilst expressing interest in this topic, members considered that it was not an appropriate avenue of enquiry for the Study Group. In particular, it was noted that the topic might prove to be too varied and the contextual differences too significant to draw any general conclusions. It was, however, noted by one member that some elements of this topic may be incorporated in research conducted under topic 3.

IV. MISCELLANEOUS

Various points for consideration were raised orally and in writing by members of the Study Group. Some of these have already been incorporated in the previous Sections, but some defied categorization. For reasons of convenience and in order to assist the discussions in Johannesburg they are reproduced below:

- One member of the Study Group noted that the interpretative authority of various types of commentary on treaties on specialist topics warrants attention. In the view of the Co-Rapporteurs, this could be examined with the context of topic 3;
- The question was raised whether the interpretation of codification treaties should be considered as treaty interpretation or the interpretation of customary international law,

[26] M. Wood, 'The Interpretation of Security Council Resolutions', (1998) Max Planck Yearbook of United Nations Law 73.

[27] Wood (n26), 85 *et seq*; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Seabed Dispute Chamber of the International Tribunal of the Law of the Sea, Advisory Opinion, 1 February 2011, Case No. 17, paras. 57 *et seq*; ICTY, (interpretation of Statute); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, para. 95; Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, STL-11-01/I, para 26 *et seq*.

or whether there are special rules on the subject. Again, it is suggested that this could be treated under topic 3 and/or 4;
- In relation to topic 3, it was highlighted that the term 'regime' needs to be clarified in order to determine the methodology to be used by the Study Group;
- It was suggested that topic 3 should be approached in two stages. The first stage would consist of detailing the interpretive approaches adopted in different international legal regimes. This would provide the basis for the second stage, in which the Study Group would explore and identify the reasons for the differences across 'regimes'.
- The Co-Rapporteur suggested that members may find it instructive to consult R.S. Summers & D.N. MacCormick (eds), *Interpreting Statutes* (Dartmouth 1991) as an example of a previous comparative project that examined interpretation across different jurisdictions.

V. CONCLUSION & NEXT STEPS

On the basis of the *ILA Study Group Road Map*, the inaugural meeting in Athens and the comments of the members, there was consensus among the members of the Study Group that the scope of potential topics for the Study Group's attention was currently too broad. Finalization of the research agenda and the division of labour was deferred to the Study Group's meeting in Johannesburg. The Closed Session in Johannesburg should be used to determine the direction of the Study Group's work in light of the Preliminary Report and the comments of the members. Inspiration would also be drawn from the comments of the ILA members present during the Open Session.

In terms of substantive conclusions, some provisional agreements and arrangements have arisen prior to the meeting in Johannesburg. It was agreed that the first part of the *Road Map* would be revised to outline a brief history of treaty interpretation in order to provide context for the subsequent sections. All members expressed willingness to contribute to the work of the Study Group. In their individual comments, some members indicated a preference for specific topics. Once the methodological approach of the Study Group has been determined - in particular in relation to topic 3 of the *Road Map* - allocation of research and output responsibilities will be circulated to the members.

Finally, members were in agreement that the output of the Study Group's research will take not only the form of a final report, but also of an edited volume.

STUDY GROUP ON THE CONTENT AND EVOLUTION OF THE RULES OF INTERPRETATION

WORKING SESSION

Monday, 8 August 2016, 2.00pm

Chair: Dr Charlotte Ku (US)

The Chair opened by emphasising the rules of interpretation in international law. It was surprising that there had not been any systematic report on this issue. This was probably due to the fact that rules of interpretation always related to something else and was not necessarily considered as a topic on its own. She expressed her gratitude to the CoChairs and the CoRapporteurs for all their efforts so far.

Dr Panos Merkouris (Greece) thanked attendees for attending the session. He mentioned that the main point of this session was to receive the input and thoughts of members present. When introducing the topic, he mentioned that the study of the rules of interpretation had never been the main focus of any systematic study. There were rules of interpretation of various regimes which all tended to be fragmented.

The process of preparing the report and the proposal for the establishment of the Study Group had been very challenging because those involved had to constantly correct themselves seeing that they found every point on interpretation interesting and could not narrow down the topic. This resulted in the topic being very broad.

The idea of the topic being broad was to demonstrate how many important and relatively unexplored areas regarding the process of interpretation still existed. The Study Group was established in 2015 and had its first inaugural meeting in May 2016 in Athens. In between times, there had been a few discussions and agreements regarding the way forward. Professor Merkouris wanted now to present the main issues to attendees to hear their thoughts on the various areas of research.

One of the preliminary issues that the Study Group had to deal with was the question as to what were the "rules" of interpretation. This was a very important theoretical issue, but for the purpose of the Study Group, the officers had decided to take an agnostic approach. This meant using the term "rules" as a working term without going into too much debate on the nature of the term. This was also accepted with regards to the idea of evolution, which was also to be used as a working term.

Dr Merkouris made reference to an earlier closed meeting of the officers. The final thing that emerged from that meeting was that it would make more sense for the group to focus on judicial interpretation as evidenced by the case law of international courts and tribunals. He justified this by stating that most of the time, but not all the time, the courts and tribunals might give some indication of the process of interpretation, meaning that they explained why they followed certain rules and what their structure was.

With regards to other sources such as the practice of States, interpretation was usually presented as a given. There was no explanation on the process or the rules. In addition, the officers felt that the focus on international judicial bodies made more sense when attempting to produce results that would benefit the project of the Study Group.

Regarding the particularities of the research, Dr Merkouris said that the Study Group had originally identified six main areas of research. The first area was the evolution of the rules of interpretation, being the reason why the term "evolution" came into being.

The main point was whether international courts and tribunals had the tendency to apply modern rules of interpretation (ie, post the conclusion of the *Vienna Convention on the Law of Treaties* (VCLT)) in order to interpret older treaties. This raised a lot of concern with regards to time and temporality and the correctness of the approach.

The officers felt that this was an area that had not been explored and, for that reason together with the fact that when one looked at the evolution of how the rules of interpretation had changed through time, they felt that this particular area was important in order to create a base for how rules before the VCLT had evolved and to compare their analysis with the post VCLT era.

Dr Merkouris felt that the best way in this regard was to first look at the period prior to the VCLT and then to look at the post VCLT period to see if there was a change in both eras or if the VCLT as such was a critical point of difference or simply crystalised existing rules. The discussion would also help in that, apart from giving them structure in the analysis, it would also help tackle the issue of referring to previous treaties. The discussion would also function as a springboard for the following areas of research, which brought him to the second area.

Dr Merkouris admitted that the Study Group had not done a very good job with the second area of research, for which he blamed himself. He noted that the title of the area was quite long ("Content of the VCLT and Customary Rules of Interpretation: Elements in Need of Clarification and Points of Divergence"). What the Study Group wanted to examine in this area was that were key terms in the rules of interpretation as enshrined in Articles 31 to 33 of the VCLT that were still debatable, namely subsequent agreement and practice, ordinary meaning, whether there was a hierarchy between Articles 31 and 32, and whether preparatory works could be used to correct the text of a treaty. The Study Group would also look at what was meant that by "parties" in Article 31 and other principles of interpretation that were not mentioned specifically but which courts and tribunals sometimes used.

The Study Group felt that this particular area would allow it to clarify the rules of interpretation and also to look at the interaction between the VCLT and customary rules of interpretation. As it emerged from the discussions in Athens and earlier in Johannesburg, the Study Group felt that this area of research overlapped with the previous area on evolution.

As for the third area of research (interpretation across regimes), the Study Group wanted to identify the rules of interpretation and examine whether there were any points of divergence or convergence between different regimes or different judicial bodies. In this regard, the term "regime" was used in an agnostic manner.

Dr Merkouris anticipated come overlap with the second area of research because clarification of the content of the rules of interpretation would emerge as the Study Group looked at the process of interpretation across the various regimes. For that reason, the Study Group felt that the best way to proceed was to create a list of possible questions

that would be constantly updated as their research progressed. Another main point that the officers were struggling with and required input from members was the way to tackle the approach of interpretation across regimes.

One line of thought was to focus on areas of law, such as human rights, trade, and investment, law of the sea and environmental law. The other possibility was to begin by focusing on the judicial bodies such as the European Court of Human Rights or InterAmerican Court of Human Rights. At the end there would be a merging of these alternatives approaches because some bodies had a more general jurisdiction, and did not deal solely with human rights treaties but also with environmental and treaties related to law of the sea. The concern was how the Study Group would start and what were the best ways to tackle these issues.

The third area of research was one that had gained the most interest from members of the Study Group. The reason for this was the fact that they wanted the result of the Study Group to have value and not just be an academic exercise. The idea was for the Study Group to provide some practical value, a clarifying tool that not only academics but also practitioners and State representatives could use to identify what the rules of interpretation were. Besides the process of the rules of interpretation, they were still stumbling in the dark as to what could be argued and what the proper process was.

The fourth area of research was about the interpretation of customary international law. The first question that was normally encountered here was "but why focus on customary international law and not general principles, which are another source of international law". Dr Merkouris responded by saying that it was a strategic kind of selection and that the problems with customary international law were large enough, and in the limited time available the Study Group would not be able to deal with the even greater problems associated with general principles. Indeed, there was some concern that dealing with customary international law was too large. This was a very interesting area of research but could become a very tricky and difficult undertaking based on several reasons, such as the fact that there was very little analysis on the topic. Even when courts and tribunals interpreted customary international law, it tended to be in an automatically hidden fashion and one needed to decipher the process through which a court and tribunal would arrive at a particular interpretation of customary international law. He said that, both doctrinally and practically, it was a very interesting but very tricky area and the general consensus seemed to be, that due to time constrains, it might not be an appropriate area for the Study Group to research. Rather, it could be examined incidentally when the Study Group considered the third area (ie, interpretation across regimes).

The fifth area of research was the interpretation of unilateral acts and declarations. The International Law Commission (ILC) had addressed this issue in its report on unilateral acts. There was a guiding principle that was adopted, which stated that the rules of interpretation of treaties apply *mutatis mutandis*, which helped the ILC solve problems, however there was no substantive analysis of the issue, which was the same with declarations. His concern was that there was very limited practice on the issue, which might not allow the Study Group to get results. That said, the Study Group could add to scope the issue of the interpretation of optional clause declarations. Similar to the fourth area, the idea was that this area of research would be best served if it was integrated into the third

area, especially when discussing and researching the interpretation across regimes, where the Study Group might came across the interpretation of unilateral acts and declarations.

The same kind of considerations emerged with the sixth and final area of research, which was the interpretation of acts or secondary instruments of international organisations. This was another very interesting topic, especially when one looked into Security Council resolutions and the practice for organisations where various memos circulated. But again, it was felt that, for the sake of time, it was best to minimise the overlap by only examining this topic under the lens of the third area of research.

Dr Merkouris invited members to comment on the six area of research. Ultimately, his suggestion was that the best way to proceed was to look at the value of the outcome of the Study Group and for the Study Group to tackle areas of historical evolution of the rules of interpretation as well as areas of divergence and convergence between various regimes regarding interpretation.

The Chair congratulated Dr Merkouris and his fellow Co-Rapporteur, Dr Daniel Peat, for their work in pin-pointing the problems and outlining the direction in which they wanted the project to move forward.

The Chair offered two observations. First, as this topic was being tackled by an ILA Study Group and had a few radical, the Study Group should try to single out the areas that the members would like to consider. Secondly, the work done by an ILA Study Group could be theoretical, general or might not focus on a particular topic. The work of the Study Group could lead to something more concrete, which would become the mandate of an ILA Committee. She gave an example of the interpretation of secondary acts, which was a big topic, and which could be made into the topic of a Committee. The example was to encourage members of the group not to exclude anything that they though would be beneficial to the Study Group.

In order to make this particular project provide positive input, it would be important for the Study Group to listen to the presentation by Dr Merkouris and also to hear from the members of the ILA in attendance.

Apart from the CoChairs and CoRapporteurs (who did most of the work), there were 15 members of the Study Group who had been carefully selected and were experts in their particular field. These 15 members were a sufficient number for a Study Group, although not all of them were in attendance.

The Chair went on to say that there had been one meeting where the officers of the Study Group worked out a road map and presented it to the Executive Council of the ILA. This was at a time when they were applying for the Study Group to be established. Based on that, she shared with attendees that they had a very fruitful discussion where everything that the CoRapporteur was presenting was put on paper for a second round. When the preliminary report was presented in their discussion that morning, the members of the Study Group were very helpful in the process of identifying additional questions and the CoRapporteur summarised them well.

The Chair requested that the Study Group focus on who they want to see as the interpreter of international law, because there were many interpreters of international law. This focus could assist the Study Group avoid getting lost in the topic. She recalled that Professor

Hélène Ruiz Fabri had previously suggested that the Study Group focus on judges and judicial bodies as interpreters, because in that situation there were many reasons to justify it. She invited Professor Fabri to elaborate on this idea during the session. A focus of the judiciary was also based on the fact that they had jurisprudence; most courts and tribunals had publicly available documents and jurisprudence (a notable exception being investment arbitration tribunals).

The Chair then moved from the "who" to the "what". She queried how judges interpreted rules of interpretation. She said that, in order to arrive at a toolkit, the Study Group would have to start by focusing on this issue rather than contextual and content issues. This approach would allow the Study Group to have a much greater output as opposed to doing something that would not yield results.

The Chair stressed the need for the Study Group to get some "mapping". In this regard, the Co-Rapporteurs could focus on establishing a questionnaire on what the Study Group would need to look at once the Study Group had considered and selected the interpreters. The Chair concluded by forecasting that the work of the Study Group would last at least two years and suggesting that, during this time, the Study Group must try to delimit the subject.

Professor Geir Ulfstein (Norwegian) recalled that the Study Group was not a Committee, and therefore had a great flexibility and freedom in choosing its approaches within its mandate. The Study Group had the luxury of having many different possible areas of research. But it had to set priorities. He suggested that the members of the Study Group could elaborate on some areas without going into depth but rather raise some questions and discuss some ideas for further study. In addition to that, the Study Group could also discuss the extent of the interaction between the interpretation of treaties and of secondary acts, unilateral acts by States etc.

Professor Ulfstein stated that, even if the Study Group were to focus on the interpretation of treaties, it could also include, to some extent, the other areas outlined by Dr Merkouris. For instance, the Study Group could investigate whether international courts and tribunals focus on different principles of interpretation or whether they just interpret treaties without really discussing the relevant principles of interpretation. Furthermore, the Study Group could investigate why some courts or tribunals interpret in a certain way as opposed to other courts and tribunals, and whether the difference was based on the fact that they were "old" bodies or "new" bodies, or bodies of a particular substantive regime. It could also investigate why certain interpretations were being used and whether there were consequences for compliance with decisions. It could investigate the legitimacy of the decisions and whether compliance with certain interpretations improved the legitimacy of the relevant court or tribunal. There were therefore several issues that the Study Group should address in addition to the mapping exercise.

The Chair said that the task before the Study Group was to assist the officers of the Study Group in shaping what sounded to her like a feasibility study to detest the potential for studying this subject and then decide on the way in which to study it, in order to produce something that would give rise to additional work or an initial statement on what the mapping exercise would actually reveal and hopefully would turn into something that would provide practical guidance to those in the business of interpreting international law.

There seemed to be two tasks: one was in terms of the content and what would be of great interest; the other was related to the matter that would actually give the richest output. Although there were many possibilities listed, it was equally important to find which approach would produce the greatest value for further understanding.

Professor Hélène Ruiz Fabri (France) started off her intervention by complementing the presentation by Dr Merkouris, which reflected what the Study Group had discussed earlier in its closed meeting. The focus on traditional interpretation was based on previous reflection that was already consolidated in the report. The direction that the Study Group had taken was also based on the consideration of the specifics of judicial interpretation. The Study Group would have to make some comprehensive assessment of each step that it took. The issue was to consider which step to take first, and whether the Study Group would begin by looking at the case law of particular bodies and to select a few issues from there.

Mr Arnold Pronto (US) found the topic very interesting. There were currently some difficulties in terms of the gravitational weight of the VCLT and deciding whether it was about changing the VCLT or reverting back to pure VCLT, although this was just a side note.

Mr Pronto expressed doubts and concerns about the way forward for the Study Group. While understanding that judicial bodies made for an easier focal point, he noted that the constitutive instruments of the relevant body would constrain the outcome or conclusion. Moreover, Mr Pronto was not sure that the toolkit would equally apply to all courts and tribunals. The officers of the Study Group needed not only to focus on the adversarial context, but also the non-adversarial, meaning that they must consider the divergence within regimes as well as across regimes.

Ms Alexia Solomou (Cyprus) favoured studying the interpretation of unilateral acts by international courts and tribunals. She mentioned, in reference to the ICJ case between Colombia and Nicaragua concerning territorial and maritime boundaries, that often when tribunals interpreted international customary law, they did so on the basis of a norm that had been crystallised in a treaty that had not been signed by the States concerned. On that basis, she preferred for the Study Group to give priority to the interpretation of unilateral acts ahead of that of customary law. She also mentioned that if the Study Group focused on interpretation by judicial bodies, then the following factors needed to be taken into account:

- the constitutional documents of the body
- the rules and procedures of international law
- applicable law
- the functions of the body (eg, adversarial or truth finding)

Dr Otto Spijkers (Netherlands) mentioned that he was fascinated by the term evolution and how the rules had evolved over time. He would have liked the Study Group to consider why these rules had evolved over time. He also requested that the Study Group consider the increasing influence of Africa and Asia in the interpretation of international law. He also mentioned that there had been a change in the way in which people researched these days, especially among academics and judges, and he would like to know

the extent to which that had changed the way that those people interpreted and applied international law.

He also asked that, if the Study Group was going to consider the jurisprudence of international courts and tribunals, they must also consider jurisprudence of domestic courts because, for those courts, interpreting and applying international law was something new.

Dr Merkouris mentioned that the road map of the Study Group clearly outlined the roles of the ILC and ILA so it was very important to make sure that the work of the two groups did not overlap. Besides the issue of subsequent agreement and practice, there were many more areas where there was a lot of work to be done. Regarding the adversarial context, the Study Group could end up with many different results if they integrated non-adversarial examinations. The solution was that the Study Group had to make certain choices. Taking into consideration time constraints, he suggested that the Study Group start with the adversarial context to later on include non-adversarial. For now, the Study Group needed to get the discussion rolling. He mentioned that there was already an ILA Committee examining how domestic courts applied international law, so this Study Group needed to avoid stepping onto its territory.

Regarding for the reasons behind the evolution or change, which was discussed by the Study Group at its earlier closed meeting, he said that the Study Group must avoid staying on the surface and start examining the reasons and variables behind particular points of convergence and divergence. However, what made it a little tricky was that the Study Group was still new and needed to first gather data to see whether this was an issue of the VCLT itself, the judiciary, or the nature of the court or the treaty being interpreted.

Regarding unilateral acts and customary international law, unilateral acts needed a good commentary on customary international law. In relation to the ICJ, that became more problematic. Here, Dr Merkouris referred to the *Kasikili/Sedudu Island Case*. In relation to the evolution of the terms themselves, he said that the Study Group would take into account how the rules had evolved through particular courts. There were many things to consider and the comparison of judicial bodies had a lot of things to reveal.

Professor Ulfstein said that the Study Group should further discuss the course of action through a hypothesis, but this must be done in a careful way.

Professor Photini Pazartzis (Greece) found Mr Pronto's remarks to be very helpful, and his comments about adversarial/non-adversarial were noted in particular. She added that it would be a lot more difficult to consider everyone. The outcome was not predetermined by constitutive instruments, because interpretation was an art. In response to Ms Solomou, Professor Pazartzis mentioned that even the esteemed ICJ had recently started considering what other courts were doing and that was an indication that there was something happening.

Professor Locknie Hsu (Singapore) suggested that it might be interesting to examine and compare interpretation by *ad hoc* decision makers and decision makers of standing tribunals.

Professor Susan Karamanian stated that this was a very important project as it was concerned with the legitimacy of international law. The project should therefore be given

great attention. The work of the Study Group should have a strong comparative focus to show the role of treaty interpretation in harmonising perceived conflicting regimes.

Mr Juan Pablo Hugues enquired about the meaning of "evolution". Certain tribunals and precedents seemed to adopt an approach to VCLT's articles 31 and 32 in an involute manner rather than as an evaluator.

In relation to the toolkit, it should also be made applicable to national courts to ensure, among many other things, that national courts take into account international precedents when interpreting international law.

Professor Pazartzis recalled that there was an ILA Committee that is already working on domestic courts and that the work of the two groups could not overlap. However, there was a very close relationship between domestic and international law, and the toolkit could be something that in principle could help domestic judges. The Study Group should not exclude domestic but try not to encroach on the other Committee.

Professor Ulfstein noted, with respect to ad hoc arbitration panels, that it was something that the Study Group must discuss. He went on to say that, in respect to the legitimacy and coherence between the different ways of interpretation across regimes and judicial bodies, the Study Group tended to go beyond the fragmentation debate to ensure more coherence could promote foreseeability of the rule of law to provide more than the old fragmentation debate.

Professor Ulfstein added that national courts should not be a main part of the Study Group's work, but if it was able to develop a toolkit useful for national courts that would be good, but the Study Group must not make that the main focus.

Dr Merkouris agreed that it was good to make a distinction between legal and non-legal variables to see which one would be more conducive to results. There had been an emerging trend in a number of investment tribunals of applying an evolutive approach towards the interpretation of investment treaties. He emphasised that the term evolution was used as a generic term. The fact that everyone agreed to a toolkit was an indication that the Study Group was on the right track.

Mr Pronto requested that Study Group change the title of the topic to indicate a focus on the judicial context. In this way, there would be a clear limitation and it would facilitate more elaborate rules of procedure. He further noted that treaty negotiators might also be potential users of the toolkit. They too were interested in interpretation. Since this was not covered by any study group, it was something the Study Group must look into.

Ms Solomou recalled the factors outlined earlier that the Study Group should take into account when considering judicial bodies.

Professor Ruiz Fabri said that judicial practice came with added motivation in a sense that it explained not only the interpretation but how it was reached.

Mr Andreas Follesdal (Norway) suggested that the Study Group consider the following:

- the trends in judicial interpretative practice that raise larger questions about the nature of international law

- differences in interpretative practice across regimes
- explanations for such differences
- whether such differences and trends could be justified as legitimate.

The Chair indicated that the Study Group might have to look at national bodies due to the availability of data and material to analyse.

Mr Fenghua Li commented on how to handle the tension between international adjudication and national adjudication by making an example of the different approach to interpretation by the Hague District Court and the international tribunals in the Yukos Investment Arbitration regarding the provisional application of Energy Charter Treaty.

Professor Ruiz Fabri added that the relationship between norms could give the Study Group insight into the evolution of international law. Thus far, courts had been able to change the content of treaties through interpretation.

Dr Merkouris expressed his concern that the Study Group would have enough time or resources to look at the difference between national and international courts. However, this would ultimately depend on the choices that the Study Group made at the beginning of its work.

He also clarified that the Study Group was not aiming to harmonise the approach but rather to show the divergence in the approaches to interpretation in order to help people know how courts approach interpretation.

Professor Ruiz Fabri said that if there were no underlying mechanisms then one would be lost in the detail and suggested that there should be a working model to assist in predictions.

The Chair closed the session.

Reporters: Tinotenda Kakora and Anele Zondi

INTERNATIONAL LAW ASSOCIATION

JOHANNESBURG CONFERENCE (2016)

STUDY GROUP ON PRINCIPLES ON THE ENGAGEMENT OF DOMESTIC COURTS WITH INTERNATIONAL LAW

Members of the Study Group

Professor André Nollkaemper (Netherlands): *Chair*
Professor Yuval Shany (Israel): *Co-Rapporteur*
Professor Antonios Tzanakopoulos (UK): *Co-Rapporteur*

Professor Curtis A Bradley (US)
Professor BS Chimni (HQ)
Dr Frédéric Dopagne (Belgium)
Ms Shaheed Fatima QC (UK)
Professor James T Gathii (US)
Professor Yuji Iwasawa (Japan)
Professor Bing Bing Jia (HQ)
Professor Karen Knop (Canada)
Professor Ralf Michaels (US)
Justice Andreas Paulus (Germany)
Professor Anne Peters (Switzerland)
Justice Ariranga Pillay (HQ)
Professor Mónica Pinto (Argentina)
Professor August Reinisch (Austria)
Professor Anthea Roberts (Australia)

FINAL REPORT

Mapping the Engagement of Domestic Courts with International Law

by Antonios Tzanakopoulos[1]
Co-Rapporteur of the Study Group

Introduction

1. This Final Report is the outcome of the work of the Study Group on *Principles on the Engagement of Domestic Courts with International Law*. It draws on previously published work by the officers of the Study Group,[2] as well as from the Preliminary

---

[1] Associate Professor of Public International Law, University of Oxford; and Fellow of St Anne's College, Oxford. Apart from thanking the Chair of the Study Group, André Nollkaemper, its Co-Rapporteur, Yuval Shany, and all the members and researchers who submitted work, views, comments, and participated in the open and closed meetings of the Study Group, the author would like to acknowledge the excellent research assistance of Eleni Methymaki and Anna Ventouratou. Responsibility for all errors and omissions in this Final Report, however, rests with the author.

[2] See generally the work of A Nollkaemper, and especially his *National Courts and the International Rule of Law* (OUP, Oxford 2011); the work of Y Shany, and especially his *Regulating Jurisdictional Relations between National and International Courts* (OUP, Oxford 2007); and A Tzanakopoulos, mainly 'Domestic Courts as the "Natural Judge" of International Law: A Change in Physiognomy' in J Crawford and S Nouwen (eds), *Select Proceedings of the European Society of International Law* (vol 3, Hart, Oxford 2012) 155–68; and 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 Loyola of LA Int'l & Comp L Rev 133–68.

Report of the Study Group.[3] It mainly draws, however, on the discussions that took place during a number of both open and closed Study Group meetings since 2011, including in Amsterdam, London, Sofia,[4] Washington DC,[5] and Heidelberg, as well as from a number of thematic and national reports solicited from Study Group members and from scholars from around the world.[6]

2. After introducing the underlying reason for the work of the Study Group, namely the increased relevance of domestic[7] courts for international law (Part A, section I), the Final Report sets out the challenges presented by the different constitutional settings, the different methods and techniques of domestic court engagement with international law, and its different outcomes (Part A, section II). Part B of the Final Report seeks to map the postures or strategies of domestic court engagement with international law by drawing on the work submitted to the Discussion Group by its members and other scholars. Part C then discusses the grounds or reasons that emerge as justifying different strategies or postures of engagement, with a view to laying the groundwork for the normative exercise of compiling a set of principles or guidelines for the engagement of domestic courts with international law. This latter work, however, is one properly mandated to a Committee of the International Law Association, rather than the Study Group, whose work prepared the ground for such a normative exercise.

3. Before launching into the substantive discussion, the term 'engagement', chosen for the title of the Study Group's work, needs to be explained. The driving principle for the choice of the term was to avoid a binary approach (enforcement/application versus non-enforcement/breach) in favour of a functional approach: the term 'engagement' captures, in the Study Group's view, the richness of approaches of domestic courts to international law. The Study Group's aim is to try and extract some general categories of engagement from this diversity.

4. The courts of the European Union are included in the Study Group's understanding of 'domestic courts', at least to the extent that these, as functionally hybrid courts, engage in judicial/constitutional review that is akin to that normally undertaken by domestic courts.[8] This is not to question that EU courts do also operate in 'normal international law mode'.

---

[3] See International Law Association, *Report of the Seventy-Fifth Conference held in Sofia* (ILA, London 2012) 971–83.

[4] See ibid, 984–93.

[5] See International Law Association, *Report of the Seventy-Sixth Conference held in Washington, DC* (ILA, London 2014) 900–15.

[6] These reports will be made available on the Study Group's website at <http://www.ila-hq.org/en/study-groups/index.cfm/cid/1039> and a forthcoming publication. A list can be found at the end of this Final Report.

[7] The term 'domestic' is considered as interchangeable with 'national' and 'municipal' in this Final Report.

[8] See further paragraph below.

PART A: THE CHALLENGES OF MAPPING DOMESTIC COURT ENGAGEMENT

I. The Increased Relevance of Domestic Courts for International Law

a. The traditional position

5. International law traditionally treats domestic law, including domestic court decisions, as facts.[9] As a fact, a domestic court decision construing international law may be seen either as being in harmony with the international obligations of the State or as being in breach of them.[10] In the latter case the domestic court decision may create an international dispute (or allow a dispute to 'mature' so as to become internationally justiciable, as for example is the case when the rule of exhaustion of local remedies applies), or it may engage the international responsibility of the State.[11] Furthermore, domestic court decisions are to be considered elements of the practice of States, or ways through which States may express their *opinio juris* or views on the proper interpretation of their international obligations. As such, they may contribute to the formation of customary international law or to the understanding of the scope and content of treaties. This is different from domestic court decisions potentially constituting 'material sources' of international law in the sense of Article 38(1)(d) of the ICJ Statute.

6. There is little doubt that significant areas of public international law have been shaped by domestic court jurisprudence, which provided the requisite state practice and *opinio juris* for the creation of custom—the law of immunity being but one such example.[12]

---

[9] *Certain German Interests in Polish Upper Silesia* (Merits) [1926] PCIJ Ser A No 7 at 19. CW Jenks, *The Prospects of International Adjudication* (Stevens, London 1964) 552, already noted however that the general proposition that national laws are to be treated before international tribunals only as facts is 'at most, a debatable proposition the validity and wisdom of which are subject to, and call for, further discussion and review'.

[10] International courts commonly treat domestic laws, and domestic court decisions, as evidence of the breach by a State of its obligations under an international treaty or under customary law. See J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP, Oxford 2012) 52; WTO, India: *Patent Protection for Pharmaceutical and Agricultural Chemical Products* (*India-Patents*)— Report of the Appellate Body (19 December 1997) WT/DS50/AB/R [65]. See however further Article 38(1)(d) ICJ Statute and paragraph below.

[11] See Article 4 of the Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Annex to UN General Assembly resolution 56/83 (12 December 2001), UN Doc A/RES/56/83 and Commentary (2001) II(2) YBILC ('ARSIWA'); and cf generally C Eustathiadès, *La responsabilité internationale de l'État pour les actes des organes judiciaires et le problème du déni de justice en droit international* (vol 1, Pedone, Paris 1936).

[12] See the collection of essays in A Tzanakopoulos and CJ Tams (eds), *Symposium on Domestic Courts as Agents of Development of International Law* (2013) 26 Leiden Journal of International Law 531–665, with contributions by R O'Keefe, R van Alebeek, D Hovell, Y Ronen, S Olleson, and S Wittich. Another area of international law which has been shaped to some extent by the jurisprudence of domestic courts is that of international environmental law. Important cases include the *Minors Oposa* case (*Minors Oposa v Secretary of the Department of Environmental and Natural Resources*, Supreme Court of Philippines, Judgment of 30 July 1993, 33 ILM 173 [1994]) and the *Vellore Citizens Welfare Forum* case (*Vellore Citizens Welfare Forum v Union of India and Ors*, Supreme Court of India, Judgment of 28 August 1996, Air 1996 Sc 2715). See further D Bodansky and J Brunnée, 'The Role of National Courts in the Field of International Environmental Law' (1998) 7 Review of European Comparative and International Environmental Law 11; and M Anderson and P Galizzi (eds), *International Environmental Law in National Courts* (BIICL 2002).

Furthermore, since domestic courts are organs of the State, their decisions may constitute subsequent practice affecting the content of international law norms, within the meaning of Article 31(3)(b) VCLT.[13] Finally, given that domestic courts could be seen as included in the term 'judicial decisions' in Article 38(1)(d) of the ICJ Statute, they may constitute subsidiary means for the determination of rules of international law.[14]

7. The potential for conflict between the courts and the executive in the area of formation of customary international law should be highlighted at this juncture. In principle, it is only when decisions of domestic courts are *not* 'rejected' by the State's executive (in the sense of being considered and outwardly presented as *not* representing the State's practice on the relevant issue) that they are capable of contributing towards the formation or development of customary law.[15] This is because the formation or development of custom arguably requires consistent practice of all branches of government.[16] The requirement of consistency could be seen as a projection of the domestic constitutional principle of separation of powers at the international level. It guarantees that the executive or legislative branch can adopt different approaches than those taken by courts in the course of formation of international law, and thereby they may limit the impact of domestic courts on the formation of that law.[17] Conflicting practice of different branches of government could not constitute the consistent practice required for the emergence of a customary norm. In any event, it also may be that a decision by the executive is annulled or declared to be incompatible with international law by a domestic court, in which case the executive action would not necessarily be considered to express the State's *opinio*

---

[13] See *Prosecutor v Goran Jelisić*, ICTY Trial Chamber Judgment, Case No IT-95-10-T (14 December 1999) [61]; Second Report of Special Rapporteur Georg Nolte on 'Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties', UN Doc A/CN.4/671 (26 March 2014) [42].

[14] But see M Mendelson, 'The International Court of Justice and the Sources of International Law' in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP, Cambridge 1996) 63, 69 and 82; A Pellet, 'Article 38' in A Zimmerman et al (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP, Oxford 2012) 862 [321]; cf A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 International and Comparative Law Quarterly 57.

[15] See Sir R Jennings and Sir A Watts (eds), *Oppenheim's International Law: Volume I Peace* (9th edn, Longman, London 1996): '[C]ourts are not organs of the state for expressing in a binding manner its views on foreign affairs'; E Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 American Journal of International Law 241, 248; Roberts (n 13) 62.

[16] See International Law Commission, 'Identification of Customary International Law', UN Doc A/CN.4/L.869 (2015), draft conclusions 6–8; B Simma and A Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 American Journal of International Law 306; see generally also I Wuerth, 'International Law in Domestic Courts and the *Jurisdictional Immunities of the State* Case' (2012) 13 Melbourne Journal of International Law 1, 5 citing this Study Group's Preliminary Report (n 2), as well as M Akehurst, 'Custom as a Source of International Law' (1975) 47 British Year Book of International Law 1, 21–22 and Roberts (n 13) 61.

[17] See *North Sea Continental Shelf Cases (The Netherlands/Germany; Denmark/Germany)* [1969] ICJ Reports 3, 44 [74].

juris. As such, the discussion above does not necessarily imply priority of one branch of government over another in the formation of customary law.[18]

8. Even if not contradicted by the State's executive or other State organs, a domestic court's decision may still be of little or even negligible impact in the formation of customary law. States other than the forum state may also challenge the decision of the domestic court, thereby leading to contradictory State practice or *opinio juris*. Of course, this is in no way peculiar for domestic courts and simply reflects the normal process of the formation of customary international law.

9. The historically limited role of domestic courts in international law is further confirmed by the traditionally bilateralist performance structure of international obligations (*traité-contrat*). International obligations usually demand(ed) performance by one State towards another on the international plane—eg omission from intervention in its domestic affairs, abstention from the threat or use of force, default permission to innocently pass through the territorial sea, etc. Domestic courts would have little to say with respect to the performance of such obligations: the doctrine of immunity or 'act of State' would preclude them from pronouncing on another State's (sovereign) acts, while they would also traditionally avoid pronouncing on the conduct of international relations or foreign affairs of their own State, having developed a number of relevant 'avoidance techniques' to that effect.[19]

b. The reasons for increased engagement

10. The traditionally bilateralist performance structure of international law has been put under constant and significant strain in the last decades.[20] At the danger of stating the trite, more and more regulation is taking place today at the international plane, ie at a level beyond the State. The development of various areas of international law regulated by multilateral instruments, otherwise called 'sectoral regimes', do not fit within this bilateral scheme. The international law on the protection of human rights is the most obvious example of the bilateralist structure breaking down and being replaced by a multilateral framework of protection (*traité-loi*). International environmental law, aspects of the law of the sea, and other areas of international law, including international investment law, international economic law, international criminal law, international humanitarian law, and so forth, also reflect this development. The attempts then to protect general interests through the assumption of international obligations lead, in the event of a violation,

[18] But see the position of the ILA Committee on Formation of Customary (General) International Law, 'Final Report: Statement of Principles Applicable to the Formation of General Customary International Law' in International Law Association, *Report of the Sixty-Ninth Conference held in London* (ILA, London 2000) 712, 729. In discussing principle 9, the Committee notes in paragraph (e) of its commentary that 'since it is the executive which has primary responsibility for the conduct of foreign relations, that organ's formal position ought usually to be accorded more weight than conflicting positions of the legislature or the national courts'. The Committee does however go on to note the point on consistency made just above: 'But it should also be noted that, in such a case, the internal uniformity or consistency which is needed for a State's practice to count towards the formation of a customary rule may anyway be prejudiced'.

[19] See further Part A, section II, below.

[20] See generally B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Recueil des cours de l'Académie de droit international de La Haye 217.

to a lack of any identifiable 'specifically' injured State,[21] and make it more difficult to demonstrate any specific or quantifiable damage—on which all forms of reparation for internationally wrongful acts are predicated under the law of State responsibility.[22]

11. But even in traditionally bilateralist areas of international law, the latter has developed so as to remove the clearly inter-state slant in the implementation of international obligations. Indeed, traditional international law was primarily concerned with the establishment of State-to-State obligations that were to be implemented through conduct on the international plane, that is *outward-looking* obligations. States were then by-and-large free to determine what measures were required within the domestic legal order to implement these obligations, if any were required at all.

12. Today, however, international obligations are increasingly *inward-looking*. This means that they specifically enjoin States to undertake certain conduct *within their own domestic legal order*: to adopt a specific legal framework, to accord individual rights, to abstain from taking specific actions, etc. International human rights law (protection of specific rights) or international environmental law (eg curbing of emissions,[23] or obligations to grant access to information, justice, or obligations to allow participation in decision-making[24]) may be invoked as the obvious example. Still, one may also think of analogous examples from diverse fields, such as WTO law (obligations to regulate subsidies, curb dumping, adopt technical regulations within the domestic legal order in accordance with prescribed processes and on prescribed grounds, and so forth),[25] international investment law (curbing State regulatory power, even in areas of human rights, or environmental protection, in order to grant 'fair and equitable treatment' to investors—or, more simply, being bound to follow particular internationally accepted procedures in order to exercise regulatory power affecting, if only incidentally, foreign investments/investors, and so forth), international criminal law (obligations to criminalise within the domestic legal order certain behaviour defined in international treaties),[26] the international law of the sea, and even diplomatic and consular law, which traditionally required States to adopt certain conduct within their domestic legal order.[27]

---

[21] Cf Article 48 ARSIWA.

[22] See Article 31 ARSIWA and commentary.

[23] For example under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (11 December 1997, entered into force 16 February 2005) 2303 UNTS 1.

[24] For example under the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June 1998, entered into force 30 October 2002) 2161 UNTS 447).

[25] cf E-U Petersman, 'Multi-Level Judicial Trade Governance Without Justice? On the Role of Domestic Courts in the WTO Legal and Political Settlement System' (2006) EUI Working Papers Law No2006/44.

[26] For example under the United Nations Convention against Corruption (31 October 2003, entered into force 14 December 2005) 2349 UNTS 41 and the United Nations Convention against Organized Crime (15 November 2002, entered into force 29 September 2003) 2225 UNTS 209.

[27] See eg the ICJ decisions in *LaGrand* [2001] ICJ Reports 466 and *Avena and other Mexican Nationals* [2004] ICJ Reports 12, where the US was required to bring its domestic law and process into compliance with its international obligations to allow consular assistance under the 1963 VCCR. See also the flare-up between the UK and Ecuador regarding the UK's ability to withdraw the qualification of Ecuador's Embassy in London as diplomatic premises under a relevant UK

13. Penetrating the façade of the unitary State, looking at these obligations from within it, ie from the perspective of the individuals within the jurisdiction of the State, these international obligations look merely as constraints on State power: executive or legislative action needs to take place within the limits set by the State's obligations. It is domestic law that in some way enables the 'reception' of international law in the domestic legal system (and it does so in virtually all domestic legal systems, even if with significant differences[28]). Individuals (and legal entities) within the State's jurisdiction will thus regularly challenge executive action for compliance with the limits imposed on such action (challenges against legislative action are, however, more unusual) without necessarily distinguishing whether these limits have their source in domestic or international law (especially in legal contexts where international law can be relied upon before domestic courts). It is also normal for domestic courts to be called upon to police executive compliance with the limits posed on State action—this, in the final analysis, is part of their mandate. As such, individuals will turn to domestic courts employing international legal arguments, and domestic courts will thus be forced to engage with these arguments.

14. The analysis above aims to account for the increased significance of domestic courts in the interpretation, application, but also development, of international law. This significance is mainly asserted rather than proven empirically, as is the increased engagement of domestic courts with international law. It makes sense to assert that this is so, given the high visibility of domestic decisions in the last couple of decades, be it—among others—with respect to sovereign immunity, or with respect to compliance with or disobedience of Security Council sanctions, and given further the increasing interdependence of States and concurrent 'blurring of the dividing line' between international and domestic law due to the new 'directionality' of international obligations described above.[29] While empirical research needs to be undertaken to prove in specific terms this increased engagement, to delineate its scope and impact, as well as to assess the increased significance for international law of domestic court decisions, this is not the mandate of this Study Group.[30]

15. One final note of caution is necessary, however. Even if there is increased engagement of domestic courts with international law in recent years, this may be more the case in some States than in others. A recent study by a member of this Study Group demonstrates that citations to domestic case law in international law textbooks and in judgments of many international courts and tribunals come overwhelmingly from Western liberal

---

Statute of 1987: see the contributions of 16 and 17 August 2012 by R O'Keefe and D Akande, available at <http://www.ejiltalk.org>.

[28] See further Part A, section II.a, below.

[29] Benvenisti (n 14) 241–242, argues that the increased engagement of domestic courts with international law 'is part of a reaction to the forces of globalization, which are placing increasing pressure on the different branches of government to conform to global standards … Stated differently, most national courts, seeking to maintain the vitality of their national political institutions and to safeguard their one domestic status vis-à-vis the political branches, cannot afford to ignore foreign and international law'; cf Y Shany, 'National Courts as International Actors: Jurisdictional Implications' (2008) Hebrew University International Law Research Paper No. 22-08, available at <http://dx.doi.org/10.2139/ssrn.1292056>.

[30] But see for a classic statement of the assertion JG Collier and V Lowe, *The Settlement of Disputes in International Law* (OUP, Oxford 1999) 5.

democratic States in general and from a handful of those States in particular.[31] Focusing on domestic case law as evidence of the content, or even as a source, of international law may have the effect of rendering the practice of some significant States less visible to the extent that it rarely occurs in their domestic courts, or to the extent that the relevant decisions are rarely reported or not easily accessible (including because of linguistic barriers). It could also result in a disproportionate focus on accessible decisions in the domestic courts of influential, English-speaking, common law States, like the United States and the United Kingdom. A number of points could be made in this respect, drawing parallels to the relative weight to be accorded to practice coming from different States in the process of determining the emergence of customary law, noting the practice of some courts, notably the German and Israeli highest courts, of circulating (partial) translations of important judgments, and so forth. This Final Report is not the place to further discuss these issues, but they should be noted and it should also be highlighted that both the members of the Study Group and the author of the Final Report are acutely aware of such considerations.

II. The Infinite Variety of Engagement

16. The previous section aimed at laying the groundwork which potentially explains—if it does not prove—the increased significance of domestic courts for international law. But how domestic courts actually engage with international law is a perennial question that has yet to be mapped out satisfactorily. One reason for this is the 'infinite variety' of constitutional set-ups regulating the reception of international law within the domestic legal order of any given State, and the subsequent infinite variety of domestic court engagement with these rules of international law. This in part explains, if it does not justify, the application of (and thus arguably also compliance with) international law by the domestic court, as well as the denial of application of (and thus potential breach of) international law. These issues are taken up in turn.

a. Variations in the Reception of international law

17. The traditional distinction between **monism** and **dualism** leads to the two traditional methods of reception of international law into domestic law, thus corresponding roughly to **incorporation** and **transformation** respectively. If the domestic constitution adopts a monist approach, international law is (ideally) 'automatically' considered part of domestic law and thus incorporated in the legal order of the State. If, by contrast, the domestic constitution takes a dualist stance, then international law remains an external body of law that must be transformed into domestic law through the adoption of some domestic (usually legislative) act in order to lay claim to application in the domestic jurisdiction and before domestic courts.

18. This picture is already rather simplified.[32] In reality domestic law, even if it adopts a 'monist' stance, sets a number of prerequisites before 'incorporating' international law, or distinguishes between different sources of international law—eg, treaties ratified by

[31] A Roberts, *Is International Law* International? (forthcoming: OUP, Oxford 2017). References were overwhelmingly made to US and UK case law, followed by French, Canadian, Australian, German and Israeli case law, and to a lesser extent Italian, South African, Dutch, and Belgian case law.

[32] See eg A Paulus, 'The Emergence of the International Community and the Divide between International and Domestic Law', in J Nijman and A Nollkaemper (ed), *New Perspectives on the*

the US explicitly form part of the law of the land, while there is no specific provision for customary law;[33] by contrast, the UK arguably 'incorporates' customary law into the common law, or rather treats it as a source of the common law,[34] but requires transformation of treaties before there can be any domestic application.[35] The position is similar in Canadian law,[36] while a similar position has also been judicially developed in Israel.[37] The Greek constitution provides for the 'incorporation' of treaties ratified by Greece, which however takes place through the adoption of a formal law to that effect each and every time, while it makes little relevant provision for customary law, although it states in general terms that 'generally accepted rules of international law' constitute an 'inalienable part' of Greek law.[38] The South African Constitution determines that both treaties and custom are directly applicable in the South African legal order, but requires transformation of treaties unless they are self-executing, while custom is considered as automatically incorporated only if it is not in conflict with the Constitution or legislative acts.[39] In Germany, general international law is automatically incorporated with precedence over contrary legislation, whereas treaties of a political or legislative nature are incorporated by a law of parliament and share, in principle, their rank.[40] Constitutional orders may introduce distinctions even within the same source of international law: the German,[41] South African and Turkish constitutions distinguish between human rights treaties and other treaties as regards their legal effects in the domestic legal order; the legal position in the Argentinean legal order has nowadays evolved into prioritizing a 'constitutional bloc' consisting of the Constitution and human rights obligations, followed by international treaties and finally ordinary law;[42] the Austrian constitution grants a specific treaty (the ECHR) constitutional rank; the Swiss constitution grants quasi supra-constitutional status to *jus cogens* norms.[43] Notably, the Sri Lankan Constitution subjects all of international

Divide between National and International Law (OUP, Oxford 2007) 228 – 234 for an argument that the juxtaposition between monism and dualism masks the pluralism of legal orders.

[33] The position in Israel is similar: see the *Report on Israel* (2013) [1]–[2].

[34] See in detail for the complex position of customary international law under UK law R O'Keefe, 'The Doctrine of Incorporation Revisited' (2008) 79 British Year Book of International Law 7–85 and cf the *Report on England* (2015) [35]–[39].

[35] See also the *Report on England* (2015) [35]–[39]. See further the *Report on South Africa* (2013) (2)–(3) for the similar position that State.

[36] *See the Report on Canada* (2013) 3–4.

[37] See the *Report on Israel* (2013) [1]–[2].

[38] See Article 28(1) of the Constitution of Greece (2008), available at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

[39] See the *Report on South Africa* (2013) (2)–(3).

[40] Cf Articles 25 and 59 of the German Basic Law; and BVerfG, Beschluss des Zweiten Senats vom 15. Dezember 2015 - 2 BvL 1/12 [35]ff, available at <http://www.bverfg.de/e/ls20151215_2bvl000112.html> (partial transl in Press Release No 9/2016 of 12 February 2016, available at <www.bverfg.de>); cf A Paulus, 'Germany' in D Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement* (CUP, Cambridge 2009) 217–219.

[41] Article 1(2) of the German Basic Law provides for a special status of core human rights treaties: see Beschluss des Zweiten Senats vom 15. Dezember 2015 (n 39) [76] with further references.

[42] See generally the *Report on Argentina* (2015).

[43] It should be noted that the 'Swiss' notion of *jus cogens* is broader than that currently acceptable under international law, but Swiss courts will not consider a treaty void for conflicting with the broader notion of *jus cogens*. See generally the *Report on Switzerland* (2013).

law to the Constitution and to ordinary law, but provides that investment treaties are only subject to the Constitution.[44]

19. Within this great variety, many further variations are possible. These relate to the hierarchical standing of international law, or of particular sources of international law, in the domestic hierarchical pyramid, some of which have been incidentally mentioned in the preceding paragraph. International law (or particular sources, or particular elements within sources, such as human rights treaties) may be given a standing equal to that of ordinary law, superior to that of ordinary law, or even superior to that of the domestic constitution. Further, even 'automatic' incorporation does not guarantee the applicability of international law in the domestic legal order, as domestic law may allow 'direct effect' of certain sources of international law only, or of some elements within such sources only (eg self-executing treaties), or may permit the local constitution or even subsequent or more special ordinary law to override international law. This brief sketch demonstrates that the distinction between monism and dualism is simplistic and often unhelpful: not only may both approaches be adopted within a given domestic legal order, but it can be further argued that there is no such thing as 'monism' properly so-called: in all circumstances, and as far as domestic courts are concerned, the reception of international law into the domestic legal order is regulated by domestic law itself, whether more or less stringently.

20. On the other hand, the position of international law on legal hierarchy and relevance is clear, and quite indifferent to any variations in its reception by domestic law. Domestic law (of any importance or hierarchical standing) may never constitute justification for the non-compliance by a State with its international obligations.[45]

b. Variations in the Application of International Law

21. Depending on the relevant domestic constitutional ordering, to which domestic courts are of course bound, the latter may proceed to give effect to international law, relying on relevant constitutional principles, or they may be able to refuse its application for a variety of reasons. Domestic courts have devised[46] a wide range of **blunting rules** or **moderating techniques** that moderate the effects of both **monism**/**incorporation** and **dualism**/**transformation**. To start with incorporation, there is no guarantee that this will lead to direct application of international law by the domestic court. Domestic courts have devised a variety of avoidance techniques, which allow them to blunt the otherwise sharp edge of constitutional requirements to apply international legal provisions: these include the doctrine of **non-justiciability** (wherein one might include the **political question** doctrine), the **act-of-State** doctrine, denials of **standing**, and the doctrine of **non-self-execution** of treaties, among others. Even the avoidance of substantive international law questions through **according immunity** (whether to a foreign State under international law or to the forum State under domestic law) may be seen as such a blunting technique,

[44] See the *Report on Sri Lanka* (2013) 6.

[45] See Article 3 ARSIWA and cf Article 27 of the Vienna Convention on the Law of Treaties (23 May 1969, entered into force27 January 1980) 1155 UNTS 331.

[46] Though the position may be taken that the blunting or moderating techniques 'stem' from domestic law and its provision as to the position of international law in the domestic legal system, and thus domestic courts merely apply, rather than devise, these techniques.

even though of course we have to recognize that respecting immunity itself may be a form of application of international obligations.

22. The increase in inward-looking norms of international law creates a larger contact area between domestic and international law, which in turn has the potential of leading to greater conflict between the two sets of rules. The importance of this development is illustrated in recent domestic cases which might be taken as signaling a '**reactive turn** (of domestic courts) **to domestic law**' in the face of 'inconvenient' international law. This 'reactive turn' might be considered another blunting technique, similar in function to the ones described above. The difference here is that the domestic court does not refuse to pronounce on a matter involving international law (as for example in cases of non-justiciability or act-of-State), but rather may accept that international law is implicated but deliberately—if sometimes implicitly—reject its application. A number of recent cases can be seen as falling in this category: reactions to Security Council sanctions, such as *Kadi*[47] in the EU courts and *Ahmed*[48] in the UK courts, form one such group; while cases like *Medellín*[49] in the US Supreme Court form another, to the extent that the latter court refuses to apply the binding decision of an international court. The constitutional acceptance of 'treaty override' by contrary domestic legislation provides another example of the 'reactive turn to domestic law'.[50] Whether these groups of cases do indeed form separate categories, or belong in the same category, is something that requires further study.[51] We may be dealing here with a type of constitutional review where fundamental values are invoked against (other) international law rules as part of a process of normative contestation. Such an approach would seem to conceive the legal order as unitary and attempt to hierarchically order various rules and principles within the unitary legal system. Or we may be dealing with a claim of hierarchical structuring of separate legal orders, whereby the international legal order is subjected to the court's domestic legal order (which from the perspective of the international legal order would be a clear breach of international law as indicated in paragraph above).

23. Conversely, there are ways in which domestic courts may give indirect effect to international law even if the latter has not been **transformed** through a domestic act as required by the relevant constitutional framework. This is mainly done through the principle of **consistent interpretation**, which has been introduced through judicial practice,[52]

[47] Joined Cases C-402/05 P and C-415/05 P [2008] ECR I-6351; cf Case T-85/09 *Kadi II* [2010] ECR II-5177; and Joined Cases C-584/10 P, 593/10 P and C-595/10 P *Kadi II* [2013] ECLI:EU:C:2013:518.

[48] [2010] UKSC 2.

[49] 552 US 491 (2008).

[50] BVerfG, Beschluss des Zweiten Senats vom 15. Dezember 2015 (n 39).

[51] Some views are set out in Part B below.

[52] For reasons of space, only a brief overview will be given here. The *locus classicus* is the US Supreme Court's *Charming Betsy* principle: *Murray v The Charming Betsy* 6 US 64, 118 (1804); see also *MacLeod v US* 229 US 416, 434 (1913); *F Hoffmann-La Roche Ltd v Empagran SA* 542 US 155, 163 (2004). See further on this C Bradley, *International Law in the US Legal System* (2nd edn, OUP, New York 2015) 15–18. In Germany the rule of consistent interpretation is seen as flowing from the *Völkerrechtsfreundlichkeit* of the Basic Law, and has been reiterated by the Federal Constitutional Court in 74 BVerfGE 358, 370; see also 128 BVerfGE 326, 367–372. In Switzerland the principle of consistent interpretation is called '*Schubert-Praxis*' and flows from the relevant practice of the Federal Supreme Court. A principle of consistent interpretation exists in Australia, as enunciated by the High Court in *Kruger and ors v Commonwealth of Australia*

or even through constitutional entrenchment,[53] in a significant number of domestic legal orders. Taking a fairly broad-brush approach to the principle, it effectively institutes a presumption in favour of harmony of domestic law with international law. The domestic court will presume that the domestic legislator did not mean to introduce legislation in breach of the State's international obligations, and will thus seek to interpret domestic law 'in the light of' or 'in accordance with' the State's international obligations, ie with international law. The presumption is of course rebuttable, but the difficulty of rebutting it fluctuates between different legal orders, some making the presumption virtually irrebuttable, others allowing its rebuttal even by necessary implication, as discussed below.

24. Consistent interpretation typically requires at least some ambiguity in domestic law, which needs to be construed, in order to invite the application of international law. However, different domestic courts have taken a variety of positions on the degree of ambiguity required to initiate the interpretative process, some requiring none at all.[54] Further, consistent interpretation in some cases refers merely to treaties, or it excludes from application constitutional texts, and so forth. A field of domestic law where the interpretative application of international law may be of particular interest is administrative law. If statutes authorizing administrative actions are subject to a presumption of consistency with international law, then so is the relevant administrative action, which may be challenged and brought under judicial scrutiny.

25. Domestic courts have also sought to apply other interpretative principles which are similar to the principle of consistent interpretation. One such principle is that of **legitimate expectations**, which has been used by Australian and Scottish courts and by the Privy Council.[55] It effectively construes treaty ratification (among others, possibly)

reported in 118 ILR 371, 374, 377–379. In New Zealand there exists a very strong presumption of conformity with international law: see P Sales and J Clement, 'International Law in Domestic Courts: the Developing Framework' (2008) 124 LQR 388, 393–394; as it does in Canada, both with respect to treaty obligations and obligations under general international law: *R v Hape* [2007] 2 SCR 292; 2007 SCC 26 [53]; *B010 v Canada (Citizenship and Immigration)* 2015 SCC 58 [47]–[48]; cf K Knop, 'Here and There: International Law in Domestic Courts' (1999-2000) 32 New York University Journal of International Law and Policy 501. South African courts also employ the principle of consistent interpretation: *AZAPO and ors v South Africa and ors* [1996] ZACC 16 [26]. Italian courts engage in a rather peculiar construction with results similar to those when adopting a principle of consistent interpretation: they consider international law rules as special norms who are not superseded by later (domestic) general norms. See B Conforti, 'National Courts and the International Law of Human Rights' in idem and F Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff, The Hague 1997) 3, 11–12. As to the United Kingdom, there is (a) a presumption of compatibility in the common law regarding unincorporated treaty obligations; and (b) a statutory provision in the Human Rights Act 1998, which transforms the ECHR, which imposes a similar presumption. Finally, the ECJ has adopted a principle of consistent interpretation of EU law with international obligations of the EU: see Cases C-286/90 *Poulsen* [1992] ECR I-6019 [9]; and C-308/06 *Intertanko* ECR I-4057 [51].

[53] See the *Report on South Africa* (2013) (3)–(4).

[54] See for example the *Report on England* (2015) [27]–[31]; the *Report on South Africa* (2013) (5); and the *Report on Canada* (2013) 20.

[55] See for example *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. There have been contradictory decisions in English courts regarding the doctrine of legitimate expectations deriving from the signature and ratification of an unincorporated treaty, see *Report on England* (2015) [33.3].

as a promise on which it allows basing some doctrine of promissory estoppel. Finally, what may be seen as a most potent principle of interpretation is that of **legality**. It holds that the domestic legislature may not be considered as derogating from or abrogating an international right or duty save when it does so explicitly. In effect, this principle may lead to an almost irrebuttable presumption of conformity with international law, though in practice the strength of the presumption again varies.[56]

26. Finally, domestic courts may use international law as a way to '**understand**' the world, and thus domestic legislation, and not just as a method to interpret domestic law in order to avoid a breach of the State's international obligations.[57] In this conception of interaction between international and domestic law, international law provides a set of definitions which help the domestic court *understand* domestic legislation rather than *override* it. Examples could include the (controversial) use of international materials to understand the content of 'cruel and unusual punishment' in domestic law[58] and to interpret a presidential authorization to use force.[59] Another such example is the use of the Alien Tort Claims Act, a one-sentence long statute almost two centuries old, as a vehicle for examining the human rights-related practice of other States in US courts.[60]

27. All of the techniques described in paragraphs – above (which can also be positioned on a spectrum ranging from more to less rigid techniques) we may still call **blunting techniques**, as we did with the techniques described in paragraphs – (which we also called 'avoidance' techniques). This is because both sets of techniques each blunt the sharp edges of incorporation and transformation respectively.

28. To summarize, the main scheme so far positions the two **main techniques**, that of **incorporation** and that of **transformation**, at the opposite ends of a spectrum; but a number of **blunting rules** or **moderating techniques** immediately come into play and position the various legal orders all along the spectrum: **a first set of blunting rules** mainly moderate the impact of **incorporation**, pushing towards the transformation end of the spectrum, while **a second set of blunting rules** moderate the impact of the requirement for **transformation**, and pull towards the incorporation end of the spectrum.

29. An observation is called for with respect to the paradoxical counter-move indicated in paragraph above: it refers precisely to the seemingly paradoxical moderation of the opposing main positions of incorporation and transformation, so that irrespective of the local constitutional set-up, blunting or moderating may lead to similar outcomes in differently internationally inclined domestic legal orders. This paradoxical counter-move is revealing, and perhaps points towards blunting or moderating as dependent not on the local constitutional set-up, but rather on the substance of the relevant domestic and international rules at stake in each instance of engagement. Once again then, the substance of the rules at stake seems to be decisive as regards the engagement of the domestic court with international law. This is not meant to ignore that, in some cases, other factors, such

[56] See the *Report on England* (2015) [27]ff, [33.3].

[57] See for example ibid, [33.2] citing *McIntosh v HM Advocate* [2003] 1 AC 1078, in which an unincorporated international treaty was used to 'illuminate' the object and purpose of the relevant domestic legislation.

[58] See *Roper v Simmons* 543 US 551 (2005).

[59] See *Hamdi v Rumsfeld* 542 US 507 (2004). See further Bradley (n 51) 309–311.

[60] See the litigation under the *Alien Tort Claims Act* 28 USC §1350 (1789); cf Roberts (n 13) 76–77.

as the individual preferences of specific judges, may also explain some of the inclination or disinclination to apply international law. An attempt to discuss such factors is made in Part C, after the engagement of domestic courts with international law has been mapped in Part B.

30. To the operation of these main and moderating techniques we should add another interesting variation which also heavily depends on the substance of the rule at stake and is currently understudied: this is the use of '**consubstantial norms**'. Consubstantial norms are norms which happen to exist both at the international and at the domestic level, and provide for the same substantive regulation (ie, they have the same substance).[61] One example of such a norm could be the right to an effective remedy for violation of a vested right; or other fundamental human rights[62] which are guaranteed at both the international and most domestic levels.[63] In that sense 'consubstantial norms' could be likened to 'multi-sourced equivalent norms', which have been argued to exist at the international level.[64] The commitment of domestic constitutions to international law and human rights[65] as well as the references by domestic courts to their domestic and international counterparts[66] can be relevant to the concept of consubstantial norms. The reason for including the impact of such consubstantial norms in the Study Group's consideration of the various methods of engagement of domestic courts with international law is that they may serve to both align with and to contest international rules—as will be demonstrated in Part B, below.

---

[61] The term 'consubstantial' is originally a theological term which seeks to describe the Holy Trinity as being 'of the same substance', ie 'consubstantial' (ομοούσιος). See further Tzanakopoulos, 'Domestic Courts in International Law', 142–4. The reference to 'same' substantive regulation need not (and probably should not) be understood as implying identical regulation—sometimes the domestic norm may be more protective of a particular right or value, but in order to be considered 'consubstantial' with an international norm it may not be *less* protective or may not strike a *different balance* from the one struck by the international norm. International law thus serves as the minimum standard of protection.

[62] For a discussion of the term 'fundamental rights' and its relationship to 'human rights' from an international-domestic comparative law perspective, see A Tzanakopoulos, 'Judicial Dialogue in Multi-level Governance: The Impact of the *Solange* Argument' in OK Fouchald and A Nollkaemper (eds), *The Practice of International and National Courts and the (De-Fragmentation) of International Law* (Hart, Oxford 2012) 185, 210–15.

[63] Indeed there is a feedback loop in the protection of fundamental human rights, with the American and French declarations of the eighteenth century influencing both the Universal Declaration of Human Rights and the first international treaties for the protection of human rights. These international documents then influenced the adoption of human rights protections in constitutions of States emerging from colonial rule or dictatorships. See ibid, and for examples see the *Report on Anglophone Africa* (2015) 10: many Anglophone African constitutions contain human rights protections influenced by international human rights instruments. See also the *Report on Sri Lanka* (2013) 2–3.

[64] See generally for the concept T Broude and Y Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms' in eidem (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart, Oxford 2011) 1–15.

[65] Cf Article 6(3) TEU; Article 1(2) German Basic Law; Preamble and Article 1(a) South African Constitution.

[66] Cf PM Huber and A Paulus, 'Cooperation of Constitutional Courts in Europe' in M Andenas and D Fairgrieve (eds), *Courts and Comparative Law* (OUP, Oxford 2015) 281.

Before turning to this point, however, the variations in the outcome of domestic court engagement with international law must be briefly mentioned.

c. Variations in Outcome

31. A crucial aspect of the engagement of domestic courts with international law is whether, in the final analysis, the domestic court's 'intervention', as it were, leads to alignment with, or rather to breach of, international law. This is also a most difficult field of study. Not only does such an enquiry assume that international law always has fixed and objectively ascertainable contents;[67] it also ignores the fact that every purported violation of international law has within it the seeds of a potential change in the law. In customary law, a 'violation' by a domestic court may lead to the emergence of a new customary rule, or to the modification of an existing one. In treaty law, a 'violation' could evolve into a 'subsequent practice' which establishes the agreement of the parties regarding the interpretation of the treaty (in the sense of Article 31(3)(b) VCLT respectively) or causes the treaty to fall into desuetude or obsolescence.[68] This creates an interesting feedback loop, where domestic court engagement may both violate and develop international law. One crucial question then is how to distinguish between breach of the law and its development, or the emergence of new law. In addition, to the extent that rules of international law are invoked to challenge other rules of international law, a breach of one set of norms may promote compliance with another set of norms, and may even have implications for their hierarchical standing.

32. There are examples of instances that can be cited as substantiating the feedback loop referred to in paragraph above: the Greek and Italian courts' jurisprudence on sovereign immunity could (and perhaps sought to) effect a change in the customary law of immunity, and it may have been successful were it not for conflicting practice of other domestic courts and finally for the intervention of the International Court of Justice, which put an end to the discussion for the foreseeable future.[69] Similarly, Greek court jurisprudence on the definition of 'ship' under the 1992 CLC/FUND Conventions has caused the States parties to consider adopting the Greek courts' interpretation over the one they preferred earlier (and on the basis of which the Greek court decisions were in clear violation of the relevant instruments).[70] The jurisprudence of UK courts has led the European Court of Human Rights to change its interpretation of provisions in the ECHR in some instances.[71]

33. It thus appears that in a number of cases it will be very hard to determine with any certainty whether a particular domestic court decision is in alignment with or in breach of international law—much will depend on other States' reactions (or lack thereof) to

[67] On this see further paragraphs and below.

[68] MG Kohen, 'Desuetude and Obsolescence of Treaties' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP, Oxford 2011) 350.

[69] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Reports 99.

[70] *Marine Env'l Services MC and anor v 1992 IOPC Fund* (6 July 2006) ILDC 856 (GR 2006); cf Record of Decisions of the October 2012 Sessions of the IOPC Funds' Governing Bodies Doc IOPC/OCT12/11/1 (2012) [4.6.3]–[4.6.6]; see further Record of Decisions of the October 2015 Sessions of the IOPC Funds' Governing Bodies Doc IOPC/OCT15/11/WP.1 (2015) [2.1.5].

[71] Eg with respect to the admissibility of hearsay evidence under Article 6 ECHR: *R v Horncastle* [2009] UKSC 14 and cf *Al-Khawaja and Tahery v UK* (App Nos 26766/05 and 22228/06) (ECtHR Grand Chamber 2011) [146]–[147].

the decision, as well as to the possibility of 'corrective intervention' or 'monitoring' by an international judicial organ, such as the International Court of Justice (but also the European Court of Human Rights, or the WTO dispute settlement organs, or an ad hoc or ICSID arbitral tribunal, among other possibilities).

PART B: MAPPING ENGAGEMENT

34. The difficulty in discerning any single principled approach to the engagement of domestic courts with international law is obviously the result of the great variety of domestic constitutional treatment of international law as to its position within the domestic legal framework, and the subsequent variations in the engagement of domestic courts with international law and in the outcome of such engagement, as described in Part A above. The most crucial part of the Study Group's work was to map the practices and methods of engagement and their potential outcomes. The main part, Part B, of this Final Report is concerned with mapping the relevant variety in domestic court engagement with international law, rather than seeking to explain what might be made of that variety. Part C then proceeds to identify the possible grounds behind domestic courts opting for one or the other strategy of engagement described in this part. But before moving on the mapping exercise, some preliminary comments are in order.

35. In the first phase of the work, members of the Study Group agreed that, in the interest of making the project manageable, the Study Group should focus on norms 'at the edge', that is to say on norms of international law that seem to suffer from 'legitimacy' deficits and are thus likely to provoke and encounter the resistance of domestic courts. While the term 'legitimacy' is itself contested, what is meant here is norms of international law that may be seen as problematic in three aspects: (a) **source legitimacy concerns**—such as those created by norms emerging from a vague law-making process, such as that of customary international law, or decreed by non-elected international organs, such as the secondary law of international organizations; (b) **procedural legitimacy concerns**—such as those created by norms produced in some manner which is procedurally incompatible with national traditions or otherwise problematic; and (c) **outcome/content legitimacy concerns**—such as those created by the potential or perceived conflict of international norms with deeply rooted local constitutional sensitivities.

36. The focus on norms 'at the edge' pulls with it the focus of the elaboration of principles of engagement of domestic courts with international law: problematic rules make for problematic responses by the organs charged with their interpretation and application, and thus the Study Group sought to focus on instances of domestic court resistance to, contestation of, but also development of international law. However, it became clear, in view also of the work submitted to the Study Group in the course of its operation by its members and by other scholars, that an exclusive focus on problematic norms 'at the edge' might present a skewed picture of the engagement of domestic courts with international law, overemphasizing resistance and contestation as a form of engagement. As such, the following three sections of this Part B generally map the engagement of domestic courts with all possible norms of international law, viewed statically (section I), dynamically (section II), and finally from the perspective of monitoring (section III). The concept of norms 'at the edge', however, continues to play a role in this analysis, as indeed it does in the context of identifying reasons for particular strategies or postures of engagement discussed in Part C.

I. Engagement Viewed Statically: Postures or Strategies

37. Whatever the contents of any norm of international law may be, there are broadly three **ideal types** of **strategy** or **posture**[72] of domestic court engagement with international law, qualified by the outcome of such engagement. These are: the **posture** or **strategy of avoidance** (where the question of international law is altogether dodged); the **posture** or **strategy of alignment** (where—irrespective of the prescription of the constitutional framework, or even on the basis of an interpretation of such prescription which, on its face, seems to point towards avoidance—an attempt is made to align with international law or at least to harmonize domestic law or practice with international regulation); and the **posture** or **strategy of contestation** (where domestic law is ostensibly used as a method to contest the generally accepted content of existing international law, such as in cases like *Kadi* and possibly *Medellín*).

38. The three ideal types described above and elaborated on further below match Hirschmann's three categories of **exit** (avoidance), **voice** (contestation), **loyalty** (alignment).[73] However, further differentiation is required within each ideal type, and this is the purpose of the subsections that follow.

a. Avoidance

39. **Avoidance** is the general posture or strategy of a domestic court avoiding the application of international law in circumstances where the latter may be applicable. Such avoidance can be **evasive** or **affirmative**. It should be noted at the outset that the legislature or executive may also adopt a practice of avoidance by delaying ratification of treaties which would require changes in domestic law, or by allowing ratification/ratifying only with broad reservations which aim to shield domestic law from change.[74] In any event, the term avoidance should not be considered as being necessarily negative. The court may be forced by its own domestic law to avoid or refuse the application of international law, as described below. And delays in ratification or the making of reservations may be designed to ensure full compliance with all applicable international obligations.

40. **Evasive avoidance** is where international law is not applied without any relevant argument being made and without any discussion by the court. The court simply remains silent where the application of international law is plainly called for (and may even have been pleaded by the parties),[75] in a sort of 'willful blindness'.[76] An instance where this might be the case is where the legislature has passed a relevant law which

[72] The difference between 'strategy' and 'posture' is that the former term conveys a sense of genuineness in the approach, whatever the underlying purpose, while the latter term may convey a more rhetorical, rather than genuine, position. The two terms however are used interchangeably in this Final Report.

[73] See generally AO Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970).

[74] See the *Report on Switzerland* (2013) 6.

[75] For examples see the *Report on Israel* (2013) [31]–[32]; the *Report on Belgium* (2014) 9–10; the *Report on Canada* (2013) 19; the *Report on International Human Rights Law* (2015) 10; and the *Onondaga* litigation, reported in ILA Committee on the Implementation of the Rights of Indigenous Peoples, *Johannesburg Conference Draft Report* (2016) 18–19, available at <http://www.ila-hq.org/download.cfm/docid/22EA2347-3AC2-41A0-849732487DA9A7C4>.

[76] For the expression see the *Report on Canada* (2013) 19.

may not fully reflect or may diverge from applicable international law. The domestic court may be bound to apply the relevant domestic law and may thus choose to silently ignore relevant international norms. An example is where States have passed immunity legislation, such as for example the UK, the US, Argentina, Japan, India, and so forth, with the expected result of prompting reliance on the domestic rather than the relevant international norms.[77] A countervailing trend which has been noted in some jurisdictions is for the executive to (be allowed to) intervene in order to prompt the domestic court to comply with international obligations on immunity.[78]

41. Avoidance can also be **affirmative** (or **professed**). This is the case when the court considers the application of international law but explicitly rejects it, as this is, in the court's view, the appropriate position under domestic law. Some of the blunting or moderating mechanisms described above, such as non-justiciability or non-self-execution, may well lead to affirmative avoidance.[79] For example, the finding by a domestic court that internationally binding norms protecting social rights are programmatic and non-executable norms will lead it to determine that it is not up to it to apply these norms and to ensure compliance with them.[80] Similarly, the adoption of a dualist position with respect to treaties will allow (or impose on) courts to disregard international law, as compliance with it is seen as the responsibility of other State organs.[81] This will essentially leave it to the executive to comply with these norms uncontrolled by the domestic court, or to the legislature to produce consubstantial obligations which will allow the domestic court to weigh in. This can also be the outcome of the application of the principle of consistent interpretation, another moderating or blunting mechanism, when the presumption that the principle establishes is relatively weak and can be readily resisted by an argument that the law being interpreted is not ambiguous (or, for common law jurisdictions dealing with customary international law, that the common law does not require development).[82]

42. Affirmative is also the avoidance that ostensibly relies on international law to argue, though clearly wrongly, that on its own terms the latter is not applicable. A historical example of such affirmative avoidance is apartheid South Africa, where the application of customary law was rejected through the denial of its customary status: domestic courts would require 'universal' acceptance for a rule to be considered customary international law.[83] By setting the bar so high, it was virtually guaranteed that almost no norm would be granted customary international law status by a South African court.

---

[77] See the *Report on Belgium* (2014) 4–5; and the *Report on India* (2013) 23 [53] and 25ff [57]ff.
[78] See ibid and cf *Tachiona v US* 386 F.3d 2005 (2d Cir. 2004).
[79] See the *Report on South Africa* (2013) (14); the *Report on Israel* (2013) [26]–[30]; the *Report on Canada* (2013) 16ff; and the *Report on International Humanitarian Law* (2013) 3–5. See further ILA Committee on the Implementation of the Rights of Indigenous Peoples, *Johannesburg Conference Draft Report* (2016) 6, referring to instances where lawsuits by indigenous peoples in the domestic courts of Bolivia where found inadmissible even despite the fact that Bolivia has transformed relevant international law into domestic law.
[80] See the *Report on Switzerland* (2013) 7.
[81] See the *Report on Argentina* (2015) 2–3; the *Report on Anglophone Africa* (2015) 8; and the *Report on India* (2013) 5–6 [11]–[12] and 7ff [16]ff.
[82] See the *Report on England* (2015) [27]; and the *Report on Canada* (2013) 20.
[83] See the *Report on South Africa* (2013) (11)–(13).

b. Alignment

43. **Alignment** can come in a number of variations: **simple** or **'fair weather'** alignment; **overriding** alignment; **consubstantial** alignment; and **'hyper'**-alignment (or alignment 'on steroids'). Alignment, and in particular hyper-alignment is a strategy or posture particularly favoured by newer or smaller States that may wish to not appear parochial.[84] It is instructive in this connection that the US in the eighteenth century could be considered as 'bending over backwards' to (be seen as) align(ing) with international law. But it is by no means exclusively so, and much will depend on the particular variation of alignment in each case. The variations outlined above are now examined in turn.

44. **Fair weather alignment** is basically alignment with international law in run-of-the-mill, politically unproblematic situations. It is difficult to report on such alignment as examples abound in day-to-day life but, having no 'special' characteristics, they do not necessarily constitute 'newsworthy' instances. These may include instances where international law is cited explicitly in support of relevant domestic law, as well as other cases where the perceived content of the international and domestic law converge. Fair weather alignment becomes meaningful only when seen against the background of other types of alignment, and most crucially against the light of avoidance or contestation in politically charged circumstances. This is much like an omission, which becomes evident and meaningful only against the light of an obligation to act.[85] By contrast, the need to engage with politically charged rules, such as for example the rules of international humanitarian law in the context of an armed conflict in which the State whose courts are called upon to apply it is engaged, may well lead to (affirmative) avoidance or contestation.[86]

45. **Overriding alignment** consists in the application of international law by the domestic court over conflicting domestic law. Determining the existence of normative conflict is in itself a very difficult matter, as 'apparent' conflicts may be resolved through interpretation, leading some to only consider irresolvable conflicts as 'genuine'.[87] However, interpretation being an art rather than a science, it is difficult to draw a bright line between 'apparent' and 'genuine' conflicts. A rather large area could be said to be gray between the two extremes.

46. Consistent interpretation can be seen as a technique for producing consubstantial alignment, when a domestic court interprets domestic law in conformity with international obligations of the State (generally if a statute or domestic law is at least somewhat ambiguous). But in some instances a very strong presumption of consistency of domestic law with international obligations, even in the face of little or no ambiguity in domestic law, may produce overriding alignment. This is for example the case in Belgium, where domestic courts have resorted in consistent interpretation in circumstances where the

[84] See the *Report on Albania* (2013) 1. See further Part C below.

[85] Cf V Lowe, *International Law* (OUP, Oxford 2007) 41, 92, on *opinio juris* shedding light on the practice of 'not doing something' in the context of customary international law formation.

[86] See the *Report on International Humanitarian Law* (2013) 2–9. See further paragraphs above and below respectively.

[87] See generally E Roucounas, 'Engagements parallèles et contradictoires' (1987) 206 Recueil des cours de l'Académie de droit international de La Haye 9; and M Milanovic, 'Norm Conflict in International Law: Wither Human Rights?' (2009) 20 Duke Journal of Comparative and International Law 69.

domestic norm being interpreted did not at all seem ambiguous,[88] as well as in South American States where international human rights law has been relied upon even to change a given Constitution (or its up to that point predominant interpretation).[89] It is also the case in South Africa where the Constitutional Court has taken the position that the only reasonable interpretation of domestic legislation is an interpretation that is consistent with international law.[90]

47. Further, it can be argued that allowing challenge of domestic law or domestic normative acts on the basis of international law despite the availability of blunting rules which could lead to avoidance (and so would not avoid the challenge to domestic law) also produces overriding alignment. This is again the case in Belgium, where non-self-executing international law norms have been relied on in order to seek annulment of domestic normative acts, to seek compensation, and even to challenge criminal charges.[91] Similar examples can be found in the area of international investment law, where certain domestic courts have applied the provisions of an international investment agreement in order to reverse conversion of contracts from one currency to another (though there is practice on the part of domestic courts for either evasively avoiding these issues, or affirmatively avoiding them by reference to blunting techniques).[92]

48. Both consistent interpretation and the non-invocation of blunting techniques leading to avoidance have also shaped the position in Argentina, which may be seen as having transitioned from a period of affirmative avoidance to one of overriding alignment.[93]

49. **Consubstantial alignment** is the application by the domestic court of domestic norms that are consubstantial with the international norms. As already mentioned above, the strategy or posture of consubstantial alignment can be independently adopted by a domestic court,[94] but it can also be forced upon it by the executive or legislature producing consubstantial obligations (ie ratifying a treaty only once they have changed domestic law to reflect the relevant international obligations, producing consubstantiality, in particular leading to *preemptive* consubstantial alignment).[95]

50. The question that emerges is *when* the action of the legislature or executive in producing domestic norms leads to (evasive) avoidance (see paragraph above) rather than consubstantial alignment. One could easily argue that the passing of domestic law is a

[88] See the *Report on Belgium* (2014) 4–5.
[89] See the *Report on South America* (2015) 18ff.
[90] See the *Report on South Africa* (2013) (5)–(6).
[91] See the *Report on Belgium* (2014) 6ff.
[92] See the *Report on International Investment Law* (2013) [Kjos].
[93] See generally the *Report on Argentina* (2015), esp 5ff.
[94] See the *Report on India* (2013) 15–17 [34]–[37].
[95] See the *Report on Switzerland* (2013) 6 and consider the practice of Eastern European States in bringing their domestic law in conformity with the ECHR prior to joining the Council of Europe and having the obligation to do so. See also the practice of the UK where some statutes do not directly incorporate a treaty but are meant to give effect in whole or in part to the provisions of an unincorporated treaty. (Note that here the term 'incorporation' is meant to signify transformation into domestic law in the terminology used in Part A of this Report.) These statutes are meant to be interpreted with reference to the unincorporated treaty, producing consubstantial alignment. See the *Report on England* (2015) [21]–[23] and cf the *Report on Canada* (2013) where a similar approach of both full transformation and consubstantial transformation is used.

method for applying international law in the domestic legal order rather than for avoiding it (or for contesting its content). No easy answer can be given to this question, ie the distinction between evasive avoidance and consubstantial alignment is not easy to draw in these circumstances. Much will depend on what we consider the *content* of the specific international norm to be, and on whether we consider that the relevant domestic norm is consistent with that content. This highlights the potential for all categories to collapse into another or to alternate depending on context and perhaps also on the particular reader's viewpoint. It is however no reason not to undertake the mapping exercise, and to argue whether a particular domestic court engagement falls within one or the other category. Any such argument is essentially an argument as to the content of the relevant norms or (which amounts to the same thing) their interpretation, and this will always be an issue on which views will occasionally diverge, sometimes widely.[96]

51. Consubstantial alignment primarily takes place when the domestic court applies domestic law in a way that is aligned with what is required of the relevant State under relevant international law, even without any reference to such international law. The domestic law applied is consubstantial with the State's international obligations, and so the outcome is one of alignment with these international obligations. It should be noted that international law does not require that it be either incorporated or transformed into domestic law, and generally makes no provision on the way in which States will elect to comply. What is required is simply that compliance ensues, by whatever means. This is evident, for example, in the way the European Court of Human Rights has treated exhaustion of local remedies: the Court does not require that specific ECHR rights be explicitly pleaded before domestic courts. It only requires that the *substance* of these rights has been pleaded, even if solely under domestic law.[97]

52. However, because of this peculiar characteristic of consubstantial alignment, ie that no explicit reference to international law is required for consubstantial alignment to take place, showcasing examples may be difficult at times. Much will depend on the analysis of the specific case, of its result, and of the requirements of international law, by each scholar or commentator.[98] An example, however, could be the *Tsilhqot'in* case in the Supreme Court of Canada: while the domestic court did not refer to international law, its analysis of the concept of indigenous rights over land was seen as being substantively in line with relevant international law.[99] Another example could be the approach of some Russian courts to indigenous peoples' rights.[100] Similarly, the US Supreme Court's approach in *Roper v Simmons* on the application of the death penalty to minors could be seen in this light.[101] Further examples can be seen essentially in many cases in which an international court, say the ECtHR, has reviewed the action of domestic courts and has

[96] See further paragraphs above and below.

[97] See *Castells v Spain* (App No 11798/85) Judgment of 23 April 1992 [32]; *Ahmet Sadik v Greece* (App No18877/91) Judgment 15 November 1996 [33]; *Azinas v Cyprus* (App No56679/00) Judgment of 28 April 2004 (Grand Chamber) [40]–[41]; *Gäfgen v Germany* (App No 22978/05) Judgment of 1 June 2010 (Grand Chamber) [142]–[146].

[98] See again paragraphs and above, and below.

[99] See ILA Committee on the Implementation of the Rights of Indigenous Peoples, *Johannesburg Conference Draft Report* (2016) 17–18.

[100] See ibid, 26.

[101] See *Roper v Simmons* (n 57).

found no violation of an international obligation, say the ECHR, even if these courts did not explicitly refer to international law in the context of the relevant case. In many cases the domestic law that was applied will be considered consubstantial with the international obligations of the State under the ECHR, or the domestic court will have interpreted that law in consubstantial alignment with the ECHR, so as for alignment to ensue.

53. The principle or technique of consistent interpretation may also produce consubstantiality and thus consubstantial alignment. This will be the case where the domestic courts see no reason to depart from the plain meaning of legislation if it is consistent with international law, or where they engage in broad interpretation of domestic legislation by relying on relevant (not directly applicable or unincorporated) international law.[102]

54. Domestic courts have on occasion confirmed the 'consubstantiality' of domestic and international norms, in particular in the area of fundamental human rights: examples include the Swiss Federal Tribunal in *Nada*,[103] as well as the Canadian Federal Court in *Abdelrazik*,[104] and the German Federal Constitutional Court in the 'student fees' and 'forced treatment' cases.[105] In other cases, domestic courts will often give preference to 'consubstantial' domestic law over applicable international law, but will clearly indicate that applicable international norms will be taken into consideration in the construction of the consubstantial domestic norms.[106] This is likely to produce consubstantial alignment; but when it deviates from or challenges the generally accepted content of an international norm it will constitute affirmative or consubstantial contestation, on which see further in the next subsection.

55. **Hyper-alignment** is a particular category of alignment where the domestic court may go beyond what international law actually requires (even though relying explicitly on international law), finding international obligations where none actually exist or are at least debatable.[107] An example of such alignment 'on steroids' can be seen in the case of Albania, where the domestic criminal law did not provide for a reopening of proceedings

[102] See for example the *Report on Sri Lanka* (2013) 6, 8; the *Report on Canada* (2013) 11–15; and the *Report on England* (2015) [24]ff with respect to fully unincorporated treaties. See also ILA Committee on the Implementation of the Rights of Indigenous Peoples, *Johannesburg Conference Draft Report* (2016) 7–8, for examples of Chilean courts 'completing' the understanding of indigenous peoples' rights under domestic law by reference to international treaties, to some of which Chile had not even become a party; see further at 11–12 for the similar position adopted by the Supreme Court of Belize.

[103] *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative Appeal Judgment, Case No 1A 45/2007, Switzerland, Federal Tribunal (14 November 2007) 133 BGE II 450; ILDC 461 (CH 2007) [6.2].

[104] *Abdelrazik v Canada (Minister of Foreign Affairs)* [2010] 1 FCR 267; 2009 FC 580 [50]–[52].

[105] 128 BVerfGE 306 – Forced Treatment I; 134 BVerfGE 1, 34 [16] – Student Fees.

[106] See the *Report on Belgium* (2014) 6; see also the decision of the German Federal Constitutional Court on remuneration for translators, 134 BVerfGE 229 [88]; see further the discussion of international human rights law being used as a guide for the interpretation of Canadian law in ILA Committee on International Human Rights Law, *Johannesburg Conference Draft Report* (2016) 17–18, available at <http://www.ila-hq.org/download.cfm/docid/0375EBFB-FC78-4B52-8A9930EF64098049>. Cf the practice of EU courts of relying on both the ECHR and the ICCPR (and relevant jurisprudence thereunder) in analyzing fundamental rights under primary EU law, as for example in *Kadi II*: Case T-85/09 *Kadi II* [2010] ECR II-5177 [176]-[177].

[107] See the *Report on Albania* (2013) 1; and the *Report on India* (2013) 18ff [41]ff.

in the case that a violation of ECHR has been found by the ECtHR. This occasioned a split between the Albanian Constitutional Court and the Albanian Supreme Court (of Cassation), with the former ordering the latter to 'legislate' into existence such grounds for reopening proceedings, going beyond what was at the time the accepted interpretation of the ECHR.[108] In similar circumstances the Polish courts adopted the position that the lack of such grounds for reopening proceedings was regrettable, but also that it was not up to the domestic court to create such grounds.[109] Albanian courts have also relied on treaties not binding on Albania or on soft law in order to disregard domestic law in other instances of hyper-alignment,[110] while the Kosovo courts have also taken similar positions.[111] Sri Lankan courts also refer to regional instruments that are not binding on Sri Lanka, such as the ECHR.[112] Sri Lankan courts also can be considered as engaging in hyper-alignment in those cases where they have determined that soft environmental principles establish binding obligations on governmental authorities and become part of the common law.[113] Chilean courts and the Supreme Court of Belize have relied on international instruments not binding on the relevant States in the construction of indigenous peoples' rights under domestic law.[114] Other relevant examples of hyper-alignment are provided by African courts,[115] in particular Kenyan courts since the adoption of the 2010 Constitution.

56. One final such instance, which goes clearly beyond even consubstantial alignment to alignment on steroids is provided by Albanian courts in the context of the question whether the Rome Statute of the International Criminal Court is compatible with the Albanian Constitution. In responding to the question, the Albanian courts not only found the Rome Statute to be so compatible, and protecting human rights as the Albanian Constitution does, but went so far as to consider the ICC as the highest criminal court in the *Albanian* legal order.[116]

c. Contestation

57. Contestation also comes in a fair number of variations: **affirmative**; **negatory**; and **consubstantial**. Notably, contestation can refer to applicability or to content (interpretation): as such, affirmative contestation refers clearly to content; negatory contestation refers clearly to applicability (but this may be so due to the perceived content of the norm); and consubstantial contestation requires going beyond the posture of the court to determine whether what may seem as negatory contestation is in reality partial consubstantial alignment, using the contestation of the rule as a means for affecting its content. These are dealt with in turn below.

---

[108] See the *Report on Albania* (2013) 4.

[109] Ibid.

[110] See G Zyberi and S Sali, 'The Place and Application of International Law in the Albanian Legal System' in S Rodin and T Perišin (eds), *Judicial Application of International Law in Southeast Europe* (Springer, Berlin 2015) 86, 99–102.

[111] See the *Report on Kosovo* (2015) 14–15.

[112] See the *Report on Sri Lanka* (2013) 6.

[113] Ibid.

[114] See n 101 above.

[115] See the *Report on Anglophone Africa* (2015) 8.

[116] See the *Report on Albania* (2013) 10.

58. **Affirmative contestation** consists primarily in the domestic court accepting the validity or applicability of the international law norm but giving it a meaning different from that which is generally accepted, indicating thus that it wishes to change the content of the norm or that it perceives it as different from what is generally accepted. An example of such practice could be that of Israeli and Indian courts formally accepting the applicability of international law in a number of instances, but effectively rejecting its full application by diverging from the perceived as generally accepted meaning.[117] This may well be the result of the court explicitly or implicitly deferring to the position of the executive on the matter (of the interpretation of the international rule).[118] A special type of such affirmative contestation can appear when a domestic court diverges from the interpretation of international law given by an international court in a judgment, even when that is binding on the State, as sometimes happens in UK[119] and US practice.[120] Finally, attempts at consistent or harmonious interpretation may result in affirmative contestation as described here, when the court can be seen as diverging from the generally accepted content of an international norm in order to avoid conflict with a domestic norm.[121] This could be seen as 'reverse' consistent interpretation in that domestic courts tend to interpret international law in a manner consistent with the provisions of domestic law (and even sometimes policy) rather than the other way around.

59. Another instance of affirmative contestation could be the one where a domestic court contests the content of an international rule by relying on another international rule. This is the case for example in the practice of Belgian courts that challenges the content of the rules of immunity of international organisations in cases where their application would result in breach of the international obligation to respect the right to a fair trial and / or to an effective remedy.[122] Similar (though far more isolated) examples can be found in the practice of UK courts,[123] which may have been influenced by the practice of the Belgian courts. The decision of South African courts to find a decision of the Tribunal of the Southern African Development Community directly applicable domestically, and to ignore the immunity of Zimbabwe in the process,[124] is also a potential example of affirmative contestation pitting one international rule against another, as are the South African cases regarding the arrest of Bashir on the basis of an arrest warrant issued by the International Criminal Court.[125] The debate between Human Rights Monitoring Bodies,

---

[117] See the *Report on International Humanitarian Law* (2013) 2–4; the *Report on Israel* (2013) [21] ff; and the *Report on India* (2013) 26–27 [58]–[60].

[118] See the *Report on International Humanitarian Law* (2013) 2–4.

[119] See *R v Lyons* [2003] 1 AC 976 [27] (Lord Hofmann) and see further the *Report on England* (2015) [17].

[120] See *Medellín v Texas* 552 US 491 (2008).

[121] What Judge Nussberger has called 'fake harmonious interpretation' in her dissent in *Al-Dulimi v Switzerland* (App No 5809/08) (ECtHR Grand Chamber 2016).

[122] See the *Report on Belgium* (2014) 9.

[123] See *Entico Corp Ltd v United Nations Educational Scientific and Cultural Association (UNESCO)* [2008] 531 EWHC (Comm).

[124] See the *Report on South Africa* (2013) (10)–(11). Cf the *Report on Anglophone Africa* (2015) 10, for the avoidance of enforcement of the same decision by the courts of Zimbabwe, which relied on relevant constitutional law.

[125] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Ors* (27740/2015) [2015] ZAGPPHC 402 (High Court) (24 June 2015); and *Minister of Justice and*

such as the HRC or the CAT as to the proper interpretation of international human rights norms (and their relationship to rules of immunity) can also be seen in the light of affirmative contestation.[126] A rare example of affirmative contestation of this sort could be the decision of the Albanian Constitutional Court to review an international agreement for the delimitation of maritime zones between Albania and Greece not only against the Albanian Constitution (which would properly come under the preceding paragraph), but also against the general international law of the sea.[127]

60. Finally, domestic courts called upon to recognize and enforce foreign arbitral awards may engage in such types of contestation when reviewing international law application in the award, in accordance with rules of international law such as those under the 1958 New York Convention.[128] Notably, when review takes place not on the basis of the New York Convention but on the basis of domestic law which reflects, for example, the relevant UNCITRAL Model Law (which in turn reflects the New York Convention to a large extent), the type of contestation produced is consubstantial contestation,[129] on which see further below.

61. **Negatory contestation** consists in the denial of the validity or applicability of an international law norm, perhaps due to its (perceived) content. The principle of consistent interpretation may lead to negatory contestation of international law. As explained above, the strength of the interpretative presumption that the legislature did not mean to violate international law in making domestic law varies. For example in Switzerland, while consistent interpretation is used successfully in order to achieve alignment, occasionally it may be hard to apply in the context of federal acts (whether stemming from the legislature or the people through referenda) which clearly meant to disregard or violate applicable international obligations of the State.[130] In particular, if the legislator was aware of the conflict between international law and a proposed domestic law, and chose to legislate in breach, consistent interpretation will not be able to produce alignment, but the court will have to adopt a position of negatory contestation.[131] The position is similar in the UK, as well as other States.[132]

Constitutional Development and Ors v Southern African Litigation Centre and Ors (867/15) [2016] ZASCA 17 (Supreme Court of Appeal) (15 March 2016).

[126] See the *Report on International Human Rights Law* (2015) 9.

[127] *See the Report on Albania* (2013) 10.

[128] See the *Report on International Investment Law [Kulick]* (2015) 6–7; for an example see the decision of The Hague District Court in the *Yukos* case, where as the court of the seat of the arbitration it quashed a US$ 50bn arbitral award for lack of jurisdiction: *The Russian Federation v Veteran Petroleum Ltd* (Case No C/09/477160 / HA ZA 15-1); *The Russian Federation v Yukos Universal Ltd* (Case No C/09/477162 / HA ZA 15-2); and *The Russian Federation v Hulley Enterprises Ltd* (Case No C/09/481619 / HA ZA 15-112), Hague District Court, Judgment of 20 April 2016, available at < http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:4230>.

[129] Cf the *Report on India* (2013) 14–15 [33].

[130] See the *Report on Switzerland* (2013) 11ff.

[131] Ibid.

[132] But see *Report on Canada* (2013) 11, noting the Supreme Court of Canada's requirement in *R v Hape* (n 51) [53] of 'unequivocal legislative intent to default on an international obligation' to support an argument that the presumption of conformity is rebutted.

62. Further – and clearer – examples of negatory contestation can be seen in the practice of domestic courts ignoring clearly applicable international law norms, perhaps due to the fact that they find their application objectionable in the circumstances. An example is the *Yahoo* case in Belgian courts, where the bilateral US-Belgium treaty on mutual assistance in criminal matters is systematically ignored, despite being clearly applicable.[133] An even clearer example can be seen in the area of international investment law where the application of an international investment agreement would result in the breach of state aid rules also applicable in the host state under EU law (which in this connection can be seen as domestic law).[134]

63. **Consubstantial contestation**: What may look at first as negatory contestation may in reality involve partial consubstantial alignment with one rule of international law, thereby seeking to affect the content of another rule of international law, namely the rule whose application or content is contested. An example of such consubstantial contestation is provided in the reactions of some domestic courts and the EU courts to targeted anti-terrorist sanctions imposed by the UN Security Council under Chapter VII of the UN Charter. These sanctions obligate UN member States to, among others, freeze the assets and ban the travel of individuals and legal entities designated by the Security Council through the relevant Sanctions Committee.[135] However, there was at first, and for some significant period of time, no way for those subjected to the sanctions to challenge their designation. Attempts to challenge the sanctions in domestic courts were normally bound to fail for lack of jurisdiction of domestic courts over the UN, or because of UN immunity, and so forth. At some point, nonetheless, domestic courts started considering the challenges, directed as they were against the domestic acts implementing the sanctions rather than directly against the UN act. In cases like *Kadi* in the Court of Justice of the European Union[136] (as well as *Kadi II*)[137] and *Ahmed* in the UK Supreme Court,[138] these courts reviewed the impugned domestic acts for compliance with the courts' domestic law (EU primary law and UK law respectively), and annulled them for violating fundamental human rights guaranteed under that law. This effectively forced the relevant States into an impossible situation: deprived of the domestic legal basis for implementing the UN measures, they had to either disregard their own courts or disobey the Security Council. From the perspective of international law this is clearly a problematic result: domestic law cannot serve to justify the breach of an international obligation.[139] However, the domestic law relied on in these cases, the protection of the fundamental human right to

---

[133] See the *Report on Belgium* (2014) 10.

[134] See *Ioan Micula and ors v Romania,* ICSID Case No ARB/05/20, Award of 11 December 2013 and the *Report on International Investment Law [Kjos]* (2013) 12.

[135] See for example the regime imposed by Security Council Resolution 1267 (1999) and kept continuously in force ever since, with most significant updates coming in Security Council Resolutions 1333 (2000); 1730 (2006); 1904 (2009); 1988 (2011) and 1989 (2011), the latter two splitting the regime up for persons or entities associated with the Taliban and Al-Qaeda respectively; and 2252 (2015) extending the 1267/1989 regime to persons or entities associated with ISIS (or ISIL, or IS, or Da'esh).

[136] Joined Cases C-402/05 P and C-415/05 P [2008] ECR I-6351.

[137] Case T-85/09 *Kadi II* [2010] ECR II-5177; Joined Cases C-584/10 P, 593/10 P and C-595/10 P [2013] ECLI:EU:C:2013:518.

[138] [2010] UKSC 2.

[139] See paragraph above.

a fair trial and to an effective remedy, also constitutes international law. The contestation mounted by the domestic courts thus can be seen as consubstantial contestation: contesting the content of one rule of international law (the obligation imposed by the Security Council) because of the application, even if indirect, of the substance of another rule of international law (the right to a fair trial and to an effective remedy).[140]

64. A similar analysis can be made of the decision of the Italian Constitutional Court that found the ICJ Judgment in *Jurisdictional Immunities of the State* contrary to the Italian Constitution.[141] It is beyond question that the Italian Constitutional Court's decision constitutes a challenge to the ICJ's determination of the content of the international law of immunity on the basis of domestic constitutional law.[142] The contestation was founded, however, on the substance of the universally protected right of access to a court, even if by reference to its protection under the Italian Constitution. Essentially the Italian court can be seen as attempting to re-open the debate regarding the relationship between the international rule of sovereign immunity and internationally protected human rights, offering an alternative reading based on consubstantial domestic law. By contrast, the decision of the US Supreme Court in *Medellín* cannot be likened to the examples above, and does not constitute consubstantial contestation, based as it is on the peculiarly American 'procedural default' rule, which finds no corresponding rule (in substance) in international law.[143]

65. Following the discussion on consubstantial contestation above, it can be argued that all types of contestation here examined may be also distinguished on the basis of whether they constitute **local contestation** or **internationally-minded contestation**. In the former case the domestic court is contesting the international rule by reliance on a domestic law principle which finds no corresponding principle in international law (thus 'local' contestation).[144] In the latter case the domestic court contests the content of an international rule by reliance on another international rule (affirmative contestation as described in paragraphs – above). Or it contests the content of an international norm by reliance on domestic law, but in cases where a parallel can be drawn between the domestic law relied on and international rules which are 'consubstantial' with that

[140] See generally A Tzanakopoulos, 'Collective Security and Human Rights' in E de Wet and J Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP, Oxford 2012) 42–70, for the argument that in relying on the right to a fair trial and to an effective remedy, cases like *Kadi* and *Ahmed* are effectively resolving a conflict between international norms (Chapter VII UN Security Council decisions and fundamental human rights) or alternatively reinterpreting Article 103 of the UN Charter.

[141] See Decision 238/2014 of the Italian Constitutional Court, available at <http://www.diritticomparati.it/2014/10/sentenza-n-238-anno-2014-repubblica-italiana-in-nome-del-popolo-italiano-la-corte-costituzionale-composta-dai-signori.html> [in Italian].

[142] See M Lando, 'Intimations of Unconstitutionality: The Supremacy of International Law and Judgment 238/2014 of the Italian Constitutional Court' (2015) 78 Modern Law Review 1028, 1038–9.

[143] *Medellín* (n 119) could be seen as an example of local contestation.

[144] Which could also be regarded as a form of avoidance, the difference being however that contestation indicates some discomfort with the content of the international rule while avoidance merely ignores the international law rule.

domestic law (consubstantial contestation).[145] Or, finally, the contestation may focus on the question of who is the authoritative interpreter of rules of international law, with the domestic court claiming—even if implicitly—a privileged role in this connection.[146] This final example could also be deemed as constituting affirmative contestation as described in paragraphs – above.

II. Engagement Viewed Dynamically: Development

66. Courts, as organs of the State, necessarily affect the content of norms of international law whenever they engage with them. They serve as agents of development (or harbingers of corrosion and decay) of international law norms. This is the dynamic aspect of their engagement with international law. All the strategies or postures discussed in section I above may also reflect a **strategy or posture of development** of international law, as they may either seek or achieve to set in motion the process of adjustment or change of the relevant international rules. Domestic courts do not single-handedly develop international law: they merely may set that process in motion, or continue it and consolidate change. But this they can do, and it is then up to other actors to weigh in (on which see paragraph below).

67. One question that immediately comes up in the context of discussing domestic courts as agents of development of international law is whether the domestic court should be cognizant of its role as such an agent of development. This question cannot be answered with a high degree of certainty, however: it is difficult enough to determine what the domestic court is doing, and how it is engaging with international law, let alone to determine what it thinks it is doing (except on rare occasions where courts explicitly articulate their views on their role in developing international law[147]). Further, it cannot be excluded that for a number of reasons domestic courts may not wish to engage in brazen statements as to their role and purpose. And even if they make statements as to what they think they are doing, these may well be geared towards shielding them from criticism or appeasing the various direct and indirect addressees of the decision. Thus, when called upon to choose between **what domestic courts are saying they are doing** and between **what they are actually doing**, the approach of this Final Report has generally been to assess what the court was actually doing. For example, there are instances where the domestic court may be paying lip service to an international legal rule, but then proceed to merely apply domestic law, or to avoid the relevant question altogether, thereby resulting in a violation of international law. Conversely, there are arguably instances where the domestic court, even though it makes no reference to international law, and even explicitly rejects its application, may be actually applying an international norm in deciding a case, even if only in its 'consubstantial' incarnation.

---

[145] Eg in *Kadi* and *Ahmed* discussed above (see text at nn 135–137) domestic courts relied on constitutional rules protecting the right of access to a court and to an effective remedy, ie recognized aspects of the internationally protected right to a fair trial.

[146] The example here could be *Sanchez Llamas v Oregon* 548 US 331 (2006), where the domestic court claimed that it was the ICJ that read a provision in an international treaty wrongly, whereas the domestic court was reading it correctly (in the instance reference was to Article 36 VCCR).

[147] See for example the Israeli Supreme Court in *Ajuri* [40], available at <http://elyon1.court.gov.il/Files_ENG/02/150/070/A15/02070150.A15.pdf>.

68. Even when domestic courts do not consciously engage in development as a strategy or posture, development of the law may still ensue. This is because domestic courts engaging with international law rules may set in motion a process which will call for and perhaps lead to the reaction of (a) **other domestic courts**, so as for practice to accumulate either for or against the position taken by the domestic court (also: *horizontal dialogue*, ie between courts in different domestic legal orders); (b) **international courts**, which may be seen as 'monitoring' the engagement of domestic courts with international norms (also: *vertical dialogue*, see further section III below); and finally (c) **States**, who are the principal lawmakers and the ultimate monitors of the engagement of both domestic and international courts with international norms that they (the States) have made (on which see also further section III below).

III. Informal 'Monitoring' of Engagement

69. The engagement of domestic courts with international norms, and the consequent impact on the content of such norms, is subject to an informal process of '**monitoring**', ie to decentralised **control** and **corrective intervention**. Domestic courts are accustomed, when acting within the domestic legal order, to functioning under the corrective control of the legislature. This sort of corrective intervention is far less ubiquitous in the decentralised legal system that is international law. Informal processes of monitoring domestic court engagement with international law are varied and diffuse, but such informal monitoring may be undertaken by international courts. An example is the *Jurisdictional Immunities of the State* case before the ICJ:[148] here the actions of Greek and Italian courts led to a dispute which was submitted to the ICJ. The ICJ reversed an attempt at the development—or erosion—of the international law of immunity that had been initiated by the domestic courts or by States (eg through reaction to and protest against the decision of a domestic court of another State).[149] But this may still not be the final word, as further reaction on the part of domestic courts has followed, with the Italian Constitutional Court engaging in (consubstantial) contestation.[150]

70. Given the paucity of international judicial settlement of disputes, judicial law-making by domestic courts that impacts on international law, while subject to informal and diffuse international monitoring, requires much more vigilance in order to be kept within acceptable limits, and in order to have a **developing** rather than a merely **corrosive effect** on international regulation (which could be cast as a form of fragmentation).[151] In the final analysis, the ultimate guardians will be the actual law-makers, the States, which also 'monitor' the engagement of domestic courts with international law. The State can seek to influence (by intervening in a case) or finally reject the position of its own domestic courts (by legislating to overrule it) or of the domestic courts of other States (by making protests or presenting claims to their States for violation of international law).

---

[148] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* [2012] ICJ Reports 99.

[149] cf Roberts (n 13) 64ff.

[150] See paragraph above.

[151] cf Knop (n 51) 506; and Shany (n 28) 27ff.

PART C: PRINCIPLES OF ENGAGEMENT?

71. Elaborating a set of principles of engagement would require, in addition to several other considerations, a determination of the **reasons** behind the choices of domestic courts with regard to their techniques and strategies of engagement with international law. Establishing the reasons for domestic courts opting to avoid or to contest or to align with international law in given circumstances, evaluating them as positive or negative from an international law perspective, and considering the costs of each strategic choice, would allow the elaboration of guidelines and practice directions for domestic courts. Significant work needs to be done in order for such guidelines, principles or practice directions to be elaborated, and this is beyond the remit or capacity of the Study Group.

72. As a contribution to the mapping exercise as to the engagement of domestic courts with international law, this Final Report presents some thoughts on the reasons for the adoption of the various strategies or postures of engagement, and the role of the various techniques developed by domestic courts in this respect. This is meant to assist further work in the direction of setting out a set of principles on the engagement of domestic courts with international law, possibly by a Committee to be established by the International Law Association.

73. Before giving some thoughts on the reasons, it should be mentioned (as it already has been in the other parts of the Final Report)[152] that the mapping of strategies or postures in Part B is not open and shut, as it depends on consensus regarding the content of the various rules of international law. The various categories may even collapse into one another depending on the observer's viewpoint and in particular her conception of the content of the international rule at stake. Just as it was highlighted in paragraph above that the passing of domestic law could be seen as both a method for applying international law in the domestic legal order and as a method for avoiding it (or for contesting its content), it could equally be argued that deference by the domestic court to the executive's interpretation of a particular treaty can be cast as avoidance (avoiding to engage with applicable international law) as easily as it can be cast as alignment (it is the executive that negotiated and concluded the treaty and thus has a better understanding of its content). Much will depend on one's evaluation of the content of the relevant law and the decision of the domestic courts. Some of these considerations may be imposed by virtue of constitutional provisions or principles in the domestic legal order, but they also constitute reasons why the domestic court has opted for a particular strategy or posture. But it is difficult to determine whether a court is 'hiding behind' constitutional constraints in order to avoid engagement with international law, or whether it is convinced that this is the correct position under its domestic law. What remains clear, from the perspective of international law, is that domestic courts can take widely diverging positions on the same issue. In the context of the exercise of discretion given to the State under international law, for example, some domestic courts may refuse to exercise that discretion, as they do not see themselves as the appropriate organ for this;[153] other courts may step up to the plate to obligate the State to exercise its discretion under international law in

[152] See paragraphs and above.

[153] See *R v Keyn (*The *Franconia* case) (1876) 2 Ex D 63.

the particular manner decided by the court.[154] But this does not mean that the mapping exercise is pointless, nor does it mean that one should not attempt to set out the potential reasons for the adoption of the various strategies or postures adopted by domestic courts.

74. The strategy or posture adopted by domestic courts will depend to some degree a number of variables, partly identified in Part A of this Report as the challenges for mapping domestic court engagement with international law. The first such variable, as evident also from the preceding paragraph, is the domestic constitutional provision on the relationship of international and domestic law, and the various blunting mechanisms developed by and available to the courts for moderating the effects of these provisions. These can be used by domestic courts to shift the posture more towards avoidance or more towards alignment than a plain reading of the constitutional instrument or rules would suggest.

75. Another variable is the relative position of the State concerned in the international community or its strategic choice about approach to international law. Newer, smaller, or developing States (and their courts), as well as States that place a high premium on their reputation as supporters of the international 'rule of law' and international cooperation, may wish to promote or consolidate their position as well respected members of that community by adopting and encouraging their courts to adopt a strategy or posture of alignment, occasionally even going into hyper-alignment. The same goes for States emerging from the status of pariah States, such as South Africa post-Apartheid. By contrast, powerful States, who are long-standing members of the international community may engage in contestation in its various guises, whether mounting local (constitutional) resistance and turning away from international law, or seeking to influence its content and development (occasionally also through consubstantial alignment rather than open contestation). Further, domestic courts in States undergoing radical (if still constitutional) change may look to international law as a way to protect themselves against themselves—ie to resist or to calm down constitutional but radical change. This may occasion a strategy or posture of alignment, perhaps even hyper-alignment.

76. A further variable, also identified as a challenge in Part A, is the type of rules involved in the adjudication. It has become apparent in Part B of the Report that the domestic courts of particular State do not exclusively conform to one particular strategy or posture, but may shift between them. These shifts can be explained in various ways, including by determining how politically or otherwise problematic the international rule and compliance with it is. It may be relatively easy to adopt a strategy or posture of alignment to politically unproblematic rules (or in circumstances which make alignment with the rules unproblematic) (fair weather alignment). In more problematic cases of politically- or value-laden rules, such as human rights or international humanitarian law rules, domestic

[154] See the *Korean 'Comfort Women'* case, Korean Constitutional Court (Judgment of 30 August 2011) 2006Hun-Ma788: Korean courts force Korea to pursue dispute settlement with Japan on the matter: this is because the discretion given to the Korean State under international law has to be structured in accordance with the Korean constitutional provisions on human rights. Cf the decisions of the Canadian courts in *Canada (Prime Minister) v Khadr* [2010] 1 SCR 44; 2010 SCC 3; and *Abdelrazik* (n 103).

courts may be more inclined to engage in avoidance or contestation.[155] It should be noted however that there are examples of domestic courts engaging with politically problematic international rules, such as those on the rights of indigenous peoples, in a manner which produces consubstantial alignment.[156]

77. Occasionally, strategies or postures of engagement may also roughly map on to the type of rule involved in terms of its 'directionality' (see Part A section I.b above). It is easy to surmise that avoidance will be the preferred strategy of engagement with outward-looking, horizontal rules of international law.[157] But within inward-looking norms things are less clear: whereas rules that obligate the state to regulate cross-border private relations[158] may occasion a larger degree of alignment (and development), vertical inward-looking norms which regulate the relationship between the State and those within its jurisdiction may occasion all types of engagement depending on their (perceived) specific content and the interests at stake. This is so in part because transnational rules are rather laxly supervised by either international courts or States. Domestic courts are in fact the main agents applying treaties including such rules, and indeed the treaties themselves envision domestic courts as the main agents of enforcement. As such, domestic courts are relatively comfortable interpreting the sometimes vague language of these rules (eg child 'in intolerable situation'), which in a purely horizontal or vertical context they might have found simply too vague, and opted to defer to the executive.

78. A number of other variables may play a role in this respect, and they have been identified by the Study Group, but may be too difficult to study in any exhaustive manner. These include whether and to what extent counsel have pleaded international law before the domestic court, and the quality of these pleadings. Anecdotal evidence suggests that domestic courts rely heavily on good argument on the part of counsel, and this would make sense: domestic court judges are not international law scholars and good argument will assist them in properly dealing with the international law issues in the case (and vice versa). A related factor is the way that international law is employed by counsel before the court: it may be used by the claimant or applicant as a sword to attack a normative act or government position; but it may also be used by the government as a shield to defend against an attack by the claimant or applicant. The way that international law is used, against the background of the relative merits of the case, may affect the disposition of the domestic court towards it. A further factor is the general disposition of the domestic court or judge towards international law in general. A most important factor relates also to the

[155] See generally the *Report on Israel* (2013) and cf the Swiss courts' position that the ICESCR is not directly effective, in contrast to most other human rights instruments in the domestic legal order, in the *Report on Switzerland* (2013) 8.

[156] See n 101 above.

[157] Note however that some seemingly outward-looking, horizontal rules are actually also inward-looking, and indeed specifically addressed to domestic courts (at least in part). The rules of immunity are such an example, and they occasion both alignment and contestation in their various incarnations.

[158] Sometimes called 'transnational rules', these inward-looking rules are found in numerous international treaties such as the Convention on the International Sale of Goods, the Hague Convention on the Civil Aspects of International Child Abduction, the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, among others. Countless domestic court decisions refer to the rules in these treaties, while in dualist States they always get transformed into domestic law, even if simply by scheduling.

independence of the judiciary in the relevant State. The problem with all these factors, however, is that they are all to some extent subjective. Hence the difficulty in studying them in an exhaustive manner.

79. A final variable is the certainty and frequency of supervision or monitoring, in particular by international courts. While in general international law there is the possibility of supervision or monitoring being exercised very occasionally, in the context of regional human rights treaties, especially those establishing courts with quasi-compulsory jurisdiction as their monitoring organs, supervision is much more certain and frequent. This, in large part, will occasion more alignment (as avoidance will not be appreciated by the monitoring court), though it also has the potential of leading to contestation.

List of Reports by Study Group members and invited scholars referred to in the Final Report

1 Thematic Reports

1.1 M Kanetake, *Report on International Human Rights Law* (2015)
1.2 HE Kjos, *Report on International Investment Law* (2013)
1.3 A Kulick, *Report on International Investment Law* (2015)
1.4 S Weill, *Report on International Humanitarian Law* (2013)

2 National Reports

2.5 EM Belser and R Oleschak, *Report on Switzerland* (2013)
2.6 F Dopagne, *Report on Belgium* (2014)
2.7 G van Ert, *Report on Canada* (2013)
2.8 S Fatima, *Report on England* (2015)
2.9 M Freitas Mohallem, *Report on South America* (2015)
2.10 R Gunaratne, *Report on Sri Lanka* (2013)
2.11 M Killander, *Report on Anglophone Africa* (2015)
2.12 M Pinto and N Maisley, *Report on Argentina* (2015)
2.13 Z Ratniece, *Report on Kosovo* (2015)
2.14 OG Schwartz, *Report on Israel* (2013)
2.15 H Woolaver, *Report on South Africa* (2013)
2.16 R Yadava and SP Kumar, *Report on India* (2013)
2.17 G Zyberi and S Sali, *Report on Albania* (2013)

STUDY GROUP ON THE PRINCIPLES ON THE ENGAGEMENT OF DOMESTIC COURTS WITH INTERNATIONAL LAW

WORKING SESSION

Monday, 8 August 2016, 2.00pm

Chair: Professor Mary Footer (UK)

The Chair welcomed attendees and introduced the panel, composed the Chair of the Study Group and the CoRapporteurs.

Professor André Nollkaemper (Netherlands) described the circumstances under which the Study Group was established six years ago. Since its inception, the Study Group had been mandated to explore and evaluate the principles that govern domestic courts (both technique and procedure). Through its work in evaluating these principles, the Study Group had come up with elements or questions. These included the question on how to assess the work of domestic courts, the reasons behind the choice of a particular technique or a specific alignment, how to evaluate these practices, and whether it was possible to establish guidelines which would confront the work of national courts.

Professor Nollkaemper indicated that, in order to evaluate or provide guidelines on the work of domestic courts, it was appropriate to look at what domestic courts were doing by engaging them. Domestic courts needed to be engaged to determine the reason why some courts were more affirmative while other courts rejected international law. He stressed that the mandate on evaluation and assessment was not discharged and he indicated the reasons for this.

Before concluding his remarks and handing over to first CoRapporteur, Professor Nollkaemper introduced the first challenge, being the difference of practices on the reception of international law in a domestic system. He indicated that what needed to be done to surmount this challenge was a matter to be decided at the present session.

Professor Antonios Tzanakopoulos (UK) presented the final report of the Study Group entitled "Mapping the Engagement of Domestic Courts with International Law."

During his introductory remarks, Professor Tzanakopoulos described how the report was compiled. He stressed that the report was compiled by taking into account various materials from previously published works by the officers of the Study Group, as well as from the preliminary report of the Study Group. He indicated the discussions that took place during a number of both open and closed meetings of the Study Group since 2011, including in Amsterdam, London, Sofia, Washington DC, and Heidelberg, as well as from a number of thematic and national reports solicited from Study Group members and from scholars from around the world.

After underlining reasons for the work of the Study Group on principles on the engagement of domestic courts with international law, namely the need to assess what domestic courts were doing, the reason behind the practices of the various States, and the need to evaluate these practices and to develop principles or guidelines for guidance to domestic courts, Professor Tzanakopoulos described four important points set out in the final report which constituted the challenges faced by the Study Group. These included the different constitutional settings, the different methods and techniques of domestic court

engagement with international law, and the different outcomes set in Part A of the final report.

Another challenge was the question of the mapping of the postures or strategies of domestic court engagement with international law. This was based on the work presented by members and other scholars. He also described Part C of the final report, which discussed the grounds or reasons that emerged as justifying different strategies or postures of engagement. As previously indicated, the reason for the mapping was to provide a groundwork for the normative exercise of compiling a set of principles or guidelines for the engagement of domestic courts with international law. He also highlighted that the duty to develop a set of principles or guidelines was among the tasks of an ILA Committee, rather than a Study Group, whose work was to prepare the ground for such a normative exercise.

Challenges in mapping the engagement

Having highlighted the structure of the report and described the challenges faced by the Study Group, Professor Tzanakopoulos presented the first challenge, namely "Mapping Domestic Court Engagement". He highlighted that this challenge was based on the increased relevance of domestic courts for international law.

He explained this challenge by demonstrating the fact that traditionally international law considered domestic law, including domestic court decisions, as facts. A domestic court decision applying international law might be seen either as being in harmony with the international obligations of the State or as being in breach of them.

When a domestic court decision was in breach of international law, such a decision might create an international dispute or engage the international responsibility of the State. Explaining the role that domestic courts might play, Professor Tzanakopoulos stressed that, since domestic courts were organs of States, their decisions translated the ways in which States expressed their *opinio juris* on the interpretation of international law.

Professor Tzanakopoulos then moved on to the increased engagement of States with international law. He pointed out that the constant and significant strain of the traditional bilateralism performance structure of international law was being replaced by a multilateral framework of protection (*traité-loi*). In this regard, he stressed that more and more regulations were being adopted in the international sphere because of the development of its various areas regulated by multilateral instruments. He pointed out areas such as international law on the protection of human rights, international environmental law, the law of the sea, international investment law, international economic law, international criminal law, international humanitarian law, among other areas of international law.

Comparing the nature of the international law obligation, Professor Tzanakopoulos indicated that there had been a development to remove the clearly inter-state slant in the implementation of international obligations. He indicated that, under the traditional bilateralism structure, States had the discretion to determine what measures were required within the domestic legal order to implement these obligations.

Professor Tzanakopoulos noted that there had, however, been a change, and international obligations were now more inward-looking than outwardlooking. This meant that international law today required States to undertake certain action within their own domestic

legal order, including the adoption of a specific legal framework, respect and promotion of individual rights (international human rights law), the undertaking of specific actions such as the curbing of emissions (international environmental law), granting access to information or to justice, or allowing participation in decision-making.

Professor Tzanakopoulos indicated that the foregoing analysis was needed to explore the reason behind the increased significance of domestic courts engagement with international law.

Professor Tzanakopoulos then moved on to stress the last of the challenges for the application of international law. He pointed out the infinite variety for the reception of international law by domestic legal orders. He indicated that the traditional distinction between monism and dualism, which required the incorporation and transformation of international law respectively, were among the challenges for the implementation of international law. He explained that domestic constitutions that adopted a monist approach applied international law "automatically" and considered it as part of domestic law. By contrast, domestic constitutions that took a dualist stance considered international law as a different system of law that must be transformed or adapted through the adoption of some domestic (usually legislative) act before its application or introduction into domestic law.

Professor Tzanakopoulos indicated that State practices for the reception of international law was even more challenging because even monist countries set a number of prerequisites before applying international law or distinguished between different sources of international law. For instance, in the United States, treaties formed part of the law of the land, while there was no specific provision for customary law. This was different from the United Kingdom, where customary law was incorporated into the common law and was considered as a source of the common law, but act of transformation was required before the domestic application of any treaty.

The situation was also different in South Africa, where the constitution provided that both treaties and custom were directly applicable in the South African legal order, but required transformation of treaties unless they are self-executing, while custom was considered as automatically incorporated only if it was not in conflict with the constitution or any legislation.

Professor Tzanakopoulos stressed that domestic courts had developed various techniques that moderated or blunted the effects of both monism and dualism systems. These included the doctrine of non-justiciability (wherein one might include the political question doctrine), the act of state doctrine, denials of standing, and the doctrine of non-self-execution of treaties. The avoidance of substantive international law questions through affording immunity (whether to a foreign State under international law or to the forum State under domestic law) might also be seen as such a blunting technique.

Recalling the ways in which international law was received in the domestic legal system, Professor Tzanakopoulos indicated that there was a way in which domestic courts might apply international law indirectly, even if the State opted for a dualist system. This is possible through the principle of consistent interpretation, which had been introduced through judicial practices or constitutional entrenchment. He explained that this principle constituted a presumption in favour of harmony between domestic and international law

in that a domestic court would presume that the domestic legislator did not mean to introduce legislation in breach of the State's international obligations. The domestic court would thus seek to interpret domestic law "in the light of" or "in accordance with" the State's international obligations.

Other interpretative principles which are similar to the principle of consistent interpretation, such as the principles of legitimate expectations and the principle of legality were also explained. Professor Tzanakopoulos explained that the principle of legality presumed that the domestic legislature may not be considered as derogating from or abrogating an international right or duty, except when it did so explicitly.

In addition to the above techniques, Professor Tzanakopoulos indicated that another practice existed, which, although currently understudied, depended on the substance of the rule at stake. This was the use of "consubstantial norms", which were norms which happened to exist both at the international and at the domestic level, and provided for the same substantive regulation.

Finally, before mapping the practices and methods of engagement and their potential outcomes, Professor Tzanakopoulos explained the reason why the Study Group was considering the various methods of engagement of domestic courts with international law. He explained that this was because they provided the basis of State's attitude on whether to align with or to contest international rules.

Mapping engagement

Professor Tzanakopoulos then moved on to explain Part B of the final report. He indicated that the mapping of the relevant domestic system engagement with international law was the most crucial part of the Study Group's work. However, he stressed that the mapping had, to some extent, helped to identify the possible grounds behind domestic courts opting for one strategy of engagement over the other.

Professor Tzanakopoulos indicated that there were broadly three ideal types of strategy of domestic court engagement with international law. These were:

- the strategy of avoidance (where the question of international law was altogether dodged);
- the strategy of alignment (where, irrespective of the prescription of the constitutional framework, or even on the basis of an interpretation of such prescription, domestic courts would attempt to align with international law or at least to harmonise domestic law or practice with international regulation); and
- the strategy of contestation (where domestic law was ostensibly used as a method to contest the generally accepted content of existing international law.

In describing the first strategy, Professor Tzanakopoulos defined avoidance as the situation where a domestic court refused to apply international law, even when it was applicable. He stressed that avoidance had various forms: evasive or affirmative or by delaying the ratification of treaties which would require changes in domestic law, or by allowing ratification only with broad reservations which aimed to shield domestic law from change.

"Evasive avoidance" was a situation where the court simply remained silent where the application of international law was necessary. He described evasive avoidance as a situation of "willful blindness". This was a situation where the legislature passed a law which might not fully reflect or might diverge from applicable international law. He further explained that a domestic court might be bound to apply the relevant domestic law and might thus choose to silently ignore relevant international norms. This was the case where a State deliberately passed immunity legislation and avoided applying international law. Such countries include the United Kingdom, the United States, Argentina, Japan and India (among others).

"Affirmative avoidance" was a situation where a court recognised the existence of international law, but explicitly rejected the application and applied the appropriate position under domestic law. He stressed that a moderate mechanism of affirmative avoidance could be seen in the case of non-justiciability or non-self-execution. A practical example of affirmative avoidance was the requirement of universal acceptance set up by the apartheid regime in South Africa. Here, the application of customary law was rejected through the denial of its customary status; domestic courts would require "universal" acceptance for a rule to be considered customary international law. In this case, no norms would be granted customary international law status by South African courts because the bar was both too high and vague.

Moving to the second strategy, Professor Tzanakopoulos defined "alignment" as a posture whereby domestic courts simply referred to international law without complying with it. He indicated that this practice was mainly favored by newer, smaller, or weaker States that might wish to avoid appearing parochial. However, the application of this strategy might vary significantly.

For instance, it was explained that "fair weather alignment" was used when a State made use of (referred to) international law in run-of-the-mill, politically unproblematic, situations. In these cases, States would explicitly make reference to international law in support of a relevant domestic law or when a specific rule or content of the international law was in accordance with domestic law. Professor Tzanakopoulos indicated that the alignment with international law became meaningful when defending a politically charged circumstance and avoiding or rejecting the need to engage with politically charged rules, such as the rules of international humanitarian law in the context of an armed conflict in which the State whose courts were called upon to apply it was engaged.

Another variation of alignment was "overriding alignment". This type of alignment consisted of the application of international law by the domestic court over conflicting domestic laws. However, given the difficulty in determining apparent and genuine normative conflict, consistent interpretation had always been seen as a way to achieve this technique, and especially consubstantial alignment.

Professor Tzanakopoulos defined "consubstantial alignment" as a situation where a domestic court interpreted domestic law (whether there were ambiguities or not) in conformity with the international obligations of the State. A case in point was that of Belgium, where domestic courts resorted to consistent interpretation in circumstances where the domestic norm being interpreted did not seem ambiguous. South American States provided another example where international human rights law was relied upon to

change a given constitution. It was explained that this was also the case in South Africa, where the constitutional court had taken the position that the only reasonable interpretation of domestic legislation was an interpretation that was consistent with international law.

To highlight this, Professor Tzanakopoulos indicated that consubstantial alignment primarily took place when the domestic court applied international law in a way that was in accordance with that State's obligations under relevant international law, even without reference to such international law. At this point, he reminded attendees that international law made no provision for the way in which States would chose to comply with its norms; it did not specifically require its norm to be incorporated or transformed into domestic law, it simply required compliance.

This was also evidenced by the practice of some courts, including the European Court of Human Rights, which did not necessarily require the specific rights (on the exhaustion of local remedies) to be pleaded before domestic courts. Instead it only required the substance of these rights to be pleaded, even if solely under domestic law.

In addition to the previous variation of alignments, Professor Tzanakopoulos indicated that there was another particular type of alignment called "hyper-alignment". He explained this as a situation when a domestic court went beyond what international law actually required (even though relying explicitly on international law).

Albania was used as an example of such alignment "on steroids". In Albania, the domestic criminal law did not provide for a reopening of proceedings in the case that a violation of European Court of Human Rights had been found. This occasioned a split between the constitutional court and the supreme court, with the former ordering the latter to "legislate" into existence such grounds for reopening proceedings.

Professor Tzanakopoulos pointed out numerous other cases of over interpretation (or "hyperalignment") such as where Albanian courts relied on treaties that were not binding on Albania or on soft law in order to disregard domestic law. Sri Lankan courts had also found that soft environmental principles established binding obligations on governmental authorities and became part of the common law.

The third strategy of engagement was contestation. This was a situation whereby domestic courts deviated or refused to agree with a rule of international law, whether through the application or by altering the content (interpretation) of international law. He stressed that there were different forms of contestation. One form was "affirmative contestation", which referred to a situation where a domestic court accepted the validity or applicability of international law but gave it a different meaning or a different interpretation to the one generally accepted (the contestation of the content of the norm). A second form was explained as "negatory contestation". This referred to the contestation of the applicability of an international law. The third form of contestation was "consubstantial contestation" which was where a domestic court altered or contested a rule of international law by affecting its content.

Finally, Professor Tzanakopoulos explained that, since courts were organs of the State, they might necessarily affect the content of norms of international law whenever they engaged with them. Domestic courts served as agents of development of international

law norms. In this regard, one needed to ask whether domestic courts should be cognizant of their roles an agents of development of international law. It was difficult to answer this question with certainty, but indicated that it was perhaps even more difficult to determine what domestic courts were doing, and how they were engaging with international law. This was the approach that the final report had itself taken to assess what domestic courts were actually doing.

Principle of engagement

Having highlighted the various strategies, Professor Tzanakopoulos moved on to discuss the reasons why a State might choose a particular strategy over the other. The analysis of the reasons behind the choice of domestic courts as to whether to avoid, contest or align with international law in given circumstances, evaluating them as positive or negative from an international law perspective, and considering the costs of each strategic choice, would allow the elaboration of guidelines and practice directions for domestic courts.

At this point, Professor Tzanakopoulos emphasised the need for significant work to be done in order for such guidelines, principles or practice directions to be elaborated. He explained that this was beyond the capacity of the Study Group, which only facilitated the elaboration of a set of principles on the engagement of domestic courts with international law.

Elaborating on the reasons or strategies, Professor Tzanakopoulos indicated that these reasons or strategies depended on a number of variables such as the domestic constitutional provisions which determined the relationship between international and domestic law, as well as the status of a State as a newer, weaker, or developing State or the State's consideration of international law (there were some States that placed a high premium on their reputation as supporters of the international "rule of law" and international cooperation). This latter category of State, including those emerging from the status of pariah States, such as South Africa post-Apartheid, might especially engage in hyperalignment while powerful States, which had had a long-standing membership in the international community might engage in contestation in its various guises, whether mounting local (constitutional) resistance and turning away from international law, or seeking to influence its content and development (occasionally also through consubstantial alignment rather than open contestation).

Professor Tzanakopoulos identified another variable that might induce States to adopt a particular attitude towards the application of international law. This variable was the type of rules involved in the adjudication. He stressed that, since domestic courts were not usually bound to one particular strategy or posture, they might shift between different strategies depending on how politically or otherwise problematic the international rule was, as well as compliance with it. Oftentimes, such a shift would happen in the case of rules of human rights or international humanitarian law rules, in respect of which domestic courts might be more inclined to engage in avoidance or contestation.

Professor Tzanakopoulos concluded by indicating that the manner in which counsel pleaded international law before the domestic court, the quality of such pleadings, the quality of the domestic court, and the independence of the judiciary might also induce the court to adopt a particular approach.

Professor Yuval Shany (Israel) indicated that the most pertinent part of the final report, which he wanted to discuss, was the part relating to reasons why domestic courts chose a particular strategy over the other one. He stressed that there were several other limitations in this regard, including:

- limited exploratory powers of legal doctrine in international law – countries that occupied a vast place always refused to apply international law.
- judges' motivation – a judge's motivation to behave in a particular way towards the application of international law might influence States or allow some flexibility on how they should regard international law. He went further to distinguish motivation between normative references and incentive motivation. Professor Shany then explained that, in the former case of motivation, commitment might motivate the application of international law, while in the latter, the application of international law was incentivised by a particular event, occasion or opportunity.

The question became even more complex when assessing the unit of the study. He indicated that institutional legitimacy was lacking and many States were not able to apply international law just because international law was already covered. Emphasising the motivation factor, he explained that there were two levels of motivations. On the one hand, some States wanted to be upfront and decide to align their national law with international law, while on the other hand, some States simply refused to play a role in the international sphere and were not motivated by the application of international law.

Addressing the term consubstantiality, Professor Shany indicated that it required a normative exercise to determine whether a court which did not apply international law was in violation of international law or not.

Professor Shany also addressed the contestation approach. He indicated that the approach in the *Kadi* case might provide the key exercise. In that case, a domestic court engaged so as to apply an international rule. Whether there was something unique about the judicial motivation from the court was the question of consideration of the national legal system. He called upon members of the Study Group to think about the judicial motivation behind this, and to put forward a question on whether and to what extent national courts were lawmakers.

Professor August Reinisch (Austria) thanked and congratulated the Study Group for the final report and the attempt to overcome the issue surrounding the monist and dualist approaches (constitutional requirements). He then criticised the report for having mixed strategies or a different conceptual framework. He indicated that, on the one hand, the report offered some valuable points such as the underlined mandate of the Study Group, especially Part C of the final report, which explained the reason why domestic courts pursued these strategies. On the other hand, there were some speculations, such as the discussion on how young States might show interest in international law.

Professor Reinisch then asked whether domestic courts or judges had sufficient knowledge of international law before they contested or aligned with international law. He indicated that the answer was no, as sometimes these strategies (contest or align) were adopted solely out of frustration. Lastly, he indicated that the other specific value or

normative question that needed to be discussed was the issue on the contestation of international law by other rules of international law or by domestic rules.

Professor Yuji Iwasawa (Japan) indicated that, although he joined the Study Group late, he would like to congratulate the members for an excellent final report, which at least provided a framework within which domestic courts could be engaged. The report did not contain data from East Asia and Africa, while it claimed to have covered a variety of areas. Furthermore, some parts of the report needed further attention. Professor Iwasawa indicated that Part A of the final report emphasised different constitutional setups, which he considered to be a "big mess" and an overemphasis. He suggested that Part A could be characterised or grouped into two systems, namely the monist and dualist systems. Professor Iwasawa then indicated that Part B of the final report was the most crucial part. He explained that the final report provided true contribution by engaging domestic courts. The terms used regarding the alignment categorisation were a bit difficult. The same applied with the term "affirmative contestation". He stated that the categorisation was good but questioned whether the terminology used conveyed the message or not.

With regard to Part C of the final report, Professor Iwasawa indicated that, when he recalled the findings of Study Group on the variables (constitutional setup and the position of States in international law), he found again that the categorisation was good but the terms confusing. He concluded his intervention by indicated that the variables relating to the independence of the judiciary was most important.

Lady Justice Arden made one comment and asked one question. First, she asked if the report could provide guidance to domestic courts on questions where the rules of international law were not clear, for instance a question of international law not previously considered by the International Court of Justice, or a question of interpretation of the Refugee Convention. She also commented that an investigation into the preferences of individual judges might divert from the main purpose. She indicated that, within the judicial practice, there were some judges who were more conservative and others that were more progressive, and that the personality or the education of a judge might direct the position of such judges towards the application of international law.

Mr Isye Gobann (Uganda) commented and built on the previous comment indicating that a judge's lack of knowledge in international law might be the main reason why a domestic court might adopt a particular strategy or position towards the application of international law.

Mr Mohan Katarki (India) indicated that the subject was more of a subject for study in comparative law than in international law, because it looked into the practices and principles on how domestic courts applied international law.

Professor Nollkaemper responded to the last intervention on the need for a comparative study to articulate domestic practices. He indicated that the problem or barrier in conducting this study was that international law could not say what domestic law was or should be doing. The role of interpretation was to assess how domestic courts applied international law. From an international law perspective, many international lawyers agreed with the *Kadi* case but also acknowledged that many judges could deviate from the application of international law. He added that the comparative analysis might be used

to explain why international law was not applied and that national comparative analysis was also necessary.

Professor Shany also responded to these comments. He indicated that the Study Group was not as much concerned about the outcomes but rather the engagement which was broader and captured other issues. The Study Group was also focused on the scope. He noted the comment on individual judges who sometimes drove courts to adopt a specific strategy for the application of international law. The lack of knowledge of international law among judges was a critical issue. While legal education was important, international lawyers took it for granted and assumed that judges on national courts knew international law, which was not always the case. The more judges that were engaged in international law the more they would be familiar with it.

Professor Tzanakopoulos responded to the first question on the terms used in the report. He explained that the terms were used to put ideas into a box and they were assumptions not exact things. He added that the report was a collective efforts and the terms used were not the product of one person. He then commented on the question regarding the lack of data for Africa and India in the report, and requested that material and comments on the report might also be sent via email.

Commenting on the issue of the education of judges, Professor Tzanakopoulos agreed that the role of judges in international law was very important and different from the civil and common law systems. He indicated that the role of judges also differed with their ranks and whether their decisions were formally binding or not. He stressed that the role of the Study Group was to create a database for judges but that challenges of organising conferences when everyone could attend hindered this.

Professor Tzanakopoulos then commented on the question of the several interpretations of the norms. He indicated that formally this was wrong because a judge's interpretation of international law did not change the normative fact that in the case of a breach of international law the State would be internationally responsible.

Ms Marija Đorđeska (Slovenia) stressed the need for more scientific approaches and empirical method of research. She also indicated that if a domestic court interpreted an international norm, that norm became or went into a domestic reserve (in addition to its international existence).

Dr Rob McLaughlin indicated that most avoidance took place on the procedural grounds rather than in the substance, and gave the example of the different difficulties faced by Australian and German judges in this regard.

Professor Shany intervened and indicated that the context was very important because criminal cases were different from civil ones. He gave an example of customary law which many States refuse to apply because of the lack of legal precision. He further indicated that the issue was more the selection of how much attention should be given to international law and if we were dealing with human rights or criminal law. All these issues might affect the motivation of the judges.

With regard to methodology, Professor Shany said that it required time and financial support to review the different approaches in civil and criminal procedures. He also

indicated that when a norm was incorporated under national law, it might develop its own identification and in this case customary law would be above the national law.

Professor Shany continued to comment on the interpretation of international law, which he said could be reversed. He also responded to the idea on visual presentation but indicated that there was a lack of resources for such an exercise.

Professor Shany made references to Professor Tzanakopoulos's presentation with regard to the review of the judiciary and indicated that oftentimes, national courts had no other choice but to apply international law. He indicated that some national courts might refuse to apply international law in order to avoid political repercussions. At other times, domestic courts might refer to international law without deciding whether they were bound or not. Thus, the use and the existence of reviewing the judiciary was also a good process.

Professor Nollkaemper added that the application of international law was the subject of national procedural law. He indicated that the question of whether national courts must apply international law depended on the procedure or the context.

Ms Đorđeska made a further comment on the domestication of international law. Some States had taken the position that they would be affected by international law once it became part of national law. Que questioned what role the executive should play in determining whether international law should come into the national system.

Dr Hannah Woolaver (South Africa) raised a concern regarding the role of domestic courts in the development of international law. She stressed that it would be important to explore the Study Group's conception of this if, in the future, it sought to set out normative principles of how and when domestic courts should engage with international law. In addition, when domestic courts (exceptionally) articulated how they conceived of their role in developing international law, this could be a variable that explained why they chose to align with, contest, or avoid international law.

Mr Dipak Bhattacharyya (India) also raised a concern about rules of interpretation. He indicated that the interpretation of law differed depending on judicial discretion. In the jurisprudence of India, the dictum of *ratio decidendi* was followed. He also indicated that a law followed in terms of national customary law might eventually be annulled for public good. This would not be a wrong interpretation of the codification of law but the correct use of judicial discretion. He questioned this position with regard to how it would be viewed from an international law perspective.

Professor Shany responded to the question on the role of domestic courts in the development of international law. He indicated the importance of the question but highlighted that it was not really on the side of judges to decide this but it was rather the role of the jurisprudence to advance international law. But if judges did indeed have the capacity or expertise required, the Study Group needed to consider whether they had a role to play in developing international law or not. He stressed that the complexity of the issue was that the courts were part of the State. If that court, as part of a State, adopted an interpretation of international law knowing that it would be in violation of international law, the question arose regarding who should be engaged to resolve this. Professor Shany further indicated that if people were aware of the existence of international law, then it was not a shameful thing to apply it.

Professor Tzanakopoulos responded to the intervention of Dr Woolaver. A domestic court might set a process of development. The perception of judges was a difficult issue and that perhaps this should help explain whether national courts played a role or not.

Responding to Mr Bhattacharyya, Professor Tzanakopoulos indicated that the ILA strove to be inclusive, and there were reports from India included in the study. On the question of judicial discretion and judicial interpretation, it was difficult to draw the line between whether customary law could become public good. He indicated that customary laws were not codified and could change over time. He indicated that only *jus cogens* could resolve the conflict by taking prevalence.

Professor Nollkaemper added a comment on the development of international law by domestic courts. He indicated that the Italian courts provided a good example in this regard.

Dr Jie Huang (HQ) commented on the status of *ad hoc* investment arbitration in the mapping of domestic application of international law.

Dr Gentian Zyberi (Albania) asked about the engagement of domestic courts with different sources of international law. He raised the issue of what contestation was more serious or grave, that of formal sources or that of enforcement mechanisms. Secondly, he looked at whether more or less immunity for State officials was positive or negative from the perspective of international law.

Mr Yota Negishi (Japan) asked how the practice of contestation should be evaluated. He put forward that local contestation was negative, and consubstantial contestation was positive.

Professor Tzanakopoulos responded to some of these interventions. In response to Dr Huang, he indicated that international investment law had also been cited in the report. In response to the intervention of Dr Zyberi on immunities, he stressed there should be some sentences on the final report on this issue, but it was difficult to make this evaluation.

Professor Tzanakopoulos also responded to the question on how to normatively evaluate contestation. He indicated that consubstantial contestation could be both good and bad, depending on one's personal views. What was good or bad would also depend on whether international law was defined superficially.

Professor Nollkaemper intervened on the question of whether particular contestation was good or bad. He indicated that the domestic legal order needed to align with international law, but also that international law needed to recognise its limitations. International law must recognise the fact that norms might conflict. He emphasised that both legal systems must acknowledge their limitations.

Professor Shany added that international law must be sensitive to the concept of effectiveness and legitimacy. On the issue of good and bad, Professor Shany stressed that one could not contest the form of the source because it was good or bad. It was better to ignore it by avoiding and not contesting the sources. It was better that the two systems (international and national) cooperated together.

Dr Hilly Moodrick-Even Khen (Israel) asked a question about the issue of contestation between domestic and international law in *jus cogens* and how to compel a domestic court to abide with international law in the context of a conflict.

Professor Shany responded that the purpose of the project was not to compel, although given that there are instances of contestation with *jus cogens*, there was a need to create cooperation. Professor Yuval further emphasised that there was no international law legal system to compel national cooperation. The obligation was directed to the State and the State was the only one that could determine how to apply international law. He noted that the final report could only highlight good practices and explore motivation. There was no channel on how international law was created. This is the role for the Vienna Convention on the Law of Treaties.

Professor Tzanakopoulos added that if a domestic court did not comply with international law that was contestation and that the final report did deal with the issue. In cases where domestic courts, although applying international law, did so in their own way, this was also affirmative contestation. On the issue of *jus congens*, when domestic courts faced contestation between two norms, it was better to evaluate whether they contested international law or whether they contested the *jus cogens*. This normative assessment might depend on the nature of the rules.

Professor Shany then asked the members of the Study Group to consider what the next stage for the project should be. He indicated that there were three options:

- establishment a commitment of the ILA to articulate principles to be adopted by an ILA Committee;
- have a new Study Group based on the prior works but aim to establish normative principles;
- leave further work to the academics.

Professor Shany stated that the challenges of the Study Group were more financial than anything else. He suggested the possibility of getting member funding and re-establishing a new Study Group.

Dr Zyberi (Norway) responded that the current Study Group must continue.

There was consensus from the audience who agreed to continue to contribute to the work of the Study Group. There was also a request that the ILA make recommendations and provide guidelines for the engagement of domestic courts.

Professor Andre indicated there was also an agreement to establish or meet online to discuss the final report. He further indicated that the members would be informed on the next step, and that, if the Study Group could not continue, a Committee could be set up. He added that the study would be left incomplete if it were to stop now.

Reporters: Kandala Lupwana and Nicholas Kassier

STUDY GROUP ON SOCIALLY RESPONSIBLE INVESTMENT

WORKING SESSION

Monday, 08 August 2016, 3.00pm

Chair: Eduardo Grebler (Brazil)

The Chair welcomed all the attendees to the working session, then proceeded to explain the change in the schedule of the meeting (invitation by the Johannesburg Stock Exchange) and apologised for the inconvenience.

He explained that this Study Group is relatively new and small, but that it is growing. He introduced the Chair of the Study Group, Ms Ida Levine who prepared an agenda for the meeting. The Chair asked Ms Levine to provide details on the agenda for the day.

Ms Ida Levine (UK) introduced herself and proceeded to indicate that during the meeting, they intended to discuss the growing number of statutory, regulatory and other initiatives in this area. Ms Levine pointed to the fact that these measures cover not only asset owners (such as sovereign wealth funds, pension funds and insurance companies) but also their agents – the asset managers. In her opinion, this is a welcome trend – and is only likely to expand given the focus on climate change post-Paris, and the vigorous fight against modern slavery, bribery and corruption and the growing focus on the responsibility of investors across a range of environmental, social and governance (ESG) topics. But, there are a number of key ingredients missing:

- There is no overall master plan and coherence between the growing number of supra-national, national and non-governmental/private initiatives.
- There is no agreed methodology to test the effectiveness of these measures or publicise concrete, positive results.

On the first point she noted that the field presents a plurality of sources (law, regulation and soft law) and actors (state and non-state actors). She stated the lack of coherence between the various initiatives and regulations, there are lots of things happening in many different places. Ms Levine indicated that in spite of this there is not really any master plan. There is nothing that is comprehensive. Therefore, Ms Levine considers that the Study Group could aim to bring some order to the field.

Furthermore, Ms Levine noted—related to the second point—that there is no methodology to test or monitor the effectiveness of the various measures. There are a number of initiatives, but so far there is no methodology to determine if and how these are affecting behaviours. Ms Levine proceed to address these recent different initiatives:

UN Extractive Industries Initiative (EITI) (2007–15)

Comes under the heading of supra-national initiative. EITI is a global standard to promote the open and accountable management of natural resources – it seeks to address the governance of the oil, gas and mining sectors through disclosure and other tools. This growing transparency movement has now been implemented in 49 countries (including a number of emerging markets). The US is in very early stages of implementing this initiative.

UN Convention on Cluster Munitions (2008)

A cluster munition is a form of air-dropped or ground-launched explosive weapon that releases or ejects smaller sub-munitions. Because cluster bombs release many small bomblets over a wide area, they pose risks to civilians both during attacks and afterwards. Cluster munitions are prohibited for those nations that ratify the UN Convention on Cluster Munitions, adopted in May 2008. The Convention entered into force and became binding upon ratifying states on 1 August 2010.

As of June 2016, a total of 119 states have joined the Convention. By way of example, the Convention was ratified by the Luxembourg government through the law of the 4 June 2009 that prohibits all use, stockpiling, production and transfer of cluster munitions, hence the impact on Luxembourg funds. Although the convention does not explicitly prohibit investment in cluster munitions, the prohibition on assistance should be interpreted by states to include investment in cluster munitions producers. Fund managers in Luxembourg have implemented compliance measures to comply with this measure.

Ms Levine said that compliance procedures in relation to this Convention have been implemented by many investment funds due to its adoption in fund jurisdictions – particularly Luxembourg. It would be a good candidate to test the impact of this type of measure on companies' behaviours – will this impact investment behaviour and cause them to discontinue the manufacture of cluster munitions? This points out the role of the investor as a possible "private attorney general" given the obligation to act as a fiduciary and comply with applicable rules and regulations.

UN Sustainable Development Goals (2015)

At the United Nations Sustainable Development Summit on 25 September 2015, world leaders adopted the 2030 Agenda for Sustainable Development, which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by 2030. The goals contain 169 aspirational targets. These follow the Millennium Development Goals that were established in 2000 with goals to be achieved by 2015. There is global commitment to achieve these goals however as they are aspirational and are not enforced, the level of implementation may be variable.

Bloomberg Task Force on Climate-related Financial Disclosures (2016)

At the request of the G20, the Financial Stability Board (FSB) engaged the private/public sector to review how the financial sector can incorporate climate-related issues in financial reporting. In December 2015, the FSB established the Task Force on Climate-related Financial Disclosures headed by Michael Bloomberg (former major of New York) to assess what disclosure should look like and design recommendations for voluntary company financial disclosures of climate-related risks. It has delivered its Phase I report[1] and is scheduled to deliver Phase II – its final recommendations - by the end of 2016.

Ms Levine stated that this Task Force will provide investors with enhanced disclosure of climate risks. Investors take their due diligence seriously; they are required to read the disclosure and analyse the investment in light of this disclosure in order to invest in the best interests of their clients.

[1] https://www.fsb-tcfd.org/wp-content/uploads/2016/03/Phase_I_Report_v15.pdf

On the national level, Ms Levine discussed the following initiatives:

Stewardship Code – UK (2010), Japan (2014), Hong Kong (2016), other versions exist

Ms Levine noted that there are several jurisdictions that have incorporated Stewardships Code and she proceeded to explain the UK Code.

The UK Stewardship Code is a set of principles or guidelines released in 2010 by the Financial Reporting Council directed at institutional investors who hold voting rights in United Kingdom companies. Other countries have followed this example. In all cases the goal is to promote sustainable growth of companies through investment and dialogue, promoting companies' "good governance". Usually operating as "comply-or-explain" principles, investors are encouraged or required to publish a response explaining their approach to stewardship. The reports of investment firms and asset owners are made publicly available so that their commitment to stewardship of the companies in which they invest can be tested. They provided disclosure on e.g., proxy voting practices, engagement with companies, and collective engagement.

Investor Forum – UK (2015)

Ms Levine explained that she is on the board of this forum that is mix of a state and non-state actors initiative. Ms Levine explained that Professor John Kay made a recommendation to create this forum and subsequently laid the building blocks for the forum. The forum was eventually created by the industry. Following the Kay Report (that suggested the creation of the forum), the Investor Forum was set up with the encouragement of the UK Government. It is an investment industry initiative designed to position stewardship at the heart of investment decision-making by facilitating dialogue between UK corporates and their owners. To date, it has facilitated nine engagements with significant FTSE 100 companies, and become self-sustaining.

Bribery and Corruption – UK (2010, 2016; other jurisdictions

Within the UK, there have been a number of significant laws passed that look to tackle the scourge of corruption. Most notably in 2010 the Bribery Act gained royal ascent to the statute book in addition to a raft of other codes, laws, and patch-work of legislation. However not all poor, fraudulent and corrupt behavior was legislated against and this has led to the further development of the 2010 Act by way of extension to some sections of the Act but also the introduction of the Bank of England and Financial Services Bill which achieved royal ascent in May 2016. This law seeks to make senior managers responsible for taking steps to prevent regulatory breaches in the areas of the firm for which they are responsible. In other words, it seeks to ensure that individuals can be made culpable for poor behavior.

Conflict Minerals Disclosure – USA (2012)

On August 22, 2012, the US Securities and Exchange Commission adopted a new rule under the Dodd-Frank Act to require companies to publicly disclose their use of conflict minerals that originated in the Democratic Republic of the Congo ("DRC") or an adjoining country. The rules require certain companies to disclose their use of "conflict minerals" if those minerals are "necessary to the functionality or production of a product" manufactured by those companies or contracted by those companies to be manufactured.

Under Section 1502, the term "conflict minerals" includes tantalum, tin, gold, or tungsten. Congress enacted Section 1502 because of concerns that the exploitation and trade of conflict minerals by armed groups is helping to finance conflict in the DRC region and is contributing to an emergency humanitarian crisis. This was subject to judicial challenge, but has now been implemented.

National Low-Carbon Strategy – France (2015)

The National Low-Carbon Strategy (SNBC), introduced by the energy transition for green growth act, outlines the approach to be adopted in order to reduce greenhouse gas emissions. It sets in motion the transition to a low-carbon economy. This sets targets for reducing the national carbon footprint, and provides sector specific recommendations that outline the pathway to a low-carbon economy. "An 'energy transition for climate' label will help identify investment funds that are funding the green economy, promote the creation of new green funds and encourage businesses to highlight the green aspects of their operations."

Modern Slavery Act – UK (2015)

The Modern Slavery Act 2015 is an Act of Parliament designed to tackle slavery in the UK and consolidates previous offences relating to trafficking and slavery. The act extends to England and Wales. It received Royal Assent and became law on 26 March 2015.

Ms Levine noted that the new UK PM Theresa May has put this on her agenda. Ms Levine continued to address national initiatives and referred to the non-governmental/private initiatives.

Commonsense Principles of Corporate Governance – US (2016)[2]

Ms Levine said that recently a group of 13 top executives at leading US public companies and institutional investors released the "Commonsense Principles of Corporate Governance" for public companies, their boards of directors and their shareholders. The Principles are described as being intended "to provide a basic framework for sound, long-term-oriented governance" and to "promote further conversation on corporate governance." Full-page ads summarizing key parts of the Principles were published in national and international newspapers.

Ms Levine pointed out that there is really a mixture of initiatives and the Study Group could contribute with its work to this very important field. She stated that coming from the Johannesburg Stock Exchange, the members of the Study Group were very interested in learning that they were one of the leaders in establishing criteria and measuring the companies. She noted that emerging economies seem to be ahead on these issues.

She opened the floor to the attendees for further contributions on the topic.

The Chair mentioned that the Socially Responsible Investment Study Group is a relatively new group and as such, is still on the way of shaping its work. He posed the question whether the name of the group is sufficiently clear for everyone to know exactly what the group will tackle. The current name is "Socially Responsible Investment Study Group". The Chair pointed to the fact that in other places the same subject has been referred to

[2] http://www.governanceprinciples.org/

as Environmental and Social Governance (ESG). The Chair noted that environment and corporate governance have their own field of studies. He raised the following questions:

- Should we think of socially responsible investment in the same way or would some of us prioritise environment? Or social? Or governance?
- What is the importance of the issue of corruption? Is it one more aspect or should it be given priority in this Study Group?

Ms Levine said that the Study Group welcomes questions and suggestions on the name.

Dr Kamal Hossain (Bangladesh) noted that the ILA came a bit late on the topic. He recalled a case in which the CFO and the CEO of a company (both of them have now been criminally prosecuted) discussing this topic and one said that what has been done "may have been immoral but was not illegal". He pointed to the fact that younger lawyers are taught to believe that this is true, that when something is not technically illegal however immoral it is still permissible. He made the point that members of the ILA need to be considered and consider ourselves as socially responsible lawyers. He noted that there have been big stock exchange scams such as the one in India (multibillion dollar scam involving owners of big hotels around the world). In this case, the Indian Supreme Court ordered that the money should be refunded and the responsible people criminally charged. The response of the Court was to deny bail until a percentage of the money had been refunded. Dr Hossain considers this to be a very innovative response.

Dr Hossain noted that people in jail are sometimes the brightest products of top universities and he pointed to a meeting where the Deans of these universities wondered what had they been doing wrong. They concluded that they must strengthen their ethics courses.

The Chair asked if there were any more comments or questions.

Dr Markus Gehring (Germany) stated that while there is a lot of research out there very little is legal research. He encouraged the audience to search for the international law dimension. He mentioned that he recently published a study analysing Canada's language in its investment treaty highlighting corporate social responsibility as a common endeavour. There are many questions one could analyse in this regard. If an individual is claiming unfair treatment but has not lived up his/her own voluntary commitments and social responsibility commitments, can he/she legally claim unfair treatment if the treaty makes reference to such commitments? He noted that we should try to focus on those kinds of questions, particularly on the international law aspect. He proposed that it would be interesting to focus on how to elevate the political commitments to more of legal commitments. He referred to the Kimberly Process as a good example of that as it links to the World Trade Organisation.

Ms Levine expressed her interest in the idea.

Dr Markus Gehring (Germany) stated that CSR needs to be given more of a legal framework. If you disclose wrongly on your environmental impact report you could be prosecuted in different jurisdictions. He noted that now we have a situation in which an investor goes to a country and develops its own CSR standards and doesn't live up to it. He asked what would be the consequence of that and he suggested to study it from the International Law Perspective.

Dr Damilola S. Olawuyi (Nigeria) noted that the notion of responsible investment has found its way to climate finance. He mentioned that a very good example of this is Shell sponsoring a carbon project in Nigeria and he stated that this has triggered all kind of reaction. Similarly, in Honduras, Panama, and Indonesia where the civil society denounces human rights violations. He asked whether the Study Group would be looking at the interaction of CSR and the emerging obligations of the Paris Climate Agreement. Dr Olawuyi asked how these evolving norms could be mainstreamed in the context of trade and investment. Trying to combat climate change through carbon projects; he noted that we seem to neglect how the UN system will need to reflect these norms. He referred to the carbon projects in many parts of the world and the problems they carry (land grabs, people losing forest, no due process, civil society protesting). The civil society denounces that these cannot be UN projects because they are irresponsible projects. He said that we seem to be looking at SRI outside the UN system and he wondered whether the Study Group would be interested in looking closely at these topics.

He posed a second question asking whether this Study Group plans to integrate its views to the UN Business and Human Rights Agenda that is getting a lot of momentum. He considered that it is tough to discuss SRI without engaging with this UN agenda.

Dr Marcis Menkes (Poland) commented on the name of the committee indicating that the name wasn't clear enough to understand which perspectives are being considered. He also stated that the outline seemed to convey a concern for the issue of legitimacy and embrace the financial sector's point of view. He asked whether the Study Group would consider the work of the non-governmental sector, either directly or indirectly. He also remarked that to everyone it is quite clear what the environmental dimension is, but the social agenda seems to be slightly vague. Given the context of the current crisis, he asked whether it would be useful to take into account labour issues. He also mentioned that it would be interesting – in order to have an impact on investment policies – to engage in dialogue with the Bretton Woods institutions and most importantly with the IMF's idea or policy on suggestions to the state for investment purposes.

Ms Levine addressed the questions posed by the attendees. Firstly, with regards to the scope of the Study Group, Ms Levine mentioned that the group started with a narrower scope and expanded afterwards. In the beginning they were focusing on the rules and regulations on investment but they immediately acknowledged that there are many facets – not only institutional investors, monitoring and supervisions, treaties and more.

Secondly, with regard to the question on the possible overlap with the Study Group on Business and Human Rights, Ms Levine noted that the Study Group has discussed the possibility of merging the two groups. However, there was no agreement as the topics – albeit related – do not overlap and have different focus. She made it clear that both Study Groups would have to coordinate and collaborate, as dialogue is necessary.

With regard to the question on the IMF, IFC and Bretton Woods and how these supranational institutions view investment, Ms Levine suggested that the Study Group should engage with them. She mentioned that the group was in Washington D.C. two years ago and they met with people from the IFC and they discussed some of the criteria they looked for. Ms Levine stated that looking at the supranational organization and what they are doing with regard to investment is highly relevant and an interesting avenue to pursue.

Ms Levine explained that the reason why they started from the investment side was that she worked in this industry and she believed it could play a role as a powerful private attorney general. It is important to get investors behind various initiatives, rules and regulations because they have the obligation and means to research and analyze them in order to fulfill their role as fiduciaries acting in the best interests of their clients. This responsibility is particularly important in the case of the bigger global investors as their reputation is so important to them. However, she noted that there are many other ways to approach this issue and they are all very interesting and they are welcome to the Study Group.

The Chair pointed that some of the comments made by the attendees raised some concerns. He said that in its inception the Study Group was motivated by the hope that the institutional investors could be stimulated to be more socially responsible investors. But he acknowledged that this is one of the facets of the problem, not the entire problem.

The Chair referred to the comment made by Dr Gehring and flagged the connection with the treaty obligations as an example of the complexity of the topic.

The Chair noted that one of the ideas behind the Study Group was to find ways to encourage investors (institutional or even investors of the standard of the IFC) to be aware of the need to be socially responsible. This is one way of putting the problem, but that would be a much more market-based approach than hard-law approach. He noted that institutions such as the IMF may have some rules; the IFC does have rules; some governments have rules (i.e. the Brazilian Development Bank); and several other financial institutions have rules with regard to environmental issues. However, he noted that these are not legal standards but policy standards. He referred to the comment made by Dr Gehring and asked whether the Study Group is dealing with this issue from the perspective of international law or from the perspective of economic policies. He then asked the attendees about the best approach for the subject. He asked whether it makes more sense to focus on soft-law, recognising that soft law may or may not be effective, or whether the Study Group should strive for hard-law solutions. He then proceeded to open the floor for discussion.

Dr Sharif Bhuiyan (Bangladesh) stated that both the study of soft-law and hard-law should be done in parallel. He noted that often times to arrive to hard law solutions there is a need for lots of work and practice to create the ground work for them. He said that in other areas of international law, as experience indicates, the practice started as a soft-law issue. Investors would have their own internal control systems to not fund investment projects that were not environmentally sustainable.

Ms Levine, in agreement with Dr Bhuiyan, stated that soft law reached places where hard law might, in the first instance, find slightly more difficult.

Dr Bhuiyan added that in relation to issues that are new, such as this one, one cannot resort to a hard law solution right away. It would be necessary to have a period of soft law activities in order to create the groundwork for other, creative situations.

Ms Levine argued that issues such as corruption and ethics have to be incorporated into the equation and that necessarily is the essence of soft law. She point to the work currently being done on culture, corporate culture and culture in the financial services

industry, which is extremely important. When one problem is solved by a hard law solution, another problem might arise. As such, not all problems would be covered until there is a cultural change and people are focusing on the right things and finding some responsibility for the world we are in.

Ms Levine further explained that while the soft law element is important, there will be some instances where hard law is essential. For example, in the area of climate one was never going to be able to kick off anything seriously until the Paris Accord. She added that it was a wonderful platform for soft law and for other solutions but one cannot get away from the issue of culture in corporations and financial firms. There is still work to do in this area.

The Chair noted that the very purpose of the Study Group was to encourage the topic to go further and deeper.

Ms Levine highlighted that she was interested in hearing what people from outside of the financial services and the corporation would like to contribute to the dialogue because contributions from the side of the argument are necessary for a balanced discussion.

Mr Oyeniyi Abe (Nigeria) asked, in the context of extractive resources, who determines the kind of investment that will have impact on the local communities - considering the fact that even the local communities (the individual or citizen) are not even parties to these treaties? As such, people are producing contractual agreements where local communities can sue on the contract. One example is the West African gas pipeline. Mr Abe posed some critical questions on this note:

- Who determines the kind of investments; how they will be invested; the kind of impact they will have; and what will be needed?
- How do we incorporate people in the debate about CSR – keeping in mind the element of human rights as the world is moving beyond corporations solely focused on profit-making?
- What about detriments to human life? There should be a link between business and corporations making investments and the human rights obligation or human rights impact assessment requirement.

The Chair said that there is, unavoidably, an overlap between what the Study Group talks about from the perspective of investor and what other Committees and Study Groups can also approach from different perspectives. The issues are connected and intertwined. He announced that this Study Group proposes to look at the problem from one perspective and perhaps other Committees or Study Groups could look at the same problem from a different standpoint. Inevitably, they would be dealing with problems which are partly common to both approaches and perspectives.

Dr Damilola S. Olawuyi (Nigeria) discussed analysis of the problem from the perspective of industry. He notes that there is no manual on what socially responsible investors should do to be fully compliant with international law. On the one hand, scholars argue that there is a need for responsible investment. However, people who need to know do not know enough. Consequently, there is a perception that corporations are not ready to be socially responsible. On the other hand, corporations are uncertain about how to be responsible under international law. Many of these norms have not been put together

as guidelines on social responsibility. He proposed that one of the key contributions of the Study Group could be to draft practical guidelines on how to be responsible for corporations.

Ms Levine stated that the lack of coherence was one of the issues identified and discussed with another ILA colleague. It was proposed that this committee could take steps to developing a framework for responsibilities.

Ms Levine highlighted the fair amount of work in area of government, particularly in the UK where there is a Stewardship Code, investor forum, and the Financial Reporting Council (FRC) as a supervisory body for the governance of the Stewardship Code. This has been seen from the governance side with clear requirements. However, this is lacking in other areas. There are the Principles of Responsible Investment (PRI), for instance, but they also lean mostly towards governance. Returning to Dr Olawuyi's suggestion, she noted that a guideline would be a good outcome.

Dr Hossain argues that the subject has been alluded to but not touched upon since some of the investments are done on the basis of long-term contracts. As such, the framework of negotiations is worth further investigation in the context of something that could go wrong. Brazil offered a lesson learned but more so in African countries. In some instances investment agreements are unbalanced, overlook certain issues and may cause adverse impact on the recipient. The African Development Bank (AfDB), for example, highlighted that in the context of negotiations, different elements need to be reflected and incorporated in the agreement itself. This is an ongoing endeavour, which the AfDB is engaged in.

Dr Hossain proposed that it would be useful to look at what the provisions and mechanisms that need to be incorporated for monitoring the provisions are. There is more concern in ensuring that the regulatory framework is reflected in agreements. This is because many countries, with the exception of Nigeria, have little experience, which can have adverse impact.

The Chair asked whether this forum might well be the source for certain suggestions, rules or standards that could be imparted to countries or companies that have not reached the level of experience to defend themselves.

Dr Hossain in response suggested that this Study Group provides an open-ended opportunity to produce this kind of material, which would be very useful for lawyers. There is that capacity to negotiate effectively and deal with matters that create adverse impacts.

Ms Levine further noted that the investment community needed to be aligned to the abovementioned problems. If one does not invest in safety infrastructure, one is likely to encounter problems. There are lessons to be learned within the business community. For example, BP, which was running a company with inadequate investment in safety standards.

Siemens, for instance, had a policy of determining how expensive it was to pay all the fines and decided that they could continue with their business and pay the fines. This practice was eventually exposed by the US, which came in under the Foreign Corrupt Practices Act. The fine for Siemens was the largest fine by a very large measure. This was truly a wake up call for other companies that they could not just incorporate paying bribes or fines into their business models.

Dr Hossain commended the Siemens judgement for the amount of information that was uncovered. In this context, comprehensive material on malpractices is useful, as the safety environment cannot be dealt with summarily.

Ms Levine agreed that this would not work out in the long term.

Dr Hossain argued that companies would be far more willing to sit and think through these issues. The ILA offers a good forum for the different bodies to interact and share their views and insights.

The Chair noted that he could not miss the opportunity, from all the discussions, to bring to everyone's consciousness of one particular situation that is being undertaken in Brazil. In the past two years, there have been enquiries and a large number of scandals with contracts being concluded between private contractors and government have been disclosed. That involved practically all contractors – companies that have services in construction and supply and several sectors of the government. Many of those companies have had their CEOs imprisoned. A legal issue was raised – whether the companies themselves should be put on a blacklist and prohibited from contracting with governments. This is something that, for a legal mind, makes sense. However, one should consider how this might affect the entire construction sector of a country or that it may put in jeopardy works and contracts, which are underway. Thus, the social harm that would originate from such heavy sanctions would be possibly greater than the advantages of resorting to the sanctions.

In the Chair's opinion, the legal community in Brazil or perhaps in other parts of the world never considered such a situation where an entire sector of the economy was involved in corrupt practices. He questioned what one would do in those instances, as going for hard law provision there is a possibility of shooting one's foot because works that would benefit the population itself would have to stop.

The Chair noted that this is an ongoing debate in the legal community, but there is a trend to relieve some of the sanctions as a means to allow companies to continue their works to avoid problems of layoffs, unemployment and other difficulties, which have to be dealt with. This is the kind of experience that very few countries might have faced in the past.

Ms Levine emphasised that it is about culture.

Dr Menkes returned to the issue of corporate culture and lack of coherence in terms of new guidelines. Perhaps with corporate culture, one should not focus a lot on the substantive issues, but rather on procedural issues. He raised some questions to consider in this regard:

- To what extent is there a compliance officer?
- How is he positioned in the corporate structure?
- To what extent do we take into account new developments?

Dr Menkes concluded that CRS substantive issues cannot be scheduled together. There are dozens of CSR guidelines from NGOs and national committees. However, there is a lack of guidelines or a general framework for establishing CSR compliance.

Ms Levine noted this as another good idea.

The Chair proposed exploring future work and the way forward.

Ms Levine noted that good suggestions were identified during the discussions. She then asked how the Study Group should operate given large amount of detail needed and extracting of information from different sources. Before asking the audience for their suggestions for increasing visibility of the Study Group to make it more effective, she pointed out some of the suggestions for the way forward including, a blog or frequent posts on the ILA website.

The Chair proposed that the first thing would be to have as many members involved as possible. He then invited members of the audience who were not members of the Study Group to become members.

Ms Levine agreed that it would be great to have new members in the Study Group. She further noted that there was a number of members who could not attend the session.

The Chair highlighted that while Study Group meetings take place every two years, communication among the Study Group would be a continuous process. He welcomed individuals who are interested in making contributions, making themselves available and joining the Study Group.

Dr Menkes asked whether the Study Group had considered the possibility of interacting with different institutions that come up with CSR initiatives on different stock exchanges.

Ms Levine in response noted that they had not yet considered this. However, they had discussed a number of topics in a meeting with the Johannesburg Stock Exchange. In the context of SRI Indices, she was of the opinion that there is no coherent structure and they are possibly not used a lot by the broader investment community. This could be a good starting point but there was a concern in understanding what the criteria for the indices are.

Ms Levine noted that all the information from the session would be processed and circulated to members. She also reminded the audience of the Study Group website on the ILA website and suggested that some of the material from the session, including the suggestions made in discussions and the session report would be posted on the website as a port to channel information.

The Chair announced that the Study Group is in the range of 15 members and that perhaps this could be expanded to 20 members – allowing more critical mass of ideas and suggestions and at the same time motivate those who could make it to the session to participate over the internet.

Ms Levine added that the members could have a conference call – bearing in mind the possibility that not everyone would be available. Perhaps the starting point could be using the website as a port. She welcomed younger members to join the Study Group as part of the leadership of the Study Group. This would entail shadowing herself as the Chair and Dr Myriam Senn as the Rapporteur of the Study Group.

The Chair in closing noted the great contribution of ideas during the session and thanked everyone in the audience for their participation.

Reporters: Lucia Berro Pizzarossa and Mothepa Shadung

TEACHING OF INTERNATIONAL LAW (INTEREST GROUP)

WORKING SESSION

TUESDAY, 9 AUGUST 2016, 9:00 am

Chair: Professor Math Noortmann (UK)

The Chair opened the session, noted with satisfaction the high number of attendees interested in the topic, and introduced the Chair of the Interest Group, Professor John Gamble. Teaching, he added, was a state of mind, and tended to be underestimated. At every ILA conference, however, they looked at better ways of teaching international law.

There would be three presentations addressing the topic of "Teaching International Law Better and to More People: Goals and Prospects". Professor Gamble, who had set up the Interest Group, would speak on "(Re) Conceptualising International Law Teaching"; Professor Annelize Nienaber, from the University of Pretoria, would address "Teaching International Law in (South) Africa: New Demands and New Insights" and Professor Charlotte Ku, who had taken part in work on these topics from the very beginning, would speak on "Remarks Prepared for the Interest Group on Teaching of International Law".

The Chair gave the floor to Professor Gamble.

Professor John Gamble (US) said that his experience had broadened his interest in teaching beyond his position as professor. The conclusion was that huge opportunities to teach international law better and to more people had not been seized.

Professor Gamble had been challenged to think more broadly about teaching by Judge Manfred Lachs and Professor Wilhelm von Humboldt. Judge Lachs, in his book entitled *The Teacher in International Law*, highlighted that international law should be understood not just by law students but by a much broader public, and argued for a balanced view of international law. Professor von Humboldt had described, two hundred years ago, a model university with "the unity of teaching and research" and "an organic link between the creation of knowledge and its transference".

Professor Gamble had had a long-standing interest in international law. As an undergraduate in Ohio, he had been intrigued by the UN Charter. Later, during graduate school at the University of Washington, he had worked as a research assistant at Treaty Research Center in Seattle – the first endeavour of its kind in the world – and Professor Peter Rohn, its director, had become his mentor and lifelong friend.

Professor Gamble then worked for the UW Law School on the law of the sea and oceanrelated treaties. The UN, at the time, was discussing the future of the 1982 *UN Convention on the Law of the Sea*.

Later, as Assistant Professor at the University of Rhode Island and Director of the Law of the Sea Institute, he watched the 1982 Convention develop. In 1976 he joined Pennsylvania State University and had taught international law regularly and written about it. His interest in teaching changed drastically in 1989 when the Ford Foundation, funding a major new survey on international law teaching carried out by the American Society of International Law (ASIL), selected him to head the survey as he was a recognised scholar and the only ASIL member with a background in statistics and survey research. He became the reference person for international law teaching in professional

associations and, over the years, had published books and articles on the teaching of international law and detected areas and strategies needing improvement.

Two examples illustrated the urgency to change attitudes and approaches towards teaching. First, the neglect from professional associations. The last time a global international law professional association held a plenary on teaching was in 1991, at the ASIL annual meeting. There had been over 350 participants, Professor Ku had chaired, and Professor Gamble had presented findings from the survey sponsored by the Ford Foundation.

The second example referred to the unchallenged gross distortions by public figures (mass media and government officials). An illustrative example was comments made by US Senator Dan Quayle during the 1988 presidential campaign on the Russians breaking their treaties; that was, in fact, an erratic statement.

Professor Gamble turned to the preoccupation with text in a visual cyberspatial world. Most international law research and scholarship avoided quantification and texts had limitations. International law – by nature detail-oriented and concentrating on the written word – in the 21st century operated in a digital/information age with increasing visualising modes in college classes. The international law scholarly community, not having responded to the tools and techniques of the information age, should adapt. The most important question was whether international law should move towards a practical accommodation in order to thrive in the information age. Graphics, for instance, were hardly used.

The most radical reaction to the textual orientation of law was that students and legal professionals never acquired the skill to recognise the ethical complexity of a given situation. Diagrams and other visual and audiovisual representation – in contrast – assisted in developing stylised sensitivities to certain historical structures or patterns of facts. How to visualise information was a central issue. Professor Edward Tufte, who had been a great influence in this area, described his work as "analytic design".

Professor Gamble's work at the TRC – in the first ever project to use computer storage of information on treaties – made him reflect on the statistical analyses of treaties and for almost 15 years he had developed the Comprehensive Statistical Database of Multilateral Treaties (CSDMT), a macroscopic, statistical approach. Treaties, he noted, were a good example of graphical representation of international law, and diagrams and graphic illustration in international law were rare.

Professor Gamble showed attendees examples evolved from his own teaching and the difficulties students had with certain concepts. They represented the nature of law and its effect on State behaviour, treaties and custom as sources of international law, regional and global treaties over time and signed at different time intervals, and the years needed to reach one thousand new treaties.

As to the concrete actions and suggestions, he mentioned the creation of a 21st century introductory course which left out details of treaties and court decisions. This, he observed, might make professors uncomfortable. The other option was having a multilateral treaty database (CSDMT), reaching new groups of students and which had proved an excellent teaching and research tool. It provided a framework for a broader audience and included virtually all multilateral treaties in force over the last 600 years. The CSDMT could

become a widely-available teaching tool for international law. A third option was having a quick, permanent response team for international law, which might be taken over by a professional association, to educate people more broadly in international law. In this way, the media's errors would be corrected in a clear, polite manner.

In conclusion, Professor Gamble stressed that international law was different to other subjects and a wide public around the globe could understand its basics and action for a better world. The ILA and ASIL should find ways to teach and explain international law to a wider audience. This, he added, needed to be done systematically and in an understanding of the audience.

Professor Annelize Nienaber (South Africa) said that she had an interest in university teaching and student learning and therefore followed different journals on international law teaching methods and the debate around the perspective from which international law should be taught.

She would be addressing the international law teaching from a (South) African perspective, dealing with:

- the issues arising in response to calls for a "new" international law to be taught representing a "decolonised" curriculum after the "fees must fall" student protests in South Africa in 2015/16 and radical voices calling for the "transformation" of the curriculum;
- the difficulties law students experienced with the subject of international law; and
- linked to the above, her experiences teaching on issues in international law of special interest to Africa.

First, the issues arising in response to calls for a "new" international law to be taught representing a "decolonised" curriculum. The 2015 student campaign to halt the customary annual increase in university fees across South Africa was supported in social media under the hash-tag #FeesMustFall. Students around the country took part in protests, which at times turned violent. The campaign was not just concerned with the increase in student fees but also with student accommodation, low-paid support staff, and objections to Afrikaans as a medium of instruction. Underlying these protests, there seemed to be legacies of racial discrimination and colonialism, high levels of unemployment, and the increasing income inequality in South Africa.

South African President Jacob Zuma, in response, announced a zero increase of university fees for 2016 and discussions on broader issues. A commission of inquiry was appointed and university authorities had tried to accommodate the needs of the students, but protests were likely to continue as they were rooted in economic realities and in South Africa's past and politics. Debates on university campuses showed the disillusionment and anger of some young black South Africans with a curriculum which they considered narrow and unreformed, and on university cultures where they felt like unwelcome outsiders. There had been attempts to renew the South African higher education system and several universities were revising their curricula.

Professor Nienaber had found it hard to comply with some calls for a "decolonised" international law curriculum, as they went beyond the four "drivers", ie responsiveness to

social context, epistemological diversity, renewal of pedagogy and classroom practices, and an institutional culture of openness and critical reflection. Some demands called for an academic application to purely political demands.

At the University of Pretoria, the under- and post-graduate international law curricula incorporated aspects of the "theory" of international law, including the so-called "Third-World Approaches" to international law (TWAIL). Students were taught different views on the forces and functions of the international legal system, and approaches emphasising that the law was an ideology for the purpose of gaining, cementing and justifying the exercise of power were highlighted. Throughout the curriculum, they sought to unveil the partial character of international law. However, some individuals calling for a 'decolonised' international law curriculum had in mind that international law must be taught from a "decolonised" perspective and that TWAIL should not only be part of the theory section of the international law curriculum, but it must be the curriculum; international law should be taught solely as substantially as a representation of the imperialist-colonialist hegemonic agenda, thus from a certain political viewpoint.

Three issues arose. First, the actual meaning of "decolonising" the curriculum. Second, if it were accepted that international law was taught as an ideology furthering the imperialist-colonialist hegemonic agenda, and there were attempts to address this by presenting an anti-colonialist TWAIL approach to the law, it would be a "slanted" view. Third, the international law curriculum did not exist in a vacuum; outside realities dictated its content and shaped the law, and in some parts of the international law curriculum, TWAIL gave little or no insight into the forces that shaped the law.

Professor Nienaber considered that rethinking the curricula and altering teaching approaches might be necessary, but should this be done in response to demands of a political nature?

Her second topic was on the reasons international law posed difficulties for students and it contained a suggested approach to overcome such difficulties.

In South Africa, international law was part of an undergraduate degree in law (LLB) or a BA in political science, and was taught as a content-based or doctrinal subject. Pedagogic methods were confined to those traditionally employed in law schools or faculties and the reason students found the study of international law difficult was not only bad teaching but also defective student learning.

The more "traditional" methods of communicating knowledge had been criticised as imparting the substance of law in a vacuum, ie, removed from the real lives of people and the everyday practice of law. The first problem that arose was that students perceived the study of international law as remote from their everyday lives. If they were not interested in international affairs, the subject matter of international law was seen as alien to the law that they intended to practice. The second problem was that, contrary to other doctrinal subjects, the approach in international law did not orient students to the reality of unfolding problems in international law. The subject matter did not fit neatly into a mould and therefore students should change their approach to studying.

Regarding context matters, and the difficulties related to student "learning", there were various theories. Professor Nienaber focused on the Gestalt learning theory and the

constructivist learning theory. The former emphasised the importance of the whole learning experience and the notion that what one saw and heard was determined by what one already knew (a pre-existing context). The latter argued that students learned by building patterns to interpret the world around them. In this case – constructivism – knowledge was not transmitted from lecturer to student but was built into the student's mind as a consequence of learning. The lecturer transmitted information to the student but the transformation of information into knowledge was an internal process by the student and presupposed that new knowledge was acquired in relation to prior knowledge.

Professor Nienaber addressed the implications of the Gestalt theory and constructivism for student learning in international law. She said that her students' difficulties with international law sprang from their inability to assign new information to any pre-existing context because in lecturing from an international law perspective she failed to show its synergy with the municipal legal system, a system with which the students were well acquainted. So the students in her course found it hard to fit the new information on international law into their existing schemata. She therefore looked for ways to present information in connection with what students already knew about the law generally, ie, she attempted to build on existing knowledge of the South African legal system in order to make sense of the international legal system. Students fared much better this way.

Based on her lecturing experience, Professor Nienaber concluded that a viable method of teaching international law at senior undergraduate level was by building on students' prior knowledge of (municipal) law. Not all aspects of international law – diplomatic protection, for instance – fit into this theory.

Next, Professor Nienaber addressed her experience teaching issues of special interest to Africa. Both in the undergraduate and postgraduate curricula at the University of Pretoria, much time was spent on the topic of South Africa's failure to arrest Omar alBashir during his visit to the country in 2015. Both the trial and appeal court cases were dealt with extensively in the module. Because it was a very topical issue, most students had followed the events as reported by the press. At times, what they had read in the press get in the way of the law. She called this problem "ideology over substance", the tendency of some students to uncritically believe what they read in the press. The only remedy for this was to keep recalling students to the law.

As a general conclusion, Professor Nienaber said that her position was that university should be an independent organisation that taught a variety of approaches to the law, including a variety of approaches to international law. University should not be dominated by a political agenda.

The Chair reflected on his experience as research professor in Transnational Law and Non-State Actors and the importance of keeping the teaching of international law free from curriculum politics He then gave the floor to Professor Ku for her presentation.

Professor Charlotte Ku (US) said that Professors Gamble and Nienaber brought a wealth of information and experience to the challenge of getting international law taught at universities and schools of law. As educators and practitioners, they detected the importance of international law to world order and the many opportunities globalisation offered to illustrate its relevance. But international law was often perceived both by students and many faculty alike as too distant from daily work and events to make it a priority. This

perception could be underscored by the mode of teaching which might make the subject appear esoteric and disconnected by reference to daily activity.

Professor Ku had worked at this puzzle over twelve years as Executive Director of ASIL and through her involvement with the ILA Committee on the Teaching of International Law and the present Interest Group. As a political scientist who had done most of her international law teaching in international relations or political science programmes, she worked hard to convey how the anarchy of a system of sovereign States was nevertheless regulated by rules and practices to allow for international activity. With the advent of increasingly localised effects of international law through human rights, trade, and environmental agreements, international law facilitated and gave rise to globalisation.

Two additional features of this teaching/learning puzzle were to consider the backgrounds of those teaching international law classes and how they could motivate students to go beyond national jurisdictions in their thinking. As to faculty background, the Professor Ku drew on the work and findings of Milan Markovic (Texas A&M University) and Ryan Scoville (Marquette University), who examined the backgrounds of faculty teaching the general international law class – to the extent that schools even taught a general international law class. Their study revealed that only 19% of US law schools offered a general international law class in both semesters of the typical law school academic year; 62% offered it in one semester and another 19% did not offer the course at all. The study further revealed that the majority of those teaching international law (66%) did not have experience outside the US. This included experience studying or working outside the US. Where there was international experience, it was limited. A further finding was that, of those who had studied outside the US, 32% had experience in Europe, Australia, New Zealand or Canada; 19% outside Europe; and 15% spent time in both western and non-western countries.

This could lead to a more national worldview of international law as faculty work within what was familiar to them. Further encouraging a national focus was to facilitate communication with students by using domestic concepts acquired in law schools and analogising or comparing those to international law. Another reason for looking at international law through a national lens was to show students where and how international law intersected with the domestic legal system in which most students would be working.

Another approach to demonstrating the significance and fundamental character of international law was to get students to work outside their national legal systems. This could work in a professional education setting like law education in the US. Adding a skillset or developing some other competitive advantage was of interest to students, their career counsellors, and employers.

At the Texas A&M University School of Law, their goal would be to have all students working in individual or group settings outside the US for a short period of time (4-12 weeks). These externship experiences would be accompanied by coursework to introduce international law and comparative legal systems, as well as creating awareness of professional cultures, practices, and standards outside the US. An important piece of this project was to get faculty out of the US, accompanying the students and working through the puzzle of what to teach and how to learn. The experiential piece provided an opportunity for active learning while equipping faculty to teach and motivate students.

Professor Ku concluded by informing attendees that the Texas A&M University programme would be piloted starting August 2016 with the goal of phasing in this requirement for all School of Law students in 2-3 years' time. If successful, this would be an important new initiative in law teaching in the US. The ultimate objective was to expand awareness and knowledge of international law among both students and faculty.

The Chair made brief reference to the presentations. The issue was how to teach international law. There was a new generation of students who no longer read articles but searched media files and professors and educators must adapt to the new requirements and present teaching materials in different ways. Professor Gamble's presentation stressed the importance of teaching international law better and to more people and, to do so, provided examples and suggestions for international law to thrive in the information age. Also, the new generation was no longer an observant one. It was critical and questioned teachers. Professor Nienaber illustrated this in her presentation when she referred to the student protests in South Africa and the calls for a "decolonised" international law curriculum. Professor Ku, for her part, had an interesting experience combining the political sciences with international law. It was extremely useful for students to be sent abroad to gain new experience. However, this was not always possible and might become a challenge.

The Chair highlighted the value of analysis and discussion – such as those within this Interest Group – on how better to teach international law, and invited comments from the floor.

Dr Charles A. Khamala (Kenya) said that, although international lawyers aspired to universal ideas, and despite international law having been incorporated in the Kenyan Constitution, it remained an alien notion to Kenyan practitioners and even more so to the public. Professor Gamble had referred to gross distortions by public figures and the teaching of simplified concepts of international law. This would be useful, especially in cases like the Kenya cases before the International Criminal Court, where the public opinion had initially favoured intervention but, after sustained negative publicity by the political class (including the executive and legislature), it was made to believe that the ICC was a neo-imperial institution engaged in "race hunting". It was therefore necessary for institutions to engage in outreach programmes, whether through civil society or academic institutions to inform the public about "universal" values.

Dr Busineje Kabumba, a non-ILA member from Uganda, referred to the need for contextual approaches to international law teaching. Based on his experience and the impossibility of obtaining a scholarship for study abroad, he drew attention to the situation of Ugandan students who might never interact with reality. This raised serious issues as – the subject being international law – detaching from reality was not an option. A fine line had to be drawn between the teaching objectives and the local context. In his case, to achieve this, Dr Kabumba focused on the issue of legitimacy, the idea of reclaiming a part of international law, and the contribution by Africa.

Professor Gamble said that these were very good questions and noted the usefulness of talking to people in practical ways, for instance, telling a person purchasing a tin of tuna that this was a protected species and, in this way, raising awareness. Information and communication had to be clear and in the US some popular ideas and attitudes were based on errors and needed to be corrected. The best way to clarify and correct was to proceed in a gentle, persuasive manner.

Professor Ku stressed the importance of the outreach of international institutions and organisations. The challenge was the financial side. However, experience could also be gained without travel. Conferences like the present one were important to see the outside world, interact and learn together.

Professor Nienaber noted that international law was actually breaking her students' perceptions.

Dr Pauline Collins (Australia) was surprised that, in Australia – a common law country – international law was not a core subject. She suggested developing a scheme for international law teachers to be integrated into schools to enrich dialogue, engagement, and learning for students around the world. Teachers would also benefit from this experience.

Dr Manuel Almeida Ribeiro (Portugal) said that he was a member of this Interest Group since it used to be an ILA Committee, and that discussing ways of teaching international law deserved a permanent effort. It would be useful to have a permanent forum for discussion, questioning, and exchange of experiences. This could be done through a blog, website, or any other way of putting the members in communication on a permanent basis. The conference sessions could form part of a digest based on the exchange of ideas during the previous years.

The Chair said that the problem was that the method of the teaching of international law did not seem to be a priority topic with the teachers of international law.

Professor Gamble answered that, according to the ILA statutes, nominations for new membership had to be made by the different branches of the ILA. This was a procedural matter that had to be observed.

Dr Almeida Ribeiro suggested, as member of the Executive Council of the ILA, raising this question at future Council meetings.

The Chair said that the discussion encompassed teaching in general, and not only the teaching of international law. As to financial aspects, they represented a challenge. Most western students had a wealthy basis and access to learning materials whereas, in developing countries student lacked access to important publications. That circumstance required a rethinking of the teaching international law and the absence of funding made it even harder.

Ambassador Ihor Turyanskiy (Ukraine) said that Ambassador Oleksandr Kupchyshyn, President of the Ukrainian Branch, had observed that Ukraine had long historical traditions in the field of international law, which substantially contributed to development in this field. They also made a substantial contribution teaching students from Ukraine and other countries around the world. After the Second World War, the International Relations Faculty and Chair of International Law were established at Kyiv State University, and many of its Ukrainian and Eastern European graduates held high positions in their respective countries. Graduates from the Institute of International Relations attached to Kyiv National University had become, among others, ambassadors, lecturers and professors in Kyiv and other Ukrainian universities, teaching public and private international law. The Research Institute of State and Law, for its part, with its International Law Department, had been long-standing within the framework of the Ukrainian National Academy of Sciences.

Ambassador Turyanskiy observed that this was an era of globalisation in which international relations – both in politics and economics – were increasingly important and required qualified specialists.

The Chair opened the floor to concluding remarks.

Professor Gamble reiterated the need for international law teaching to adapt to the new times and stressed the importance of having good teaching methods and experienced educators.

Professor Ku considered that the ILA could contribute to create opportunities for formal mechanisms and stressed the importance of using technological devices for teaching and training and collecting information in a more visible way.

The Chair thought that it was a very good idea to further the discussion and efforts on international law teaching. Input from colleagues around the world would no doubt be helpful, and technology should be available to all universities. They should aim to find ways to give the poorer universities access to technology to enable a better teaching and learning of international law.

The Chair thanked Professors Gamble, Nienaber and Ku for their presentations, and attendees for their comments.

Reporter: Viviane Contin-Williams (UK)

STUDY GROUP ON DUE DILIGENCE IN INTERNATIONAL LAW

SECOND REPORT

July 2016

Chair: Duncan French
Rapporteur: Tim Stephens

INTRODUCTION

The ILA Study Group on Due Diligence was established to consider the extent to which there is a commonality of understanding between the distinctive areas of international law in which the concept of due diligence is applied.[1] The members of the Study Group are listed in the Annex at the conclusion of this Second Report.

The First Report (2014) set out the initial work of the Study Group. It provided a summary of the history of due diligence in international law, the development of due diligence in the context of State responsibility, and the role of due diligence in several specific areas of international law. The First Report examined in some detail a number of disciplinary areas where due diligence has been deployed to supply content to obligations of conduct, namely international investment law, international human rights, transnational criminal law and international environmental law. The primary purpose of the First Report was to map how due diligence is utilised in those selected fields of international law.

This Second Report is not intended to be a continuation of this mapping exercise. It undertakes a thematic and analytical, rather than sectoral, approach. It is therefore concerned less with *how* due diligence is used in specific fields and more with broader, analytical questions, concerning *what* functions due diligence serves, and *why* it is employed as a standard of conduct in many and varied areas of international law.

The Second Report is divided into three Parts. Part 1 introduces overarching issues and questions, such as the relevance and appeal of due diligence across international law, whether as a result it constitutes a broader principle, and whether it is susceptible to clear and concise definition in these terms. Part 2 turns to operational issues, namely the normative content of due diligence in terms of standards of good governance and administration, and the factors that may influence variability in this standard (such as levels of economic development). Part 3 considers specific areas of contention where some of these normative and operational issues are being played out and are most visible, including in relation to the performance and responsibility of business enterprises and international organisations.

In compiling the Second Report the Rapporteur has had the benefit of significant contributions from several Study Group members, and these are acknowledged in footnotes accompanying those sections of the Second Report that draw from these contributions.[2]

---

[1] Due Diligence in International Law, Mandate, available at http://www.ila-hq.org/download.cfm/docid/EB075BB9-E130-4B48-99745A01E9E1E8FB.

[2] The Rapporteur also acknowledges the research assistance provided by Mr Jialu Xu, a fourth year LLB student at the Sydney Law School, University of Sydney, Australia.

PART 1 – OVERARCHING ISSUES AND QUESTIONS

A – Why due diligence is (so regularly) employed as a standard of conduct in various areas of international law

At its heart, due diligence is concerned with supplying a standard of care against which fault can be assessed. It is a standard of reasonableness, of reasonable care, that seeks to take account of the consequences of wrongful conduct and the extent to which such consequences could feasibly have been avoided by the State or international organisation that either commissioned the relevant act or which omitted to prevent its occurrence. The resort to due diligence as a standard of conduct should be seen against the backdrop of general approaches to accountability in international law.

Due diligence is core to many areas of international law for the primary reason that there is no uniformity in the standard of conduct expected of States or international organisations in discharging their international legal responsibilities that range across a wide arena of obligations and potential harms to other actors. With limited exceptions (for instance in relation to the management of hazardous materials or activities[3]) international law has not embraced strict or absolute liability. And as international law develops into new, more complex, areas (e.g., in response to cyber-attacks), due diligence is increasingly viewed as an important tool in responding to such challenges.[4]

In international law obligations of conduct are far more common than obligations of result. This means that international law tends to focus primarily on the behaviour of States rather than the outcomes of that behaviour. Due diligence standards preserve for States a significant measure of autonomy and flexibility in discharging their international obligations. Rigid application of international rules, mandating results, or imposing liability in the event of breach in any circumstance cuts against the grain of notions of State sovereignty and domains of non-interference.

The use of due diligence makes the international legal system adaptable to meet particular needs of States within a diverse international community. Akin to the margin of appreciation (*marge d'appréciation*) concept developed in European human rights jurisprudence,[5] due diligence avoids perfect parity of obligations in favour of a more flexible approach to performance so as to encourage broader participation in treaty and customary regimes. In doing so it is a strategy to avoid oscillation between apology and utopia. As Koskenniemi has observed in relation to 'particularism' within customary international law standards:

> It is commonplace to read the most varied kinds of contextual determinants into the ascertainment of [a] State's customary obligations. Classically, this has been so in respect of rules of State responsibility and especially the customary standard of due diligence. More

[3] See, for example, the Convention on International Liability for Damage Caused by Space Objects 1972, article II of which provides that 'A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight.'

[4] See further the work of the ILA Study Group on Cybersecurity, Terrorism and International Law, available at http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1050, and the Tallinn Manual on the International Law Applicable to Cyber Warfare, available at https://ccdcoe.org/research.html.

[5] See Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 *European Journal of International Law* 906.

> recently, the search for equitableness has affected the law on, for example, natural resources, treatment of individuals, State succession or the status of non-State actors.[6]

Due diligence as an open-ended standard or principle therefore avoids difficulties that can arise in agreement on precise rules (which may be impossible to achieve) and in the enforcement of such rules (which may be controversial if indeed achievable). Again, borrowing from Koskenniemi, due diligence can be seen as a technique of proceduralisation, deferring controversial inquiries as to the content of substantive rules regulating wrongdoing to less controversial questions relating to informed decision-making and process. Rather than posing answers to questions of breach, due diligence instead tends to inquire whether States have taken reasonable and appropriate steps to avoid or mitigate injury to other States.

The effect of due diligence is therefore, in some contexts, to dilute the stringency of State obligations. However, there may be sound reasons for this. Less rigid focus on the equivalence of obligations may encourage broader participation in an international regime, and thus, paradoxically, over time the regime may be strengthened (or, in relation to customary rules, State practice and *opinio juris* might develop the necessary extent and clarity to support its crystallisation). Moreover, and as a related point, the content of due diligence duties themselves are not fixed. They can and do evolve over time. Hence while a broad due diligence obligation may be an initial strategy to promote participation, once involvement increases the strictness of the applicable standard can be enhanced and mature into a more demanding system of legal accountability. An example of this is the obligation to undertake environmental impact assessment which has now been considered by the ICJ on several occasions and progressively strengthened.[7]

There are stark disparities in the capacity of States to fulfil international obligations and, appropriately, States from the Global South may appeal to the apparent forgiving character of due diligence as a benchmark for the performance of obligations. Due diligence introduces flexibility in this respect to serve a broader international community objective to ensure that States with limited economic capacity can participate in the international legal system without being burdened by unreasonable normative demands.

However there are a number of contexts in which such exceptionalism has its limits or does not apply at all. For instance in the law applicable to diplomatic missions and diplomatic immunity, special duties of protection apply irrespective of the capacity of the receiving State.[8] Crawford explains that this 'creates a special standard of care over and above the normal obligation to show due diligence in protecting aliens within the State.'[9]

---

[6] Martti Koskenniemi**,** *From Apology to Utopia: The Structure of International Legal Argument* (1989), p. 391.

[7] *Pulp Mills on the River Uruguay, Case Concerning (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14 (*Pulp Mills Case*); *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica),* Judgment of 16 December 2015 (cf. the Separate Opinion of Judge Donoghue's in which she observed that due diligence and environmental impact assessment should not be fixed and prescribed, and that there should be 'scope for variation in the way that States of origin conduct the assessment').

[8] Vienna Convention on Diplomatic Relations 1961, Article 22(2).

[9] James Crawford, *Brownlie's Principles of Public International Law* (8th ed, 2012), p. 403.

Another example is in relation to the law of the sea. In *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Seabed Mining Advisory Opinion)*[10] the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) rejected the argument that the stringency of marine environmental protection obligations could be adjusted according to the level of development of a State. It would 'jeopardize uniform application of the highest standards of protection of the marine environment' if 'sponsoring States "of convenience"' became prevalent.[11] This decision can be seen as one that balances two competing community objectives in relation to due diligence. On the one hand an objective, enshrined in the notion of common but differentiated responsibility, which takes account of the historical and economic disadvantages faced by developing States, with, on the other hand, the collective community interest in protecting global environmental commons.

Due diligence is imbued with differing content according to the specific area of international law in which it is invoked. This is illustrated in the most recent decision of the ICJ concerning transboundary environmental damage: the joined proceedings in *Costa Rica v Nicaragua; Nicaragua v Costa Rica*.[12] These proceedings concerned two separate claims:

1. By Costa Rica against Nicaragua, for Nicaragua's military occupation of Costa Rican territory and for Nicaragua dredging a channel in the occupied area, as well as a separate claim that Nicaraguan dredging works on the San Juan River was in violation of international law;
2. By Nicaragua against Costa Rica, for Costa Rica carrying out major road construction works in the border area between the two countries on the San Juan River, in violation of international law.

In the first claim, the Court found that Nicaragua had breached Costa Rican territorial sovereignty and awarded reparations on that basis. In relation to the environmental claim, however, after affirming previous ICJ jurisprudence on the need for environmental impact assessments and for consultation with affected States, the ICJ found that Nicaragua did not breach international environmental law obligations by engaging in dredging activities, as it did not give rise to a risk of significant transboundary harm and thus did not activate the need to carry out an environmental impact assessment.

In the second claim, the Court reaffirmed the need for environmental impact assessments where there is a risk of significant transboundary harm. The Court ruled that Costa Rica had failed in its obligations to engage in a proper environmental impact assessment, as it did not make its assessments prior to construction but rather did so after construction, thus not satisfying the requirements for environmental impact assessments at customary international law. However, the evidence did not ultimately show that the construction of the road caused significant transboundary harm to Nicaragua.

Thus this most recent decision of the ICJ affirmed the following principles:

---

[10] (2011) 50 ILM 458.

[11] Ibid, para. 159.

[12] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica),* Judgment of 16 December 2015.

- That due diligence involves an obligation to carry out an environmental impact assessment if there is a risk of significant transboundary harm (following *Pulp Mills*);
- That where the environmental impact assessment confirms a risk of significant transboundary harm, due diligence requires that the State planning to undertake the activity notify and consult in good faith with the affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk;
- The obligation to carry out an environmental impact assessment requires the assessment to be done ex ante, not post hoc after construction has already started;
- The procedural obligation to undertake environmental impact assessment is distinct from the substantive obligation (not to cause transboundary harm).

It remains to be seen however, whether due diligence is strengthened or diluted by this apparent move to separate procedural and substantive obligations. As Brunnée notes, 'it appears as if the ICJ distinguishes between the duty to take diligent steps to *prevent* significant transboundary harm, which it then deals with under the rubric of separate procedural obligations, and the duty to take diligent steps not to *cause* harm, which it considers cannot be violated simply by a failure to act diligently'.[13]

B – Whether due diligence embraces/constitutes a broader principle of international law[14]

The core content of the due diligence principle was articulated in the *Corfu Channel* case,[15] namely 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'. This principle has developed over a lengthy period, is now clearly a part of customary international law, and reflects cornerstone concepts of international law (including State sovereignty, equality, territorial integrity, and non-interference).

The tri-partite core of the due diligence principle is as follows:

- A sovereign State is obligated to ensure;
- That in its jurisdiction (which includes all those spaces where the sovereign exercises formal jurisdiction or effective control[16]);
- Other States' rights and interests (including those with respect to the protection of their citizens and companies) are not violated.

This broad principle of due diligence can be understood as underlying more specific rules of due diligence. Hence, it can be viewed as a default standard that is triggered in operation if no more specific elaboration of due diligence or stricter standard is in existence.

Subject to specific primary rules, this general principle of due diligence remains applicable and requires active (though not easily identified) measures of due diligence by States

[13] Jutta Brunnée, 'Procedure and Substance in International Environmental Law: Confused at a Higher Level' (2016) 5 *ESIL Reflections* 6 (June 3, 2016).

[14] This section is based upon a submission to the Rapporteur by Study Group Member Eric De Brabandare.

[15] *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland *v.* Albania), [1949] ICJ Rep 4.

[16] *Al-Skeini v UK* [2011] ECtHR 55721/07.

in their own territory. Even if the content of due diligence is very general, it is clear that its requirements are defined at the level of international, rather than national, law. Today, of course, many areas of State behaviour are covered by more detailed primary rules of international law. An example is the treatment of aliens, which was once a major arena for the application of due diligence but is less so today because of the application of human rights and investment protection law.

The question was raised in the First Report of the Study Group as to whether it would be desirable to interpret and understand the due diligence standard only within its particular context. As was stated in the First Report:

> Normative and institutional fragmentation has revealed significant divergences in the application of due diligence, both in terms of the scope of its application, and also seemingly its content. Nevertheless, the idea that there is a common standard persists. To mention one contemporaneous example; the obligation on States "to refrain from…acquiescing in organized [terrorist] activities within its territory directed towards the commission of such acts [in another State], when the acts referred to in the present paragraph involve a threat or use of force". How should one approach such an obligation? If it is accepted for the moment that the standard required of the host State is that of due diligence, to what extent is this an obligation that flows from the Court's comments in *Corfu Channel*? Or must the application of the due diligence standard be interpreted and understood only within its particular context?

Given the generality of the due diligence principle, as articulated in the *Corfu Channel* case, it may be argued that there is no contradiction between the general standard and more specific expressions of due diligence in sub-branches of international law. The broader obligation of due diligence underlies the more specific instances of due diligence, which will become operational if they apply in a given situation. As there is no norm-conflict between the very general due diligence and these more specific manifestations, it seems also justified to say that no conflict of law rules are needed to resolve these (such as *lex generalis* and *lex specialis* rules).

PART 2 – OPERATIONAL ISSUES

A – Matters affecting whether the standard of due diligence is met[17]

This section of the Second Report addresses the substantive content of due diligence, that is what can be expected of a State which has assumed a due diligence obligation.

The issues addressed in this section are linked to the issues covered in Part 2.B below ('Whether there are factors that can vary this standard'). The question is also closely linked to the objectivity or subjectivity of the standard of conduct. It is acknowledged that a primary rule may set out one or more elements to assess in determining whether a State has met a due diligence obligation.[18]

---

[17] This section is based upon a submission to the Rapporteur by Study Group Member Eric De Brabandere.

[18] For example, article 18 of the International Convention for the Suppression of the Financing of Terrorism 1999, 2178 UNTS 197, requires States parties to adopt domestic legislative measures directed at 'financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity.'

It is suggested that it is possible to identify a number of elements that may be considered core to due diligence as a standard of conduct. Precisely how the due diligence standard is applied is still subject to considerable discussion and debate (as befits a principle which derives much of its utility because of its general character). Courts and tribunals often provide little in the way of detailed analysis of the standard and whether it has been met in the circumstances.[19] There is an important secondary issue here; due diligence is a positive obligation on States but will tend to be assessed on an *ex post facto* basis to determine compliance and responsibility. For obligations of result, ascertaining (il)legality – though often not without uncertainty – is usually less problematic. But in terms of due diligence, how can States ascertain clearly, and in advance, that they are satisfactorily meeting – and continuing to meet – their obligations of conduct?

'Reasonableness' as the overarching standard

It is difficult to define the standard in absolute terms, as was acknowledged in the *Seabed Mining Advisory Opinion*:

> The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time…[20]

At the same time, the difficulty in defining the standard does not imply that the obligation to act in due diligence has no content. The due diligence standard, from this perspective, bears some resemblance to those rules of international law which leave States discretion in deciding which specific measure can be taken in order to comply with an obligation. States have significant latitude in the choice of means they employ when taking all measures they could reasonably be expected to take. However, discretion in the choice of means can be limited either because (1) the primary norm in itself may explicitly prescribe certain means, such as specific duties to legislate in order to prevent and repress certain conduct, or (2) a specific type of measure is indispensable to avoid harm. Where regulation is necessary for States to meet an international obligation effectively, custom may develop into an express duty on States to regulate (e.g. in order to regulate potentially harmful activities). As such, due diligence has been described as 'a flexible reasonableness standard adaptable to particular facts and circumstances, provid[ing] the underlying legal framework. It amounts to "due, or merited, care"'.[21]

Although difficult to define in precise terms, several elements can be derived from case-law and treaty practice to identify core features of due diligence as a concept and principle.

Another example is article 7 of the United Nations Convention against Transnational Organized Crime 2000, 2225 UNTS 209, requiring imposition by parties of a 'comprehensive' domestic supervisory and regulatory regime for banks and non-bank financial institutions.)

[19] See, for example, *National Grid plc v. The Argentine Republic*, UNCITRAL, Award, 3 November 2008, paras. 189-190.

[20] (2011) 50 ILM 458, para. 117.

[21] RP Barnidge Jr, 'The Due Diligence Principle Under International Law' (2006) 8 *International Community Law Review* 118 citing C Corino, 'Environmental Due Diligence' (2000) 9 European Environmental Law Review 120, 120.

Reasonableness

'Reasonableness' is a golden thread in determining which measures States should take to act in a duly diligent manner.[22] Indeed, one might describe a due diligence obligation as an obligation for the State to take *all measures it could reasonably be expected to take*.[23] Even in the instance of preventing a gross violation of international law from occurring, such as the commission of genocide, the standard articulated by the ICJ in order to incur international responsibility was that a State 'manifestly failed to take all measures' that were 'within its power' to take.[24]

In the history of international law, due diligence in the context of the protection of aliens was expressed as the need for States to take all measures it could 'reasonably' be expected to take.[25] For example, in the *Wipperman* case it was stated that no State is responsible for acts of individuals 'as long as *reasonable diligence* is used in attempting to prevent the occurrence or recurrence of such wrongs.'[26] In the *Neer* case, often quoted as representing the international minimum standard, the Claims Commission described the international minimum standard in these terms:

> the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every *reasonable* and impartial man would readily recognize its insufficiency.[27]

Reasonableness has echoes in subsequent practice, well beyond the treatment of aliens and diplomatic protection. In relation to the UN Guiding Principles on Business and Human Rights,[28] developed by John Ruggie as Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, similar references to 'reasonableness' can be found. In this context the concept of due diligence, applicable to transnational corporations, is defined as:

> Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, *a reasonable and prudent [person or enterprise]* under the particular circumstances; not measured by any absolute standard, but depending on the relative facts

---

[22] See also Ian Brownlie, *Principles of Public International Law* (7th ed, 2008), p. 526 and Helge E. Zeitler, 'The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors' (2005) 3 *Stockholm International Arbitration Review* (2005), 1.

[23] Jeswald W. Salacuse, *The Law of Investment Treaties* (2010), p. 217.

[24] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 Feb 2007, ICJ Reports 2007 para 430. (emphasis added) (*Genocide case*)

[25] See also International Law Association, Study Group on Due Diligence in International Law, First Report (7 March 2014) <http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045> pp. 2 ff.

[26] John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol III, p. 3041 (emphasis added).

[27] General Claims Commission (Mexico and United States), *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, Decision of 15 October 1926, IV UNRIAA, pp. 60-66, at pp. 61-62 (emphasis added).

[28] *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Human Rights Council, UN Doc. A/HRC/17/31 (March 21, 2011).

> of the special case. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that *a reasonable and prudent enterprise* needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.[29]

Similar references are found in corporate due diligence obligations in transnational criminal law,[30] and in relation to the progressive realisation of human rights.[31] The Draft Articles on Prevention of Transboundary Harm from Hazardous Activities also contain references to 'reasonableness'.[32]

Yet, the term 'reasonable' is, as the due diligence standard itself, difficult to determine *in abstracto*, and leaves States much discretion in the choice of means. Reasonableness implies an evaluation of the measure taken by reference to what could be *expected* from a State. And this is problematic to define, since what could be *expected* from a State cannot be ascertained in general terms. The assessment of the reasonableness of the measures taken depends also, *inter alia* on the question whether 'what is reasonable' is assessed through a standard which takes into account the level of development of a State.

Good government

The expectation of 'good government' as an element of duly diligent behaviour finds some support in the writings of publicists and in international case law. The parameter here is closely linked to the general standard of 'reasonableness' and the potential variability of the due diligence standard according to the State's level of development.

In his 1955 Hague Academy lecture, Freeman noted that the standard of due diligence requires 'nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.'[33] Some investment tribunals have posited the need for States to act 'in accordance with the parameters inherent in a *democratic* State',[34] in order to delimit what could reasonably be expected from a State. In *AAPL v. Sri Lanka*, the Tribunal noted

> A number of other contemporary international law authorities noticed the "sliding scale", from the old "subjective" criteria that takes into consideration the relatively limited existing possibilities of local authorities in a given context, towards an "objective" standard of

---

[29] UN Human Rights Office of the High Commissioner, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012), at p. 4 (emphasis added).

[30] See First Report, above n 25, p. 22.

[31] Influenced by the South African Constitutional Court's jurisprudence on progressive rights realisation, the new OP-ICESCR contains language referring to 'reasonableness' in article 8, para. 4 of the OP-ICESCR. See also Evelyne Schmid, 'Thickening the Rule of Law in Transition: The Constitutional Entrenchment of Economic and Social Rights in South Africa' in Edda Kristjánsdóttir, André Nollkaemper and Cedric Ryngaert (eds.), *International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States* (2012), p. 73.

[32] International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, UN GAOR 56th Sess., Supp. No. 10, UN Doc A/56/10 (2001), Commentary to article 3, para. 10.

[33] A.V. Freeman, 'Responsibility of States for Unlawful Acts of their Armed Forces', 88 RCADI (1955-II) 263, pp. 277-278.

[34] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 177 (emphasis added).

> vigilance in assessing the required degree of protection and security with regard to what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State.[35]

Such an approach also is implicit in the *Seabed Mining Advisory Opinion*.[36]

International minimum standard and national treatment

Notwithstanding the ascendance of the international minimum standard, a matter sometimes referred to in mistreatment of alien cases in assessing whether a due diligence standard is met, and whether the acts taken by the State are 'reasonable,' is how a State has treated its own nationals. Treatment of a foreign national may be considered unreasonable if it is of a lesser quality and degree than that normally provided to nationals.[37]

In the *Alabama Claims Arbitration,*[38] the British government argued, unsuccessfully, for a (restrictive) national standard, contending that a lack of due diligence meant 'a failure to use…such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation.'[39] Max Huber in *British Property in Spanish Morocco* case[40] observed that:

> Vigilance, which from the point of view of international law the State is required to guarantee, can be characterized by applying by analogy the Roman law term of *diligentia quam in suis*. This rule, consistent with the overriding principle of the independence of States in their internal affairs, in fact offers States, for their nationals, the degree of security which they can reasonably expect. As long as the vigilance exercised clearly falls below this level *compared to nationals of a foreign State*, the latter is entitled to consider this to be an injury to its interests which should enjoy the protection of international law.[41]

This element implies that at least some account is taken of the capacities of the relevant State and its relative level of development.

Control over territory and non-State actors

International humanitarian law contains specific due diligence obligations within both treaty and customary international law, and in some situations it requires, for the standard to be applied, that the State should have control over its territory.[42] Also connected to the

---

[35] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, para. 77 (internal references omitted).

[36] *Seabed Mining Advisory Opinion*, (2011) 50 ILM 458, para. 158.

[37] Helge E. Zeitler, 'The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors' (2005) 3 *Stockholm International Arbitration Review* 1, p. 16.

[38] *Alabama Claims Arbitration (United States/Great Britain)* (1872) 29 *RIAA* 125, p. 129.

[39] Case presented on the Part of the Government of Her Britannic Majesty in Papers relating to Foreign Relations of the United States 1872, part 2 vol 1, p. 412.

[40] *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni) (British Property in Spanish Morocco)*, Decision of 1 May 1925, II *UNRIAA*, pp. 615-742.

[41] Ibid, p. 644 – original in French – translation by Eric De Brabandare.

[42] Geneva Conventions I-IV 1949, 75 UNTS 287, articles 1 & 3; *Prosecutor v Akayesu* (Appeal) ICTR-96-4 (1 June 2001); *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14; *Prosecutor v Tadić* (Appeal) ICTY-94-1 (15 July 1999); *Application of the Convention on the Prevention and Punishment of the Crime*

issue of control, which goes to the reasonableness of State action (or inaction) in some circumstances, is the degree of influence a State has over non-State actors.

In the *Nicaragua* case the ICJ applied the 'effective control' test for determining whether the United States was responsible for the actions of a paramilitary force.[43] In *Prevention and Punishment of the Crime of Genocide (Bosnian Genocide* case) the ICJ reaffirmed the 'effective control' test.[44] In contrast, the ICTY in *Tadić* contended that the less demanding 'overall control test' ought to apply both in determining whether a conflict was international in character, and whether the actions of the Bosnian Serbs could give rise to the international responsibility of the Former Republic of Yugoslavia.[45] Given that the application each test turns on the level or degree of control exercised then due diligence is relevant to both. In the *Bosnian Genocide* case the ICJ explained the operation of the due diligence principle in relation to the obligation to prevent genocide:

> In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.[46]

Degree of risk

As noted in the *Seabed Mining Advisory Opinion*, '[due diligence obligations] may also change in relation to the risks involved in the activity.'[47] This is also reflected in the ILC's

---

of Genocide, Case Concerning the (Bosnia and Herzegovina v Serbia and Montenegro) (Merits) [2007] ICJ Rep 43; *Yeager v. The Islamic Republic of Iran*, Iran-US Claims Tribunal (1987) 17 CTR 92, pp. 101–104; Nigel White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs' (2012) 31 *Criminal Justice Ethics* 233.

[43] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, [1986] ICJ Rep 14, p. 126

[44] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment), [2007] ICJ Rep 43 (*Bosnian Genocide* case).

[45] *Prosecutor v Tadić,* International Criminal Tribunal for the Former Yugoslavia (ICTY), Appeals Chamber, 1999 (Case no. IT-94-1-A).

[46] *Bosnian Genocide* case, [2007] ICJ Rep 43, para. 403.

[47] *Seabed Mining Advisory Opinion,* (2011) 50 ILM 458, para. 117.

Draft Articles on the Prevention on Transboundary Harm. The Commentary to Article 3 of the Prevention Articles explains that due diligence standard should be 'appropriate and proportional to the degree of risk of the transboundary harm'. [48] The UN Guiding Principles on Business and Human Rights also accepts that due diligence requirements increase in situations in which the risks of harm are known to be particularly significant.[49]

Knowledge of an activity or potential risk

States can usually only be expected to act in accordance with a due diligence obligation to prevent harm if the State has knowledge of the situation which requires action.[50] However, in some circumstances a State may be under a specific obligation to use best efforts to gain knowledge of activity within its territory or jurisdiction.

The State has a due diligence obligation to monitor certain kinds of activities taking place on its territory or under its jurisdiction. As observed in the *Corfu Channel* case, 'the fact of…exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events.'[51] It may allow the State which is the victim of an international wrong 'a more liberal recourse to inferences of fact and circumstantial evidence.'[52] In that case, the Court concluded that the laying of the minefield in the channel 'could not have been accomplished without the knowledge of the Albanian Government.'[53] Albania was held responsible because it either knew or should have known about the activity.

Bad faith/absence of any measure

A State cannot be considered to have acted diligently when the State has acted in bad faith or has knowingly refused to take any measures whatsoever. This was the case, for example, in *Wena v. Egypt[54], in which the Tribunal found that the failure by the State to take any action against those responsible for the forceful seizure of Wena's property constituted a breach of the full protection and security standard.[55] This idea is very much*

---

[48] International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, UN GAOR 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to article 3, para. 11.

[49] *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Human Rights Council, UN Doc. A/HRC/17/31 (Mar. 21, 2011). Principle 17(b) explicitly states that due diligence 'will vary in complexity with…the risk of severe human rights impacts'. See also Principle 7, requiring States to pay particular attention to the human rights-related risks of businesses operating in conflict-affected areas, and Principle 3 (assessing the adequacy of laws in light of evolving circumstances) and Principle 21 (formal reporting where business operations or contexts pose risks of severe human rights impacts).

[50] Helge E. Zeitler, 'The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors', 3 *Stockholm International Arbitration Review* (2005) 1, p. 14.

[51] *Corfu Channel* case [1949] ICJ Rep 1, p. 18.

[52] Ibid.

[53] Ibid, 22.

[54] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 84,

[55] Ibid, paras. 82, 84 and 94.

in conformity with due diligence as understood in international environmental law, to the extent that a State has to act diligently in the event of foreseeable harm.[56]

B – What factors, if any, may vary a due diligence standard[57]

It is useful to consider due diligence standards in light of both objective and subjective criteria. An objective standard of due diligence means that all States are held to the same standard, irrespective of their individual characteristics. Subjective standards of due diligence allow for varying expectations of States, taking into account considerations such as the level of development of a State, the degree of control a State has *de facto* over its territory if subject to alien occupation or territorial control by guerrilla forces, or other characteristics that put a State in a unique position at a given time.[58]

Subjective Variation in Due Diligence Obligations

The level of a State's economic development can have a bearing on the operation of due diligence obligations in some circumstances. For instance, the World Trade Organisation allows States to self-identify as 'developing countries' but reserves the designation of 'least developed countries' to those accepted by the United Nations Development and Policy Analysis Division.[59] The World Bank relies on its own World Development Indicators to distinguish low, lower-middle, upper-middle, and high income countries.[60]

In international environmental law, the language and concept of "common but differentiated responsibilities" emerged from the Rio Conference on Environment and Development in 1992 and the treaties it produced.[61] Three factors justify such an approach in environmental law. The first is the need to balance environmental protection with economic development of all States on an equitable basis. Measures of environmental protection should be designed and implemented in such a way as to support rather than inhibit States in achieving human development objectives. The second factor is the historical responsibility of developed States for environmental damage since the industrial revolution and their continuing, vastly disproportionate, consumption of the Earth's resources and contributions to the biggest environmental threat of the Anthropocene: climate change. The third factor is the greater financial and technological capacity of more developed

---

[56] First Report, above n 25, p. 26.

[57] This section is based upon a submission to the Rapporteur by Study Group Member Rachael Lorna Johnstone.

[58] Eric de Brabandere, 'Host States' Due Diligence Obligations in International Investment Law' (2015) 42(2) *Syracuse Journal of International Law and Commerce* 319, pp. 354-355.

[59] World Trade Organisation, 'Who are the Developing Countries in the WTO?' <http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm> accessed 11 February 2015; UN Development Policy and Analysis Division, 'Who are the Least Developed Countries (LDCs)?' <http://www.un.org/en/development/desa/policy/cdp/ldc_info.shtml> accessed 11 February 2015.

[60] The group of high income countries is also divided between OECD and non-OECD members: The World Bank, 'Country and Lending Groups' <http://data.worldbank.org/about/country-and-lending-groups> accessed 11 February 2015.

[61] Rio Declaration on Environment and Development (1992) 31 ILM 876, principle 7; Convention on Biological Diversity 1992 (CBD), 1760 UNTS 79, article 6; United Nations Framework Convention on Climate Change 1992 (UNFCCC), 1771 UNTS 107, article 3(1); United Nations Convention to Combat Desertification 1994 (UNCCD), 1954 UNTS 3, article 6 (this latter does not use the terms "common but differentiated responsibilities" but the concept is implicit).

States to shoulder the costs of transition towards more environmentally sustainable use of resources. Reflecting these considerations, the Rio Declaration provides:

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[62]

Elsewhere, the Rio Declaration requires States to apply the precautionary approach 'according to their capabilities.'[63] The precautionary approach was analysed by the Seabed Disputes Chamber in the *Deep Seabed Mining Advisory Opinion*. On the one hand, the Chamber held that the general provisions of the UN Convention on the Law of the Sea (UNCLOS), especially Part XI, should be objectively defined (i.e. the standard of the good government) as the relevant Part does not explicitly provide for a variable standard.[64] On the other hand, the Seabed Disputes Chamber held that it was possible that specific Regulations established by the International Seabed Authority under the authority of Part XI, could allow for variable degrees of diligence according to a State's capabilities.[65] However, the Chamber was unwilling to read "capabilities" as a reference only to the level of economic development of a State, but rather considered 'capabilities' in light of all the circumstances, including the resources, knowledge and technological capability available in fact in each case.[66] The Chamber no doubt had in mind the scientific expertise of the private contractors that the State in question sponsors.

The Chamber's reasoning indicates its view that whether or not the degree of diligence required varies between developed and developing States pivots on the applicable primary rules. Developing States will only be subject to a reduced standard if provided for in the treaty, binding secondary norms established under the treaty, or in customary law in the relevant, narrow context. Part XI of the UNCLOS contains no such provision. Alternatively, it may be that the common heritage character of the deep seabed and its superjacent high seas preclude the application of common but differentiated responsibilities. The same (common) resources should be treated with the same degree of care by all States.

Within international human rights law, in respect of *some* human rights, there are variable expectations on States according to their economic circumstances. States should take 'all appropriate means' to achieve progressively certain rights, in particular, but not exclusively, economic, social and cultural rights.[67] Developing States are also permitted to restrict certain economic, social and cultural rights to nationals and exercise a lower

---

[62] Rio Declaration, ibid, principle 7.

[63] Rio Declaration, ibid, principle 15.

[64] *Seabed Mining Advisory Opinion,* (2011) 50 ILM 458, para. 158; but see UN Convention on the Law of the Sea 1982 (UNCLOS), 1833 UNTS 397, Part XII, article 194 which requires States to take measures to prevent pollution of the marine environment 'in accordance with their capabilities'.

[65] *Seabed Mining Advisory Opinion,* (2011) 50 ILM 458, paras. 160-161.

[66] Ibid, para. 162.

[67] International Covenant on Economic, Social and Cultural Rights 1966 (ICECSR), 993 UNTS 3, article 2(1); Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW), 1249 UNTS 13, article 2. See also International Law Association, Study Group on Due

standard of diligence in respect of non-nationals.[68] There may also be a *limited* scope for States at any level of development to reduce human rights protection in times of economic crisis.[69]

International humanitarian law contains specific due diligence obligations both within treaty and customary international law. Nonetheless the extent of control that parties have over territory, whether effective or overall control, as well as the role of non-State parties, including private military contractors and international organisations, results in varying standards of due diligence being applied depending on the circumstances.[70]

Different views are held regarding international investment law as to whether developing States may exercise less diligence than more developed States.[71] One view is that due diligence in this context may be a variable standard for some aspects, such as in the application of the 'full protection and security' (FPS) standard of treatment in relation to acts of third parties, also considered part of the international minimum standard of treatment. However, a common, objective standard of diligence for other aspects applies, such as the State's due diligence obligation in the case of harm caused by acts of third parties, to apprehend and punish those responsible for the acts. This is also part of the FPS standard, an obligation with parallels to the customary norm on the prohibition of a denial of justice, which is considered part of the international minimum standard of treatment.[72] The scant attention given by arbitral tribunals to this question however leaves much ambiguity as to the objectivity of the applicable due diligence standard.

As States develop economically and their capacity increases, so too are the requirements of diligence heightened. Furthermore, States do not all develop at the same rate. This has proven controversial in the context of international climate law. Some of the obligations under the Kyoto Protocol were obligations of result (e.g. emissions limits) but the Protocol contained also obligations of due diligence.[73] Fast-developing (and high carbon-emitting) China and India maintained that they should be treated as developing

---

Diligence in International Law, First Report (7 March 2014) <http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045> accessed 15 April 2014, p. 16.

[68] International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3, article 2(3).

[69] Rachael Lorna Johnstone and Aðalheiður Ámundadóttir, 'Human Rights in Crisis: Securing the International Covenant on Economic, Social and Cultural Rights (ICESCR) in Economic Downturns' (2013) 1 *International Journal of Human Rights and Constitutional Studies* 6, pp. 10-20.

[70] Geneva Conventions I-IV, 1949, 75 UNTS 287, articles 1 & 3; *Prosecutor v Akayesu* (Appeal) ICTR-96-4 (1 June 2001); *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14; *Prosecutor v Tadić* (Appeal) ICTY-94-1 (15 July 1999); *Bosnian Genocide* case [2007] ICJ Rep 43; *Yeager v. The Islamic Republic of Iran*, Iran-US Claims Tribunal (1987) 17 CTR 92, 101–104; Nigel White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs' (2012) 31 *Criminal Justice Ethics* 233.

[71] See De Brabandere, above n 58, pp. 353-358.

[72] Due Diligence in International Law, First Report, above n 67, p. 10. See *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009), para. 77 (for the claims that the due diligence standard applies subjectively and objectively, *see Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990) para. 77 (for the claim that an objective standard generally applies)).

[73] Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 (Kyoto Protocol), 2303 UNTS 162, article 2.

countries subject to lower expectations while many Annex B countries rejected what they saw as unfair latitude. This tension was an impediment to effective negotiations under the 1992 UN Framework Convention on Climate Change (UNFCCC) and the 1997 Kyoto Protocol, hampered the setting of targets for the period 2013-2020. The issue of differentiation has been at the heart of negotiations for emission cuts in the post 2020 period. It was resolved to a large extent in the Paris Agreement,[74] which significantly reduces the differentiation between developed and developing countries in recognition of the need for urgent, global, concerted action to address rapidly unfolding climate crisis.

Another aspect of the common but differentiated responsibility concept is the enhanced duties of developed States. This was a position promoted by developing countries at the Rio Conference but has remained controversial.[75] It is implicit in Principle 7 of the Rio Declaration but also appears in the UNFCCC according to which developed countries "should take the lead" and the performance of developing countries is made conditional on financial support and technology transfer from developed countries.[76] The UN Convention to Combat Desertification establishes special obligations of developed country parties, including provision of financial support.[77] The Convention on Biological Diversity has quite detailed provisions on financial assistance according to which developing States' performance is made contingent on transfer of financial resources and technology from developed States parties.[78] The duty to transfer technology and scientific knowledge to developing countries is also found in UNCLOS in the context of exploitation of the deep seabed.[79]

Under human rights law, States' obligations are primarily to persons within their territory or jurisdiction but the 1966 International Covenant on Economic, Social and Cultural Rights is not jurisdictionally limited.

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[80]

This could be read to mean that developed States parties should exert best efforts to secure the Covenant rights to all people in all other States parties as well as their own.[81] At the very least, they should exercise due diligence to ensure that activities under their

---

[74] 2015 Paris Agreement, available at https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf

[75] See International Law Association, Report of the Committee on Legal Principles Relating to Climate Change, in the Report of the Seventy-Fifth Conference (The Sofia Conference, August 2012), pp. 442, 445.

[76] UNFCCC, above n 61, articles 3(1) and 4(7).

[77] UNCCD, above n 61, article 6.

[78] CBD, above n 61, article 20; see also article 16 on transfer of technology.

[79] UNCLOS, above n 36, article 144.

[80] ICESCR, above n 67, article 2(1)

[81] See Committee on Economic, Social and Cultural Rights, General Comment No. 3 'The Nature of States Parties' Obligations (art. 2, para. 1, of the Covenant)' (1990) in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, Vol. I, May 27 2008, HRI/GEN/1/Rev.9 (Vol I) paras. 13-14.

control, including through international organisations in which they play a leading role, do not detract from economic, social and cultural rights abroad.[82]

Subjective factors aside from economic development can also enhance the degree of diligence required of States. In the *Bosnian Genocide* case, the Court held that the geographical proximity and "political, military and financial links" between the organs of Serbia and the génocidaires in Bosnia meant that Serbia's duties to take measures to prevent the genocide could be distinguished from those of all other States parties to the Genocide Convention.[83] An enhanced degree of diligence can also result from a Court order (as in the case of the two Provisional Orders in the *Bosnian Genocide* case proceedings[84]) or a Chapter VII Security Council resolution directed at a particular State.

Where a State does not have effective control over the entirety of its territory, the degree of diligence expected may also be mitigated accordingly. International law presumes, whether accurately or not, that a State has control over its territory and holds that 'responsibility is the corollary of sovereignty.'[85] (The proceedings in the European Court of Human Rights against Ukraine in relation to the shooting down of MH17 is arguably an example of this). However, in reality, situations such as alien occupation or control by a guerrilla force, mean that States cannot provide the same protections to, *inter alia,* their own nationals, aliens, investors or even the environment of neighbouring States under such conditions.

It is not clear, however, that this is truly a question of requiring less *diligence* or instead is a matter of *force majeure* as a (temporary) circumstance precluding wrongfulness.[86] However conceptualized, such circumstances would have no effect on States' duties to uphold norms of *ius cogens,* for instance duties to prevent acts of genocide or torture committed within their territories. On the other hand, occupying States also have due diligence obligations within the territories that they occupy and the extent of their obligations will vary according to the degree of control they exercise.[87] International organisations, particularly those administrating territories or engaged in long-term peacekeeping

---

[82] Committee on Economic, Social and Cultural Rights, General Comment No. 2, 'International Technical Assistance Measures (Art. 22 of the Covenant)' (1990), in Compilation of General Comments and General Recommendations Vol I, ibid. More ambitiously, see Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2012) 34 *Human Rights Quarterly* 1084-1169.

[83] *Bosnian Genocide* case, [2007] ICJ Rep 43, paras. 430 and 434.

[84] Ibid, para 435; *Application of the Convention on the Prevention and Punishment of Genocide, Case Concerning the (Bosnia and Herzegovina v Yugoslavia)* (Order for Provisional Measures) [1993] ICJ Rep 3; and *Application of the Convention on the Prevention and Punishment of Genocide, Case Concerning the (Bosnia and Herzegovina v Yugoslavia)* (Order for Provisional Measures) [1993] ICJ Rep 325.

[85] *Island of Palmas case (Netherlands v United States of America)* 1928, Permanent Court of Arbitration, Arbitrator: Huber, 2 RIAA 829, p. 839.

[86] Articles on Responsibility of States for Internationally Wrongful Acts 2001 in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, UN Doc A/56/10 (2001), article 23.

[87] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, p. 253; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras. 102-113.

operations will also hold similar due diligence obligations with regard to *ius cogens* and other human rights and international human rights norms.[88]

Corporate human rights due diligence, as expressed in the UN General Principles, also provides for variable standards of diligence taking into account both the size of the corporation as well as criteria relating to the nature of the company's operations and the risk to human rights.[89]

Objective Due Diligence Obligations

There are some obligations of due diligence for which the same standard is required of all States and no account is taken of the economic resources of a State, its degree of control over its territory or other special characteristics. Here we can consider, *inter alia,* the provisions of the minimum core of economic, social and cultural rights;[90] certain aspects of the international minimum standards in international investment law;[91] the prevention of terrorism,[92] international humanitarian law,[93] and certain obligations to protect the environment of areas beyond national jurisdiction.[94] As discussed above, the *Deep Seabed Mining Opinion* concluded that developing States are not to be held to a lower standard in their governance of contractors engaged in deep seabed exploration and exploitation and that they should apply best environmental practices, although it allowed more latitude in respect of the application of the precautionary approach.[95]

---

[88] Boris Kondoch 'Human Rights Law and UN peace operations in post-conflict situations' in Nigel White and Dirk Klaasen (eds.), *The UN, Human Rights and Post Conflict Situations* (2005) 149; 27-33, Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011) pp. 320-393; Ralph Wilde*, International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2010).

[89] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc A/HRC/17/31 (March 21, 2011) (UNGP 2011), general principle 17(b). See also First Report, above n 25, p. 21.

[90] First Report, ibid, pp. 16-17; CESCR General Comment No 3, above n 81, para. 10.

[91] First Report, ibid, pp. 6-7; As explained above, the State's due diligence obligation to apprehend and punish those responsible for acts of violence committed towards aliens, whether one considers this as part of the FPS standard or the international minimum standard of treatment, does not allow taking into consideration the means or economic development of the State. See, for example, *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award (12 November 2010) para. 422 ff; and *Parkerings-Compagniet AS v. Lithuania,* ICSID Case No. ARB/05/8, Award (11 September 2007) paras. 356 ff.

[92] UN Security Council Resolution 1373 (28 September 2001); UN Security Council Resolution 1540 (28 April 2004).

[93] Rome Statute of the International Criminal Court 1998, 2187 UNTS 3, article 5; *Prosecutor v Akayesu* (Appeal) ICTR-96-4 (1 June 2001), paras. 432-445; Geneva Conventions 1949, above n 70; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977, 1125 UNTS 609.

[94] *Seabed Mining Advisory Opinion* (2011) 50 ILM 458, para. 158.

[95] Ibid, paras. 158-159 and 161.

ITLOS followed the Seabed Dispute Chamber's interpretation of due diligence in its 2015 advisory opinion on illegal, unreported and unregulated fishing (IUU fishing).[96] In this advisory opinion, ITLOS did not contemplate the possibility of common but differentiated responsibilities in respect of flag States' obligations 'to ensure' that vessels flying their flag were not engaged in IUU fishing in light of their obligations to preserve and protect the marine environment under Part XII of UNCLOS.[97] This would seem to support the interpretation that if the primary rule does not explicitly concede a lesser expectation of diligence from developing States, an objective, international standard is to be preferred. Whereas article 194 of UNCLOS requires states to take measures to prevent pollution of the marine environment 'in accordance with their capabilities', UNCLOS does not explicitly differentiate States' duties in relation to prevention of IUU fishing.

The Tribunal in the *South China Sea* arbitration between the Philippines and China agreed with the ITLOS *SRFC Advisory Opinion, and noted that* 'anything less than due diligence by a State in preventing its nationals from unlawfully fishing in the exclusive economic zone of another would fall short of the regard due pursuant to Article 58(3) of the Convention.'[98] The Tribunal observed that '[i]n many cases, the precise scope and application of the obligation on a flag State to exercise due diligence in respect of fishing by vessels flying its flag in the exclusive economic zone of another State may be difficult to determine.'[99] This is because, the Tribunal said, unlawful fishing will often take place covertly, far from any official presence, and in such circumstances it will be 'far from obvious what the flag State could realistically have done to prevent it.'[100] This was not the situation with this case, however, as Chinese fishing vessels were escorted into the Philippines EEZ by Chinese government vessels.

Due diligence also emerged in the *South China Sea* arbitration in the context of the obligations to protect the marine environment. In interpreting Articles 192 and 194 of UNCLOS, the Tribunal referred approvingly to the *Pulp Mills* case and the *Deep Seabed Mining Opinion,* and noted that the obligation to protect the marine environment entails a duty of due diligence. The evidence disclosed that China's activities, including the poaching of endangered species in the South China Sea which was tolerated and encouraged by the Chinese government, clearly fell foul of the due diligence obligations under Articles 192 and 194.[101]

Another area in which common but differentiated responsibilities appear to be excluded is in the facilitation of remedies. Commonalities can be seen across international investment law, procedural environmental law, international human rights law, international humanitarian law, and international institutional law, in this regard.[102] The maintenance

[96] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC),* International Tribunal for the Law of the Sea Case No. 21 (Advisory Opinion) (2 April 2015), paras. 125-129.

[97] Ibid, paras. 130-140.

[98] *In the Matter of the South China Sea Arbitration* (Philippines v China), Arbitral Award, 12 July 2016, [744].

[99] Ibid, [754].

[100] Ibid.

[101] Ibid, [964].

[102] See eg, First Report, above n 25, p. 10 (international investment); p. 14 (international humanitarian law); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

of competent investigatory bodies, such as police services, criminal courts and tribunals to resolve private law disputes is an obligation of result and hence not a matter of due diligence at all.[103] Similarly, the provision of reparation and the punishment of those who have been found guilty under criminal law of human rights violations is a strict obligation and not subject to due diligence.[104] However, the quality of any investigation depends on the subjective competence and efforts of individuals working in the institutions. That the investigation be *effective* is a duty of due diligence: the State's organs must exercise their responsibilities *diligently.*[105] *A failure to convict a perpetrator according to the rigorous standards of criminal law despite the exercise of best efforts will not constitute a violation of a State's international responsibilities. Nevertheless, there does not seem to be the same scope for reduced effort* on the part of developing States (or States otherwise constrained by circumstances) in the provision of investigation and remedies.

Significantly, where subjective factors affect the degree of diligence required of States, *this is nevertheless still a standard of international law* and does not relate to the standard of care States exercise in their own domestic affairs.[106]

Variability between Primary Obligations of Objective Due Diligence?

Even where an objective standard of due diligence applies (i.e. all States are treated the same), the degree of diligence required of States varies according to the primary rule in question. In other words, there is not one single standard of diligence that applies to all primary norms (although as discussed elsewhere in this report, there may be a single *baseline* standard of due diligence that underlies all positive obligations that applies in the absence of more specific (and demanding) requirements).

For example, what is considered to be reasonable in exercising diligence to prevent genocide (a violation of a norm of *ius cogens*) will obviously be more demanding than that which is expected for the prevention of harm to property or financial interests.[107] In this

1984, 1465 UNTS 85, articles 13-14 (human rights law); International Law Association, Committee on the Accountability of International Organisations, Final Report (2004) <http://www.ila-hq.org/en/committees/index.cfm/cid/9> Part Four (on remedies against International Organisations).

[103] Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German Yearbook of International Law* 9, p. 46; Riccardo Pisillo-Mazzeschi, *Responsabilité de d'état pour violations des obligations positives relatives aux droits de l'homme,* Collected Courses of the Hague Academy of International Law 2008 (2009), Volume 333 p. 335; First Report, above n 25, p. 23; De Brabandere, above n 58, pp. 342-343.

[104] Pisillo-Mazzeschi 1992, ibid., pp. 28-30; Pisillo-Mazzeschi 2008, ibid., p. 351; First Report, ibid., p. 22.

[105] European Court of Human Rights, Application no. 30054/96, *Kelly and Others v United Kingdom* (May 4 2001) para. 96; see also De Brabandere, above n 58, pp. 342-345.

[106] First Report, above n 25, p. 4; ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 2001, above n 32, commentary to article 3, para. 9 (citing the *Alabama Arbitration (United States of America v United Kingdom)*; Pisillo-Mazzeschi 1992, above n 103, pp. 41-42 (adding that: 'the same conclusions hold with regard to environmental conservation); Pisillo-Mazzeschi R, *"Due Diligence" e Responsabilitá Internazionale degli Stati,* Series: Quaderni di <Studi Sensi> Raccolti da Paulo Nardi no. 67 (1989), p. 398-399; Timo Koivurova, 'Due Diligence', in Rüdiger Wolfrüm, *Max Planck Encyclopedia of Public International Law* (2012), online edition, para. 16.

[107] *Bosnian Genocide* case [2007] ICJ Rep 43.

case, the degree of diligence varies according to the importance of the interest requiring protection.[108]

In international environmental law, a higher standard of care is required when inherently hazardous activities are undertaken; here, the degree of diligence varies in light of the level of risk.[109] Advances in scientific understanding and technological capabilities can also increase the degree of care required *over time.* The extent of risk or advances in scientific knowledge that allow us to *perceive* more accurately the extent of risk (either higher or lower) will also influence the degree of diligence required.[110] This can also be seen in the relationship between the principles of precaution and prevention. States should take a precautionary approach to 'threats of serious or irreversible damage.'[111] They must take 'cost-effective measures' in light of those threats and 'must not disregard those risks'.[112]

However, if science shows that the risk of damage is not merely theoretical but a causal link can be proven, the principle of prevention takes over: where there is a likelihood of significant harm, a State that permits an operation to proceed is acting wrongfully.[113] Thus as scientific understanding advances over time there are two distinct shifts in the due diligence standard: first of all, the damage decreases in severity from 'serious or irreversible' (precautionary approach) to (merely) 'significant' (principle of prevention). Secondly, while States should only give due regard to uncertain risks and are encouraged to take 'cost-effective measures' to reduce the risk (the precautionary approach), where there is a known risk or likelihood of negative transboundary impact, a State must exercise a much higher degree of diligence to prevent the damage (the principle of prevention). Physical changes beyond a State's control, such as an earthquake, a flood or volcano, may also render an activity more hazardous and hence increase the degree of diligence required of a State (if it is aware – or should have been – of the possibility of such hazards occurring).[114] Furthermore, technological advances can enhance States' capacities to reduce negative impacts or render them cheaper (i.e. 'cost-effective'). This is reflected in the standards of 'best available technology' and 'best environmental practices', where the 'best' is likely to evolve over time.[115] International organisations are also subject to similar requirements when undertaking territorial administration.[116]

Since the degree of diligence pivots on the primary rules, changes to the primary rules will also affect the standard of care expected. This can take place over decades under

---

[108] Pisillo-Mazzeschi 1992, above n 103, p. 44.
[109] *Seabed Mining Opinion* (2011) 50 ILM 458, para. 117.
[110] Ibid, para 117; Pisillo-Mazzeschi 1992, above n 103, p. 44: First Report, above n 25, p. 29; ILC Draft Articles on Prevention of Transboundary Harm, commentary to article 3, para 11.
[111] Rio Declaration, above n 61, principle 15.
[112] *Seabed Mining Advisory Opinion* (2011) 50 ILM 458, para 131.
[113] *Pulp Mills* [2010] ICJ Rep 14, para. 101.
[114] ILC Draft Articles on Prevention of Transboundary Harm, ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 2001, above n 32, commentary to article 1, para 15.
[115] *Seabed Mining Advisory Opinion* (2011) 50 ILM 458, para. 117; Pisillo-Mazzeschi 1992, above n 103, p. 44.
[116] Committee on the Accountability of International Organisations, Final Report (2004), above n 102; Wilde, above n 88.

customary international law or it can take place through the entry into force of a treaty or even a Security Council Resolution.[117] For example, accession to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property[118] or the 1966 International Covenant of Economic, Social and Cultural Rights would increase the degree of diligence expected of States in the protection of culturally significant antiques and of human rights respectively well above the standards of customary international law. Security Council Resolutions 1373 and 1540 (on the prevention of terrorist financing and the prevention of the transfer of weapons of mass destruction to terrorists) also had the immediate effect of increasing the degree of diligence required of UN Member States.[119]

Due diligence duties can increase (and, at least in theory, also decrease) through changes in customary international law, although this is likely to occur over a longer period of time.

Differentiated Responsibilities Viewed as Differentiated Results

Common but differentiated responsibilities under the UNFCCC and the Kyoto Protocol include different *results* expected of States at different stages of development.[120] Obligations of result are not normally conceived of as due diligence obligations but are obligations which the State must achieve by means of its own choosing. For such obligations a defence of 'best efforts' – either subjectively or objectively defined – is unavailable.

It is possible to view differentiated responsibilities in a number of areas of international law not as variable standards of due diligence but rather as differentiated results. For this, it is necessary to consider what is intended by the term 'diligence'. If diligence only means 'effort' then the different results expected of States at different levels of economic development may not be an indication of a lower standard of diligence at all.

The different timescales in the fulfilment of socio-economic rights can also be viewed as differentiated results rather than a lesser degree of diligence. With fewer resources the same effort will produce lesser outcomes. If a State is indeed applying 'all appropriate means' it can hardly be said that they are exercising less diligence, less effort than any other State. 'Realisation' may be an obligation of result but the duty to take steps – indeed all appropriate steps – is immediate.[121] While the content and nature of those steps will differ depending on the resources and needs of each State, each State must exercise equal diligence in selecting and implementing the most appropriate measures.

---

[117] Compare, for example, the gradual increase in the requirements of due diligence in environmental law from *Trail Smelter Arbitration (United States v Canada)* 1941, 3 RIAA 1905 to *Pulp Mills* [2010] ICJ Rep 14.

[118] 823 UNTS 231.

[119] UN Security Council Resolutions 1373 and 1540, above n 92, (immediately increasing the degree of diligence required to prevent terrorists operating within States' jurisdictions).

[120] UNFCCC, article 4(2); see also Report of the Committee on Legal Principles Relating to Climate Change, above n 75, p. 435.

[121] Committee on Economic, Social and Cultural Rights, General Comment No 3, above n 81, para. 2.

Conclusions

Just as the degree of diligence required varies between different areas of international law and is given content by the primary rule, so the scope for a subjective standard of due diligence also pivots on the primary rule. In other words, in some cases, the primary rules permit a lesser standard of conduct for developing States or States otherwise possessing limited capacities while in others the same degree of care is required of all States. Under treaty law, such a variable standard can be identified in the treaty provisions; but in the absence of any such provision, an argument can be made that the presumption is for an objective standard of due diligence.[122]

It is more difficult to evaluate whether standards of due diligence are subjective or objective with regard to duties under customary international law. This reflects the perennial problem of identifying with sufficient clarity the precise contents of customary international law in any area and is not peculiar to the evaluation of due diligence. At a high level of abstraction, the same principle applies, that is to say that the primary (customary) rule will determine whether an objective or subjective standard applies. Recent research in international investment law indicates that the presumption in that area of law is for a subjective standard but there remains some older case-law, which is indicative of an objective approach.[123] Soft-law instruments in international environmental law which often stimulate the crystallisation of customary international law in this field also seem to prefer the subjective standard.[124] However, this apparent presumption in favour of a subjective standard of due diligence cannot be straight-forwardly extrapolated to customary norms in other areas of international law.

C – What of unavoidable loss and damage? [125]

Being quintessentially an obligation of conduct rather than result, it is quite possible that a State will act with all due care and diligence and yet this will nonetheless result in some level of loss or damage being caused to another State.

In fashioning a due diligence standard applicable to a specific issue area (such as transboundary harm) it is important that regard is had both to the *level of effort* required of States to meet the requisite duty and also to the *degree of harm* that would be occasioned even if the State fulfills this standard. That is to say that there is a balancing process in which both the onerousness of the due diligence obligation and the effects of the activity or omission upon a victim State are considered.

---

[122] *Seabed Mining Advisory Opinion,* (2011) 50 ILM 458, para. 158; see also *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, International Tribunal for the Law of the Sea Case No. 21 (Advisory Opinion) (2 April 2015).

[123] De Brabandere, above n 58 (citing, *inter alia, British Property in Spanish Morocco* UNRIAA Vol 2, p. 661; Ian Brownlie, *Principles of Public International Law* (7th ed., 2008) and Pisillo-Mazzeschi, above n 103 (in support of the subjective standard) and General Claims Commission (Mexico and United States), *H G Venable (USA) v United Mexican States*, Decision of 8 July 1927, IV UNRIAA, pp. 219-261 (in support of an objective standard)).

[124] Rio Declaration, above n 61,; ILC Draft Articles on Prevention of Transboundary Harm, commentary to article 3, para. 13.

[125] This section is based upon a submission to the Rapporteur by Study Group Members Sara L Seck and Evelyne Schmid.

This was an issue of concern for the ILC during the more than 50 years that it was engaged in the codification of the law of State Responsibility.[126] In the 1970s, more than 20 years after beginning its work on State responsibility, the ILC decided to start work on a second parallel track on State liability for the injurious consequences of acts not prohibited by international law.[127] While initially conceived as an alternate conceptual basis necessary for the imposition of liability on States for 'lawful' activities causing environmental harm (absolute or strict liability) this approach was critiqued by Ian Brownlie among others as 'fundamentally misconceived' for confusing primary and secondary rules.[128] In 1996, draft Articles and Commentary dealing with prevention, co-operation, and strict liability for damage were proposed by the ILC, but the strict liability articles were said to be too controversial as a 'progressive development' of international law.[129] Ultimately, the ILC divided this work plan into what became 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (the 'Prevention Articles'),[130] and the 2006 Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities ('Loss Allocation Principles').[131]

The Prevention Articles provide 'an authoritative statement on the scope of a State's international legal obligation to prevent a risk of transboundary harm'[132] and provide in Article 3 that a State of origin 'shall take all appropriate measures to prevent significant transboundary harm or at any rate to minimize the risk thereof'.[133] According to the Commentaries, this obligation is one of 'due diligence' that requires the State to 'exert its best possible efforts to minimize the risk.'[134] The standard of due diligence is that which is 'generally considered to be appropriate and proportional to the degree of risk

---

[126] This section is drawn from: Sara L Seck, *Home State Obligations for the Prevention and Remediation of Transnational Harm: Canada, Global Mining and Local Communities* (PhD Thesis, Osgoode Hall Law School, York University, 2008) [unpublished].

[127] See AE Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?" (1990) 39 *International and Comparative Law Quarterly* 1; and Günther Handl, "Liability as an Obligation Established by a Primary Rule of International Law" (1985) 16 *Netherlands Yearbook of International Law* 49.

[128] Ian Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (Oxford: Clarendon Press, 1983) at 50.

[129] PW Birnie & AE Boyle, *International Law and the Environment,* 2d ed (Oxford: Oxford University Press, 2002) at 105. See "Report of the Working Group on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law" (UN Doc A/51/10, Annex 1) in *Yearbook of the International Law Commission 1996,* vol 2, part 2 (New York: UN 1998) (UN Doc A/CN.4/SER.A/1996/Add.1).

[130] ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 2001, above n 32, pp. 366-436.

[131] ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*,* UN GAOR 61st Sess, Supp No 10, UN Doc A/61/10 (2006), pp. 101-182.

[132] First Report, above n 25, p. 5, citing James Crawford, *Brownlie's Principles of Public International Law* (8th ed, 2012) pp. 356-7.

[133] ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 2001, above n 32, article 3. A "State of origin" is defined in article 2(d) as "the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are planned or carried out."

[134] Ibid, Commentary to article 3, pp. 391-396.

of transboundary harm in the particular instance.'[135] While the 'operator of an activity is expected to bear the costs of prevention,' the State of origin is to put in place 'administrative, financial and monitoring mechanisms.'[136] To this end, the State of origin is to require its prior authorization for activities, and must play an active role in regulating them.[137]

According to Article 15, natural or juridical persons at 'risk of significant transboundary harm' are to be provided access to justice in the courts of the State of origin, unless the States agree on alternate means of redress through, for example, a bilateral agreement.[138] Neither access to justice in State of origin courts, nor the alternate agreement on redress are said to be conditional upon the State of origin failing to meet its due diligence obligation in Article 3; indeed, it could be said that the provision of access to remedy in Article 15 may itself be part of the due diligence obligation to prevent or minimize the risk of harm, at least to the extent that access to courts could be used to seek injunctive measures designed to prevent harm.

The ILC's 1996 Draft Liability Articles would have imposed strict liability on a source State for significant transboundary harm that it could not prevent by exercising due diligence.[139] When the ILC resumed work on liability for environmental harm in 2002, it moved away from strict liability of States to a focus on 'loss allocation among different actors involved in the operation of hazardous activities.'[140] The rationale for this move was an assessment that State practice did not reflect strict liability for transboundary harm arising from activities that are within the lawful sovereign rights of States to pursue within their domestic jurisdiction.[141] Instead, the aim of the Loss Allocation Principles is for States to apply national laws to private actors so as to provide compensation. Drafted as a non-binding declaration of principles, the Loss Allocation Principles indicate that they are without prejudice to rules relating to State responsibility and any claim that might arise in the event of a breach of an obligation of prevention.[142]

The assumption under the Loss Allocation Principles is that the due diligence and other duties under the Prevention Articles have been fulfilled, so the focus is specifically upon damage that has occurred despite the exercise of due diligence.[143] This is conceptualized as liability for risk, rather than State responsibility[144] and is focused upon providing compensation to victims. Victim is defined in Principle 2(f) as 'any natural or legal person or State that suffers damage.' The underlying motivation for this conceptualization is the need to create mechanisms for addressing losses that would remain uncompensated if we were to leave them to the traditional analysis of State responsibility for which legal con-

[135] Ibid, Commentary to article 3 at para. 11.
[136] Ibid, Commentary to article 3 at para. 15.
[137] Ibid, articles 6 and 7.
[138] Ibid, article 15 and Commentaries.
[139] AE Boyle, "Globalising Environmental Liability: The Interplay of National and International Law" (2005) 17 *Journal of Environmental Law* 3, pp. 4-5. See Article 21, *Report of the Working Group on International Liability etc, Report of the ILC (1996),* UNGAOR A/51/10, Annex 1, at 320.
[140] Boyle, ibid, p 6.
[141] Ibid.
[142] ILC Draft Principles on the Allocation of Loss, above n 131, General Commentary, paras. 6, 11, and the Preamble.
[143] Ibid, Commentary to principle 1, para. 6.
[144] Ibid, Commentary to principle 1, at para. 5.

sequences are only available where there is an internationally wrongful act attributable to a State.

Principle 3 of the Loss Allocation Principles provides that the dual purposes are to 'ensure prompt and adequate compensation to victims of transboundary damage' and 'to preserve and protect the environment in the event of transboundary damage, especially with regard to mitigation of damage to the environment and its restoration and reinstatement.'[145] Principle 4 outlines in five headings the nature of State measures necessary to ensure prompt and adequate compensation, including the imposition of strict liability upon the operator of the hazardous activity, although liability may be limited by, for example, compliance with a compulsory measure of a public authority.[146] Principle 4 also emphasises avenues to prevent and address loss that would otherwise remain unremediated – either because its extent surpasses the capacities of the actor(s) responsible for the damage or because liability and/or attribution cannot be established. The Principle provides that the operator or other entity should be required to 'establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.'[147] Moreover, in appropriate cases, the establishment of national-level industry-wide funds should be required.[148] Finally, should insufficient adequate compensation be available despite implementation of the earlier recommended measures, the Loss Allocation Principles explicitly state that the 'State of origin should also ensure that additional financial resources are made available.'[149] However, according to the Commentaries, a 'central theme' of the Loss Allocation Principles is that each State has the freedom to choose 'one option or the other in accordance with its particular circumstances and conditions' and these are to be treated as best practice guidelines for States.[150]

The issue of uncompensated loss has also arisen under the UNCLOS deep seabed mining regime.[151] In the *Seabed Mining Advisory Opinion,* the Seabed Disputes Chamber of ITLOS considered the liabilities of States sponsoring deep seabed mining operations, including in situations where States fulfilled their due diligence obligations. The Chamber concluded that there was a distribution of "responsibilities" for deep seabed mining activities 'between the contractor, the Authority and the sponsoring State,'[152] with the main liability for wrongful acts committed by the contractor or the Authority resting with the contractor or Authority rather than the sponsoring State. Existing in parallel is the liability of the sponsoring State, which would arise from its own failure to carry out its own responsibilities, provided that a causal link could be established between the

[145] Ibid, principle 3.
[146] Ibid, Principle 4(2) and Commentary to principle 4, para. 27. This could be imposed upon another person or entity if appropriate.
[147] Ibid, Principle 4(3).
[148] Ibid, Principle 4(4).
[149] Ibid, Principle 4(5).
[150] Ibid, Commentary to Principle 4, para. 39.
[151] The following analysis is drawn in part from: Anna Dolidze and Sara L Seck, "ITLOS Case No. 17 and the Evolving Principles for Corporate Responsibility under International Law" in *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place*, edited by Noemi Gal-Or, Math Noortmann, and Cedric Ryngaert, (Brill Publishers, 2015, in press) at 235-259. See further UNCLOS, article 156.
[152] *Seabed Mining Advisory Opinion,* (2011) 50 ILM 458, [200]

sponsoring State's failure and the existence of damage caused by the contractor.[153] As described by the Chamber, a 'gap in liability' might arise despite the sponsoring State taking 'all necessary and appropriate measures', when a sponsored contractor causes damage but is unable to pay its liability in full.[154] In addition, a gap may occur 'if the sponsoring State failed to meet its obligations but that failure is not causally linked to the damage.'[155] The Chamber concluded, however, that there was no room for residual State liability under the regime established by UNCLOS Article 139 and related instruments.[156] To address these situations, the Chamber recommended that the ISA consider establishing a trust fund.[157] The Chamber indicated, however, that UNCLOS specifically refers to the development of further rules on responsibility and liability, either within the deep sea mining regime (including through new ISA rules) or customary international law.[158]

Interestingly, the Chamber did not specifically consider the consequences in a situation where harm to the international deep seabed might arise despite no wrongdoing on the part of the contractor (as opposed to the sponsoring State). The UNCLOS deep seabed mining regime specifically contemplates that a contractor must engage in wrongful conduct in order to be liable; yet by contrast, the ILC's Loss Allocation Principles contemplate that the 'operator or, where appropriate, other person or entity' should be liable even without proof of fault, with the responsibility to implement measures to ensure prompt and adequate compensation placed upon the State of origin.[159] The Chamber's omission may be explained if attention is given to the standard clauses for exploration contracts recommended by the ISA, as it would appear that coverage for harm in the case of non-wrongful conduct may be captured by contractual requirements for contractors to hold insurance coverage.[160] The Chamber's silence about the issue is especially noteworthy, considering that IUCN explicitly touched upon the issue of fault in the conduct of the

---

[153] Ibid, [166]-[184]. Under customary international law, state liability would arise even though no material damage resulted from the failure of the state to meet its international obligations.

[154] Ibid, [203]. Note, however, that the use of terms such as "liability" and "responsibility" is inconsistent and potentially leads to confusion. See on this point the suggested distinction between responsibility and liability in Anna Dolidze and Sara L Seck, "ITLOS Case No. 17 and the Evolving Principles for Corporate Responsibility under International Law" in *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place*, edited by Noemi Gal-Or, Math Noortmann, and Cedric Ryngaert, (Brill Publishers, 2015, in press) at 235-259.

[155] *Seabed Mining Advisory Opinion,* (2011) 50 ILM 458, [203].

[156] Ibid, [204], [184], [166]. UNCLOS Article 139 states explicitly that while "damage caused by the failure of a State Party … to carry out its responsibilities … shall entail liability," a "State Party shall not however be liable for damage caused by any failure to comply … by a person who it has sponsored… if the State Party has taken all necessary and appropriate measures to secure effective compliance…". This is bolstered by Annex III, Article 4, paragraph 4.

[157] Ibid, [205]. While the ILC Loss Allocation Principles would have provided residual state liability here, the Chamber did not refer to them here. *See also* Donald K. Anton *et al*., *Advisory Opinion on Responsibility and Liability for International Seabed Mining, (ITLOS Case. No. 17): International Environmental Law in the Seabed Disputes Chamber*, (Austl. Nat'l Univ., ANU Coll. of Law, Research Paper No. 11-06, 2011), *available at* http://ssrn.com/abstract=1793216 at 64.

[158] *Seabed Mining Advisory Opinion,* (2011) 50 ILM 458, [211].

[159] ILC Draft Principles on the Allocation of Loss, above n 131, Principle 4.

[160] International Seabed Authority, *Standard Clauses for Exploration Contract*, §§ 16, 16.5, http://www.isa.org.jm/files/documents/EN/Regs/Code-Annex4.pdf.

contractor and pointed to the ILC's Loss Allocation Principles as applicable international law.[161]

PART 3 – PARTICULAR ISSUES OF CONTENTION

The Second Report now considers two specific areas in which due diligence has been in contention: (i) due diligence duties arising from business activities and (ii) due diligence obligations as regards international organisations. Together, they provide a number of important insights into the development of due diligence in international law in fast-moving areas of normative evolution.

A – Due Diligence and Business Activities[162]

International law relating to due diligence in the business context has received much attention since 2011, as a result of developments in international human rights law. And as discussed in the First Report of the Study Group, another area of international law where businesses (as foreign investors) may be required to exercise due diligence is in international investment law. Nevertheless, this part will focus on non-binding due diligence obligations on businesses broadly under the remit of corporate social responsibility.

International human rights law applies binding legal obligations directly on States alone. Despite a number of attempts, and some statements by the human rights treaty bodies, to apply these obligations to non-State actors, the international human rights framework (outside international criminal law and international humanitarian law) has not yet developed this aspect. However, there are some developments in the area of the obligations of corporations that indicate a way forward, and these include considerations of due diligence.[163]

In 2011 the UN Human Rights Council adopted the UN Guiding Principles on Business and Human Rights (UNGPs),[164] which had been developed by Professor John Ruggie as Special Representative to the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG). These create a framework of three pillars, being a State duty to protect human rights, a corporate re-

[161] *Seabed Mining Advisory Opinion,* (2011) 50 ILM 458, *Written Statement of International Union for Conservation of Nature and Natural Resources, Commission on Environmental Law, Oceans, Coastal, and Coral Reefs Specialist Group*, [81]-[85] (Aug. 19 2010), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf .

[162] This section is based upon a submission to the Rapporteur by Study Group Members Robert McCorquodale, Mary Footer, Sara Seck and Lise Smit.

[163] See Robert McCorquodale, 'International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights' in Lara Blecher, Nancy Kaymar Stafford and Gretchen Bellamy (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (2014), pp. 51-78, from which some of this section is drawn. Negotiations are currently taking place at UN level regarding a possible binding treaty to regulate corporate human rights impacts. If any such treaty is adopted and based on the terminology of the UNGPs, human rights due diligence will presumably form part of the treaty provisions. See Robert McCorquodale and Lise Smit 'Human Rights Due Diligence: A Responsibility, A Defence or A Mirage?' in S. Deva and D. Bilchitz (eds), *A Treaty on Business and Human Rights? Exploring its Contours* (forthcoming, 2016)

[164] SRSG, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Human Rights Council, UN Doc. A/HRC/17/31 (March 21, 2011) ('Guiding Principles')

sponsibility to respect human rights, and the need for access to a remedy. Importantly, the SRSG clarified that corporations ('business enterprises') can abuse all types of human rights – economic, social, cultural, civil, political, and collective – and that all business enterprises, no matter their size, nature, or location, should be subject to the Guiding Principles.

The concept of due diligence is used throughout the second pillar. Guiding Principle 15, being one of the foundational principles, provides the following:

> In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:
> (a) a policy commitment to meet their responsibility to respect human rights;
> (b) a *human rights due diligence process* to identify, prevent, mitigate and account for how they address their impacts on human rights;
> (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

This responsibility placed upon business enterprises to respect human rights is not a legal obligation, unlike the obligation of States. There may be a great deal of pressure from inside and outside a business enterprise, including from its own sector, to comply with this responsibility, but it is not legally binding under international law.[165]

Guiding Principles 17 to 21, which discuss the practical steps that business enterprises should take to discharge this responsibility, appear under the heading of 'Human rights due diligence.' These steps include having a human rights policy; assessing human rights impacts of business activities; integrating those values and findings into corporate cultures and management systems; and tracking as well as reporting on the effectiveness of the actions taken.

This concept of due diligence is defined as follows:

> Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.[166]

The use of the term 'due diligence' in the Guiding Principles appears to be an integration of the international human rights legal obligation of due diligence in relation to the actions of non-State actors,[167] and the general voluntary business practice of due diligence, such as in mergers and acquisitions.[168] In relation to the general business practice, the SRSG has stated:

---

[165] See Robert McCorquodale, 'Pluralism, Global Law and Human Rights', (2013) 2 *Global Constitutionalism* 287.

[166] UN Human Rights Office of the High Commissioner, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012), at p. 4.

[167] See *Velasquez Rodriguez v. Honduras*, (1989) 28 ILM 294.

[168] See, e.g., Jeffrey Perry and Thomas Herd, 'Mergers and Acquisitions: Reducing M&A Risk through Improved Due Diligence' (2012) 32 *Strategy & Leadership* 12, p. 12.

> Businesses routinely employ due diligence to assess exposure to risks beyond their control and develop mitigation strategies for them, such as changes in government policy, shifts in consumer preferences, and even weather patterns. Controllable or not, human rights challenges arising from the business context, its impacts and its relationships, can pose material risks to the company and its stakeholders, and generate outright abuses that may be linked to the company in perception or reality. Therefore, they merit a similar level of due diligence as any other risk.[169]

Thus, the Guiding Principles cleverly (though potentially misleadingly) aim to use a terminology that is familiar to both human rights law and business management practices. When the Guiding Principles refer to processes to 'identify, prevent, mitigate and account for … adverse human rights impacts' (as in Guiding Principle 15(b) above), the term due diligence is used in the business-practice sense of the term, being about the management process.[170] In contrast, the general foundational statement in Guiding Principle 11 is as follows:

> Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

This approach in Guiding Principle 11 uses the term due diligence as a standard of conduct and so is used in the human rights law sense of the term. Thus there is some confusion in the application of the term due diligence in the Guiding Principles.

The context for the operation of due diligence in the corporation's responsibility to respect human rights is explained in Guiding Principle 13:

> The responsibility to respect human rights requires that business enterprises:
> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

A clear distinction is made in Guiding Principle 13 between the responsibility of a business enterprise to *avoid* causing or contributing to its own human rights impacts (13 (a)) and the responsibility to *seek* to prevent or mitigate impacts by third parties (13 (b)). Therefore, two different standards of due diligence are operating in the application of Guiding Principle 13 to a business enterprise: a stricter standard of avoiding its own impacts; and a leveraged standard for seeking to prevent others' impacts. This is discussed further below.

The Guiding Principles provide some guidance on what corporate human rights due diligence entails. Guiding Principle 17 provides the following:

> In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process

---

[169] SRSG Report to UN Human Rights Council, UN Doc. A/HRC/11/13 (Apr. 22, 2009).

[170] See further in Jonathan Bonnitcha and Robert McCorquodale, 'Is the Concept of 'Due Diligence' in the Guiding Principles Coherent?' (January 29, 2013). Available <http://ssrn.com/abstract=2208588 or http://dx.doi.org/10.2139/ssrn.2208588>

> should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.
> Human rights due diligence:
> (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
> (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
> (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve**.**

Thus appropriate due diligence should consist of four components:

- Assessing actual and potential human rights impacts;
- Integrating and acting upon the findings;
- Tracking responses; and
- Communicating how impacts are addressed.[171]

Guiding Principle 17(a) also continues the distinction drawn in Guiding Principle 13 between human rights due diligence for adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, and human rights due diligence for adverse human rights impacts of third parties.

It is of note that the Guiding Principles make clear, correctly, that corporate human rights due diligence is an obligation which exists independently of States' human rights obligations, and over and above compliance with national laws.[172] Therefore, in assessing its impact, a business enterprise should take into account all internationally recognised human rights obligations, such as those contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.[173] For practical reasons, certain rights may be prioritised for due diligence purposes, in accordance with the severity of the risks,[174] and provided all human rights impacts are periodically reviewed.[175]

The scale and complexity of the due diligence required will depend on various factors, such as the 'size, sector, operational context, ownership and structure'[176] of the business entity, as well as the nature of the business and the risk of severe human rights impacts.[177] Potential adverse human rights impacts should be prevented or mitigated, whereas actual adverse impacts, which have already taken place, should be remedied.[178]

---

171 Guiding Principles, above n 164, Guiding Principle 17.
172 Ibid, Guiding Principle 11.
173 Ibid, Guiding Principle 12.
174 Ibid, Guiding Principle 24.
175 Ibid, Commentary on Guiding Principle 12.
176 Ibid, Guiding Principle 14.
177 Ibid, Guiding Principle 17(b).
178 Ibid, Commentary on Guiding Principle 17.

As mentioned above, a lesser standard of control is required in relation to the actions of third parties with which the business enterprise has business relationships. The commentary to Guiding Principle 17 provides:

> Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all.

The level of control over the third party will depend on the amount of 'leverage' which the business entity has over the relevant third party. For example, Guiding Principle 19(b)(ii) provides that appropriate action by a business enterprise will depend on the 'extent of [the business enterprise's] leverage in addressing the adverse impact.' Leverage is defined as 'the ability to effect change in the wrongful practices of an entity that causes a harm,'[179] and leverage is 'considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.'[180] This applies even where the business entity has *not* contributed to a harm, in what has been described as '*leverage-based* negative responsibility'.[181] Appropriate action will be determined by such factors as 'how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.'[182]

In international human rights law the State's obligations in relation to the actions of third parties are often expressed in terms of due diligence. For example, in *Velazquez Rodriquez v Honduras,* the Inter-American Court of Human Rights found that a State may be held liable for human rights violations caused by a third party where the State has failed to exercise due diligence to prevent the violation or to respond as required.[183] The Guiding Principles, similarly, refer to the corporate obligation to exercise due diligence to 'seek to prevent or mitigate' adverse impacts caused by third parties. States and business enterprises therefore have similar due diligence obligations with respect to third parties' actions.

However, according to Guiding Principle 17, business enterprises also have due diligence obligations in relation to their own conduct. In contrast, where a human rights abuse is a direct result of a State's own conduct, due diligence would not ordinarily be the applicable standard. Instead, national and international human rights law provide States with other forms of tests or 'justifications' where their own conduct has adverse human rights impacts, such as necessity, proportionality, and legislation of general application aimed at a legitimate purpose. These mechanisms of justification are not available to business enterprises, which are private entities without any legal or territorial jurisdiction.[184]

---

[179] Ibid, Commentary on Guiding Principle 19.

[180] Ibid, Commentary on General Principle 19.

[181] Stepan Wood, 'The Case for Leverage-Based Corporate Human Rights Responsibility' (2012) 22 *Business Ethics Quarterly* 63, p. 65.

[182] Guiding Principles, above n 164, Commentary on Guiding Principle 19.

[183] *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para. 172.

[184] Yousuf Aftab, 'The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies,' 60 Rocky Mt. Min. L. Inst. 19-1 (2014) at 19-10.

In certain contexts, corporate due diligence is required by domestic (including EU) legislation.[185] In some cases, proving due diligence affords a defence against liability[186] or provides for a reduction in sentence.[187] In other cases due diligence may be essential to enforcement measures in pursuit of a broader set of socio-economic policy goals, such as climate change mitigation, as under the EU Timber Regulation.[188] In the latter case, due diligence is used to address the effects of illegal logging, which brings about risks linked to environmental and societal changes, e.g. deforestation that contributes to desertification and soil erosion, or local forest-dependent communities whose livelihoods are threatened.[189]

Similarly, the Guiding Principles' due diligence requirements which regulate corporate human rights impacts are increasingly finding their way into statutory instruments, even if not always phrased in human rights language. Examples include §1502 of the US Dodd-Frank Act,[190] the US Department of State's reporting requirements for US firms in Burma,[191] as well as the EU Directive on the disclosure of non-financial information by certain large companies.[192] The Council of Europe has adopted Recommendations which include that member states apply measures which 'encourage or, where appropriate, require' mandatory human rights due diligence of companies domiciled or conducting substantial activities within their jurisdiction.[193]

---

[185] Olga Martin-Ortega 'Human rights due diligence for corporations: From voluntary standards to hard law at last?' (2013) 31 *Netherlands Quarterly of Human Rights* 44, p. 52.

[186] See for example section 90 (1) of the UK Financial Services and Markets Act 2000, section 11(b)(3)(A) of the US Securities Act 1933, and section 7(2) of the UK Bribery Act of 2010 read with UK Ministry of Justice, Guidance on the Bribery Act 2010, at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf> pp. 20-31.

[187] See for example §8B2.1. of the United States Sentencing Commission '2011 Federal Sentencing Guidelines Manual', available at http://www.ussc.gov/guidelines-manual/2011/2011-8b21, accessed 26 February 2015, where it is stated: 'The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.'

[188] See for example EU Parliament and Council Regulation (EU) No 995/2010 of 20 October 2010, laying down the obligations of operators who place timber and timber products on the market [2010] OJ L 295/23 (Timber Regulation), recital 3.

[189] For specific provisions concerning the establishment of a system of due diligence for the responsible sourcing by business operators of timber and timber products, which have not been illegal harvested, see the Timber Regulation, ibid, recitals 15-17, 20, 25 and 29 together with articles 4-6, 8, 13 and 20.

[190] Dodd–Frank Wall Street Reform and Consumer Protection Act (2010) 12 USC 5301 (US), s 1502.

[191] United States Department of State 'Responsible Investment Reporting Requirements' (2012), <http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf>. See also United States Department of State 'Responsible Investment Reporting Requirements Frequently Asked Questions' (23 September 2013), <http://www.humanrights.gov/2013/09/23/responsible-investment-reporting-requirements-frequently-asked-questions>.

[192] European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1.

[193] Recommendation III. 20 of Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers to members States on human rights and business, adopted on 2 March 2016.

Beyond statutory requirements, the corporate responsibility to respect human rights is increasingly embedded in international standards that are promoted by States and industry associations to business enterprises operating internationally, particularly in the extractive industries context.[194] For example, the responsibility to respect is embedded in the 2011 revisions to the OECD Guidelines for Multinational Enterprises (OECD Guidelines),[195] as well as in the revised Sustainability Performance Standards of the International Finance Corporation (IFC),[196] both of which are briefly analysed below. These standards could also inform the standard of care for the purpose of establishing domestic law tort liability, and thus become legally binding within domestic legal systems.[197] The standards, and thus the corporate responsibility to respect human rights through due diligence, may also become legally binding through incorporation in financing or investment contracts.

Business due diligence is often conducted voluntarily to avoid certain risks. The incentive to conduct due diligence may be the avoidance of legal liability, both civil and criminal, such as for corruption or money-laundering, the costs of remedying environmental contamination, a reduction in creditworthiness, or other forms of operational, reputational or financial damage.[198] In cases where are there are no fixed legal requirements, the scope of the due diligence is determined by the business enterprise. It has to ask itself whether its due diligence is sufficiently comprehensive to protect it against the risks it seeks to avoid. Resources and time will be decisive factors, and will be weighed up against the likelihood and severity of the risks. However, the commentary to Guiding Principle 17 explains that business enterprises conducting appropriate human rights due diligence 'should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.'

There is one other difference between business and human rights due diligence. Business due diligence is most often a once-off investigation aimed at providing a business enterprise with necessary information, for example before a merger or acquisition is negotiated, or before a large transaction or financing of a project takes place. Human rights due diligence, however must be ongoing. The Commentary to Guiding Principle 18 states:

> Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major

[194] See for example International Council on Mining & Metals (ICMM), 'Business and Human Rights,' ICCM online: <http://www.icmm.com/page/84154/our-work/projects/articles/business-and-human-rights>.

[195] OECD Guidelines on Multinational Enterprises, adopted in 1976, revised in 2000 and 2011, now retitled as the 'OECD Guidelines on Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Environment'; they form part of, and are annexed to, the 'Declaration on International Investment and Multinational Enterprises', adopted on 25 May 2011 by the OECD Members as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania. Available at <http://oecd.org/daf/inv/mne/48004323.pdf> (last accessed 24 February 2014) (hereinafter OECD Guidelines).

[196] International Finance Corporation (IFC)'s Policy on Environmental and Social Sustainability (Washington, International Finance Corporation, 2012), available at <http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES>

[197] See for example *Choc v Hudbay Minerals Inc* (2013), 116 O.R. (3d) 674, (Ont Sup Ct).

[198] For more detail on the manifestation of these risks see www.business-humanrights.org accessed 13 May 2015.

> decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.

This approach is similar to a State's human rights due diligence as action to protect human rights is not a once-only protection.

OECD Guidelines for Multinational Enterprises[199]

The OECD Guidelines state that business enterprises should conduct 'risk-based due diligence' by, for example, 'incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts'.[200] While they should 'avoid causing or contributing to [such] adverse impacts … through their own activities' they should also 'seek to prevent or mitigate an adverse impact where they have not contributed' to it but where that impact is nevertheless 'directly linked to their operations, products or services.'[201] The latter is an oblique reference to the responsibility of business enterprises for impacts arising in all their business relations, including supply chains,[202] an issue which is explored below. Due diligence, for the purposes of the OECD Guidelines is defined as "the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management system.

A new chapter on human rights was inserted in the OECD Guidelines in response to the developments in the Guiding Principles. This sets out a business enterprise's duty to respect human rights, which is aimed at limiting adverse human rights impacts, and includes human rights due diligence:[203]

> [Business enterprises should] within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations … [ensure that they] carry out human rights due diligence appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.[204]

The Commentary recommends that business enterprises implement a process of human rights due diligence, which may fall within their broader enterprise risk management system, which should include assessing 'the actual and potential human rights impacts' of the business activity, integrating and acting upon the findings, tracking responses and communicating how such human rights impacts are addressed.[205] In this regard,

---

[199] This section and the following one draws on Mary E Footer, 'Human Rights Due Diligence and the Responsible Supply of Minerals from Conflict-Affected Areas: Towards a Normative Framework?' in Jernej Letnar Černič and Tara Van Ho (eds), *Human Rights and Business: Direct Human Rights Obligations of Corporations* (2015), pp. 179-228.

[200] OECD Guidelines, above n 195, General Policies, Chapter II, Section A, p. 20, para. 10.

[201] Ibid, paras. 11 and 12.

[202] Ibid, para. 13, which urges enterprises to 'encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the *Guidelines*'.

[203] OECD Guidelines, above n 195, Chapter IV, pp. 31-34.

[204] Ibid, p. 31, para.5.

[205] Ibid, Commentary on Human Rights to Chapter IV, p. 34, para. 45.

due diligence should be an 'on-going exercise, recognising that human rights risks may change over time as the enterprise's operations and operating context evolve.'[206]

There is also a business responsibility that runs with a transnational supply chain to 'seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.'[207] This includes 'complex situations where an enterprise has not contributed to an adverse human rights impact', including 'relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services.'[208] One of the factors to take into account in determining 'the appropriate action in such situations" is "the enterprise's leverage over the entity concerned',[209] which resonates with the UNGPs.[210]

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas

Due diligence, as part of responsible supply chain management, has also received specific attention where it concerns the sourcing of minerals from conflict-affected and high risk areas. In 2010 the OECD developed a collaborative, government-backed, non-binding instrument called the Due Diligence Guidance for responsible supply chains of minerals from conflict-affected and high-risk areas (OECD Due Diligence Guidance).[211] Built on a multi-stakeholder initiative for the responsible supply chain of minerals from conflict-affected areas, it initially involved OECD Members and eleven member States of the International Conference on the Great Lakes Region ICGLR. It was later supported by Brazil, Malaysia and South Africa, as well as industry and civil society organisations.

In its 2012 revision the OECD Due Diligence Guidance,[212] benefitted substantially from John Ruggie's work on due diligence in the supply chain[213] and the UNGPs more gen-

[206] Ibid.

[207] Ibid, Chapter IV, p, 31, para. 3.

[208] Ibid, supra, Commentary on Human Rights to Chapter IV, p. 33, para. 43.

[209] Ibid.

[210] Guiding Principles, above n 164, Guiding Principle 19(b)(ii), discussed above.

[211] The original OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 2010, was approved by the OECD Investment Committee, the OECD Development Assistance Committee (DAC) and was endorsed by the 11-Member strong International Conference on the Great Lakes Region (ICGLR) in the Lusaka Declaration, 15 December 2010.

[212] The revised (second edition) of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (hereinafter OECD Due Diligence Guidance), was approved through the OECD Recommendation on the Due Diligence Guidance, adopted by the Council at Ministerial level on 25 May 2011 and subsequently amended on 17 July 2012 to include a reference to the Supplement on Gold (hereinafter 'Gold Supplement'), pp. 61-118. The 3'T's Supplement was retained as a supplement to the second edition of the OECD Due Diligence Guidance at 631-60 (hereinafter '3'T's Supplement'). The second edition of the OECD Due Diligence Guidance was adhered to by Argentina, Brazil, Latvia, Lithuania, Morocco, Peru, Romania, South Africa and the eleven member countries of the ICGLR. Details are available at <http://oecd.org/daf/inv/mne/GuidanceEdition2.pdf>

[213] See, for example: the SRSG's Discussion Paper, "'he Corporate Responsibility to Respect Human Rights in Supply Chains', 10th OECD Roundtable on Corporate Responsibility, 30 June 2010; available at <http://oecd.org/dataoecd/17/50/45535896.pdf>

erally. It further builds on, and is consistent with, the principles and standards contained in the OECD Guidelines. Significant too is the fact that OECD Due Diligence Guidance contains a detailed Supplement on Tin, Tantalum and Tungsten, which updates the original Supplement,[214] and a new Supplement on Gold was added in 2012 (hence 3TG).

The OECD Due Diligence Guidance provides a framework for detailed due diligence as a basis for responsible global supply chain management of tin, tantalum, tungsten, their ores and mineral derivatives, and gold. Its main emphasis is on conducting due diligence throughout the 3TG supply chain, involving all the processes from extraction through to transport, handling, trading, processing, smelting, refining and alloying, manufacturing, or the selling of products that contain minerals from conflict-affected and high risk areas.[215]

The concept of risk-based due diligence in OECD terms is understood as 'the steps companies should take to identify and address actual or potential risks in order to prevent or mitigate adverse impacts associated with their activities or sourcing decisions.' This is very much in line with UNGP's Guiding Principle 17, urging business enterprises to engage in an active and reactive process to ensure that 'they respect human rights and do not contribute to conflict.'[216]

In theory, the OECD Guidelines and the OECD Due Diligence Guidance remain non-binding.[217] However, they have potential to contribute to the emergence of hard law norms in the area of business responsibility, including as part of a regulatory "smart mix".

IFC's Performance Standards on Environmental and Social Sustainability

The most recent 2012 edition of the IFC's Policy on Environmental and Social Sustainability has also been influenced by the UNGPs. It refers specifically to 'the responsibility of business to respect human rights independently of the State duties to respect, protect, and fulfil human rights'.[218] This means the need to 'avoid infringing on the human rights of others and to address adverse human rights impacts business may cause

[214] The first 'Supplement on Tin, Tantalum and Tungsten' was issued as a Supplement to the original 2010 version of the OECD Due Diligence Guidance, supra, p. 19 ff.

[215] OECD Due Diligence Guidance, above n 212, p. 14.

[216] Ibid, p. 13.

[217] The OECD Guidelines remain voluntary for companies but the actual 'Declaration on International Investment and Multinational Enterprises', of which they form part, is a decision of the OECD Council, which is binding upon OECD Members under Article 5(a) of the OECD's founding instrument, the Convention on the Organisation for Economic Co-operation and Development, 14 December 1960, entry into force 30 September 1961, 888 UNTS 179. It means that OECD Members are obliged to implement this decision and to take such measures as are necessary for its implementation under the OECD Guidelines, such as the establishment of National Contact Points (NCPs). In practice, however, this has not always happened; see further Jernej Letnar Černič, 'The 2011 Update of the OECD Guidelines for Multinational Enterprises', (February 10, 2012) 16(4), *ASIL insights*, under 'Analysis and Conclusion', noting also the weaknesses in the actual NCP process, which OECD Members are bound to implement.

[218] International Finance Corporation's Policy on Environmental and Social Sustainability (2012), available at < http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES>, para, 12.

or contribute to.'[219] The IFC's Policy is further elaborated throughout eight specific Performance Standards on Environmental and Social Sustainability.

Performance Standard 1 (PS1) on the Assessment and Management of Environmental and Social Risks and Impacts, reiterates the IFC's Policy Statement.[220] It makes clear that there are human rights dimensions to many of the types of projects that the IFC finances. Due diligence is seen as a means for the client to address relevant human rights issues in its project,[221] which should be sufficient to 'identify risks and impacts at a point in the future when the physical elements, assets, and facilities are reasonably understood.'[222] There is, however, a specific footnote to the text, which acts as a reminder that '[I]n limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business.' In other words, human rights due diligence is seen as exceptional action rather than a mainstream activity in the IFC review process.[223]

Significantly, the borrower's (or client's) compliance with the IFC Performance Standards on Environmental and Social Sustainability, including whether human rights due diligence has been conducted under PS1, may be challenged before the IFC/Multilateral Guarantee Agency (MIGA) Compliance Advisor Ombudsman (CAO).[224] The CAO is a grievance mechanism that investigates complaints from project-affected communities under IFC financing or MIGA investor insurance-guarantee schemes.

The Equator Principles

The IFC Performance Standards on Environmental and Social Sustainability have influenced the formulation of the Equator Principles (EP), on which they are drawn and to which they refer. The EP 'is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making'.[225] Although a set of voluntary guidelines, as of 2014 some 80 financial institutions (so-called 'Equator Principles Financial Institutions' or EPFIs) from 34 States had officially adopted the EP, accounting for 70% of international project finance indebtedness in emerging markets.[226] The latest and third revision to the original EP dates from 2013 and is known as EPIII.[227]

---

[219] Ibid.

[220] IFC Performance Standard 1 on Environmental and Social Sustainability (PS1), January 1, 2012, p. 1, para. 3, available at: <http://www.ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1_English_2012.pdf?MOD=AJPERES>

[221] Ibid.

[222] PS1, ibid, p. 3, para. 7.

[223] Ibid, fn. 12 to para. 7.

[224] For more information about the IFC/MIGA Complaint Advisor Ombudsman (CAO) and its caseload, see http://www.cao-ombudsman.org/.

[225] Information about the Equator Principles is available at <http://www.equator-principles.com/index.php/about-ep/about-ep>.

[226] Ibid.

[227] The third edition of the Equator Principles or EP III is available at <http://www.equator-principles.com/index.php/ep3>.

Unlike the IFC Performance Standards and PS1, the EPIII specifically recognises the role of the EPFIs, as financiers, to 'promote socially responsible development, including fulfilling our responsibility to respect human rights by undertaking due diligence'. There is specific reference to the UNGPs in a footnote.[228] Principle 2 on Environmental and Social Assessment in EPIII closely resembles IFC PS1, which considers 'limited high risk circumstances' as warranting 'specific human rights due diligence' to complement the so-called Assessment Documentation.[229] Furthermore, human rights due diligence is listed as one potential environmental and social issue to be addressed in the 'Environmental and Social Assessment Documentation', which appears in Exhibit II to the EPIII.[230]

However, the EP, although now in their twelfth year of existence, remain opaque in their execution. To date, they have been monitored by a single NGO, known as BankTrack,[231] but there is no remedial mechanism for those affected by an EPFI's non-compliance with the EP.

Conclusions

The adoption of the UN Guiding Principles on Business and Human Rights has brought about a significant shift in the international consensus on the duty of business enterprises to undertake due diligence for its human rights and environmental impacts. This has flowed into other international regulation, such as in the OECD Guidelines, IFC Performance Standards and the Equator Principles, all of which now include human rights due diligence requirements, although of varying levels of compliance monitoring. There have also been clarification of the due diligence requirements of contractors, as business enterprises, in relation to their activities on the deep seabed.

Increasingly, domestic jurisdictions are incorporating human rights due diligence standards into regulatory provisions such as reporting requirements. The role of legal advisers, who are often responsible for undertaking other types of corporate due diligence, is being explored by law societies and bar associations, with guidance being issued on how to advise corporate clients on their human rights impacts.[232] Business entities, civil society and academics are exploring questions around corporate human rights due diligence, ranging from what it entails in practice to how to apply it as a legal standard.[233] Industry bodies are issuing sector-specific guidance, and local experts are publishing country-specific risk analyses[234]. Many businesses have started to report on their human rights due diligence, in varying detail, and many more are expected to do so in terms of the growing number

[228] Preamble to EPIII, ibid, p. 2.
[229] Principle 2, EPIII, ibid, pp. 5-6.
[230] See para. (l) in the Exhibit II to EPIII, id, p. 20,
[231] For details of BankTrack, see http://www.banktrack.org/show/pages/equator_principles.
[232] See, for example, Law Society of England and Wales, Business and Human Rights Advisory Group Recommendations, http://international.lawsociety.org.uk/files/BHRAGfinalRecommendations.pdf (last viewed 13 May 2015).
[233] See, for example, http://www.biicl.org/duediligence.
[234] See, for example, International Council of Mining and Metals, Integrating Human Rights Due Diligence into Corporate Risk Management Processes, http://www.icmm.com/page/75929/integrating-human-rights-due-diligence-into-corporate-risk-management-processes (last viewed 13 May 2015).

of regulatory requirements.[235] There is also the possibility of an international treaty on this area.[236]

It is anticipated that clearer legal standards will be developed by courts and tribunals, both domestically and internationally, as well as through corporate practice. Human rights due diligence requirements on business are likely to be increasingly a matter of legal regulation.

B – Due diligence, State conduct and international organisations[237]

The rise of multilateralism in the 20th Century has led to an ever increasing range of rights and responsibilities for international organisations and this has, in turn, resulted in the establishment of both positive and negative due diligence obligations.[238] Within the range of their own competences, the imposition of conditionality by the World Bank Group or the International Monetary Fund, the activities of UN Security Council, the administration of territory by the UN or the actions of the European Union the range of international human rights, humanitarian, investment, environmental and other legal obligations that now extend to international organisations is substantive. Whilst international organisations employ due diligence obligations in their dealings with States, for example requiring States to engage with due diligence in administrative functions or within domestic legal reform, they have been less consistent in the application of due diligence to their own activities.[239] That said, the role and scope of due diligence is of increasing importance and reach within institutional contexts. This is in part attributable to growing expectations that international organisations, as with States, will be accountable and responsible for their acts and omissions constituting wrongful acts under international law. This is reflected in the International Law Commission's work to develop the 'Draft Articles on the Responsibility of International Organizations 2011' (DARIO)[240] which, in contrast to the parallel Draft Articles on the Responsibility of States 2001, is generally regarded as progressively developing rather than codifying international law.[241]

---

[235] See, for example, Nestle, Talking the Human Rights Walk, http://www.nestle.com/asset-library/Documents/Library/Documents/Corporate_Social_Responsibility/Nestle-HRIA-White-Paper.PDF (last viewed 13 May 2015).

[236] Human Rights Council Resolution, A/HRC/26/L.22/Rev 1 of 25 June 2014.

[237] This section is based upon a submission to the Rapporteur by Study Group Members by Aoife O'Donoghue and Katja Samuel.

[238] Draft articles on the responsibility of international organizations 2011, http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf, albeit it does not contain any direct references to due diligence. ILA Study Group on Due Diligence in International Law, available at http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045.

[239] See eg United Nations Convention against Corruption (UNCAC), 2000 UN Convention against Transnational Organized Crime 1999, International Convention for the Suppression of the Financing of Terrorism, 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005.

[240] ILC, Draft articles on the responsibility of international organizations, with commentaries 2011, Adopted by the ILC at its sixty-third session, A/66/10 (2011) (DARIO with commentaries).

[241] DARIO with commentaries (n 237) 2-3 para 5.

Sources and Potential Parameters of Due Diligence Obligations

A starting point to determining the existence of due diligence obligations for international organisations is that like States they possess international legal personality under international law.[242] In contrast to sovereign States though, the nature and scope of their accompanying rights and duties will be more limited since they do not possess the same degree of powers and functions, reflected too in the principle of speciality.[243] The ILA's 2004 Report on Accountability of International Organisations makes clear links to due diligence and utilises both constituent documents and general international law as sources of accountability.[244] While due diligence and accountability are not synonymous both are intertwined in governance. The ILA Report on the Accountability of International Organisations makes specific reference to decisions regarding the use of force, peacekeeping or enforcement operations, the imposition of coercive measures, structural adjustment programmes and development projects during the temporary administration of territory in the context of international human rights and humanitarian law obligations. While the ILA Report does not utilise due diligence in all strands of accountability it does state that a lack of standing mechanisms for private claimants against international organisations leave the sole route State jurisdiction, making accountability of international organisations conspicuously lacking.

One overarching challenge for identifying specific obligations of due diligence for international organisations is that they do not fit neatly into more traditional sources in Article 38(1) Statute of the International Court of Justice 1945.[245] This is important since 'the nature of the due diligence obligation is a matter to be resolved by the underlying primary rules, not the secondary rules of State [or institutional] responsibility'.[246] It is of the essence, therefore, that primary rules establishing obligations under international law[247] are identified before there can be any suggestion that these have been breached, including for the purposes of establishing the existence of a wrongful act (or omission) as understood under Article 1 DARIO which would trigger secondary responsibility.

There would appear to be four potential sources of due diligence obligations for an international organisation. The first is obligations arising under an international treaty with accompanying due diligence obligations. This is likely to be the most limited origin of institutional due diligence obligations since international organisations are not generally

[242] It is for this reason too that the ICJ has held that international organisations can be responsible for their acts and omissions in international law. See eg *Reparations Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Reports 174, and *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Reports 151, 167-68.

[243] See eg *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep para 76.

[244] ILA Committee on the Accountability of International Organisations, Final Report (2004), available at http://www.ila-hq.org/en/committees/index.cfm/cid/9, 15, *Fresh Marine Company SA v. Commission of the European Communities*, Judgment of the Court of First Instance (24 October 2000), Case T-178/98, paras 61 and 82.

[245] See further eg P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413 including at 416; ND White, *The Law of International Organisations* (2nd edn Juris Publishing, Manchester 2005) 159-60.

[246] Barnidge (n21)86.

[247] See Articles 2(b) and 4 DARIO.

parties to international treaties with accompanying due diligence obligations, particularly in the sphere of international human rights and environmental law. Even where there are treaty obligations, normally the constituent treaty, controversies and uncertainties remain as to whether, how and to what extent the organisation itself is bound by its own outputs, such as human rights,[248] even though a significant element of its activities and outputs is the development of such norms.

There are circumstances though where an international organisation is expected to respect, and so far as is possible abide by, treaty standards even though it is not a party to the relevant instruments. This is true of territorial administration which is probably the most significant situation of direct governance by an international organisation in which it comes closest to acting as a *de facto* State.[249] Consequently, it is likely to possess more extensive due diligence obligations akin to those of a State, such as those accompanying the protection of basic human rights as a minimum. That said, the identification of primary obligations will not always be clear and, to some extent, will depend upon the legal basis of a specific international territorial administration situation. Often this emerges from Security Council Resolutions but may also derive from peace agreements amongst interested parties.[250] If the legal basis is a peace agreement, a key challenge here is that it will often be vague as to the obligations it imposes on international organisations and will rarely mention standards or positive legal obligations on which to adjudge whether international organisations act or fail to act on the basis of due diligence. As such, where and when the duties of States and international organisations may be different or identical and, thus, overlap, is unclear. In contrast, where the legal basis is a Security Council resolution, the obligations will generally be easier to discern, including the expectation that the interim authorities will abide by international obligations notably basic human rights standards – particularly those of *jus cogens*[251] - though the exact accompanying parameters of this may not be entirely clear either.[252] Furthermore, the context of territorial administration offers some examples of due diligence obligations being embedded within an international organisation's own activities, such as the UN's Third Party Claims Process in Kosovo, the Kosovo Ombudsman, the Kosovo Human Rights Advisory Panel that investigates potential violations of human rights by UNMIK, and the ICCPR Human Rights Committee Reports on Kosovo though this latter example has been filtered through Serbia's State obligations. Peacekeeping (considered below) is another example. Certainly, it is evident that to a large extent international organisations are left to determine for themselves their own applicable legal frameworks in such contexts, subject to their other existing international legal obligations.

---

[248] See eg J. Paust, 'The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity' (2010) 51 Harvard Int'l L. J. online 301, 318-19.

[249] Paust (n 245) 328-9 in relation to the UN Mission in Kosovo and the UN Temporary Administration of East Timor where 'fully fledged governance structures' were developed.

[250] Eg General Framework Agreement for Peace in Bosnia and Herzegovina November 21, 1995 UN Doc A/50/79C.

[251] See eg B. Kondoch 'Human Rights Law and UN peace operations in post-conflict situations' in ND White and D Klaasen, *The UN, Human Rights and Post-conflict Situations* Manchester University, 2005) 27-33.

[252] See eg UNTAET, Reg. No. 1999/1 On the Authority of the Transitional Administration in East Timor, UNTAET/REG/1991/1, 27 Nov. 1999 which refers to an extensive list of international human rights instruments.

Another potential source is due diligence obligations accompanying obligations sourced in general customary international law. Once again, there is lingering disagreement regarding the exact parameters of its application to an institutional context.[253] For example, whether only norms with *jus cogens* status apply here or customary norms more generally; and whether they apply to only some organs of an international organisation, but not to others notably in relation to the Security Council when exercising its Chapter VII powers to maintain international peace and security.[254] Certainly, there is a strong argument to be made that international organisations are bound by those international obligations, such as human rights ones, existing under customary international law to the extent that they are relevant to their conduct and functions.[255] Therefore, for example, in the context of territorial administration where an international organisation is directly engaged in the governance of territory, there is a strong argument to be made that it should consider itself bound more extensively by customary international law obligations compared with its more routine activities. As a minimum, international organisations as legal actors are bound by those *erga omnes* obligations on the international community accompanying norms of *jus cogens*[256] in all of their activities.

A third source is general international law which has a number of very established principles ('general principles of law') which have been consistently applied and developed since they were referred to in early arbitration cases.[257] More specifically, these are the principles of protection, prevention, investigation, punishment and ensuring redress as also exist for States. The key difference between their application to international organisations compared with to States is that in practice what is required to meet the reasonableness standard of conduct by the latter is generally likely to be less due to the more limited powers and functions, and therefore control over a situation including jurisdictionally, that an international organisation possesses compared with a State.[258] Significantly too, due diligence obligations sourced in general international law exist independently of other international obligations, though they will often inform those due diligence obligations sourced in more conventional sources. Therefore, their existence is not dependent on the identification of primary rules binding on an international organisation sourced in treaty or customary international law which, as just noted above, can be accompanied by much uncertainty and controversy. It is further suggested that due diligence obligations sourced in general international law have further, currently not fully realized, potential to

[253] For a detailed discussion of the issues in the context of the UN see eg C Michaelsen, 'Human Rights as Limits for the Security Council: A Matter of Substantive Law or Defining the Application of Proportionality?' (2014) 19 JSCL 451.

[254] Eg E de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart, 2004) 186.

[255] A Tzanakopoulos, 'Strengthening Security Council Accountability for Sanctions: The Role of International Responsibility' (2014) 19 JCSL 409, 417. Though he was writing specifically about the UN Security Council, the principle is considered to be of more general application.

[256] See further eg ND White, 'Due diligence obligations of conduct: developing a responsibility regime for PMSCs' (2012) 31 Criminal Justice Ethics 233, 257-8; ILA Committee on the Accountability of International Organisations (n 241) 18; Tzanakopoulos (n 252) 417.

[257] Such as the *Alabama Claims of the United States of America against Great Britain*, Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, United Nations, Reports of International Arbitral Awards, Vol XXIX p130.

[258] Eg to prevent the commission of gross human rights violations.

form the basis of a wrongful act triggering secondary rules of international responsibility. This has the potential to bridge some current impunity gaps where the identification of primary rules existing under a treaty or customary international law is not possible.

The final source of institutional due diligence obligations are the 'rules of the Organization'.[259] These are broadly defined by DARIO to incorporate not only more conventional Article 38(1) ICJ sources, notably constituent instruments as treaties, but also 'decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'. Importantly, all of these institutional outputs have the potential to create international obligations for the purposes of attribution of conduct under Article 4 DARIO, 'whether they are regarded as binding or not, insofar as they give functions to organs or agents in accordance with the constituent instruments of the organization'.[260] That said, as the Commentary to DARIO recognises, not all of these instruments will create international obligations.[261] Significantly too, over time, such rules may become part of customary international institutional law[262] affording them increased weight within that particular international organisation.

An example of such institutional rules are the key documents issued by the UN Secretary-General governing peacekeeping missions where UN troops are deployed on the ground. It is likely that the Bulletin issued by the UN Secretary-General in 1999[263] and the Capstone Document issued in 2008[264] - which states that '[a]ll United Nations entities have a responsibility to *ensure* that human rights are *promoted* and *protected* by and within their field operations'[265] - now constitute rules of the UN, probably customary institutional ones. Together with internal legal advice issued by the UN Office of Legal Affairs stating that it considered the UN institutionally to be bound by human rights – presumably those reflected within peace support operations guidelines and standards - 'as a general matter',[266] such language as 'ensuring', 'promoting' and 'protecting' all point to due diligence obligations. Certainly, when one considers the UN's consistent policy of reiterating the importance and applicability of international human rights and humanitarian law to the peacekeeping context, including to its own deployed UN troops, and the gravity associated with the protection of civilian populations including from sexual

[259] Article 2(b) DARIO.
[260] DARIO Commentary p11 para 16.
[261] DARIO Commentary to Article 10 para 7.
[262] See eg White (n 242) 85.
[263] 'Observance by United Nations forces of international humanitarian law', UN Secretary-General's Bulletin ST/SGB/1999/13 (6 August 1999) reprinted in ILM, 1999, 1656 – which outlined 'fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control'.
[264] 'United Nations Peacekeeping Operations, Principles and Guidelines' (Dept of Peacekeeping Operations/Dept of Field Support 2008) (Capstone Document), http://www.un.org[Depts/dpko/dpko/Conduct/un-in.pdf accessed 15 April 2016.
[265] Capstone Document (n 261) 27.
[266] S Sheeran and C Bevilacqua, 'The UN Security Council and International Human Rights Obligations: Towards a Theory of Constraints and Derogation' in S Sheeran and N Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge, 2013) 386 – cited by Michaelsen (n 250) 455.

violence by UN peacekeeping troops, it would be difficult to argue that no accompanying institutional sense of obligation exists to abide by these standards.

Indeed, such institutional rules will often exist alongside and/or reflect other sources of due diligence obligations. For example, Common Article 3 of the Geneva Conventions 1949 and other elements of international humanitarian law are certainly part of customary international law and so too create due diligence requirements for international organisations. The ICRC argues that '[g]iven that multinational forces are more often than not deployed in conflict zones it becomes essential to determine when a situation is an armed conflict in which IHL will constitute an additional legal framework governing a specific operation' and so too, due diligence.[267] In the *Akayesu* case the Tribunal found that Common Article 3 of Geneva Conventions (forming part of customary international law) and Additional Protocols I and II 1977 set the minimum and unconditional standard of duty for States and non-State actors engaged in the use of force.[268] *Yeager v Iran* established that private actors carrying out State functions, in the absence of regular State authorities, could be attributable to the state and arguably, by extension to an international organisation.[269] Private entities/non-State actors or individuals may violate international humanitarian law derived due diligence obligations even if their conduct is not attributed to the State which also arguably extends to international organisations even if this is the shared duality of State/institutional governance. In such instances, an international organisation may incur responsibility if it is not diligent in pursuing and preventing acts contrary to international humanitarian law by prosecuting and punishing private perpetrators. Yet, this does not mean that the international organisation is inevitably required to exercise due diligence no matter the connection to the armed group; the degree of attribution and impact of the overall or effective control test will be pertinent here.[270]

In addition, the 2013 UN Human Rights Policy on Due Diligence includes specific steps to be taken before providing support to non-UN forces.[271] This policy requires the UN's support to be 'consistent with the purposes and principles as set out in the Charter of the

[267] ICRC Report on Contemporary Challenges to International Humanitarian Law, 31IC/11/15.1.2, 31, available at http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf accessed 15 April 2016.

[268] *Prosecutor v Jean Paul Akayesu* Judgment of 1 June 2001, paras 432-45; Geneva Conventions 1949, 75 UNTS 287; Additional Protocol I and II 1977, 1125 UNTS 3. Due diligence within international humanitarian law can lead to unusual arguments in favour of the use of force. Eg the British claimed in 1807 that due diligence required the shelling of neutral Copenhagen to prevent the fleet following to Napoleon. AN Ryan, 'The Causes of the British Attack upon Copenhagen in 1807' (1953) 68 *The English Historical Review* 37; Q Wright, 'Responsibility for Losses in Shanghai' (1932) 26 *AJIL* 586.

[269] *Yeager v. The Islamic Republic of* Iran, Iran-U.S. (1987) 17 CTR 92, 101–4.

[270] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (Merits), Judgment (1986) I.C.J. Reports 14, 126; *Prosecutor v Tadić,* ICTY, Appeals Chamber, 1999 (Case no. IT-94-1-A); *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment [2007] ICJ Reports 43.

[271] 'Human rights due diligence policy on United Nations support to non-United Nations security forces', Annex to Identical letters dated 25 February 2013 form the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, A/67/775-S/2013/110 dated 5 March 2013.

United Nations and with its responsibility to respect, promote and encourage respect for international humanitarian, human rights and refugee law' while also asking that both the Security Council and General Assembly utilise the guidelines when either mandate action.[272] The policy regards due diligence as risk assessment, transparency and effective implementation with more detailed requirements under each category. Nonetheless, such institutional approaches remain *ad hoc*[273] and have yet to make a significant impact in practice. In contrast with the 1999 Bulletin and Capstone Document 2008, though this 2013 policy is considered to now form part of the UN's rules, it is not yet considered to form part of UN customary international institutional law, including as to the most recent addition to due diligence related documents.

Due diligence can play a role in the context of other legal regimes and institutional settings too. For example, the roles of both the International Monetary Fund (IMF) and the World Bank Group can have significant impact upon governance within States. In particular, the 'right to development' is critical in understanding the methods by which these organisations go about achieving their aims.[274] Both the IMF and World Bank Group deploy due diligence in their agreements with States and the conditionality they impose. The character of these "letters of intent" or memorandums of understanding that both the IMF and World Bank Group set with States means review of the obligations created therein is difficult. Usually these "letters of intent" require States to take due diligence into their practice albeit this is rarely replicated within organisations.[275]

Under its Articles of Agreement, the IMF must establish adequate safeguards to ensure that loans are repaid and this is a duty the IMF owes to its own members, but this has

[272] 'Human rights due diligence policy' (n 268); HP Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?' (2014) Journal of Conflict and Security Law Advance Access, doi:10.1093/jcsl/kru011; 'Due diligence guidelines for the responsible supply chain of minerals from red flag locations to mitigate the risk of providing direct or indirect support for conflict in the eastern part of the Democratic Republic of the Congo', available at http://www.un.org/News/dh/infocus/drc/Consolidated_guidelines.pdf, Security Council Resolution 1596 (2005), accessed 1 June 2016. This has been extended to Peacekeepers in the Congo in an Environmental Context, Greening the Blue Helmets Environment, Natural Resources and UN Peacekeeping Operations UNEP, available at http://www.un.org/en/events/environmentconflictday/pdf/UNEP_greening_blue_helmets_ES.pdf accessed 1 June 2016.

[273] 'Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations', UN General Assembly, UN Doc. A/60/980 (2006); the UN Independent Audit Advisory Committee, UN General Assembly, UN Doc A/RES/60/248 (2006); 'Strengthening Accountability', at http://www.un.org/en/strengtheningtheun/accountability.shtml accessed 1 June 2016.

[274] 'Declaration on the Right to Development', UN Doc A/RES/41/128 (1986); UNDP, *Human Development Report 2005:* UNDP, *International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (OUP, 2005) 126; Bi-lateral aid, while not within the remit of this article, also is often tied to economic obligations such as privatisation or the opening up to investment. C Tan *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States Law, Development and Globalization* (Routledge, 2011) 102-10.

[275] ME Salomon, *Global responsibility for Human Rights* (OUP, 2007), Chapter 5; P Alston, 'The International Monetary Fund and the Right to Food' (1987) 30 HLJ 473; M. Lucas, 'The International Monetary Fund's Conditionality and the International Covenant on Economic Social and Cultural Rights' (1992) 25 RBDI 104.

largely has been interpreted as outward facing.[276] Within the IMF the most obvious use of due diligence is the instigation of a safeguards assessment. The aim of these is to guarantee the repayment of loans by ensuring a client State's central bank's governance is at the necessary standard. These safeguards require external audit mechanisms, legal structures and autonomy, financial reporting, internal audit mechanisms and a system of internal controls.[277] These due diligence procedures extend into processes to ensure that policies on Longer Term Programme Engagement ensure a State maintains its economic reforms.[278] All contemporary agreements with States contain due diligence provisions that also form part of the reviews of States' implementation. The creation of the Independent Evaluation Office in 2001 to appraise the IMF introduced a form of due diligence internal review.[279]

The World Bank's constituent organisations take a pro-active approach to due diligence, but as with the IMF this is largely State focused. For instance, as part of its due diligence process the International Financial Corporation in facilitating investment examines the 'environmental and social risks and opportunities' in a company's process of investing including corruption and fraud but also human rights impact assessments.[280] The World Bank Group also requires environmental impact assessments and have a due diligence checklist for aspects such as public-private partnerships.[281] As with the IMF, the World Bank constituent organisations are also bound by its Articles of Agreement to adequately safeguard its resources and have taken this as paramount in the conditionality they extend.

CONCLUSIONS

Due diligence has a significant pedigree in international law, recognising the long-standing desirability that States adhere to certain behavioural standards, or to seek to achieve certain outcomes, but without prescribing either the precise result or timeframe by which this is to occur. It is thus unsurprising that due diligence has not only remained an influential standard of conduct in international law, but that its influence and appeal has spread beyond the confines of the mistreatment of aliens and transboundary harm. Certainly,

[276] Articles of Agreement of the International Monetary Fund, Article 1 (v), 5. 3(a).

[277] Details available from the IMF at http://www.imf.org/external/np/exr/facts/pdf/safe.pdf, accessed 1 June 2016.

[278] *Review of Ex Post Assessments and Issues Relating to the Policy on Longer-Term Program Engagement,* (March 2006), available at https://www.imf.org/external/np/pp/eng/2006/032006R.pdf accessed 1 June 2016.

[279] Independent Evaluation Office terms of reference, available at http://www.ieoimf.org/ieo/pages/TermsofReference.aspx accessed 1 June 2016. These have included reviews of loans to Sub-Saharan Africa, Fiscal Adjustment Programmes and Conditionality Completed Reports, available at http://www.ieo-imf.org/ieo/pages/Completed.aspx accessed 1 June 2016.

[280] See eg the International Finance Corporation, 'IFC Project Cycle', available at http://www.gcgf.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/what+we+do/due+diligence accessed 1 June 2016; UN Global Compact, 'Guide to Human Rights Impact Assessment and Management', available at http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+ to+Human+Rights+Impact+Assessment+and+Management/About+the+Guide+to+HRIAM/ accessed 1 June 2016.

[281] PPPIRC, 'Due Diligence Checklist for Legal and Institutional Enabling Environment for PPP', available at http://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/due-diligence-checklist accessed 1 June 2016.

what was previously perhaps implicit in the judgments of international courts and tribunals when addressing State wrongs is now increasingly been made explicit, particularly through the work of the International Tribunal for the Law of the Sea, though not by it alone. The 2015 *ITLOS Advisory Opinion on IUU fishing* is a very good example of the way in which ITLOS can utilise due diligence to give substance and meaning to obligations and commitments, which until this point had remained somewhat indeterminate or unclear. Equally, new global challenges – presenting new areas of transnational and global regulation – are (at least in the absence of specific primary rules) often finding in the standard of due diligence a useful yardstick by which to hold all States (to varying degrees) to a minimum standard of conduct.

Thus, this Second Report has sought to identify why due diligence is employed, the normative core of its content and the factors that might influence the variability in its operation. As the Second Report has shown, although being able to take into account the level of a State's economic development is an oft-expressed example of the flexibility inherent within due diligence (a flexibility which due diligence does, but will not always, incorporate) there is a wider range of factors at play, including but not limited to the overall reasonableness of State conduct, the degree (and knowledge) of the risk, an expectation of good government (of some form), control over territory, and the existence (or absence) of bona fides acts. Nor is due diligence static, but what it requires of States – of *all* States – may become more demanding overtime.

To the extent that due diligence is not one, but many standards of conduct, all premised on the same one idea – that States are expected to strive to achieve certain common goals and, in the spirit of good neighbourliness, to prevent problems especially of transboundary and global harm (be it environmental, economic, military (including non-State terrorism), kinetic, or other) – due diligence is an evolving principle of international law. To refer to it merely as a standard of conduct is not inaccurate, but nor does it capture its central place in the operation of a wide array of international obligations and global governance, more generally. As the Second Report finds, there is no norm-conflict between the very general standard of due diligence perhaps best encapsulated in *Corfu Channel* and more specific manifestations.

The Study Group has found due diligence to be an expansive, sectorally-specific yet overarching concept of increasingly relevance in international law. Its application in the related, yet distinct, field of business operations and human rights (and the overlap between the two) thus highlights both its importance, but also the concomitant risk of conceptual confusion. The Study Group has now concluded its work, but it would *recommend* to the Executive Committee that if the International Law Association considers further work on due diligence were deemed appropriate, it may wish to establish an international committee, with the mandate to undertake further study and to propose a resolution identifying the material factors and underlying principles helpful in the identification and operation of due diligence as a standard of conduct in international law.

ANNEX

Study Group Members

Name	Position	Branch
Professor Duncan French	Chair	British
Professor Tim Stephens	Rapporteur	Australian
Ms Zarizana Abdul Aziz	Member	American
Professor Neil Boister	Member	New Zealand
Associate Professor Eric de Brabandere	Member	Belgian
Professor Mary Footer	Member	British
Professor Robin Geiss	Member	German
Professor Rachael Lorna Johnstone	Member	Headquarters
Professor Timo Koivurova	Member	Finnish
Dr Sandrine Maljean-Dubois	Member	French
Professor Robert McCorquodale	Member	British
Professor Lorna McGregor	Member	British
Associate Professor Yumi Nishimura	Member	Japan
Dr Aoife O'Donoghue	Member	British
Dr Katja Samuel	Member	British
Dr Evelyne Schmid	Member	Swiss
Professor Karen Scott	Member	New Zealand
Dr Sara Seck	Member	Canadian
Professor Mirko Sossai	Member	Italian
Professor Hennie Strydom	Member	South African
Associate Professor Blake C Y Wang	Member	Chinese (Taiwan)

STUDY GROUP ON DUE DILIGENCE IN INTERNATIONAL LAW

WORKING SESSION

Tuesday, 9 August 2016, 2.00pm

Chair: Professor Irmgard Marboe (Austria)

The Chair opened the session by welcoming attendees and introducing the Chair of the Study Group, Professor Duncan French (UK), who was to lead attendees through the second report of the Study Group. She encouraged attendees to visit the ILA website, where the report was available. She then conveyed the apologies of the Rapporteur, Professor Tim Stephens (Australia), who was unable to attend the session.

Professor Duncan French (UK) provided a brief summary of the history of the study group. He noted that the concept of the due diligence obligation was under-theorised. It was accepted as a standard of conduct that was applicable in different branches of international law, but there was no real sense of clarification as to the outer limits – or parameters – of the obligation, or the factors involved in its application. Against this background, Professor French made reference to the 2011 *Seabed Mining Advisory Opinion* of the International Tribunal for the Law of the Sea (*Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*), which unpacked the content and scope of the due diligence obligation. The issue of content and scope of the due diligence obligation was at the heart of the two reports of the Study Group. He explained that the first report of 2014 was a sectoral report, describing what due diligence meant in different branches of international law. The second report was more analytical in nature, concentrating on questions such as the functions that due diligence served, and the reason for which it was employed as a standard of conduct in different areas of international law. The two reports were to be read together in order to get a solid grasp of the subject matter.

Professor French proceeded to give an overview of the second report. He quoted from Oscar Wilde's *Lady Windermere's Fan*, in which Lord Darlington says "I think life is too complex a thing to be settled by these hard and fast rules". He viewed this quote as an appropriate summation of what due diligence was in international law. He once again recalled the *Seabed Mining Advisory Opinion*, in which ITLOS stated that the content of the due diligence obligation might not be easily described in precise terms. A series of factors might be taken into account in determining the content of the obligation. Among the factors that made such an activity difficult was the fact that due diligence was a variable concept that might change over time and in relation to the risk involved.

The concept of due diligence was an interesting area of law not only because of the fact that it was understudied, but also because of the problems associated with the concept. As an example, due diligence as a standard of conduct was a positive obligation on States which was normally assessed on an *ex post facto* basis to determine compliance and responsibility before an international court or tribunal. The problem that arose was how State could ascertain clearly in advance it was satisfactorily meeting and continuing to meet that obligation of conduct. There was thus a tension between the *ex post facto* review and the positive obligation on States.

The first part of the second report was concerned with the question of why due diligence was so regularly employed as a standard of conduct in various areas of international law. He noted that Judge Donoghue's separate opinion in the Border Area and Road Case before the International Court of Justice (Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) (2015) had correctly picked up on the balance between State sovereignty and territorial integrity. In addition, the second report stated that due diligence standards preserved a significant measure of flexibility and autonomy for the State in discharging its international obligations. In other words, it was for the State to decide, at its discretion, how it could meet its obligations. The international community did not prescribe to States how to achieve a certain result. Furthermore, due diligence was very much tied with the obligation of conduct. What one was assessing was how far, how reasonably States had achieved that standard of conduct. Whether harm or damage was necessary for due diligence to be triggered was an interesting question, especially in light of the Border Area and Road Case case and the SS I'm Alone Case (Canada v United States).

Professor French also noted that due diligence required more of States than simply the formality of containing relevant provisions in their statute books. What really mattered was what States were doing in practice (ie, their administrative actions). It was noble to have good environmental impact assessment provisions on the statute books but those provisions had to be properly implemented and enforced.

One of the questions raised in the first report was whether it was desirable to interpret and understand the due diligence standard only within a particular context. The terminology or words used to describe due diligence was confusing. The conflation of terms could be attributed to international courts and tribunals, especially when one analysed the Corfu Channel Case (United Kingdom v Albania). The Study Group had endeavoured to avoid such conflation. The report made a point that the broad obligations of due diligence underlined the more specific instances of due diligence, which would become operational if applied in a given situation. In this regard, there was no conceptual tension between the general principle as laid down in the Corfu Channel Case and the way in which due diligence was applied. Moreover, due diligence seemed to apply broadly in new areas of regulations such as cyber governance. Due diligence had an innate quality to it, but which commensurately raised questions as to its parameters.

Professor French then listed factors that determined whether the obligation of due diligence had been met, namely:

- reasonableness of what measures States must and should take to act in a duly diligent manner (see the *Neer Case*);
- degree of risk (see the *Seabed Mining Advisory Opinion*, in with ITLOS stated that the due diligence obligation might "also change in relation to the risks involved in the activity");
- there is a debate as to whether knowledge of an activity or potential risk was a requirement (for the knowledge requirement, see the *Corfu Channel Case*);
- control over territory and non-State actors (see *Prosecutor v Tadić*);
- international minimum standards and national treatment (see comments by Max Huber in the *British Property in Spanish Morocco Case*).

- good governance – another factor, particularly in the environmental field, was the existence of regulations, laws and good governance; in this regard, due diligence, as A V Freeman noted in his 1955 lecture at Hague Academy of International Law, required "nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances"
- bad faith/absence of any measure (see *Wena v Egypt*).

Professor French also mentioned factors that might vary the due diligence standard. This area was greatly contested. He examined due diligence standards in light of both objective and subjective criteria. Under the subheading of subjective variation in due diligence obligation, he stated that the level of a State's economic development could have a bearing on the operations of due diligence obligations in some circumstances. International law could allow for a variable degree of due diligence according to State's capabilities. However, with regard to objective due diligence obligations, international law required the same standards of all States and no account was taken of a particular State's economic resources. Upon close inspection of the case law, an objective standard of due diligence appeared to be widely applied. In support of this claim, Professor French referred to the *Seabed Mining Advisory Opinion* and the *South China Sea Arbitration (Philippines v China)*, in which the arbitral tribunal had also positively affirmed ITLOS's views in *SRFC Advisory Opinion*.

Professor French went on to consider one aspect of due diligence in the environmental field in relation to unavoidable damage and loss. What would happen if a State was shown to have met its due diligence obligations but loss nevertheless occurred? The International Law Commission had looked into this matter and had developed a legal framework to address such situations, which resulted in the 2006 *Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*.

Professor French concluded by examining two areas in which due diligence have been in contention, namely:

- due diligence in business activities – this area was a new development with a different kind of due diligence, and in this regard, referenced the 2011 *United Nations Guiding Principles on Business and Human Rights* (2011);
- due diligence of international organisations – due diligence was a very important principle in holding international organisations to account, though the difficulty was that the 2011 *Draft Articles on the Responsibility International Organisations* were, in many ways, still evolving.

The Chair thanked Professor French for his presentation and then opened the floor up discussion.

Professors Hennie Strydom (South Africa) commended Professor French and Professor Stephens for the excellent work that they had accomplished. The work of the Study Group might be the most comprehensive account on the subject of due diligence that the international community had at the present moment. He acknowledged that there was no parity obligations for the States under the due diligence principle and the way which it was applied under international law. He furthermore stated that there was a commonality in due diligence irrespective of the State, thus the State must act depending on what was

required of it under its own national laws or international law. If a State failed or refused to act, then it was in breach of its due diligence obligations. He gave an example of the South Africa case decided by the Constitutional Court on diplomatic protection (*Kaunda v President of the Republic of South Africa* CCT 23/04 (2004). In this case, a group of mercenaries were arrested in Zimbabwe en route to Equatorial Guinea to participate in a military coup. They wanted to avoid extradition to Equatorial Guinea on the basis of potential violation of due process in Equatorial Guinea. The issue before the court was the duty to provide diplomatic protection. The court decided that the provisions in the South African Constitution on citizens' rights applied. Article 3 of the Constitution was applied in arguing that, in the circumstances of the case, the South African government was not to remain silent in the matter, and had to take action. The court held that the State, by either doing nothing or refusing to act, was breaching its due diligence obligation. The term "due diligence" in this case was given a broader application.

Professor French mentioned that the issue of incorporation of international law within domestic law would have been an interesting matter for the court to address. He asked Professor Strydom if the individuals in the case were of South African nationality.

Professor Strydom responded in the affirmative.

Professor French then went on to ask whether there were issues of human rights protection raised in that case as well.

Professor Strydom replied that human rights issues featured strongly in the case, as well as international human rights obligations imposed under South African law.

Professor French noted that this case was context specific, but completely agreed with Professor's Strydom observation.

Professor Cymie Payne (US) expressed her appreciation for the work of the Study Group, and highlighted the importance of ITLOS advisory opinions on the subject of due diligence.

Professor French concurred with Professor Payne, and noted the importance of recent case law on the subject matter particularly on the law of the sea. He referenced the *Sub-Regional Fisheries Commission (SRFC) Advisory Opinion* and commended the way in which ITLOS had utilised the concept of due diligence. In addition, he acknowledged that the recent case law of ITLOS was of great significance and a positive development to the jurisprudence.

Professor Payne expressed that she shared the views of Professor French. What was of particular interest to her was how Professor French framed the two advisory opinions (ie, the *Seabed Mining Advisory Opinion* and the *SRFC Advisory Opinion*). In the former, Professor French had a feeling that due diligence had left a gap in the law, whereas in the latter, ITLOS outlined and made the due diligence obligations stronger. One fact that caught her attention on the discussion of the advisory opinions was the difficulty that States faced. States needed to know what was required of them in advance in order to satisfy the due diligence obligations, and to conduct themselves with due diligence. The advisory opinions were particularly important in that context.

Professor French noted that the arbitral tribunal in the *South China Sea Arbitration* had recognised State responsibility in a situation where the State in question had not only failed to effectively regulate but had arguably acted with complicity with the unlawful acts of its nationals; in such a case, State could not be deemed to have achieved due diligence. He added that the jurisprudence of due diligence was being built up with every case adjudicated upon by courts and tribunals that raised the matter.

Professor Makoto Seta (Japan) asked two questions. First, he queried why ITLOS and arbitral tribunals used the term "due diligence", even though the term was not used in the *UN Convention on the Law of the Sea* with regard to obligations by States. He noted that, in the arbitral award in the *South China Sea Arbitration*, the obligation of China was to protect the maritime environment. So much was clear. What Professor Seta did not understand was why the tribunal had to use the term due diligence. Could it have been that the term due diligence was convenient to specify the obligation of due diligence and to make an image of an obligation? Secondly, he questioned the difference between due diligence and due regard, which had historically been used in the context of the law of the sea.

Professor French addressed the first question by noting that there was no express method to due diligence, and in some way there was some history to take note of in terms of how the jurisprudence of due diligence had developed. In regards to the second question, there was a difference between due diligence and due regard, depending on context of the case. Due regard might not always be due diligence. He highlighted that there might be a need to explore the distinction further.

Judge Danilo Suarez (HQ) suggested that maybe due diligence was more than due regard. If that was the case, could one say that due diligence referred to an extraordinary diligence?

Professor French responded that he did not think so.

Judge Suarez suggested that if one was to enhance the international protection of consumers then one should certainly raise the standard of due diligence to the category of "extraordinary diligence".

Professor French asked Judge Suarez in what context was he talking about due diligence.

Judge Suarez replied that he was referring to it in a business context.

Professor French referred him to the *UN Guiding Principles on Business and Human Rights*. He noted that it was not extraordinary due diligence. He furthermore stated that the report points out that due diligence was used in two different contexts, including in the business and human rights context. In this regard, due diligence was used in the manner in which it was understood in public international law as well as in business practice.

Professor Payne queried the issue of international standards versus due diligence against the background of the *Pulp Mills Case*. She asked whether these two concepts could be regarded as equivalent.

Professor French responded by briefly analysing the *Border Area and Road Case*, which had overtly moved from due diligence as an ephemeral idea to a sequential procedural

model. He recognised that that ICJ in that case had provided a model of what due diligence resembled, thus a model that States could internalise.

The Chair drew attendees' attention to the *Spanish Zone of Morocco Case* as a classic text book case on due diligence. In that case, it was stated that treatment of foreign nationals might be considered unreasonable if it was of a lesser quality and degree than that normally provided to nationals. She observed that the standard applied in that case was inherently a subjective standard because it differed according to the State's level of development. She then asked if national treatment standard was still applicable in the current international law realm considering that the *Spanish Zone of Morocco Case* was an old case. If it was still applicable, was it not interfering with State sovereignty to try to define due diligence on an international law level?

Professor French responded by stating that due diligence was an obligation of conduct more than result and did not interfere with State sovereignty to a large extent. He referred the Chair to the fist report, in which the Study Group dealt with international minimum standard of national treatment in more detail. He wondered if the standard had moved significantly from the *Spanish Zone of Morocco Case* especially bearing in mind the evolution of human rights standards. Since the *Spanish Zone of Morocco Case*, international law had moved away from a distinction between developed or developing states purely based on economic development. There were other considerations that a tribunal might take into account such as capabilities and control of a territory etc. The whole nature of the scope of due diligence was that it gave States the flexibility to implement it in their own terms. He posed the question of where due diligence stood in terms of international minimum standards and national treatment. He acknowledged that Professor Eric De Brabandere had done extensive work in this field.

Professor Strydom noted that the international standard for the treatment of aliens had been marginalised or rendered irrelevant in the wake of the *Spanish Zone of Morocco Case*. This was mainly because of the development of customary international law on the protection of human rights and the large number of States that had signed international human rights treaties. Invariably, a State's conduct would be tested either against customary international law or treaties to which it was a party.

Professor French recalled as an aside the 2012 judgment of the ICJ in the *Case of Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal), in which the court did not take into consideration Senegal's economic capacity as an excuse for its failure to either prosecute or extradite. In that case, the point was that Senegal had not met the conditions.

Judge Suarez observed a disturbing trend whereby developing countries were being flooded with merchandise that was substandard from developed countries. He queried if there was a United Nations declaration or any treaty in place to protect consumers in developing countries.

Professor French noted that due diligence was a generic concept and as a legal term it had become conflated. He agreed that States should act more diligently to prevent such actions. In addition, he noted that, from a legal perspective, due diligence was a standard of care in meeting various primary obligations. One had to identify the primary

obligations; due diligence was, in many respects, best viewed as an element of the secondary rules on State responsibility. Until one could find that primary rule of customary international law or of treaty law, due diligence would be incorrectly applied. He said that due diligence may be a standard to apply in a situation like the one described by Judge Suarez only when there was a primary obligation in place that tried to regulate the relevant conduct.

The Chair thanked Professor French for delivering the second report asked about the future of the Study Group.

Professor French responded that the second report was a document that had been brought into existence by a group effort. There were further areas to develop the concept of due diligence, especially in the field of climate change.

The Chair thanked all the participants and closed the session.

Reporters: Tracey Kanhanga and Sixenxe Andisiwe

STUDY GROUP ON THE USE OF DOMESTIC LAW PRINCIPLES IN THE DEVELOPMENT OF INTERNATIONAL LAW

REPORT

Members of the Study Group

Chair: Professor M H Mendelson QC (UK)
Rapporteur: Dr Alejandro Carballo (Spain)

Dr Yas Banifatemi (France)
Mrs Farah Beitelmal (Spain)
Professor Regis Bismuth (France)
Professor Michael Bogdan (Sweden)
Professor Lauro da Gama e Souza (Brazil)
Professor Jun'ichi Eto (Japan)
Professor Vanda Lamm (Hungary)
Dr Hilly Moodrick-Even Khen (Israel)
Professor Roger O'Keefe (UK)
Dr Martins Paparinskis (UK)
Mr Arnold Pronto (USA)
Dr Fabian Raimondo (Netherlands)
Dr Michael Waibel (Austria)
Professor Sienho Yee (HQ)

I. INTRODUCTION[1]

I.1 Background

1. Increasingly complex and vital international relations keep international law moving into new domains and require steady development. However, in many cases (e.g. sovereign insolvency), due to the lack of corresponding institutions of international law, there is a need to borrow principles from the domestic legal systems (see article 38.1.c of the Statute of the International Court of Justice).[2] As the International Court of Justice (ICJ) emphasized in the *Barcelona Traction* case,

> if the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court should resort.[3]

---

[1] The Rapporteur would like to thank Ms. Isabella Conoscente for her useful comments.

[2] On the use of general principles, see: H. Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)*, 1927; H.C. Gutteridge, "Comparative Law and the Law of Nations", 21 Brit. Y.B. Intl. L. (1944) 1; B. Cheng, *General Principles of Law as applied by International Courts and Tribunals*, CUP, 1953/2006; A. McNAIR, "The general Principles of Law Recognized by Civilised Nations", B.Y.I.L., 1957.1; H. Waldock, "The 'Common Law' of the International Community—General Principles of Law", 106 *Recueil Des Cours* (1962) 54; W. Friedman, "The Uses of 'General Principles' in the Development of International Law", 57 Am. J. Intl. L. (1963), 279; A. Verdross, "Les principes généraux de droit dans le système des sources de droit international public", in *Mélanges P. Guggenheim*, 1968, 53; M. Bogdan, "General Principles of Law and the Problem of Lacunae in the Law of Nations", 46 *Nordisk Tidsskrift Int'l Ret* (1977), 37; M. Cherif Bassiouni, "A Functional Approach to General Principles of International Law", 11 Mich. J. Intl. L. (1990), 768; G. Ripert, "Les règles du droit civil applicables aux rapports internationaux", R.C.A.D.I., 1933-II, vol. 44.565; J. Ellis, "General Principles and Comparative Law", 22 EJIL (2011), 949; G. Gaja, "General Principles of Law", Max Planck Encyclopaedia of Public International Law, 2013.

[3] *Barcelona Traction (Belgium v. Spain)*, Second Phase, Judgment, I.C.J. Rep. 1970, 3, at para. 50.

2. The reference to the ICJ Statute[4] should not be misunderstood. Those general principles are not to be exclusively used in the adjudication process, but also in any decision-making process when the resort to such principles is necessary. Nevertheless, when international courts and arbitral tribunals have resorted to domestic principles in their legal reasoning, they seem to have done so cautiously, indirectly, and without clarifying how those principles were identified and how are they to be correctly applied. On the other hand, when considering domestic principles for drafting hard and soft law instruments, it has not always been clear whether all main forms of civilization and of the principal legal systems of the world were considered.

3. Therefore, the objective of the Study Group was (i) to survey and understand how domestic principles are currently identified and applied, as well as (ii) to consider whether it could be possible to provide some general guidelines to serve as a practical reference for those involved in the adjudication or other decision-making process, as well as for those concerned with the development of international law. Those guidelines could facilitate a more uniform, predictable and reviewable recourse to the general principles of law, reducing the high degree of subjectivity and potential misuse in applying this source of law.

4. Apart from holding two open working sessions (one in The Hague in 2010 and another in Sofia in 2012), the Study Group met twice, one in Cambridge (at the Lauterpacht Centre for International Law) in 2012 and another in Madrid (at the offices of Cuatrecasas, Gonçalves Pereira) in 2013. The Study Group is made up of members coming from several states in an attempt to have proportional geographic representation to the extent possible (China, South Africa, Argentina, United Kingdom, Israel, Iran…). This diversity of cultures and legal backgrounds was considered even more important in a study dealing with the general principles of law. Some members provided a substantive contribution. The other members of the Study Group were invited to comment on the drafts of the contributors. The present report takes into account their comments.

5. It is expected that the present Draft report will be considered and commented upon by participants at the 77th ILA Biennial Conference in Johannesburg. In the light of the comments received, it will be refined and expanded for the purpose of a final Report.

I.2 Methodology

6. Instead of a theoretical exercise of trying to establish those uniform guidelines at the outset of the work, the main part of the report has been concerned with identifying, summarizing and explaining the 'current practice' in identifying and applying domestic principles, both at the adjudication phase (criminal and hybrid courts, World Trade Organization, ICJ, International Administrative Tribunals, and international arbitration) and the law-making phase (International Law Commission, criminal law, global administrative law and financial/trade). The report will focus on the current practice or 'modern' use of domestic principles, rather than explaining the influence of domestic principles in the formative period of public international law. The topics covered were the result of

[4] A. Pellet, "Article 38" in A. Zimmerman et al. (eds), *The Statute of the International Court of Justice*, 2012. H. Thirlway, *The Sources of International Law*, OUP, 2014; S. Yee, "Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases", paper delivered at the ICJ seminar in April 2016 to celebrate its 70th anniversary (forthcoming in Journal of International Dispute Settlement).

a balance between the aspiration to address some of the main areas of potential use of domestic principles and the particular expertise of Study Group members. The result is, of necessity, selective, but it is hoped provides a broad enough sample to derive some useful conclusions.

7. One of the initial tasks of the Study Group was to limit the scope of the work. After some discussion, it was decided to focus primarily on those principles derived from domestic legal systems, including both private and public law principles. As was observed by Judge Tanaka in his dissenting opinion to the *South West Africa* judgment (second phase) of 1966, where the phrase 'general principles of law' is not qualified, the 'law' must be understood to embrace all branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc.[5] This approach allowed the Study Group to have a broader coverage (e.g. by including criminal law).

II. ANALYSIS OF CURRENT PRACTICE

II.1 ADJUDICATION

II.1.a International Court of Justice[6]

8. During the past 70 years, 134 contentious cases have been brought before the International Court of Justice (ICJ) – since the report tries to focus on the 'current practice', the decisions of the Permanent Court of International Justice, PCIJ, (1922-1946) have not been taken into account -. General principles of law have been invoked before the ICJ and employed by the Court or its judges in a reduced number of those cases. So far, in no case has the Court based an essential part or holding of a decision on general principles of law. Furthermore, references to domestic principles are generally brief, lack substantial legal citations in support, and do not clearly explain how those principles have been identified and can be applied. This is probably because in most of the cases domestic principles seem to have been invoked as a mere ancillary or corollary device to gain legitimacy or strengthen an already agreed point. While the ICJ Handbook[7] contains a full chapter focused on the application by the Court of treaties and conventions, custom, judicial decisions, and even on its power to decide *ex aequo et bono*, there is no particular discussion on the use of general principles of law.

9. The present section analyses the judgments and orders published by the Court as well as all declarations, separate and dissenting opinions given by its judges before March 2015. Every document was scanned for references to the term 'principle' with a digital search function. Whenever such a reference appeared, its relevance was scrutinized. Ambiguous references were excluded from the results of the research since it is difficult to confirm whether the Court was actually referring to general principles of law. As a result, the section does not include some references, such as the one contained in the

[5] *South West Africa (Ethiopia/Liberia v. South Africa)*, Second Phase, Dissenting Opinion of Judge Tanaka, I.C.J. Rep. 1966, p. 294.

[6] Based on the analysis provided by Robert Pfeiffer (external collaborator, enrolled at the U. of Postdam) and peer review from Junichi Eto and Sienho Yee. For an analysis regarding references to Islamic principles before and by the ICJ, see section 6 (prepared by A. Carballo) of the 2010 Report of the ILA Committee on Islamic Law & International Law.

[7] See 6th edition, 2016, http://www.icj-cij.org/publications/en/manuel_en.pdf

Corfu Channel case regarding use of indirect evidence (which is 'admitted in all systems of law, and its use is recognized by international decisions').[8]

10. Once a reference was identified as such, it was categorised as either relying upon, merely affirming or even negating a general principle of law. 'Reliance' is self-explanatory. Mere affirmation occurs when the existence of a general principle is acknowledged even if it is not considered relevant to the specific dispute. For the purpose of this analysis, negation means that an alleged general principle is negated as such, i.e. not considered a source of law in terms of Art. 38 (1) (c) ICJ Statute.

II.1.a.i References to General Principles of Law by the Court

11. It has been suggested that the ICJ as a judicial body has remained rather cautious in its application of the general principles of law for a number of reasons: According to ICJ Judge Giorgio Gaja, when writing as commentator, the 'difficulty of engaging […] in a comparative analysis'[9] may be a factor as well as the 'risk of transgressing into the application of equity'[10], which pursuant to Art. 38 (2) ICJ Statute requires the parties' particular consent. Moreover, he emphasized the need for decisions' continued predictability. An unexpected reliance upon a general principle of law intended to fill in *lacunae* in the law may decrease the parties' willingness to subject themselves to the Court's jurisdiction.[11]

12. The Court has arguably referred to general principles of law at least nine times, mainly in relation to issues of procedure or evidence (not as a direct source of rights and obligations). Nevertheless, in a recent case (*Timor-Leste v. Australia*) the order of the Court in 2014 regarding provisional measures considered plausible the existence of a cause of action based on a general principle of law.[12] However, while the claimant argued such principle to be derived from a domestic principle (confidentiality of communications between legal counsel and client covered by legal professional privilege), the Court refers to the international principles of the sovereign equality of States (Article 2.1 of the UN Charter) and amicable settlement of international disputes (Article 2.3 of the UN Charter) to establish the right to conduct arbitration proceedings or negotiations without interference of another State, which includes the right of confidentiality of and non-interference in its communications with its legal advisers.[13]

- *South West Africa (Ethiopia/Liberia v. South Africa)*[14]

13. In its first reference to an alleged general principle of law, in the *South West Africa* case, the ICJ negated its applicability:

> Looked at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an "*actio popularis*", or right resident in any member of a community

[8] *Corfu Channel* case, judgment of 9 April 1949, I.C.J. Reports 1949, p. 4, at p. 18.
[9] Gaja, supra note 1, para. 16.
[10] Ibid.
[11] Ibid., quoting Sir G. Fitzmaurice.
[12] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, p. 147
[13] Ibid.
[14] Second Phase, Judgment, I.C.J. Rep 1966, 6.

> to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: *nor is the Court able to regard it as imported by the* "*general principles of law*" *referred to in Article 38, paragraph 1 (c), of its Statute*.[15] (emphasis added)

- *Barcelona Traction (Belgium v. Spain)*[16]

14. In the *Barcelona Traction* case, the Court affirmed the procedure of 'lifting the corporate veil' to be a principle of international law, originating from domestic legal systems. After referring to the 'wealth of practice accumulated on the subject in municipal law', it stated that 'in accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law, is equally admissible to play a similar role in international law.'[17] As the relevant passage lacks a reference to Art. 38 (1) (c) ICJ Statute and does not employ its wording, the reference to the municipal origin of the principle is the only indicator, which justifies the assertion that the Court may have affirmed a general principle of law. The reference is thus somewhat ambiguous:

> It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations. Hence the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity. However, it has also been operated from within, in the interest of – along others – the shareholders, but only in exceptional circumstances. *In accordance with the principle expounded above*, the process of *lifting the veil*, *being an exceptional one admitted by municipal law* in respect of an institution of its own making, *is equally admissible to play a similar role in international law*. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.[18] (emphasis added)

The Court also considered international instruments and judgments of international tribunals (since both parties relied on them during the proceedings) dealing with (i) the treatment of enemy and allied property, during and after the First and Second World Wars, and (ii) the treatment of foreign property consequent upon the nationalizations carried out at that time in several countries. However, the Court considered those two developments arising out of special and very peculiar circumstances. Due to their character as *lex specialis*, no analogies or conclusions could be generally drawn from them in other fields of international law.[19] Similarly, the Court also concluded that the general arbitral jurisprudence cited by the parties could not be generalized since it rested upon the instruments establishing the jurisdiction of those tribunals or claim commissions and the protected rights.[20]

---

[15] Id., 47.
[16] Second Phase, Judgment, I.C.J. Rep. 1970, 3.
[17] Id., paras. 56 ff.
[18] Ibid.
[19] Id., paras 59-62.
[20] Id., para. 63.

After considering potential exceptions to the principle, the Court declined to 'pierce the corporate veil' and to allow Belgium to defend the rights of its shareholders in a Canadian company against Spain.[21]

- *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*[22]

15. In 1982, in a case concerning maritime delimitation, the Court proclaimed 'the legal concept of equity [as] a general principle directly applicable as law.' The Court neither cited Art. 38 (1) (c) of its Statute, nor referred to domestic legal systems. Nevertheless, the Court made an effort to distinguish the application of said legal norm from a decision *ex aequo et bono* pursuant to Art. 38 (2) of its Statute.

> *Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it*. In the course of the history of legal systems the term "equity" has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; *the legal concept of equity is a general principle* directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice. Application of equitable principles is to be distinguished from a decision *ex aequo et bono*. The Court can take such a decision only on condition that the Parties agree (Art. 38, para. 2, of the Statute), and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement. The task of the Court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.[23] (emphasis added)

16. It is admitted, however, that this reference is both ambiguous and abstract. Judge Oda criticized the Court in his Dissenting Opinion: '[…] in saying that "delimitation is to be effected in accordance with equitable principles" (para. 38), the Court cannot be regarded as suggesting principles and rules of international law, for it is simply stating a truism.'[24] Equity is used by the Court in this case as part of a particular rule, not as a general principle of law.

- *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*[25]

17. In 1985, the Court reaffirmed its previous, arguably ambiguous reference to equity as a 'general principle directly applicable as law.'[26]

> Thus the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of

[21] Id., paras. 64 ff.
[22] Judgment, I.C.J. Rep. 1982, 18.
[23] Id., para. 71.
[24] Dissenting Opinion of Judge Oda, I.C.J. Rep. 1982, pp. 157, para. 155.
[25] Judgment, I.C.J. Rep. 1985, 13.
[26] Id., para. 45.

> an instant case, it also looks beyond it to principles of more general application. This is precisely why the courts have, from the beginning, elaborated equitable principles as being, at the same time, means to an equitable result in a particular case, yet also having a more general validity and hence expressible in general terms; for, as the Court has also said, "*the legal concept of equity is a general principle directly applicable as law*"(I.C.J. Rep. 1982, p. 60, para. 71).[27] (emphasis added)

18. Judge Oda reiterated his criticism, calling equity a 'blanket concept susceptible of diverse interpretations.'[28] In any case, the Court based its delimitation upon equitable principles, but not as 'general principles of law' but as customary international law.

- *Military and Paramilitary Activities (Nicaragua v. USA)*[29]

19. In its 1986 Judgment in the *Nicaragua* case, the Court relied upon 'general principles as to the judicial process,'[30] as it determined the permissibility of evidence. While the Court neither referred to Art. 38 (1) (c) ICJ Statute, nor to domestic legal systems, the wording and content of its reference suggest that it relied upon a general principle of law.

> *The Court holds that general principles as to the judicial process require that the facts on which its Judgment is based should be those occurring up to the close of the oral proceedings on the merits of the case.* While the Court is of course very well aware, from reports in the international press, of the developments in Central America since that date, it cannot, as explained below (paragraphs 62 and 63), treat such reports as evidence, nor has it had the benefit of the comments or argument of either of the Parties on such reports.[31] (emphasis added)

- *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*[32]

20. In 2002, the Court reaffirmed a finding of its 1951 Advisory Opinion,[33] namely that 'the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding upon States, even without any conventional obligation.'[34] As the term 'principles […] recognized by civilized nations' resemble the wording of Art. 38 (1) (c) ICJ Statute, a reference to general principles of law seems arguably a reference to international custom in terms of Art. 38 (1) (b) of the ICJ Statute.[35] This assumption is strengthened by the broad and generic nature of the invoked principles, which the Court in its Advisory Opinion also referred to as the 'moral and humanitarian principles which are at [the Convention's] basis.'[36] Yet, the Court's ambiguous reference once again leaves room for interpretation.

---

[27] Ibid.
[28] Id., Dissenting Opinion of Judge Oda, I.C.J. Rep. 1985, pp. 125, 159, paras. 1 and 65.
[29] Judgment, Merits, I.C.J. Rep. 1986, 14.
[30] Id., p. 40, para. 60.
[31] Ibid.
[32] Judgment, Jurisdiction and Admissibility, I.C.J. Rep. 2002, 6.
[33] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Rep. 1951, pp. 15, 23.
[34] *Supra* note 31, paras. 41 f.
[35] W.A. Schabas, "Genocide Convention, Reservations (Advisory Opinion)", Max Planck Encyclopaedia of Public International Law, 2009, para. 10.
[36] *Supra* note 32, p. 24.

> The Court will begin by reaffirming that "*the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation*" and that a consequence of that conception is "the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)" […][37] (emphasis added)

- *Sovereignty over Pedra Branca (Malaysia/Singapore)*[38]

21. In 2008, the Court unambiguously relied upon a 'general principle of law […] that a party which advances a point of fact in support of its claim must establish that fact.'[39] While the Court had previously referred to this procedural principle before,[40] this is the first time that it used the term 'general principle of law.'

- *Navigational and Related Rights (Costa Rica v. Nicaragua)*[41]

22. One year later, in 2009, the Court reaffirmed this 'well-established general principle'[42] concerning the burden of proof, hence invoking the same general principle of law.

> The Court notes that Costa Rica, in support of its claim of unlawful action, advances points of fact about unreasonableness by referring to the allegedly disproportionate impact of the regulations. The Court recalls that *in terms of well-established general principle it is for Costa Rica to establish those points* [...][43] (emphasis added)

- *Territorial and Maritime Dispute (Nicaragua v. Colombia)*[44]

23. In 2011, the Court (quoting its 1954 Advisory Opinion on the effect of awards of compensation made by the UN Administrative Tribunal) relied upon the 'well-established and generally recognized principle of law that a judgment rendered by a judicial body has binding force between the parties to the dispute,'[45] i.e. the principle of *res judicata*.

> *It is a well-established and generally recognized principle of law that a judgment rendered by a judicial body has binding force between the parties to the dispute* (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Rep. 1954, p. 53). The Court notes that in ascertaining the scope of res judicata of the 2007 Judgment, it must consider Honduras's request in the specific context of the case. […] In order to assess whether Honduras has an interest of a legal nature in the area south of the bisector line, the essential issue for the Court to ascertain is to what extent the 2007 Judgment has determined the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras.[46] (emphasis added)

---

[37] *Supra* note 34, paras. 41 f.
[38] Judgment, I.C.J. Rep. 2008, 12.
[39] Id., paras. 44 f.
[40] E.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* I.C.J. Rep. 2007, 43, at para. 20; *Maritime Delimitation in the Black Sea (Romania v. Ukraine),* I.C.J. Rep. 2009, 61, at para. 68; *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* I.C.J. Rep. 2010, 14, at para. 162.
[41] Judgment, I.C.J. Rep. 2009, 213.
[42] Id., para. 101.
[43] Ibid.
[44] Judgment (Application by Honduras for Permission to Intervene), I.C.J. Rep. 2011, 420.
[45] Id., paras. 67-69.
[46] Ibid.

24. The Court had previously referred to this procedural principle before,[47] but in a more ambiguous way.

II.1.a.ii References to General Principles of Law by in Separate and Dissenting Opinions

25. The general principles of law which were relied upon in separate and dissenting opinions predominantly concerned procedural law, state responsibility, and the law of treaties.

26. The views of individual judges differed with regard to the existence of certain general principles of law. For instance, in the *Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants*, Judges Lauterpacht and Moreno Quintana, in their separate opinions, both relied upon the notion of *ordre public* as a general principle of law,[48] the existence of which was however negated by Judge Spencer.[49]

27. On a more fundamental level, judges have entertained divergent views regarding the nature and origin of general principles of law as a source of international law. Some judges have been in favour of a naturalist interpretation of Art. 38.1.(c) of the ICJ Statute: e.g. Judge Tanaka stated in his dissenting opinion to the *South West Africa* judgment of 1966 that 'it is undeniable that in Article 38, paragraph 1 (c), some natural elements are inherent […] the provision does not require the consent of States as condition of the recognition of the general principles. States which do not recognize this principle or even deny its validity are nevertheless subject to its rule. From this kind of source international law could […] assume an aspect of its supra-national and supra-positive character.'[50] In 2010, Judge Cançado Trindade went even further in his separate opinion to the decision in the *Pulp Mills* case asserting that '[g]eneral principles of law emanate […] from human conscience, from the universal juridical conscience, […] the ultimate material "source" of all law.'[51]

28. More judges, however, have referred to municipal legal systems as the origin of the general principles of law which they invoked. Some judges have deemed it necessary to conduct a comparative analysis of domestic legal systems, such as Judge Ammoun, who stated that 'the general principles of law mentioned by Article 38, paragraph 1 (c), of the Statute, are nothing other than the norms common to the different legislations of the world, united by the identity of the legal reason therefor.'[52] Relying upon the general

[47] E.g. in *Application of the Genocide Convention* (*supra* note 39, para. 116), the Court referred to the 'principle of *res judicata*, internationally as nationally.' See also dissenting opinion of Judge Owada in the same case, which regarded the rule of res judicata as 'a general principle of law recognized by civilized nations.' (para. 14).

[48] *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment, Separate Opinions of Judges Sir Hersch Lauterpacht and Moreno Quintana, I.C.J. Rep. 1958, pp. 79, 91 f.; pp. 102, 105.

[49] Id., Separate Opinion of Judge Sir Percy Spencer, I.C.J. Rep. 1958, pp. 116, 123.

[50] Id., Dissenting Opinion of Judge Tanaka, I.C.J. Rep. 1966, pp. 294-301, 313 f.

[51] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, Separate Opinion of Judge Cançado Trindade, I.C.J. Rep. 2010, pp. 135, 156, para. 52.

[52] *North Sea Continental Shelf (Germany v. Denmark)*, Judgment, Separate Opinion of Judge Ammoun, I.C.J. Rep. 1969, pp. 101, 134, para. 33.

principle of equity, Judge Ammoun traced its origins to several legal systems.[53] Similarly, in his separate opinion to the 2003 *Oil Platforms* judgment, Judge Simma compared 'various common law jurisdictions as well as French, Swiss and German tort law'[54] in order to identify the principle of joint and several responsibility as a general principle of law.

29. This voluntarist-naturalist divide among judges of the ICJ may be yet another reason for its reluctance to explicitly affirm and apply general principles of law.

II.1.a.iii Interim Conclusion

30. Throughout the past seven decades, the Court has indeed been rather cautious in its explicit proclamation of general principles of law. Its unambiguous affirmative references can be counted on one hand and they concern procedural law. Individual Judges, however, have been more inclined to invoke general principles of law and their understanding of the nature and origin of this source of law has varied greatly.

31. One may tentatively draw the conclusion that the Court has been more inclined confidently to enunciate rather technical and predictable general principles of procedural law than general principles of a substantive nature.

II.1.b International Criminal Courts and Hybrid Courts[55]

II.1.b.i International Criminal Courts[56]

32. The International Criminal Tribunals, in particular the International Criminal Tribunal for the former Yugoslavia (ICTY), have often invoked the concept of general principles of law to address substantive and procedural issues - mainly to bridge the gaps because international criminal law was undeveloped at the time of the establishment of these tribunals. In doing so, international criminal courts have contributed to the development of this branch of international law. However, when the courts have looked into municipal legal systems to find general principles, there are scarce mentions of the methodology used.

33. As an example, in the *Erdemović* case, the Trial Chamber of ICTY had sentenced the accused to ten years' imprisonment for crimes against humanity following a plea bargain. The accused appealed the decision, asking the Appeals Chamber to revise the sentence, on the grounds that the crime had been committed under duress. As treaty and custom were silent on the elements of the crime, the Appeals Chamber drew on general principles, and found that no principle existed to support duress as a complete defence to a charge of crimes against humanity.[57] However, Judges McDonald and Vohrah, after

[53] Id., p. 139 f., para. 38.

[54] *Oil Platforms (Islamic Republic of Iran v. USA)*, Judgment (Merits), Separate Opinion of Judge Simma, I.C.J. Rep. 2003, pp. 324, 358, para. 74.

[55] For additional reference, see F. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Brill/Martinus Nijhoff, 2008 (providing a comprehensive analysis of the use of general principles by international criminal tribunals, including the ICTY); N. Jain, "Comparative International Law at the ICTY: the General Principles Experiment", 109 Am. J. Intl. L. (2015), 486.

[56] Based on the analysis provided by Fabian Raimondo.

[57] ICTY, *Prosecutor v. Erdemović, Judgment,* Case No. IT-96-22-A, App. Ch., 7 October 1997, para. 19.

comparing thirty national legal systems (which covered civil law systems, common law systems, and a hybrid category which they called 'criminal law of other states' –China, Ethiopia, Japan, Morocco and Somalia), concluded that under domestic law, duress was a mitigating factor in sentencing.[58] Judge Li was of the same opinion in that regard.[59] Since the majority of the Appeals Chamber did not consider that duress was a complete defence, but only a mitigating factor, the sentence was reduced to five years.[60] The *Erdmović* case reveals that even if general principles were subsidiary in nature, they could play an important role, at least so far as international criminal trials were concerned.

34. But international criminal courts and tribunals have not only applied general principles as gap-fillers of the law but also as value-oriented principles to interpret international rules (for example, the ICTY has used the principles of human dignity to define the crime of rape under international law). By doing so, the courts tried to avoid any charge of arbitrary interpretations. In addition, general principles have had a supplementary function of reinforcing legal reasoning. For example, in the *Blaškić* case, the Trial Chamber of the ICTY expressed the view that the accused could be held responsible under any of the heads of individual criminal responsibility in Article 7(1) of the ICTY Statute, adding that this 'was consonant with the general principles of criminal law and customary international law.'[61]

35. Regarding the issue of the identification of general principles, international criminal courts and tribunals have sometimes relied on decisions of other international courts and tribunals (for example, they have often relied on decisions of the ICJ to argue that the court or tribunal had the ability to determine its own jurisdiction). At other times, the courts and tribunals relied on scholar writings to determine the scope (though not the existence) of particular principles. Most interestingly, some courts and tribunals, particularly the ICTY, used comparative law to ascertain general principles using the following two operations: first, the 'vertical move', which involved a process of abstracting legal rules from domestic legal systems in order to derive an underlying principle; second, the 'horizontal move', which involved a process of comparing domestic legal systems in order to verify that the principle was recognised by the generality of nations.

36. With respect to the horizontal move, most courts and tribunals would proclaim that a particular principle was recognised by 'most' or 'civilised' nations without providing evidence. Sometimes, on important issues, the court or tribunal would undertake an empirical study and provide evidence of this study in the reasons for its decision. For these studies, the court and tribunals tended to refer to the same common and civil law systems. Almost half of the domestic legal systems referred to belonged to just seven jurisdictions: United States, England and Wales, Germany, Canada, Italy, France, and Belgium. All other legal systems of the world were more often than not ignored. In the 21st century, with domestic criminal laws available online, this approach could, arguably no longer be

[58] ICTY, *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App.Ch., 7 October 1997, § 40, 55-72.
[59] ICTY, *Prosecutor v. Erdemović, Judgment, Separate and Dissenting Opinion of Judge Li*, Case No. IT-96-22-A, App.Ch., 7 October 1997, § 3.
[60] ICTY, *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T bis, T.Ch. II ter, 5 March 1998, disposition.
[61] ICTY, *Prosecutor v. Blaškić*, *Judgment*, Case No. IT-95-14-T, T.Ch. I, 3 March 2000, para. 264.

justified on the grounds of access to law. Nevertheless, the approach was due to judges tending to defer to their own legal systems, and the fact that most judges – and most legal officers working at the courts and tribunals – were from these jurisdictions. Although a likely justification for that course of action could be that some of those legal systems have influenced others beyond Europe via colonisation, it is worth noting that, over time, the staff of international courts and tribunals has become more geographically representative and the comparative law research more varied.

37. With respect to the vertical move, the ICTY would sometimes identify the principle that it was looking for to begin with, noting as an example the principle that courts had an inherent power to deal with contempt of court. In the *Tadić* case, the accused argued that successive amendments to the Rules of Procedure and Evidence that expanded the types of conduct amounting to contempt infringed his rights. In response, the Appeals Chamber of the ICTY looked at the 'general principles of law common to the major legal systems of the world, as developed and refined (where applicable) in international jurisprudence'[62] and found that while the power to deal with contempt in common law legal systems is part of the inherent jurisdiction of the courts, in the civil law legal family the power comes into existence only if enacted by legislation.[63] Despite this, the Chamber proceeded to find that the ICTY did have an inherent power to deal with contempt.[64] This could lead to the conclusion that the ICTY was determined to find a solution regardless of its comparison of domestic legal systems.

38. In the early years of the ICTY, Antonio Cassese had expressed concerns about automatic transposition of national law concepts, including general principles of law.[65] A number of persuasive reasons had been given, such as a difference between States and international society concerning legal subjects and sources of law.[66] In practice, however, international criminal courts and tribunals did not challenge the transposition of principles in light of structural issues. For example, in the first case before the ICTY (the *Tadić* case), the accused challenged the legality of the ICTY's establishment on the basis that it was contrary to the general principle whereby courts must be 'established by law'. The Appeals Chamber responded that this principle could not be applied in an international setting as it was domestically, as the legislative, executive and judicial division of powers which prevails in the generality of national legal systems does not apply to the international setting.[67] Therefore, the Appeals Chamber did not reject the application of the principle but rather adjusted its meaning to the special characteristics of the international setting. Following the adjustment, the principle meant for the Appeals Chamber that an international criminal court or tribunal is 'to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments.'[68]

---

[62] ICTY, *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-AR77, App. Ch., 31 January 2000, para. 15.
[63] Id., paras. 15-17.
[64] Id., para. 28.
[65] ICTY, *Prosecutor v. Erdemović, Judgment, Separate and Dissenting Opinion of Judge Cassese*, Case No. IT-96-22-A, App. Ch., 7 October 1997.
[66] Id., paras. 2-5.
[67] ICTY, *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case No. IT-94-1-AR72, App. Ch., 2 October 1995, paras. 42-43.
[68] Id., para. 45.

39. In *Boškoski & Tarčulovski,* the Tribunal did not base its decision on general principles of domestic law but rather used these principles to reinforce its decision.[69] Tarčulovski claimed that the Tribunal violated national rules of evidence when admitting into evidence certain out-of-court statements made during the national investigation of suspected war crimes. Even though the Appeals Chamber pointed out that pursuant to its Statute, the Tribunal is not bound by national rules of evidence, and hence evidence inadmissible by national rules of law is not necessarily inadmissible under international rules of law.[70] It added that Tarčulovski failed to identify a specific 'general principle of law' to support his argument. In other common law and civil law jurisdictions, out-of-court statements are admissible. The Tribunal also referred to the principle of *lex mitior* (the principle by which a person is to benefit from the lighter penalty set by a law posterior to the incriminated act). It relied on this principle as it was enshrined in the law of the Former Yugoslav Republic of Macedonia, to which the ICTY was invited to revert to when sentencing.[71]

40. In *Haradinaj,* the Appeals Chamber stated that the prosecution was not entitled to a right of appeal in many domestic jurisdictions –without mentioning which - for it was seen as a breach of the principle of *non bis in idem*. Arguably, in light of the gravity of the crimes prosecuted at the Tribunal and the horrific circumstances surrounding their commission, there is some justification for granting the prosecutor a right of appeal. However, the Appeals Chamber must have a clear and unequivocal basis for overturning an acquittal.[72]

41. In *Strugar,* the Appeals Chamber referred to the principle of fitness to stand trial (in particular, on minimum age or mental incapacity), 'drawing upon general principles of law recognized by all nations.'[73] First the chamber reviewed *international* jurisdictions, (previous decisions of the ICTY, the International Military Tribunals, the European Court of Human Rights, the International Criminal Court, the Extraordinary Chamber in the Court of Cambodia, the Special Court for Sierra Leone and Special Panel for Serious Crimes in the District Court of Dili), and then some *national* jurisdictions.[74] In the absence of express provisions in the statute regarding various personal defences which may relieve a person of individual criminal responsibility such as minimum age or mental incapacity, the Appeals Chamber approved the Trial Chamber's reliance on general principles of law recognized by all nations. It distinguished between common law and civil law jurisdictions, and then gave a brief overview of the procedures in the former Yugoslavia and a recent judgment by the War Crimes Chamber of the District Court in Belgrade which rejected an indictment against Kovacevic. The Chamber referred to the national criminal jurisdictions of: Australia, Canada, India, Malaysia, the UK, the USA, Japan, Korea, the Netherlands, Germany, Belgium, and the Russian Federation.[75] It analysed the tests for fitness to stand trial in common law and in civil law jurisdictions, and on this basis defined the applicable standard for fitness to stand trial as that of meaningful

[69] ICTY, *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82, TC, July 2008.
[70] ICTY, *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82, AC, May 2010.
[71] Id., para 603.
[72] ICTY, *Prosecutor v. Haradinaj et al*., Case No. IT-04-84, AC, July 2010, para. 27.
[73] ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-A, AC, 17 July 2008, paras. 44 (quoting the decision of the Trial Chamber of 26 May 2004, para. 20).
[74] Id., paras. 45 ff.
[75] Id., paras. 52-54.

participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings.[76]

42. In *Brima* the Appeals Chamber of the ICTY distinguished the application of the principle of specificity in international criminal jurisdictions from that in domestic jurisdictions.[77] It stated that the pleading principles that apply to indictments before international criminal tribunals differ from those in domestic jurisdictions because of the nature and scale of the crimes, different from those in domestic jurisdictions. For this reason, there is a narrow exception to the specificity requirement for indictments before international criminal tribunals. In some cases, the widespread nature and sheer scale of the alleged crimes make it unnecessary and impracticable to require a high degree of specificity.

43. In *Popović*, the Trial Chamber of the ICTY discussed the question of cumulative convictions of conspiracy and an underlying offense.[78] Under the tribunal's case law, cumulative convictions are permissible if each statutory provision involved has a materially distinct element not contained in the other. In the case of the crime of genocide, the Chamber noted that the Genocide Convention defined conspiracy in accordance with the common law notion of the term. In most common law countries, convictions may be entered for both conspiracy and the underlying substantive offence, but this approach had been roundly criticised. The Trial Chamber also noted that in civil law countries, convicting for both conspiracy and underlying offence is not possible. Given the variety of approaches, the Trial Chamber found resort to national jurisprudence to be of limited utility.[79] Hence, it turned to the principle of fairness to the accused[80] which is also relevant regarding multiple convictions for the same act. It noted that this principle was also applied by the ICTR jurisprudence which stated in the *Musema* Trial Judgment that the position most favourable to the accused must be paramount.[81]

44. The principal conclusion is that while there is indeed a major tendency of the international criminal courts to base some parts of their decisions on general principles of law, it is done mostly by resorting to the practice and jurisdiction of other international tribunals (either the legacy of each tribunal or mostly that of the ICTY jurisprudence). The courts and tribunals seem to find less of a need to transpose those principles from national jurisdictions. This seems to mean that these principles are regarded more as an integral part of international criminal law and less as domestic law principles that need to be transposed into international criminal law.

II.1.b.ii Hybrid Courts[82]

45. The term internationalized or hybrid criminal bodies (hereinafter 'hybrid courts') has been used to identify a new generation of international criminal courts. Contrary to the previously mentioned international criminal courts (*section II.1.b.i*), their nature is

[76] Id., para 55.
[77] ICTY, *Prosecutor v. Alex Tamba Brima*, Case No. SCSL-2004-16-A (AC, 3 March 2008).
[78] ICTY, *Prosecutor v. Popović*, Case No. IT0588T, Trial Chamber, Judgement, 10 June 2010.
[79] Id., para. 2122.
[80] Id., para. 2123.
[81] Id., para 2127.
[82] Based on the analysis provided by Hilly Moodrick-Even Khen.

a mix of international and national features (e.g. international and local staff, as well as international and national substantial and procedural law).

46. There are four hybrid courts: Bosnia and Herzegovina War Crimes Chamber (BWCC), the Special Panel for Serious Crimes in the District Court of Dili (East Timor Court- SPSC), the Extraordinary Chamber in the Court of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL). Hybrid courts have been travelling the path marked by international criminal courts and tribunals, using similar approaches to apply general principles, and giving them the same gap-filling and interpretative function. However, the hybrid courts did not deal so much with general principles of domestic legal systems. Instead, they relied on the jurisprudence of international criminal courts and tribunals as well as international instruments, and the jurisprudence of the European Court of Human Rights (ECtHR). This was done in order to obtain more legitimacy for their decisions.

47. In addition, the hybrid courts studies have been mindful of the fact that they were under a statutory obligation to apply international law as well as their own domestic law, but also took into account the characteristics of their own legal system when dealing with general principles. As an example, in the *Mitrović* case, the BWCC addressed the treatment of testimony given by a witness pursuant to a plea agreement.[83] Here, the Chamber drew connections between the obligation to evaluate each item of evidence and the right to a fair trial, as understood in civil law systems. Another example would the ECCC dealing with the standard of proof in criminal trials in circumstances where the English and Khmer text of its statute required the standard of 'beyond reasonable doubt', yet the French text and civil law jurisdictions, like Cambodia, recognised the notion of 'intimate conviction'.[84] Despite these conceptual differences, the Chamber adopted a common approach to evaluating the sufficiency of the evidence.

48. One of the major issues on the agenda of a hybrid court is the principle of legality (including the specificity of crimes, which requires that a criminal rule be detailed and indicate in clear terms the various elements of the crime). As pointed out by the SPSC, quoting Prof. Bassiouni and the brief historical overview of the permissibility of analogy in several criminal law systems,[85] the use of analogy is necessary 'because traditionally, international criminal law has lacked the specificity of national criminal law in defining crimes.'[86] However, the SPSC referred to the use of analogy 'in applying customary definitions', without any reference to domestic principles.

49. Sometimes references to domestic principles are quite vague and general, with reference to international decisions in support, even if the Statutes and Rules of Procedure of the hybrid courts contain a similar institution. E.g:

---

[83] BWCC, Case No. X-KR-05/24-1, *Prosecutor's Office of Bosnia and Herzegovina v. Petar Mitrović*, 29 July 2008 (First Instance).

[84] ECCC, *Prosecutors v. Kaing Guek Eav alias Duch*, Case No. 001/18072007/ECCC/TC, Judgment (Trial Chamber, 26 July 2010), paras. 44-45.

[85] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd revised ed., Martinus Nijhoff, 1999, 143-144.

[86] SPSC, *Prosecutor v. Joao Franca da Silva Alias Jhoni Franca*, Case No. 04a/2001, Judgment, 12 December 2002, paras. 74-75.

- the SPSC considered (with reference to ICTY, in *Tadic*)[87] that 'there can be no violation of *non-bis in-idem, under any known formulation of this principle,* unless the accused has already been tried.*'* (emphasis added)
- Similarly, a SCSL Trial Chamber arrived at the conclusion (after examining Canadian law and decisions of the ICTR)[88] that a trial *in absentia* in the context of the SCSL was permissible and lawful under certain circumstances (in fact, Article 17 of the Statute and Rule 60), and that in most national law systems, 'exceptionally, courts of justice can have recourse to trial of an accused person in his absence where such an option becomes imperative but in limited circumstances'.[89]
- In another SCSL decision, the Trial Chamber examined the nature and scope of 'judicial notice' under national and international laws (even if already covered by Rule 94(A) of the Rules of Court) concluding that the notion enjoyed universal recognition.[90] The Trial Chamber referred to the German and the Russian penal codes as national criminal laws recognizing judicial notice, while mentioning the Austrian Penal Code and the Slovenian Criminal Act as examples of the contrary.[91] In addition, the Trial Chamber examined only judgments of English courts and the US procedural law (and no other common law jurisdiction).[92] Yet, in the end, it relied upon the relevant jurisprudence of the ICTR.[93]

50. In some cases, the local legal system is resorted to for 'establishing that the accused could reasonably have known that the offense in question or the offense committed in the way charged in the indictment was prohibited and punishable'[94] (as required by the international principle of legality); or to establish some limitations (e.g. in relation to conditions for the admission of witnesses or for the hearing of witnesses for their protection)[95] or deviations (e.g. the BWCC in relation to the general principle of *lex mitior* with reference to the Criminal Code of Bosnia and Herzegovina, which was adopted the provisions contained in the European Convention on Human Rights and the ICCPR, and the jurisprudence of the Court of Bosnia and Herzegovina, following international

---

[87] ICTY, *Decision on the Defence Motion on the Principle of Non-Bis-In-Idem*, 14 November 1994.

[88] SCSL, *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days*, Case No. SCSL-04-15-T, T. Ch., 12 July 2004, at 9-10.

[89] Id., at 9. A similar decision was adopted in *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Accused, Sesay and Kallon to Appear for their Trial*, Case No. SCSL-04-15-T, T. Ch., 12 January 2005, at 12.

[90] SCSL, *Prosecutor v. Sesay el al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-15-PT, T. Ch., 24 June 2004, at 26. Similarly in *Prosecutor v. Norman et al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-14-PT, T. Ch., 2 June 2004, at 15.

[91] Id., at 15.

[92] Id., at 18-20.

[93] Id., at 30.

[94] ECCC, in the *Duch* case, *supra* note 83, para. 96 (quoting *Prosecutor v. Ojdanic et al.,* IT-99-37-AR72, Appeal Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction-Joint Criminal Enterprise, Appeals Chamber, 21 May 2003, 40).

[95] See BWCC, *Prosecutor v. Nedo Samardzic*, Case No. X-KRZ-05/49, 7 April 2006, Trial panel 1, with reference also to ECtHR decision in the case of *Doorson v. The Netherlands* of 26.3.1996, at 70.

jurisprudence).[96] Similarly, the Appeals Chamber of the SCSL confirmed that '[a]s essential elements of all legal systems, the fundamental principle *nullum crimen sine lege* and the ancient principle *nullum crimen sine poena*, need to be considered.'[97] It also recognized the requirement of *lex certa* as being an essential element of the *nullum crimen sine lege* principle, by pointing to the jurisprudence of the ICTY.[98]

51. Only in some cases there is a more clear reference to domestic principles. E.g. the Trial Chamber of the ECCC in the *Duch* Case found it necessary to discuss the legal standard required for the establishment of guilt under the different legal families, since the Cambodian legal system belongs to the civil law one, and yet, the ECCC established a standard of proof of guilt as accepted in the common law system (apparently it has done so following the legacy of the international criminal tribunals, such as the ICTY). The Court sustained that 'the basis of the finding that "[i]n order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt" is expressed differently in common law and civil law systems, and within the different language versions of Internal Rule 87(1).' Cambodian law derives from civil law and, in particular, from the notion of the judge's *intime conviction.* This notion was retained in the French version of Internal Rule 87(1), whereas both the Khmer and English versions of this Internal Rule stated that a finding of guilt against the accused requires the Chamber be convinced beyond a reasonable doubt. Despite these conceptual differences, the Chamber adopted a common approach that has evaluated, in all circumstances, the sufficiency of the evidence.[99]

II.1.c International Arbitration[100, 101]

52. For the purposes of this report the overview of cases will include inter-State arbitration (*ad hoc*, Annex VII of the UN Convention on the Law of the Sea –UNCLOS-, and Ethiopia-Eritrea Commission) and mixed arbitration (Iran-US Claims Tribunal and investment treaty tribunals under the arbitration rules of ICSID -the International Centre for Settlement of Investment Disputes-, UNCITRAL –UN Commission on International Trade Law-, or the SCC -Stockholm Chamber of Commerce-). Purely commercial international arbitration is excluded. This section will examine the manner in which domestic law principles have been used in publicly available recent decisions of international arbitration (rendered from 1980s onwards).

---

[96] See BWCC, *Prosecutor's office of Bosnia and Herzegovina v. Suljo Karajić*, Case No. X-KR-07/336, 13 April 2010, First Instance, para. 43.

[97] SCSL, *Prosecutor v. Norman et al., Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, Case No. SCSL-04-14-AR72(E), App. Ch., 31 May 2004, 24.

[98] Id., 25.

[99] *Supra* note 83, paras. 44-45.

[100] Based on the analysis provided by Yas Banifatemi and Martins Paparinskis. They are grateful for the research support of Ira Ryk-Lakhman.

[101] In relation to International Investment Law, see T. Gazzini, "General Principles of Law in the Field of Foreign Investment", 10 J. of world Investment & Trade (2009), 103; S.W. Schill, "General Principles of Law and International Investment Law" in T. Gazzini & E. de Brabandere (eds.), *International Investment Law - The Sources of Rights and Obligations*, Martinus Nijhoff, 2012, 133.

53. While the terminology of 'principles' is often encountered in contemporary international arbitration, many of these decisions do not engage with domestic law principles in the technical sense.

54. Some of the cases rather address primary rules of international law (with 'general' often signifying the abstractness of expression of the rule or its importance in the particular area). One line of authorities relating to fair and equitable treatment may be found in decisions of investment treaty tribunals, relying on the various ways that general principles (particularly good faith) interrelate with fair and equitable treatment.[102] Another line of cases relates to different aspects of the law of expropriation, mostly rendered by the Iran-US Claims Tribunal (IUSCTR).[103] These cases directly engage with international law, rather than domestic principles, and therefore are of no direct relevance for this report.

55. Other cases address the law of treaties and secondary rules of State responsibility (particularly in relation to the remedial aspects of content of responsibility), both bodies of law mostly expressed at the level of general international law:

– The law of treaties, as expressed in the 1969 Vienna Convention on the Law of Treaties (VCLT), is, for modern international arbitration, a statement of general *international* law on most issues likely to arise, and therefore will very rarely require the arbitrator to go back to domestic law.[104] There are many instances where 'principles' of treaty interpretation have been referred to by arbitral tribunals, both by the IUSCTR[105] and investment tribunals.[106]
– Many awards refer to 'principles' in relation to remedies, often explicitly situating themselves within the line of authority of *Chorzow Factory* or the 2001 ILC Articles on State responsibility. As is not uncommon in the law of State responsibility, it

[102] M. Paparinskis, "Good Faith and Fair and Equitable Treatment in International Investment Law" in A. Mitchell et al (eds), *Good Faith and International Economic Law*, OUP, 2015.

[103] To consider some of its foundational decisions, in *American International Group, Inc. and American Life Insurance Co. v Iran and Central Insurance of Iran* (1983) 4 IUSCTR 96, para 2a, the Tribunal stated that 'it is a general principle of public international law that even in a case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken.'; similarly, *James M Saghi et al v Iran,* (1993) 29 IUSCTR 20, para. 71.

[104] Although the VCLT is considered to reflect general international law, it was based on general principles, rather than customary law, e.g. in relation to the loss of right to terminate, see M. Kohen and S. Heathcote, "Article 45: Convention of 1969" in O. Corten and P. Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary*, OUP 2011, 1066; and fraud, G. Niyungeko, "Article 49: Convention of 1969", id., 1145-46.

[105] *Agrostruct International Inc v Iran State Cereals Organization (1988) 18 IUSCT 180*, Arbitrator Noori's concurring and dissenting opinion, para. 28: 'the fundamental principles of international law requiring that conditions governing the competence of an international tribunal be interpreted restrictively' – 'the Tribunal should not, without giving sufficiently careful attention to the nature of the evidence submitted by the Claimant, accept its United States nationality as proved.'

[106] *Petrobart Limited v The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005, 23; *Eureko B.V. v Republic of Poland,* Partial Award, 19 August 2005, para 177 ('Without deciding whether the exception of non performance is a maxim of interpretation or a rule of international law, the Tribunal is of the view that the exception cannot assist Claimant because it essentially applies to cases of simultaneous or conditional performance').

> may be hard to draw the line between arguments regarding secondary rules of State responsibility and regarding primary rules. But whatever the precise character of the rules that the legal argument addresses, the *source* of those rules is treaty or custom, and thus is of no direct relevance to the present inquiry into domestic law. For example, in *Iran v US (A27)*, Chamber Two of the IUSCTR relied on the 'well-settled principle of international law that every international wrongful act of the judiciary of a state is attributable to that state'.[107] In *Petrobart v Kyrgyz Republic*, the SCC tribunal referred to '[t]he relevant general principle of international law […] stated clearly in Article 12 of the' 2001 ILC Articles that *mens rea*/intention is irrelevant for assessing breach of an international obligation. [108]

56. A fourth category deals with general principles of international law. While some of those principles have originated in domestic legal traditions, they have been long become solidly anchored in the international legal order, and therefore do not require contemporary arbitrators to engage with domestic law to develop international law. A number of arbitral tribunals have referred to general principles of international law in that sense, particularly in relation to good faith[109] but not exclusively.[110] Estoppel is a clear example: as the Annex VII arbitral tribunal in the *Mauritius v UK* case suggests, estoppel in international law might have originally emerged from domestic law, but is now a principle of international law that has its own terminology and distinctions that are no longer dependent upon domestic law:

> Estoppel is a general principle of law […] Estoppel in international law differs from "complicated classifications, modalities, species, sub-species and procedural features" of its municipal law counterpart […] but its frequent invocation in international proceedings has added definition to the scope of the principle. […] Additionally—and in contrast to at least some forms of estoppel in municipal law—the principle in international law does not

---

[107] *The Islamic Republic of Iran v the United States of America (A27)* (1998) IUSCTR 39, para 71.

[108] *Petrobart* (*supra* note 105), 24.

[109] *Vigotop Limited v Hungary,* ICSID Case No. ARB/11/22, Award, 1 October 2014, para 310 ('it is undisputed that the principle of good faith is a fundamental principle of international law'); *Gustav F W Hamester GmbH & Co KG v Republic of Ghana,* ICSID Case No. ARB/07/24, Award, 18 June 2010, paras. 123-24 ('An investment will not be protected if it has been created in violation of national or international principles of good faith […] These are general principles that exist independently of specific language to this effect in the Treaty'); *Phoenix Action Ltd. v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras 77-8, 110, 113 ('In the instant case, no question of violation of a national principle of good faith or of international public policy related with corruption or deceitful conduct is at stake. The Tribunal is concerned here with the international principle of good faith as applied to the international arbitration mechanism of ICSID); *Quiborax S.A., Non Metalic Minderals S.A. and Allan Fosk Kaplun v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision in Jurisdiction, 27 September 2012, para. 298; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 142-44.

[110] Consent as a basis of international arbitration, *pacta sunt servanda,* and deciding like things alike, *Daimler Financial Services A.G. v Argentina,* ICSID Case No. ARB/05/1, Award, 22 August 2012, paras. 174, 146, 52 (respectively); inter-temporal law, *Eritrea v Yemen, Award on Territorial Sovereignty and Scope of the Dispute* (1999) 119 ILR 1, para. 444; scope of sovereign rights of the State in relation to pension systems, *Catherine Etezadi v the Government of the Islamic Republic of Iran* (1994) 25 IUSCTR 264, para. 75; *res judicata, Petrobart* (*supra* note 105), 64 ('The Treaty contains no provisions about *res judicata*, but the notion of *res judicata* is undoubtedly recognised in international law').

> distinguish between representations as to existing facts and those regarding promises of future action or declarations of law.[111]

57. Sometimes it is unclear what type of legal argument the Tribunal is employing but it appears to be (in its own view) related to general principles of international law. E.g. in the *Final Award: Pensions: Eritrea's Claims 15, 19 & 23,* the Eritrea Ethiopia Claims Commission considered 'Eritrea's invocation of the customary law doctrine of unjust enrichment', viewing it as a 'doctrine predicated upon general principles of international law', noted that 'it must be applied cautiously', and did not find it applicable.[112] In the *Duke Energy v Ecuador* case, an ICSID arbitral tribunal observed that 'although increasingly common in ICSID practice, the award of compound interest is not a principle of international law'.[113] The challenge of drawing the line between general principles within international law and those derived from domestic law is illustrated by the *Yukos v Russia* case, where an Energy Charter Treaty Tribunal considered the submission by the respondent that the 'clean hands' doctrine constituted a 'general principle of law recognised by civilized nations.' The Tribunal noted that

> General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an "unclean hands" principle in international law.[114]

58. In ultimately rejecting Russia's argument, the Tribunal emphasised that

> Respondent has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of "unclean hands" in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim.[115]

59. The Tribunal discussed various *international* judgments and opinions but did not engage with or cite approaches taken by *domestic* legal orders and courts. This suggests, by necessary implication, that it was not examining the possibility of deriving general principles from domestic law. Overall, cases examined in this section, while engaging

---

[111] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* Final Award, ICGJ 486 (PCA 2015), paras. 435-37; In *Grynberg et al v Grenada,* ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 7.1.2, the Tribunal noted that 'it is also not disputed that the doctrine of collateral estoppel is now well established as a general principle of law applicable in the international courts and tribunals such as this one.' In *Canfor Corporation v US, TEMBEC v US, Terminal Forests Products Ltd. v US*, UNCITRAL/NAFTA, Order of the Consolidation Tribunal, 7 September 2005, para. 168, the Tribunal noted that '[e]stoppel is a recognized general principle of law that has been applied by many international tribunals.'

[112] *Final Award: Eritrea's Claims 15, 19, and 23*, 19 December 2005, RIAA XXVI, para. 43.

[113] *Duke Energy Electroquil Partners et al v Ecuador,* ICSID Case No ARB/04/19, Award, 18 August 2008, para. 473. Before making that point, the Tribunal stated that 'the prohibition of compound interest contained in local law must be enforced especially considering Article VIII of the BIT which specifies that the Treaty shall not derogate from the laws and regulations of the host State', so it appears that the Tribunal was contrasting a (properly) international principle with a domestic rule here, rather than deriving the former from the latter.

[114] *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014, para. 1359.

[115] Id., para. 1362.

with 'general principles' in the technical sense, are not (any longer) directed at principles of domestic law. They are thus just as irrelevant for the present inquiry as the cases considered above.

II.1.c.i 'Principles' that Engage with Domestic Law of a Single State

60. Even when arbitral tribunals do use domestic law, they are not necessarily engaged in the use of domestic law principles for the development of international law. In certain regimes of international arbitration, particularly international investment arbitration, interpretation and application of international law may require close engagement with domestic law of a particular State. For example, arbitral tribunals may have to consider whether an investment has been made in accordance with domestic law of State A, or whether State B has provided process due under its domestic law. There may be ground for reasonable disagreement over the precise legal characterisation of these arguments.[116] But it is tolerably clear that they engage with domestic law of a single State and do not attempt to use domestic law principles for broader purposes, and are thus irrelevant for this inquiry.

61. A slightly more complicated challenge is presented by certain cases, particularly in the IUSCT, where tribunals consider principles that are both general *and* belong to the legal order of State that is a party to arbitration. For example, in the *Pomeroy v Iran* case, the Tribunal stated in relation to judicial estoppel that '[i]t is both a general principle of law and a principle embodied in Articles 247 and 248 of the Civil Code of Iran, that a party may not deny the validity of a contract entered into on its behalf by another if, by its conduct, it later consents to the contract'.[117] Closer examination of particular awards is necessary to identify the precise character of the legal argument. For the purposes of this report, these cases have been treated as relating to general principles of (at least in part) domestic law, and will be discussed in the next section.

II.1.c.ii 'Principles' that Engage with Domestic Law Principles

A. Reliance upon general principles

62. International arbitral tribunals have relied upon general principles in a variety of cases. One area where reliance on general principles may be particularly fruitful is international procedural law (even if it may be complicated to determine whether tribunals are relying on general principles in the technical sense, or rather elaborating their statutory or inherent powers, or applying customary law or general principles of international law).[118] To select a few examples: in the *Fritz v Iran* case, the IUSCT relied on the 'accepted principle that an adverse inference may be drawn from a party's failure to submit evidence likely to be at its disposal. In weighing the evidence before it, the Tribunal must therefore

[116] E. Gaillard and Y. Banifatemi, "The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process", 18 ICSID Review (2003) – FILJ 375; Z. Douglas, *The International Law of Investment Claims*, CUP, 2009, ch 2.

[117] *R.N. Pomeroy,* et.al. *v Government of the Islamic Republic of Iran* (1983) 2 IUSCTR 372, para V(1).

[118] C. Brown, *A Common Law of International Adjudication*, OUP, 2007, 85-90.

take into account the Respondents' omission to produce the directors' reports'.[119] In *American Bell International v Iran,* the Tribunal relied on 'a general principle of law that a party which at some stage of judicial or arbitral proceedings admits that certain legal conclusions can be drawn from some facts or circumstances is thereafter estopped from arguing otherwise in the same proceedings'.[120] In the *Futura v NIOC,* the IUSCT relied on the principle *actio non datur non damnificato* to dismiss the claim because the claimant had suffered no damage.[121]

63. In the *Economy Forms Corporation v Iran,* the IUSCT relied on 'a generally accepted principle of private international law' that the formation of and the requirements as to the form of a contract are governed by that law which would be the proper law of the contract, if the contract was validly concluded (however, there are only two quotes).[122] In the *AAPL v Sri Lanka* case, an ICSID arbitral tribunal confirmed that it was a general principle of law that the claimant bears the burden of proof.[123] In the *US v Iran (B36)* case, the IUSCT relied upon 'the public international law principle of extinctive prescription', noting that '[n]o rule of international law specifies the time period which must elapse in order to render extinctive prescription operative. The principle is flexible and the decision as to its applicability is left at the discretion of the Tribunal' (and the particular claim was allowed).[124] In the *Waste Management II,* an ICSID arbitral tribunal stated that '[t]here is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice', considered various international authorities and judgments of two domestic courts in elaborating its content, and applied it in rejecting an objection by Mexico.[125]

---

[119] Even an adverse inference was not in fact made against Iran: 'the Tribunal finds that insufficient evidence has been presented that on 19 January1981 STSS was an entity controlled by Iran as required by the Claims Settlement Declaration. Consequently, the Tribunal dismisses the claim against STSS for lack of jurisdiction', *Arthur J. Fritz & Co. v STSS and the Government of the Islamic Republic of Iran* (1989) 22 IUSCTR 170, paras 42 and 48.

[120] *American Bell International Inc. v the Islamic Republic of Iran,* et.al (1986) 11 IUSCTR 320, para. 16. See also *Pomeroy* (supra note 130), para V(1).

[121] *Futura Trading Incorporated v the National Iranian Oil Company* (1986) 13 IUSCTR 99, para. 62.

[122] *Economy Forms Corporation v the Government of the Islamic Republic of Iran* (1983) 3 IUSCTR 42, para III(1), quoting Dicey & Morris, The Conflict of Laws Rule 146 at 775 and Rule 148 at 784 (10th ed. 1980); O. Lando, Contracts, in III International Encyclopedia of Comparative Law, Chapter 24 at 102-103.

[123] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 56. In *Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt,* ICSID Case No. ARB/99/6*,* Award, 12 April 2002, para. 89, the arbitral Tribunal relied on *AAPL* and noted that '[t]he respective provisions of the BIT confirm what can be considered as a general principle of international procedure - and probably also of virtually all national procedural laws - namely that it is the Claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim.'

[124] *The United States of America v the Islamic Republic of Iran (B36)* (1996) 32 IUSCTR 162, paras. 72 and 74. In the *Iran National Airlines Company v the Government of the United States of America (B8)* (1987) 17 IUSCTR 187, paras. 6 and 11. The Tribunal accepted that the principle, which the US invoked by reference to statutes of limitation in the US and Iran, is 'an established principle of public international law', but did not apply it to the commercial transactions in the case.

[125] *Waste Management, Inc. v United Mexican States ('Number 2')*, ICSID Case No. ARB(AF)/00/3, Decision as to Mexico's Preliminary Objection, 26 June 2002, paras. 39-47.

64. There is a significant corpus of decisions relating to general principles in contractual and other private law matters, particularly rendered by the IUSCT in light of its broad jurisdiction that included contractual claims. Some decisions are directed at principles that are general in the sense of underpinning the legal systems. In the *Amoco v Iran* case, the IUSCT stated that '[t]he principles of good will and good faith apply in practically all systems of law to contracts as well as to treaties'.[126] In the *Mobil v Iran* case, the IUSCTR noted that '[i]t also is admitted generally that *force majeure*, as a cause of full or partial suspension or termination of a contract, is a general principle of law which applies even when the contract is silent'.[127] In the *Sea-Land Service v Iran* case, the IUSCT identified and relied upon the principle of unjust enrichment,

> The concept of unjust enrichment had its origins in Roman Law, where it emerged as an equitable device 'to cover those cases in which a general action for damages was not available.' It is codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals.[128]

65. In the *Inceysa v El Salvador* award, an ICSID arbitral tribunal relied upon unjust enrichment in a similar vein, noting that '[t]he written legal systems of the nations governed by the Civil Law system recognize that, when the cause of the increase in the assets of a certain person is illegal, such enrichment must be sanctioned by preventing its consummation.'[129]

66. In the *Questech v Ministry of National Defence of Iran* case, the IUSCT identified and relied upon change of circumstances principle, noting that

> This concept of changed circumstances, also referred to as clausula rebus sic stantibus, has in its basic form been incorporated into so many legal systems that it may be regarded as a general principle of law; it has also found a widely recognized expression in Article 62 of the Vienna Convention on the Law of Treaties of 1969. While it might be argued that, in view of wider and narrower formulations of the clausula in different legal systems and of certain differences in its practical application, it would not be easy to establish a common core of such a general principle of law, the consideration of changed circumstances in the present context is warranted by the express wording of Article V of the Claims Settlement Declaration.[130]

---

[126] *Amoco International Finance Corporation v the Government of the Islamic Republic of Iran* (1987) 15 IUSCTR 189, para. 169.

[127] *Mobil Oil Iran, Inc. v Government of the Islamic Republic of Iran* (1987) 16 IUSCTR3, para. 117.

[128] *Sea-Land Service, Inc. v the Government of the Islamic Republic of Iran, Ports and Shipping Organization* (1984) 6 IUSCTR 149, para (v). See also *PHIBRO Corporation v. Ministry of War-ETKA Co. Ltd.,* et.al. (1991) 26 IUSCTR, paras. 46-8; *Alfred Haber, P.A. v the Islamic Republic of Iran* (1989) 23 IUSCTR 133, para. 56; *Flexi-Van Leasing, Inc. v the Government of the Islamic Republic of Iran* (1986) 12 IUSCTR 335 pt III(e); *Schlegel Corporation v. National Iranian Copper Industries Company* (1987) 14 IUSCTR 176, paras. 13-7.

[129] *Inceysa v El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras 254-55.

[130] *Questech, Inc. v the Ministry of National Defence of the Islamic Republic of Iran* (1985) 9 IUSCTR 170, pt 2(c).

67. The Tribunal found that the change of circumstances principle applied in the case, and ordered compensation for damages.[131] In his separate opinion, Judge Holtzmann disagreed with the application of principle of changed circumstances, explaining that

> Concepts by which parties are excused from contractual obligations by certain changed circumstances are found in many legal systems and are known by various names. In common law systems they are embraced within doctrines of 'frustration' and 'impossibility'; in the civil law they are often known as clausula rebus sic stantibus. All of these doctrines excuse parties in case of supervening circumstances caused by outside events beyond their control that have made continued performance of a contract unreasonable. All of these doctrines are seen as exceptions to the paramount rule of pacta sunt servanda ('agreements are to be observed'). Because they are exceptions to the contractual obligation to perform they must be proven and applied with care.[132]

68. In other decisions, the IUSCT identified general principles of a more technical character. In the *Dames & Moore v Iran* case, the IUSCT relied on the principle of payment upon invoice (albeit rejecting it in the particular case).[133] In the *Schering Corporation v Iran* case, the IUSCT stated that '[i]t is a generally accepted legal principle that when a promissory note is given for an obligation, the obligation is, unless otherwise agreed, at least suspended until the note matures'.[134] In the *Morrison-Knudsen Pacific Limited v Iran,* the IUSCT rejected Respondents' submission that the remedy provided in article 16 of the contract which was the subject-matter of the claim constituted an exclusive remedy for termination, relying on the 'general principle of law [that] a party may recover losses suffered as a consequence of contract breach irrespective of whether a right also exists to terminate a contract.'[135] In the *Reynolds v Iran* case, the IUSCT noted that '[u]nder generally accepted principles of contract law, a contractually stipulated rate of interest is normally binding on the parties', although it is true that '[a]n international Tribunal will not enforce the provisions of a contract stipulating that a highly unreasonable or usurious rate of interest should be paid', which was not the case in that instance.[136] In the *DIC v Iran et al,* the IUSCT relied on general principles regarding the existence ofcontracts ('is widely accepted by municipal systems of law that one can prove the existence of an enforceable oral contract through evidence demonstrating part […] Such a principle must be taken to constitute a general principle of law')[137] and recovery for work performed ('It is well established under Iranian law and general principles of law that under the

[131] Ibid; see also *Rockwell International v The Government of the Islamic Republic of Iran* (1989) 23 IUSCTR 150, para 92 ('The concept of "changed circumstances," also referred to as clausula *rebus sic stantibus*, in its basic form, has been recognized in Tribunal practice as a general principle of law').

[132] *Questech* (*supra* note 129), pt I.

[133] *Dames & Moore v the Islamic Republic of Iran*, et.al. (1983) 4 IUSCTR 212, para 4.b.ii ('It is a well-established general principle in various legal systems that in commercial relationships one party may be obligated to pay another party, with which it has been doing business, a sum specified in an invoice if it receives the invoice but does not object to it within a certain period of time').

[134] *Schering Corporation v the Islamic Republic of Iran* (1984) 5 IUSCTR 361, pt VI.

[135] *Morrison-Knudsen Pacific Limited v the Ministry of Roads and Transportation and the Islamic Republic of Iran* (1984) 7 IUSCTR 54, pt 3(b).

[136] *R.J. Reynolds Tobacco Company v the Government of the Islamic Republic of Iran and Iranian Tobacco Company (ITC)* (1984) 7 IUSCTR 181, pt IV(4).

[137] *DIC of Delaware Inc., Underhill of Delaware, Inc. v Tehran Redevelopment Corporation, the Government of the Islamic Republic of Iran* (1985) 8 IUSCTR 144, pt B(1).

doctrine of *quantum meruit there may be a recovery for work performed'*).[138] In the *Iran v US (B1-5)* case, the IUSCT relied on the general principle of the allocation of risks and obligations between buyer and seller in a purchase/sale contract.[139] In the *Middle East Cement Shipping* case, an ICSID arbitral tribunal noted that '[t]he duty to mitigate damages […] can be considered to be part of the General Principles of Law which, in turn, are part of the rules of international law which are applicable in this dispute according to Art. 42 of the ICSID Convention'.[140] In the *Saluka v Czech Republic* partial award, an UNCITRAL arbitral tribunal relied upon the 'general principle of company law that a company is a legal entity separate from its shareholders', applying it to find that anything acquired by CSOB was not acquired by the State.[141]

69. In several investment arbitration awards, the UNIDROIT Principles of International Commercial Contracts (which are essentially a restatement of general principles found in major domestic law traditions) have been invoked as a source of general principles of contract law derived from the domestic legal systems. Some examples are: *Joseph C. Lemire v. Ukraine* (interpretation of contracts),[142] *Petrobart v. Kygyz Republic* (interests),[143] *Eureko Bv v. Poland* (the application of the *exceptio non adimpleti contractus*),[144] *PSEG Global v. Turkey* (the validity of contracts),[145] *African Holding et Al. V. Congo* (non performance and conclusion of contracts).[146]

70. Finally, in a number of decisions in international investment arbitration, Tribunals have relied upon general principles to elaborate primary obligations. In the *Saluka* case noted above, the Tribunal identified the general principle of unjust enrichment and applied it as part of fair and equitable treatment.[147] In the *Total v Argentina* case, an ICSID arbitral tribunal engaged in 'a comparative analysis of the protection of expectations in domestic jurisdictions', concluding that '[w]hile the scope and legal basis of the principle varies, it has been recognized lately both in civil law and common law jurisdictions

---

[138] Ibid.

[139] *The Islamic Republic of Iran v the United States of America (B1 Claim 5)* (1988) 19 IUSCTR 3, para 38 ('It is an accepted general principle that someone who buys goods and pays a consideration therefor to the seller, enters into the transaction in the belief that the goods are sound, unless the contrary is expressly stated in the contract. The other side of the coin is, that the seller is the guarantor of the soundness of the goods, and this warranty is imposed on him pursuant to the contract').

[140] *Middle East Cement Shipping and Handling Co SA v Egypt,* ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 167.

[141] *Saluka Investments BV v Czech Republic*, UNCITRAL, PCA administered, Partial Award, IIC 210 (2006), 17 March 2006, para. 452.

[142] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award of 28 March 2011.

[143] *Supra* note 105.

[144] *Eureko B.V. v. Republic of Poland*, UNCITRAL ad hoc, Partial Award, 19 August 2005.

[145] *PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICISD Case No. ARB/02/5, Award of 19 January 2007.

[146] *African Holding Company of America Inc. et al. v. Democratic Republic of Congo*, ICISD Case No. ARB/05/21, Award of 29 July 2008. For additional discussion on the application of UNIDROIT Principles, see J. Hepburn, "The UNIDROIT Principles of International Commercial Contracts and Investment Treaty Arbitration: A Limited Relationship" 64 ICLQ (2015), 905. Also the 2016 lecture of Lauro da Gama E Souza on UNIDROIT Principles at the Hague Academy of International Law.

[147] *Supra* note 140, paras 449-50.

within well defined limits.'[148] Other decisions relate to proportionality. In the *Occidental v Ecuador* case, an ICSID arbitral tribunal observed that '[t]he application of the principle of proportionality may be observed in a variety of international law settings', and further noted that

> On the application of proportionality generally in the context of administrative action, the most developed body of jurisprudence is in Europe. It is very well-established law in a number of European countries that there is a principle of proportionality which requires that administrative measures must not be any more drastic than is necessary for achieving the desired end. The principle has been adopted and applied countless times by the European Court of Justice in Luxembourg, and by the European Court of Human Rights in Strasbourg.[149]

71. Ecuador's annulment challenge on the issue was rejected because, in the opinion of the annulment committee, 'the Tribunal has convincingly explained that the principle of proportionality between intensity and scope of the illicit activity, and severity of the sanction is a general principle of punitive and tort law, both under Ecuadorian and under international law.'[150]

B. Affirmation of general principles

72. A considerable number of decisions that rely upon general principles and are discussed in the previous section also affirm and explain, in general terms, why they count as general principles. In some cases, the affirmation may stand on its own (or be expressed in terms so broad that may be relating to general principles of international law). In the *Amco v Indonesia* case, an ICSID arbitral tribunal discussed the approach to be taken to interpretation of an agreement to arbitrate and noted that 'the fundamental principle *pacta sunt servanda*, [is] a principle, common, indeed, to all systems of internal law and to international law.'[151] In the *Inceysa v El Salvador* case, an ICSID arbitral tribunal made a sweeping statement

Without attempting to define what the general principles of law are, the Tribunal notes that, in general, they have been understood as general rules on which there is international consensus to consider them as universal standards and rules of conduct that must

---

[148] *Total S.A. v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, paras. 128 and 129-30.

[149] *Occidental Petroleum Corporation et al v Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paras. 402-3.

[150] Id., Decision on Annulment, 2 November 2015, para. 350. Other authorities are more cautious, e.g. *Adel A Hamadi Al Tamimi v Oman,* ICSID Case no ARB/11/33, Award, 3 November 2015, para 261 ('the minimum standard of treatment under customary international law, the United States submitted, does not include a general obligation of proportionality. Proportionality is not a self-standing obligation.'); M. Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, OUP, paperback ed., 2014, lv ('*Occidental* is a complex case, both at the level of domestic law as well as primary and secondary rules of international law, and one should evaluate its reasoning with great care, but there is something to be said for pausing before one substitutes and rewrites contractual terms and consequences by reference to such a general and vague standard as proportionality.')

[151] *Amco Asia Corporation et al v Indonesia,* ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, para 14.

always be applied and which, in the opinion of important commentators, are rules of law on which the legal systems of the States are based.[152]

C. Negation of general principles

73. In a limited number of cases, arbitral tribunals have explicitly rejected arguments for the existence of general principles. In the *US v Iran (B36),* the IUSCT (possibly) rejected the argument that there was a general principle of international law setting a time period within which claims could be made, noting that it

> is not aware of State Practice clearly supporting the period of four years, especially with regard to intergovernmental contract…the period is much longer, though the length of such period is difficult to define and may vary in different circumstances. […] there is no rule of general international law that would fix a time period. In the absence of specific guidance the international judge or arbitrator enjoys a measure of discretion restricted by his duty to give due regard to the facts of the particular case.[153]

74. In the *Canfor v US* case, the consolidation Tribunal was unimpressed by the investor's argument that the US request was barred by laches, noting that:

> the general principle underlying the Anglo-American doctrine of laches has been invoked before international tribunals, and that a number of international legal scholars have argued for its existence of the doctrine in the context of the present request for consolidation. […] While there is a borrowing of principles derived from domestic legal systems in public international law, this takes the form of general principles of law that do not necessarily replicate the rules of domestic law from which they derive their common origin.[154]

75. In the *Final Award on Eritrea's Damages Claims,* the Eritrea-Ethiopia Claims Commission rejected the proposition that consequential damages were a general principle of law, by noting that

> international law does not recognize a separate category of compensable "consequential damages" involving different standards of legal causation or other distinctive legal elements. The concept of consequential damages has a significant role in some national legal systems, but does not exist in others, and so cannot be viewed as a general principle of law.[155]

76. In the Partial Award on the Merits in the *Chevron v Ecuador* case, an UNCITRAL arbitral tribunal rejected 'loss of chance' as a general principle of international law (responding to Ecuador's arguments regarding reparation for loss caused by undue delay by Ecuador's courts):

> [T]he 'loss of chance' principle does not have wide acceptance across legal systems such that it can be considered a 'general principle of law recognized by civilized nations.' At most it can be said that the 'loss of chance' principle is applied in exceptional situations where there exists a 'harm whose existence cannot be disputed but which it is difficult to quantify,' (sic) as noted in the commentary to the UNIDROIT Principles cited by the Respondent. In this case, the Tribunal finds no exceptional difficulties in coming to a conclusion as to what

---

[152] *Inceysa* (*supra* note 128), para 227.

[153] *US v Iran (B36)* (*supra* note 123), para 61 and foot note 11. These passages may also be read as relating to customary international law or inherent power of tribunals.

[154] *Canfor* (*supra* note 110) paras. 165-66.

[155] *Final Award: Eritrea's Damages Claim (Eritrea v Ethiopia)*, Eritrea Ethiopia Claims Commission, 17 August 2009, 26 RIAA 505, para 203.

> should have occurred but for the breach of the BIT and what damages result therefrom. The Tribunal therefore declines to apply the 'loss of chance' principle.[156]

77. There may be other cases where reliance on domestic law principles has been negated by implication. Decisions in investment arbitration that do not find unjust enrichment, legitimate expectations, or proportionality to be elements of particular primary obligations may be counted as rejecting the reliance on these principles in *Saluka, Total,* and *Occidental* cases discussed in the previous section.

II.1.c.iii Interim Conclusion

78. Domestic law principles play a role in modern international arbitrations, and it is not an insignificant one. But it is important to be clear about whether tribunals are really relying on domestic law principles in the technical sense of the term, and why they are doing it. In many – most – cases where the term 'principles' is employed, they are not domestic law principles but rules expressed directly at the level of international law, be they rules of treaty law, the law of State responsibility, particular primary obligations, or principles of general international law. Similarly, in many cases where 'domestic law' is relied upon, it is not used to develop international law but to resolve a particular dispute that partly hinges on the domestic law of a litigating party, particularly likely in investor-State arbitration.

79. Once these irrelevancies are disposed of, it is possible to concentrate on the cases that actually engage with general principles of domestic law. There are several strands of cases where tribunals have *relied* upon such principles. They may be loosely divided into principles of procedural law, principles of contractual/private law (both of general and more technical nature), and principles elaborating the content of primary obligations, particularly likely in investment law. There is also a number of cases where domestic law principles have been *negated* explicitly, and there may be more, again particularly in investment law, where it has been done by necessary implication. At the end of the day, principles of domestic law have a role to play -- sometimes a very important one – but one that should not be viewed in isolation from the development of international law that takes place directly at the international level through treaties, customary law, and general principles of international law.

II.1.d WTO dispute settlement[157]

80. One would have expected private law analogies to have been particularly influential in WTO law given the private law character of the trading regime. However, private law analogies seem to have played a surprisingly small role. Beyond some brief and informal discussions on the relevance of domestic law among WTO committees, it is within the framework of the dispute settlement system that WTO tribunals have assessed in a small number of cases the potential use of domestic rules and principles in the context of WTO law. This limited role is in large part due to the last sentence of Article 3 (2) of the Dispute Settlement Understanding (DSU) ('Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements').

---

[156] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v Ecuador,* UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, para 382.

[157] Based on the analysis provided by Régis Bismuth with peer review of Michael Waibel.

81. Although the DSU does not make an explicit reference to the general principles of law, the Appellate Body had early recognized that WTO agreements '[are] not to be read in clinical isolation from public international law'[158] since Article 3.2 of the WTO DSU provides that the dispute settlement system of the WTO 'serves […] to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.'

82. Among these customary rules of interpretation, Article 31.3.c of the 1969 Vienna Convention on the Law of Treaties stipulates that, for the purpose of interpreting a treaty, '[t]here shall be taken into account together with the context […] any relevant rules of international law applicable in the relations between the parties.' On this basis, the Appellate Body has recognized that its task is to interpret the language of the agreements 'seeking additional interpretative guidance, as appropriate, from the general principles of international law.'[159] The WTO website lists several 'principles and concepts of general public international law' contained in the WTO Appellate Body Repertory of Reports and Awards (1995-2013).[160] However, no specific mention is made to general principles of *domestic* law.

83. While several WTO rulings have discussed, mentioned or referred to 'general principles of law'[161] such as 'good faith',[162] '*res judicata*',[163] 'estoppel'[164] or 'non-retroactivity',[165] they have done so by relying – *inter alia* – on international instruments, the writings of international law scholars or previous decisions of the ICJ and PCIJ, but not by assessing how these principles were understood in domestic law.

84. Beyond this general overview suggesting the irrelevance of domestic law principles in the context of WTO dispute resolution, two issues deserve to be highlighted:

– the interpretation of the principle '*onus probandi actori incumbit*' for which WTO courts have expressly referred to domestic law;
– the specific case of the use of domestic law for the interpretation of WTO agreements.

II.1.d.i The interpretation of the principle 'onus probandi actori incumbit'

85. In *United States – Shirts and Blouses*, the Appellate Body addressed the issue of the allocation of the burden of proof between the parties in a dispute. Without explicitly

---

[158] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 29 April 1996, WT/DS2/AB/R, p. 17.

[159] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, WT/DS58/AB/R, at 158.

[160] https://www.wto.org/english/tratop_e/dispu_e/repertory_e/p3_e.htm

[161] For an overview, see P. C. Mavroidis, "No Outsourcing of Law? WTO Law as Practiced by WTO Courts", 102 AM. J. INT'L L. (2008) 421, 439 *et seq.*; P. Van Den Bossche, *The law and policy of the world trade organization – text, cases and materials*, CUP, 2005, at 58.

[162] E.g., *U.S. – Shrimp*, *supra* note 158, at 158

[163] E.g., Panel Report, *India – Measures Affecting the Automotive Sector*, 21 December 2001, WT/DS146/R, WT/DS175/R, at 7. 54 *et seq.*

[164] E.g., Panel Report, *Guatemala – Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico*, 24 October 2000, WT/DS156/R, at 8.23-8.24

[165] E.g., Appellate Body Report, *Canada – Term of Patent Protection*, 18 September 2000, WT/DS170/AB/R, at 71 *et seq.*

mentioning the principle '*onus probandi actori incumbit*', the Appellate Body implicitly referred to it when it stated:

> [T]he issue in this case is which party must first show that there is, or is not, a violation. More specifically, the issue in this case is which party has the burden of demonstrating that there has, or has not been, an infringement of the obligations […] In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof (15).[166]

86. It is beyond doubt that the Appellate Body implicitly referred to this principle (it is noteworthy to mention that the Latin expression has to date never been expressly cited in the WTO case-law but is an 'entry' in the WTO Analytical Index). Indeed, the writing on which the Appellate Body relied mentions at the cited page:

> A study of the practice of international tribunals shows that it could easily be concluded that, in spite of variety of approaches and differences of opinions as to the legal degree of applicability of the rule under different circumstances, the logical and legal concept of *actori incumbit probatio* has generally been accepted and applied by international tribunals.[167]

II.1.d.ii The use of domestic law for the interpretation of WTO agreements

87. States involved in WTO dispute settlement proceedings have occasionally invoked various concepts or principles of domestic law in order to suggest an interpretation of some provisions in WTO agreements. In a few cases, panels and the Appellate Body discussed the relevance of domestic law in interpreting such provisions, the meaning of which being potentially clarified by way of analogy with domestic concepts and principles.

88. In *US – Countervailing Measures*, the United States sought to interpret the terms "benefit" and "recipient" mentioned in the Agreement on Subsidies and Countervailing Measures (SCM) in order to determine the recipient of the benefit in the case of a change in ownership. It did so by using the traditional distinction in domestic law between a corporation as a distinct legal person and its shareholders.[168]

89. The panel did not follow the argumentation put forward by the United States. Rather, it considered

> that the distinction between a company and its shareholders as used by the United States is not appropriate in the context of the SCM Agreement. We agree that for the purpose of the

---

[166] Appellate Body Report, *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, 25 April 1997, WT/DS33/AB/R, at 14.

[167] M. Kazazi, *Burden of Proof and Related Issues – A Study of Evidence Before International Tribunals*, Kluwer International, 1996, 117. The expressions '*onus probandi actori incumbit*' and '*actori incumbit probatio*' are understood as equivalent. See, A.X. Fellmeth & M. Horwitz, *Guide to Latin in International Law*, OUP, 2009, 13. See also, C.F. Amerasinghe, *Evidence in International Litigation*, Martinus Nijhoff, 2005, 95.

[168] Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, 21 July 2002, WT/DS212/R, at 7.49. (Footnotes omitted)

> national corporate law of the United States and many other WTO Members, a distinction may be drawn between shareholders and the company. However the SCM Agreement does not make any reference or any distinction between shareholders and the company when it discusses the need to establish the benefit. Articles 1, 10 and 14 of the SCM Agreement make references only to 'recipient' (or 'benefit to recipient') and to 'producer.' The concept of benefit is independent of the legal business structure established pursuant to national corporate law.[169]

90. While the panel dismissed *in casu* the argument of the United States, interestingly, it did not reject *per se* the potential relevance of domestic law concepts and principles for the purpose of interpreting the provisions of the SCM Agreement.

91. Perhaps more relevantly, in *US – FSC*, the Appellate Body had to interpret the meaning of the expression 'foreign-source income' included in the SCM Agreement. Although it did so *prima facie* by having recourse to State practice as stemming from international tax treaties or model conventions, it also relied on national laws implementing a different standard in order to identify the 'lowest common denominator' of State practice and, eventually, these 'widely recognized principles of taxation'. The following excerpt[170] best encapsulates the reasoning of the Appellate Body

> 141. Although there is no universally agreed meaning for the term 'foreign-source income' in international tax law, we observe that many States have adopted bilateral or multilateral treaties to address double taxation. The United States, for instance, has more than fifty bilateral tax treaties addressing double taxation. […]
>
> 142. *Although these instruments do not define 'foreign-source income' uniformly, it appears to us that certain widely recognized principles of taxation emerge from them (121).*[171] In seeking to give meaning to the term "foreign-source income" in footnote 59 to the *SCM Agreement*, which is a tax-related provision in an international trade treaty, we believe that it is appropriate for us to derive assistance from these widely recognized principles which many States generally apply in the field of taxation. In identifying these principles, we bear in mind that the measure at issue seeks to address foreign-source income of United States citizens and residents – that is, income earned by these taxpayers in "foreign" States where the taxpayers are not resident.
>
> 143. *We recognize, of course, that the detailed rules on taxation of non-residents differ considerably from State-to-State, with some States applying rules which may be more likely to tax the income of non-residents than the rules applied by other States (122).*[172] *However, despite the differences, there seems to us to be a widely accepted common element to these rules. The common element is that a 'foreign' State will tax a non-resident on income which is generated by activities of the non-resident that have some link with that State.* Thus,

---

[169] Id., at 7.50.

[170] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* (Recourse to Article 21.5 of the DSU by the European Communities), 14 January 2002, WT/DS108/AB/RW, 141-142.

[171] '(121) We observe that, before the Panel, the United States provided examples of the source rules applied by Brazil, Canada, Chile, Malaysia, Panama, Saudi Arabia, Taiwan, the United Kingdom and the United States. The widely recognized principles of taxation appear to be reflected in these domestic rules of taxation […]'

[172] '(122) The *O.E.C.D. Model Tax Convention* itself, therefore, admits of differing standards to determine whether business income was generated by activities linked to the territory of a "foreign" State.'

> whether a 'foreign' State decides to tax non-residents on income generated by a permanent establishment or whether, absent such an establishment, it decides to tax a non-resident on income generated by the conduct of a trade or business on its territory, the 'foreign' State taxes a non-resident only on income generated by activities linked to the territory of that State (123).[173] As a result of this link, the 'foreign' State treats the income in question as domestic-source, under its source rules, and taxes it. Conversely, where the income of a non-resident does not have any links with a 'foreign' State, it is widely accepted that the income will be subject to tax only in the taxpayer's State of residence, and that this income will not be subject to taxation by a 'foreign' State. (emphasis added)

92. In *Mexico-Telecoms*, the Panel was called upon to interpret provisions of the Telecommunications Reference Paper, which formed an integral part of Mexico's schedule of liberalisation commitments under the GATS.[174] The Panel considered that some technical terms may have a special meaning (in the sense of Article 31.4 of the VCLT) of common use in the telecommunications sector, and which the parties can be presumed to have been aware of. In particular, regarding the special meaning of the term 'cost-oriented' the Panel refers to a comparative report made by the International Telecommunications Union (ITU)

> *ITU, Trends in Telecommunications Reform: Interconnection Regulation*, 3rd edition, sec. 4.2.1.2, p. 40. This paragraph also states that countries that apply long run incremental cost methodologies include United States, Australia, EC, Colombia, and South Africa, and that "numerous developing countries have adopted or proposed" some form of this model.[175]

93. In addition, the Panel stated that 'the term "interconnection" appears as a technical term with a possible "special meaning" in national laws and regulations'.[176] However, in doing so, the Panel only refers to Mexico's Federal Communications Law since

> [w]e have not been provided evidence of laws or regulations of other Members which offer definitions or usage that indicate that the definition of "interconnection" is inconsistent with the ordinary meaning of the term "linking" in Section 2 of Mexico's Reference paper. We note that under EC law, the term "interconnection" is defined comprehensively in a manner that is consistent with the ordinary meaning of the term "linking" […]
> 7.112 A "special meaning" of the term "interconnection" in Section 2, inconsistent with the ordinary meaning of this term, is also not evident from an examination of the differences between domestic and international interconnection from *commercial, contractual, or technical* points of view.[177]

94. These cases deserved to be examined separately since they are not related to 'general principles of law' already used or identified by other international tribunals (notably the PCIJ and the ICJ). Rather, they implement another way of using domestic law in

---

[173] '(123) We note that the *Andean Community Agreement*, the *CARICOM Agreement*, and the *Andean Community Model Tax Agreement and the O.E.C.D.* and *U.N. Model Tax Conventions* describe a variety of situations in which a "foreign" State is entitled to tax a non-resident on income generated through activities which are linked to that State.'

[174] Report of the Panel, *Mexico - Measures Affecting Telecommunications Services*, 2 April 2004, WT/DS204/R.

[175] Id., para. 7.175.

[176] Id., para 7.110.

[177] Id., paras. 7.111 and 7.112, with references to the United States, *47 CFR Ch. 1 §51.5 (10-1-02 Edition) (FCC) [Interconnection regulations implementing ss. 251-252 of the Communications Act of 1934]*; and Article 2 of EC Directive 2002/19/EC (Access Directive), OJ 2002 L108, p. 33.

the context of WTO dispute resolution for the interpretation – beyond what is literally prescribed by the 1969 Vienna Convention on the Law of Treaties – of ambiguous terms in WTO agreements.

II.1.e International Administrative Tribunals (IATs)[178,179]

95. International Administrative Tribunals (ITAs) are independent judicial bodies established by international organisations to settle the disputes between them and their employees on labour issues. In the *Judgments of the ILO Administrative Tribunal* case, the ICJ confirmed that '[t]he Court does not deny that the Administrative Tribunal is an international tribunal.'[180] IATs enjoy the limited jurisdiction given by their statutes. Over the years they have created a mature body of law which has a distinctive character and does not duplicate any national law.

96. Due to the lack of clarity in their statutes, IATs decisions have accepted an amalgamation of sources of law. In particular, general principles of law have been applied by most IATs as early as 1929 (by the then Administrative Tribunal of the League of Nations –LNT–).[181] The Administrative Tribunals of the World Bank (WBAT),[182] UN Dispute Tribunal (UNDT) and Appeals Tribunal (UNAT),[183] the International Labour Organisation (ILOAT),[184] the NATO Administrative Tribunal,[185] the Administrative Tribunal of the Organization of American States (OASAT),[186] and the OECD Administrative Tribunal[187] have all applied general principles of law –without any reference to Article 38.1 of the ICJ Statute– usually as a way of interpreting and filling the gaps of internal regulation of the organisations (which were initially derived from national systems). For instance, in *Wakley*, the ILOAT mentioned that 'in the absence of relevant provisions in the staff rules, the general principle of law according to which the payer is entitled to pursue the recovery against the payee of sums paid in error is applicable to the present case.'[188]

97. Usually, IATs try to interpret existing internal rules in conformity with general principles of law but in case of direct conflict between the internal written regulation and

---

[178] Based on the analysis provided by Diana Louise.

[179] For a more detailed discussion on the internal law of international organisations and IATs, see C.F. Amerasinghe in *Principles of the Institutional Law of International Organizations*, 2005 (2nd ed.), CUP, Chapter 3; *Law of the International Civil Service*, Clarendon Press, 1994 (Vol. I); and in Chapter 15 of C.P.R. Romano, K. Alter, Y. Shany (eds), *The Oxford Handbook of International Adjudication*, OUP, 2013.

[180] I.C.J. Rep. 1956, 77, 97.

[181] *Di Palma Castiglione* [1929], LNT judgment No. 1.

[182] *De Merode*, WBAT Rep [1981], Decision No. 1, at 9 and 12. In this case, the parties agreed on the relevance of general principles of law.

[183] Formerly, UN Administrative Tribunal (UNAT). See *Howrani*, UNAT judgment No. 4 [1951] and *Vassiliou*, UNAT judgment No. 275 [1981].

[184] *Ferrechia*, ILOAT judgment No. 203 [1973] and *Gubin and Nemo*, ILOAT judgment No. 429 [1980].

[185] Formerly, NATO Appeals Board. See *Warren*, NATO Appeals Board, Decision No. 57 [1974].

[186] *Alanitz*, OASAT Decision no. 13 [1975]; *Bauta*, OASAT judgment No. 25 [1976] at 21: 'this is a general principle imported from national laws.'

[187] Formerly, OECD Appeals Board. See *Angelopoulos*, OECD Appeals Board Decision No. 57 [1976].

[188] ILOAT judgment No. 53 [1961].

general principles, usually the latter prevail (only in a few cases the opposite approach has apparently been adopted):[189]

a. in *Ferrechia*,[190] the ILOAT confirmed that: 'A staff member against whom disciplinary proceedings are taken has the right to be heard before a sanction is imposed on him. This right includes inter alia the opportunity to participate in the examination of the evidence. *Deriving as it does from a general principle*, it must be respected *even where contrary provisions exist* or in the absence of any explicit text.' (emphasis added).

b. in *Callewaert-Haezebrouck*,[191] the ILOAT stated that: 'The Director-General contends that that text explicitly applies only to […] The Director-General so interprets Article 28 as to discriminate between male and female staff members, only the wives of male staff members being entitled to benefit from the insurance of their husbands. *Such discrimination offends against the general principles of law, and particularly of the international civil service, and the Tribunal cannot allow application of a text which so discriminates*.' (emphasis added)

98. IATs have also applied general principles as a way of controlling the exercise of administrative powers and discretions by the international organisations; including procedural irregularities (with particular reference to the principle of due process)[192].

99. However, there is lack of clarity on the methods used for identifying general principles and on whether those principles come from domestic law or form international law. Nevertheless, most of the general principles applied are found in domestic administrative or civil service regimes of many civil law systems (but also, in both civil law and common law countries, in the area of contract law –e.g. *force majeure*, [193] unjust enrichment,[194] or estoppel–[195] or even of conflict of laws[196]). In some cases, the IATs just refer to previous decisions of other administrative tribunals.

II.2 International Law-Making

100. In the case of international law-making, there seems to be more room for flexibility (in the way domestic principles are used) than in the case of adjudication. There is also the need to rely more on those particular legal systems which are more advanced in dealing with the specific problem at hand.

---

[189] In *Di Palma Castiglione*, supra note 194, the LNT made clear that only in case of absence of internal rules the application of general principles could be considered.

[190] *Supra* note 187.

[191] ILOAT judgment No. 344 [1978].

[192] E.g. in *Kissaun* (ILOAT judgment no. 69 [1964]), the ILOAT confirmed that the right to be heard is a *principle* 'which applies even in the absence of express texts'.

[193] *Mayras* (LNT judgment No. 24 [1946] at 5) although it was found to be inapplicable in the case.

[194] *Wakley*, *supra* n. 191; *Ogle*, OASAT judgment No. 34 [1978] and *Reeve*, OASAT judgment no. 59 [1981].

[195] *Smith*, UNAT Judgment no. 249 [1979], JUNAT Nos. 231-300, p. 202; *Waghorn*, ILOAT Judgment No. 28 [1957] at p. 7.

[196] In *Hatt and Leuba* (ILOAT judgment No. 382 [1979]), the ILOAT invoked the principles of *forum conveniens* and of comity in order to apply a decision of the UNAT on a matter within the competence of UNAT.

II.2.a International Law Commission[197]

101. In its founding statute, no reference is made to the sources of public international law the International Law Commission can turn to. In practice, the Commission has looked to the list of sources of the law provided in article 38 of the Statute of the ICJ. This is perhaps not surprising given its close institutional relationship with the International Court.

102. Since its creation, the Commission has had over 200 members from all over the globe. This means that it has served as a microcosm of the various approaches to international law found throughout the world. Such variation in approach to international law has also extended to the understanding of the importance of domestic law principles as potential sources of the law. The variation of position within the Commission simply mirrors the variation of view which already exists in international law. Nonetheless, the work of the Commission over more than sixty years of existence provides a useful repository of material for illustrating the various approaches taken to domestic law principles.

103. It is also worth recalling the distinction between the position taken by the Commission as a whole, and that taken by its individual members. The working methods of the Commission are based on deliberation and negotiation. It is in the former, involving the exposition of views by individual members, where the bulk of references to domestic law principles are to be found. On the other hand, it is rare for some statement as to, for example, the applicability of such principles to be found in the negotiated outcome of the deliberation. To the knowledge of the present writer, the Commission has never taken a general position as to the relevance of domestic law principles, even if, in some topics, some such discussion has found its way into the final commentaries.

104. In most cases, a consideration (if any) of domestic law principles typically arises as part of the background to the work of the Commission on this or that topic, sometimes only in connection with a specific rule or aspect thereof. It may be one of several considerations taken on board during the deliberations, and not always or consistently the most important such consideration. This means that it is difficult to undertake a definitive assessment of the impact of domestic law principles on the development of international law by the Commission. No such assessment will be attempted here.

105. Nonetheless, a review of the records of the Commission reveals the fact that references to the significance (or not) of domestic law principles have, on numerous occasions, been part of the argumentation pattern, usually associated with certain members. In some cases, several such arguments have enjoyed sufficient general support to find their way into the common view of the Commission as typically reflected in its commentaries.

106. An essentially inductive approach is taken here, whereby the Commission's records (including the reports of the Special Rapporteurs, as well as the final texts and the commentaries adopted by the Commission) have been reviewed for references to domestic law principles. Those references found have been analysed, and several categories of positions or stances taken were identified. Such categories are presented below with a description and illustrative examples drawn from the records of the Commission. The

[197] Based on the analysis provided by Arnold Pronto.

research was undertaken on the basis of a search for the term 'private law', which is the phrase commonly used by the Commission in its work to denote domestic law.

II.2.a.ii Positions identified

A. General statements about the relationship of domestic law principles with international law

107. An inference as to the view taken regarding the structural relationship between domestic law principles and international law can be drawn from the willingness (or not) of the Commission or one of its members to accept the relevance of the former in the formation, interpretation or application of the latter. In some cases, however, the position expressed is more direct, in the sense that Commission members have sought to express their views, or to take a position, at the level of the *relationship* between the two bodies of law. Different views, both in favour and against, have been expressed, indicating a difference of perspective as to the relevance of domestic law principles to international law. The following are a sample of the views expressed.

A.1. *Favourable statements*

108. In his report of the Sub-Committee on State Responsibility, in 1963, Mr. Ago recorded an exchange of views in which Mr. Gros indicated that '[i]nternational law was not a totally different technique from private law and it was impossible to regard it as an island by itself.' In turn, Mr. De Luna, 'agreeing with Mr. Gros, said that many of the rules formulated in the course of the development of international law had had their origin in municipal law.'[198]

109. During the debate on the topic of succession of States, the previous year, Mr. Pessou expressed the view that 'it would be difficult to avoid reasoning by analogy with existing rules of law, even if those rules belonged to private law.'[199] In 1963, in the context of the debate on the law of treaties, Mr. Paredes confirmed that 'he held to the view that international law had been greatly influenced in its formation and development by the principles of private law, which had stimulated and guided it within the limits imposed, of course, by the differences between those two branches of law arising from the subjects they governed', and that 'he was not afraid to seek clarification of international law in the principles of internal law.'[200]

110. In 1977, Sir Francis Vallat, in the context of the work on succession of States in respect of matters other than treaties, was of the view that there existed

> *a very subtle relationship between public international law and internal law*. It could be affirmed that matters which might have been regarded 50 years ago as falling under private law had now entered an area in which they were protected by public international law and, in principle, he saw no reason why that should not apply in the case of State debts towards private creditors.[201] (emphasis added)

[198] A/CN.4/152, p. 234.
[199] A/CN.4/SR.633, para. 36.
[200] A/CN.4/SR.679, para. 63.
[201] A/CN.4/SR.1424, para. 30.

111. He had occasion to repeat the point, in an indirect way, two years later, in the context of the work on jurisdictional immunities of States and their property, when he referred to the 'difficult task of isolating the concepts of public international law from those of […] private law.'[202]

A.2. *Unfavourable statements*

112. In some cases, doubts as to the relevance of domestic principles were expressed in a more nuanced manner, subject to qualifications, and leaving room for the possible applicability of domestic principles. Other statements reflected a more emphatic rejection of the analysis that such principles may be of relevance to the study of international law.

- *Qualified statements*

113. In his 1963 working document, reproduced in the report by the Chairman of the Sub-Committee on State Responsibility, Mr. Tsuruoka took the view that

> [i]n international law, the question of due diligence is not necessarily related to the notion of negligence. International responsibility may sometimes arise from the mere fact that injury has been caused. In some cases, therefore, we would have to recognize an objective responsibility related to the injured right. *But I do not go so far as to say that the principle of responsibility without fault recognized in some national laws should be generally recognized in international law*.[203] (emphasis added)

114. The same year, during the consideration of the law of treaties, Mr. El-Erian, indicated that

> he did not favour undue analogy to rules of municipal law in international law. International law had developed its own jurisprudence and there was no need to indulge in drawing analogies to private law, which did not take into proper account the different nature of international relations. However, since the end of the second world war, a number of constitutions had been enacted which incorporated principles of international law […] That interaction of international law and municipal law showed that the two were not separate, but closely interrelated.[204]

115. Sir Humphrey Waldock, in turn, indicated that he felt it 'unwise to assume that concepts applicable in private law would necessarily be relevant to international relations, though they would provide some broad indications of what was understood by "fraudulent conduct" and to that extent could be helpful.'[205]

116. The following year (1964), Mr. de Luna expressed the view that

> Mr. El-Erian had […] been right in saying that it was dangerous to carry the analogy between private law and international law too far. Nevertheless, it was noteworthy that article 1119 of the French Civil Code, which had inherited formalist concepts from Roman law, laid down that a person could normally enter into an undertaking or make a stipulation in his own name only for himself — a principle to which it then admitted exceptions — whereas article 328 of the German Civil Code and article 112 of the Swiss Code of obligations laid down that

[202] A/CN.4/SR.1575, para. 21.
[203] A/CN.4/152, at para. 13.
[204] A/CN.4/SR.676, para. 42.
[205] Id., para. 102.

> a contract could create a right in favour of a third party direct, without its knowledge or consent.[206]

117. During the same debate that year, Mr. Tunkin stated that '[a]dmittedly, some rules might occasionally be borrowed from private law; but, in [the] particular case, the rule did not fully cover the situation.'[207]

118. Several years later, Mr. Ramangasoavina, during the debate on the question of representation of States in their relations with international organizations, expressed the view that '[a]lthough it was sometimes a mistake to borrow from private law, it might be worth considering the notion of the "universal legatee", an expression used to denote a person who inherited a share of the whole of an inheritable estate.'[208] Nevertheless, in 1970, Mr. Tammes expressed the view, during the debate on the succession of States in respect of treaties, that 'all analogies with the private law governing inheritance were tending to disappear.'[209]

119. In its 1971 survey of international law, the Secretariat of the International Law Commission, indicated that the rules of international law applicable to the acquisition of territorial sovereignty were

> [h]istorically […] based on institutions of private law, developed and amplified to fit the circumstances of a society of independent States. Any attempt to codify those rules which might be undertaken at the present time would need, however, to reflect the progress made in the development and application of a number of fundamental principles of international law—in particular the principle of the prohibition of the threat or use of force and the principle of equal rights and self-determination of peoples—and to assess their effect upon the rules relating to the acquisition of territory by a State.[210]

120. In 1973, in the context of discussing whether, in the event of a succession of States, there was a transfer of property or only extinction of the right of the predecessor State and creation of the right of the successor State, Mr. Castañeda qualified his reference to the example of sale under domestic law with the statement that 'analogies with private law were often misleading.'[211]

121. In 1976, Mr. El-Erian, in discussing the concept of responsibility under international law expressed the view that 'it was not possible to use the analogy of the private law system of responsibility, which drew a distinction between criminal liability and liability at tort, to use the common law terminology. The position in municipal law was less complex than in international law.'[212] For his part, Mr. Quentin-Baxter put the matter more succinctly when he stated that, in his view, 'because international law in general lacked a system of compulsory jurisdiction, analogies from private law must be considered sparingly.'[213] In 1979, also in the context of the work on state responsibility, Mr. Sucharitkul, indicated that while 'he had mentioned the danger of adopting private

[206] A/CN.4/SR.737, para. 28.
[207] A/CN.4/SR.742, para. 19.
[208] A/CN.4/SR.972, para. 87.
[209] A/CN.4/SR.1068, para. 25.
[210] A/CN.4/245, para. 42.
[211] A/CN.4/SR.1227, para. 27.
[212] A/CN.4/SR.1370, para. 7.
[213] A/CN.4/1369, para. 28.

law terminology in international law […] as a general reminder', he, nonetheless, could accept the use of the phrase 'force majeure'.[214]

122. In his second report on State responsibility, issued in 1989, Special Rapporteur Arango-Ruiz, after analysing the views of academic writers as to the extent to which claims commissions and arbitral tribunals had had recourse to rules of private law in the ascertainment of damages, drew the conclusion that

> [a]s noted by Anzilotti and Reitzer, the rules and standards applied by international judicial bodies are often very similar to, if not identical with, the corresponding rules and standards of municipal law (Roman law, civil law or common law). This means, in the opinion of the Special Rapporteur, not so much an application of municipal legal rules by mere renvoi; it means rather that, through the work of international judicial bodies and the agreed settlements achieved directly between themselves, States have gradually worked out and accepted rules and standards on compensation. Even where such rules and standards were originally modelled partly on municipal law, they may well be found to be now in existence as part of general international law.[215]

- *Unqualified statements*

123. On several occasions, members of the Commission have expressed a more categorical rejection of the applicability of principles of domestic law to international law. As early as 1951, Mr. Hudson, in the context of the law of treaties, expressed the view that 'nothing was more dangerous than an attempt to draw analogies between the two types of law […] The discussion should keep to matters of public international law.'[216] Several years later (1963), Mr. Gros took the position that a theory of nullity of treaties on the ground of defective consent was unnecessary in international law, and expressed the view that

> one should not automatically transfer to international law concepts recognized in private law, that was to say in a society organized round an authority recognized by everyone and enforced by the courts. International law, having no common authority and no compulsory jurisdiction, was more flexible, and should remain so.[217]

124. Similarly, in the context of the discussion of whether acts performed prior to a treaty's annulment retained their full force and effect, Mr. Bartos, in the same year, confirmed that 'he wished to rule out any analogy with private law, for relations between sovereign States raised problems different from those of private law.'[218] This position was also maintained by Mr. Tunkin who in 1966, also in the context of the law of treaties, expressed the view that '[t]o draw analogies with private law was usually dangerous, because the position of third States on the international plane was so different from the position of third parties in municipal contract law.'[219]

---

[214] A/CN.4/SR.1573, para. 20.
[215] A/CN.4/425 & Corr.1, para. 29.
[216] A/CN.4/SR.98, para. 44.
[217] A/CN.4/SR.679, para. 36. See also A/CN.4/SR.704, para. 100.
[218] A/CN.4/SR.707, para. 64. See also A/CN.4/SR.683, para. 82.
[219] A/CN.4/SR.854, para. 59. See also his statement in 1964 ('[t]here appeared to be a tendency to discuss representation on the analogy of private law, but the situation in international relations was completely different from that obtaining under municipal law'), A/CN.4/SR.733, para. 19.

125. Mr. Yasseen, in 1970, in expressing support for the definition of succession being proposed in the context of the succession of States in respect of treaties, expressed the view that it 'avoided the enormous difficulties which would have arisen if the definition had been based on traditional considerations of private law.'[220] Several years later, during the debate on the second succession topic, namely that in respect of matters other than treaties, Mr. El-Erian stated that

> [g]reat care should be exercised in drawing analogies between private and international law, for while the former was at the origin of the latter, international law had now become a separate science and obligations under it differed from the obligations between individuals governed by private law.[221]

126. In 1990, Mr. Barsegov expressed a similar view when, in commenting on the report of the Special Rapporteur on State responsibility that year, he 'warn[ed] against introducing too many concepts and rules of private law—particularly Roman law— into political and public-law relations between States.'[222] More recently (2003), Mr. Pellet, in the course of the work on the responsibility of international organizations, expressed the view that 'it was ill advised to refer, even implicitly, to concepts of internal law in an international legal instrument […] International law was neither civil, criminal, Romano-Germanic nor common law, and he saw no reason to refer to concepts of internal law in the draft articles.'[223]

B. Statements concerning the applicability of domestic law in particular cases

127. The second set of statements identified are those which go further than the first, in the sense that they are aimed less (or not only) at the *general* relationship between domestic and international law, and more directly at the applicability of particular domestic principles or rules in international law.

B.1 *Favourable statements*

128. From the official records of the Commission it is clear that statements asserting the applicability of domestic rules and principles in international law have been made on numerous occasions.

- *Statements citing domestic rules in support of an international rule*

129. Favourable statements, in their most affirmative form, cite domestic rules directly in support of the existence of their counterparts under international law. Early examples are to be found in the work on the law of treaties. Hence, Sir Gerald Fitzmaurice, in his third report on the law of treaties, proposed dealing with fraud or misrepresentation, which 'correspond[ed] with the relevant rule of private law and seem[ed] necessary.'[224] Some years later (1963), during the debate on the doctrine of *rebus sic stantibus*, also in

---

[220] A/CN.4/SR.1071, para. 50.
[221] A/CN.4/SR.1417, para. 23.
[222] A/CN.4/SR.2172, para. 19.
[223] A/CN.4/SR.2753, para. 33.
[224] A/CN.4/115 and Corr.1 (English and French), para. 59. See also para. 60, where Fitzmaurice deals with the concept of 'undue influence', which he suggests 'is perhaps mainly a doctrine of Anglo- American jurisprudence.'

the context of the work on the law of treaties, Mr. Pal pointed to its domestic law origins when he recalled that

> Gentilis was generally credited with having introduced the maxim *omnis conventio intelligitur rebus sic stantibus* in the sixteenth century, when he had asserted the existence of a tacit condition in the treaty itself that treaties were binding only if circumstances remained unchanged. In developing that theory he had drawn upon the writings of the civilians, but the theory was in fact older still and had originated in canon law, which had sought to temper the rigour of Roman private law with considerations of equity. Suarez had also recognized the doctrine of *rebus sic stantibus*.[225]

130. Similarly, several years later (1966), Mr. Ago considered the comparison between international law and private law to be 'a perfectly valid comparison, since error, fraud and coercion were also grounds for alleging the invalidity or nullity of acts in private law.'[226]

131. Mr. Yasseen, in 1968, during the debate on the question of the succession of States in respect of matters other than treaties, expressed support for the use of the term 'succession', since, in his view, 'it was not the only case in which public international law had borrowed an expression from private law. Everyone knew what was meant and there was no risk of confusion […]'[227] The following year, Mr. Ago, in introducing his first report on State responsibility recalled that, when codifying the law of treaties, it had been possible for the Commission 'to refer quite extensively to the general theory of obligations in private law.'[228]

132. In 1972, when dealing with the question of treaties establishing boundaries, in the context of the consideration of the succession of States with respect to treaties, Mr. Ramangasoavina noted that most members had agreed that a treaty establishing that a boundary should not be affected by a succession of States since

> a State possessed 'title' to a certain territory with well defined boundaries. *It was the same in private law,* under which, when property was transferred, the change of ownership in no way affected the previously established boundaries.[229] (emphasis added)

133. The following year, Mr. Ramangasoavina, this time in the context of the discussion on State responsibility, observed that '[i]n private law, any act causing injury involved the responsibility of the person who committed it, and required reparation, even if the act causing the injury was not intentional. Similarly, a State might, without any intention to harm, and even in a humanitarian spirit, carry out scientific experiments the consequences of which caused injury requiring reparation.'[230]

134. In 1975, Mr. Sette Camara, in the context of the work on the succession of States in respect of matters other than treaties, noted that the right of eminent domain 'which corresponded to the *nuda proprietas* of private law', would conceivably pass to the successor

---

[225] A/CN.4/SR.694, para. 7.
[226] A/CN.4/SR.845, para. 38.
[227] A/CN.4/SR.963, para. 16.
[228] A/CN.4/SR.1011, para. 2.
[229] A/CN.4/SR.1193, para. 43.
[230] A/CN.4/SR.1202, para. 44.

State.[231] In 1979, when discussing consent as a circumstance precluding wrongfulness, Mr. Pinto observed that the draft article in question 'was firmly rooted in concepts of private law.'[232]

135. In 1980, the Special Rapporteur on the topic 'treaties concluded between States and international organizations or between two or more international organizations', Mr. Reuter, in explaining his use of the term 'succession', indicated that '[i]n private law, succession related to rights and obligations; as applied to States, it was also connected with the transfer of rights and obligations.'[233] Mr. Arangio-Ruiz, when commenting on the duty to provide reparation in 1990, pointed to the fact that various authors had, in his view,

> Persuasively […] applied international legal principles modelled on municipal principles or rules. In other words, on the basis of what Lauterpacht had called 'private-law analogies' in international law, States had, through case-law and their own diplomatic practice and through the process known as international custom, developed rules that were part and parcel of international law, however similar to rules of municipal law they might be…[and that]… [i]t was mainly in relation to patrimonial injury that judicial decisions and doctrine had had recourse to distinctions and categories typical of private law—whether civil or common—and had adapted them to the peculiar features of international responsibility.[234]

136. Two years later, also during the debate on State responsibility, Mr. Al-Khasawneh observed that

> […] the principle *inadimplenti non est adimplendum* was known to have evolved by analogy from private law and it was also known, thanks to Anzilotti, when the transformation had taken place. In the *Diversion of Water from the Meuse* case, Anzilotti had said that the principle was " … so just, so equitable, so universally recognized, that it must be applied in international relations also".[235]

137. In some cases, the applicability of domestic law was anticipated in the form of an express renvoi to the internal law of the State. For example, in his fifth report on jurisdictional immunities of States and their property, the Special Rapporteur, Mr. Sucharitkul, indicated that the acquisition by one State of property in the territory of another State 'was made possible only by virtue of the application of the internal law or private law of the State of the situs.'[236] Another example is to be found in the seventh report of the Special Rapporteur on the responsibility of international organizations, Mr. Gaja, in which it was indicated that:

> The fact that a rule of the organization 'bound, or granted rights to, persons or entities that were subjects of international law' cannot be a decisive criterion for identifying which rules of the organization pertain to international law, because certain relations between subjects of international law could well be regulated by private law.[237]

---

[231] A/CN.4/SR.1321, para. 4.
[232] A/CN.4/SR.1538, para. 14.
[233] A/CN.4/SR.1592, para. 16.
[234] A/CN.4/SR.2168, paras. 12 and 19.
[235] A/CN.4/SR.2278, para. 16.
[236] A/CN.4/363 & Corr.1, para. 112.
[237] A/CN.4/610, para. 41 (footnote omitted).

- *Statements referring to domestic rules or concepts by way of providing guidance in the formulation of international rules*

138. More prevalent are statements in which private law rules are referred to by way of guidance as to which rule to adopt at the international level. Admittedly the difference between supporting and guiding statements is relatively slight, and merely a matter of degree. With the former, the claim being made is more emphatically that international law has to adopt the domestic law rule, while with statements falling into the latter category the emphasis is placed on the usefulness of domestic rules in guiding an outcome at the international level -the assumption being that the lawmaker at the international level is not constrained to follow the domestic rule, regardless of how influential it might be.

139. In 1950, Mr. Yepes, in dealing with the question of the legal status of the continental shelf, in the context of the work on the law of the sea, indicated that '*[j]ust as in private law*, accession was a legitimate source of increment to property so, in international law, the conclusion must be reached that the continental shelf "must belong to the countries with whose coasts it was contiguous".'[238] (emphasis added) References to private law principles or rules, by way of providing guidance, are also relatively easy to find in the official records of the debates on the law of treaties. Hence, in 1950, Mr. Hudson, cited the consequences of the private law concept of a deed of transfer of title of land to illustrate his doubts with the description of a treaty being 'an agreement recorded in writing.'[239] The following year, Mr. Sandstorm drew an analogy with the rules governing contracts under private law by way of confirming the significance of ascertaining the intention of the parties.[240] Mr. Scelle pointed to the wide connotation of the concept of abuse of rights that existed under private law.[241] Several years later (1956), Bey El-Khouri drew the analogy with contracts between individuals in private law, which was limited to adults, in support of his argument that inter-State treaties should be concluded between equal and independent States and not between such a State and, for instance, a Protectorate.[242] That same year, Mr. Bartos, commenting on different types of treaty clauses, remarked that

> [i]t was possible in multilateral conventions to draw a distinction between those clauses which admitted reservations and those to which reservations were clearly impossible. On the analogy of private law, the latter could be considered as in the nature of *jus cogens* and the former as in the nature of *jus dispositivum.*[243]

140. Similarly, Sir Gerald Fitzmaurice, referring to certain aspects of the law of treaties, in his second report issued in 1957, expressed the view that

> [a]nalogous principles—or principles leading to very similar results—have received a wide degree of recognition in private law. While this is not conclusive (see for instance the different treatment given by private, as compared with international law, to the question of duress as a ground voiding contracts), it suggests that there is a case for some degree of recognition of the principle under international law.[244]

---

[238] A/CN.4/SR.67, para. 1(b).
[239] A/CN.4/SR.52, para. 3.
[240] A/CN.4/SR.86, para. 99.
[241] A/CN.4/SR.86, para. 116.
[242] A/CN.4/SR.369, para. 30.
[243] A/CN.4/SR.651, para. 42.
[244] A/CN.4/107, in *Yearbook of the International Law Commission*, 1957, Vol. II, p. 57, para. (3).

141. Likewise, when drawing a distinction between the object of the treaty itself, and what may have been the motives of the parties in entering into it, Fitzmaurice remarked that 'such distinction [was] fully recognized in private law.'[245] Two years later, in his fourth report, he again cited the private law analogy in support of a contention as to prevailing rule of international law, when he noted that the principle that reparation by way of payment of damages was not necessarily sufficient was 'well known in private law.'[246] In his fifth report, issued the following year, Sir Fitzmaurice expressed support for the recognition in international law of the *stipulation pour autrui* in the following terms: '[w]hen international law in so many ways contains analogies with private law, and reflects or applies private law doctrines, it is difficult to see why that possibility should be regarded as wholly excluded in the case of the *stipulation pour autrui*.'[247]

142. Mr. de Luna, in 1962, also in the context of the consideration of the law of treaties, discussed the different doctrines relating to the ratification of treaties, and observed that

> the first of those doctrines was the historical one which treated ratification by a Head of State of the signature of his representative almost on a par with ratification by a principal of his attorney's act when executing a power-of-attorney in private law. Grotius and many other early writers had viewed ratification in that light. Under that ancient doctrine, subsequent ratification could be held to have a retroactive effect, because it confirmed and validated the signature given by the representative. The consent given to a treaty by the signature was deemed to be conditional upon ratification.[248]

143. In 1963, Mr. Liang, Secretary of the Commission, also in the context of the work on the law of treaties, indicated '[b]y way of analogy […] that, in private law, the validity of a contract depended on such matters as the legality of the object, the reality of consent and the question of capacity.'[249] In turn, Mr. de Luna 'endorsed Mr. Liang's remark concerning the principles of private law. The doctrine in question was the broad doctrine of *falsus procurator*, where there was not merely usurpation, but also an act *ultra vires*; it was not possible, however, to transpose all the demands of the *falsus procurator* doctrine into international law by analogy.'[250] The same year, Mr. Bartos, when considering the issue of error, also looked to private law for guidance when he observed that '[h]aving regard to the stability of contractual relations, all errors could not be regarded as reasons for invalidation. Moreover, they were not so regarded either in Roman law or in comparative private law.'[251]

144. The following year, Mr. de Luna when confronted with the question of the acquisition of a right by a third State through the effect of a treaty, observed that:

> [i]t had also been asked how a third State, which was absent and unaware of the proceedings could acquire such a right. That was certainly what happened in private law— in testamentary disposition, for example, though it was true that in that case there was a legal norm. In

---

[245] Id., para. 154.
[246] A/CN.4/120, in *Yearbook of the International Law Commission*, 1959, Vol. II, para. 171.
[247] A/CN.4/130, in *Yearbook of the International Law Commission*, 1960, Vol. II, p. 103, para. 85.
[248] A/CN.4/SR.646, para. 71.
[249] A/CN.4/SR. 677, para. 39.
[250] Id., para. 49.
[251] A/CN.4/SR.680, para. 40.

> international law the norm was the *pacta sunt servanda* principle, and the right derived from the reciprocal undertaking entered into by the parties to the treaty.[252]

145. Mr. Briggs, the same year, observed that '[i]n private law, stipulation on behalf of another or the concept of trust had been found serviceable, even if not always theoretically satisfactory from the point of view of legal logic. In international law, past practice and possible future needs suggested that it might be useful to include in the draft on the law of treaties an article setting out a comparable concept […]'[253]

146. In 1966, Mr. Bartos again looked to private law for guidance, this time in the context of the discussion on the termination of treaties, when he observed that

> it sometimes happened that, without any intention by the parties to terminate the earlier treaty, the actual object of the second treaty conflicted with that of the first. If a conflict of objects appeared in one and the same instrument, that instrument would be void; but if the conflict appeared between successive instruments, it was the later instrument which prevailed, just as in private law the testator's last will prevailed.[254]

147. The following year, Mr. Bartos, in his quality of Special Rapporteur for the topic 'special missions', looked again to private law for guidance, this time in connection with the expression 'third State'. He noted that '[i]n private law the analogous expression "third party" denoted a person who was not a party to a juridical relationship but who might in certain cases have certain rights and obligations by virtue of that relationship.'[255] In 1968, the Special Rapporteur on the question of the succession of States in respect of rights and duties resulting from sources other than treaties, Mr. Mohammed Bedjaoui, in his first report, dealt with some of the theories that sought to justify succession to debts, and observed that '[a]ccepted rules of private law, such as those relating to unjustified enrichment and the maxim "*res transit cum suo onere"*, and considerations of equity had also been cited.'[256] The following year, Mr. Reuter, on the same topic, called for a study of the consequences of changes made by a State in its economic policy or structures, which established 'a case for application of the *rebus sic stantibus* clause, a legitimate case for the modification of certain contractual balances. In private law and in collective property relationships, amendments to contracts were common, and examples could also be found in public international law.'[257]

148. In 1977, Mr. Bedjaoui, in his ninth report on succession of states in respect of matters other than treaties, analysed the concept of debt under private law, *inter alia*, as follows: '[i]n private law, only the estate of the debtor, as composed at the time when the creditor initiates action to obtain performance of the obligation due to him, is liable for the debt […] In short, the relationship between debtor and creditor is personal, at least in private law', but then added that '[o]ne of the problems that will arise in the course of this

---

[252] A/CN.4/SR.737, para. 31.
[253] A/CN.4/SR.738, para. 13.
[254] A/CN.4/SR.830, para. 83.
[255] A/CN.4/SR.908, para. 74.
[256] A/CN.4/204 and Corr.1 (French only), in *Yearbook of the International Law Commission*, 1968, Vol. II, p. 109, para. 97.
[257] A/CN.4/SR. 1005, para. 2.

study is whether this also applies in international law.'[258] For his part, Mr. Ago, in his sixth report on State responsibility, issued the same year, analysed the distinction between obligations of conduct and those of result as 'simply […] following the model furnished by the systems of internal private law originating in Roman law.'[259]

149. In its study on '*force majeure'* and 'fortuitous event' as circumstances precluding wrongfulness, issued in 1978, the Secretariat of the Commission noted that the defining features of the exception of *force majeure* were 'underlined [inter alia] by private law writers.'[260] In 1979, Special Rapporteur Ago, in his eighth report on State responsibility grappled with the excuse of necessity in international legal relations. In expressing the view that the issue could not be resolved 'solely on the basis of general principles of internal law', he indicated, generally, that

> *such principles can no doubt be of some help to us,* provided, however, that it is borne in mind, firstly, that determining their existence in this matter is by no means as easy as one might wish, and, secondly, that transferring them from the field of relations between individuals to that of relations between States is a dubious undertaking.[261] (emphasis added)

150. Sir Francis Vallat also looked to private law for guidance when he observed, during the debate on the same topic, that

> [u]nder private law in common-law countries, it was clear that, in the event of damage to property or injury to life caused by the negligent act of a lorry driver employed by a company, the lorry driver incurred personal responsibility or liability for his own negligent act, and the employer also incurred vicarious responsibility or liability if the driver had been acting within the scope of his employment. The position in international law was not exactly the same, but analogous situations might nevertheless arise.[262]

151. Mr. Reuter, also in the context of the debate on State responsibility in 1979, referred to the 'idea of an act of State, taken from private law, where it described the act of a State that prevented the performance of private contracts.' In his view, '[s]uch a situation could in fact arise in international relations, especially where treaty implementation was prevented by an international decision.'[263]

152. In 1983, Mr. Riphagen, Ago's successor as Special Rapporteur on State responsibility, pointed to the domestic law analogy when confronting the question of fact that

> [t]he insistence, in international law, even in its present-day stage of development, on the international right of sovereignty of States and on international obligations of a State as resulting, in the final analysis, from the consent of that State, seems to exclude the construction of a (primary) rule of general international law, to the effect that the fault of one State, causing damage to another State, entails a duty of the first State to make reparation to the second. At any rate *it is significant that, in municipal law systems which contain such a rule for private*

---

[258] A/CN.4/301 and Add.1, in *Yearbook of the International Law Commission*, 1977, Vol. II (Part One), p. 50, paras. 3–5.
[259] A/CN.4/302 and Add.1, 2 and 3, Id., para. 12.
[260] A/CN.4/315, in *Yearbook of the International Law Commission*, 1978, Vol. II (Part One), p. 70, para. 16.
[261] A/CN.4/318/Add.5-7, in *Yearbook of the International Law Commission*, 1979, Vol. II (Part One), p. 18, para. 11
[262] A/CN.4/1534, para. 25.
[263] A/CN.4/SR.1573, para. 16.

> *law relationships,* the courts feel the need for a legal analysis of its three elements—'fault', 'cause', and 'damage'—which, apart from liability for injurious consequences of acts not prohibited by law, comes close to stipulating rights and obligations.[264] (emphasis added)

153. In 1989, during the debate on the topic international liability for injurious consequences arising out of acts not prohibited by international law, Mr. Al-Baharna referred to private law in the context of the discussion on the concept of reparation, when he indicated that '[i]n private law, reparation meant payment for an injury and redress for a wrong. Thus defined, reparation was probably not confined to pecuniary damages.'[265] That same year, Mr. McCaffrey, during the debate on the law of the non-navigational uses of international watercourses, referring to the question of compensation by States benefiting from measures of protection adopted by other States, expressed the view that '[s]uch compensation could indeed be envisaged, provided that it was based on the principle of equitable distribution, […] A problem akin to the private-law notion of unjust enrichment was, after all, involved.'[266]

154. In 1991, Mr. Arangio-Ruiz, Special Rapporteur on State responsibility, pointing to the difficulties posed by the question of countermeasures, noted 'a total absence, of any similarities with the regime of responsibility within national legal systems which would make it relatively easy to transplant into international law, in the area of substantive consequences […] private law sources and analogies.'[267] Yet another Special Rapporteur on State responsibility, Mr. Crawford, in his third report, issued in 2000, referred to the phenomenon of 'the language of national law (the so-called "private law analogy") quite often creep[ing] into international judicial decisions', in the context of a discussion on the remedies being envisaged in what became the articles on the responsibility of States for internationally wrongful acts.[268]

155. In 2004, in his second report on responsibility of international organizations, the Special Rapporteur, Mr. Gaja, referring to private law claims against the United Nations for the conduct of peacekeeping forces, noted that 'the same principle concerning attribution of conduct would apply in relation to responsibility under international law.'[269]

- *Statements pointing to domestic rules to fill lacunae in international law*

156. Perhaps more interesting are statements suggesting the function of domestic rules or principles as potential sources to draw upon in filling lacunae in international law. For example, in 1966, Mr. Jimenez de Arechaga, in the context of the debate on the law of treaties, made the following statement:

> [t]he complete nullity of a treaty as a whole should be the rule in cases where the offending clauses formed its object, but if the clauses in question were accessory stipulations,

[264] A/CN.4/366 and Add.1 & Add.1/Corr.1, in *Yearbook of the International Law Commission*, 1983, Vol. II (Part One), p. 21, para. 113

[265] A/CN.4/SR.2113, para. 50.

[266] A/CN.4/SR.2124, para. 13.

[267] A/CN.4/440 and Add.l, in *Yearbook of the International Law Commission*, 1991, Vol. II (Part One), p. 7, para. 2.

[268] A/CN.4/507 and Add. 1–4, in *Yearbook of the International Law Commission*, 2000, Vol. II (Part One), p. 13, para. 7.

[269] A/CN.4/541, in *Yearbook of the International Law Commission*, 2004, Vol. II (Part One), p. 11, para. 36.

> separability could be allowed; in that regard *the Commission might follow private law* where a contract was void if its object were found to be illegal but where an accessory clause contrary to public order would be regarded, to use the French expression, as "réputée non écrite" and would not render the contract as a whole void.[270] (emphasis added)

157. In 1969, Mr. Bartos, while discussing the question of the representation of States in their relations with international organizations indicated that, in his view, '[i]t would be enough to specify in the commentary that the term "civil jurisdiction" was to be understood in the old private law sense […]'[271]

158. An even clearer example is to be found in the second report on State responsibility of the Special Rapporteur, Mr. Arangio-Ruiz, issued in 1989, in which he stated

> [i]t follows, in the Special Rapporteur's view, that whenever the study of the doctrine and practice of pecuniary compensation indicates a lack of clarity, uncertainty or, so to speak, a 'gap' in existing law, it should not be inevitable for the Commission to declare a *non liquet.* An effort could and should be made to examine the issue *de lege ferenda* in order to see whether, in what direction and to what extent the uncertainty could be removed or reduced or the 'gap' filled in as a matter of development. This should be done, of course, in the light of a realistic appraisal of the needs of the international community, of *available private law sources and analogies,* and under the guidance of realism and common sense.[272] (emphasis added)

159. In 1999, Mr. Al-Khasawneh, commenting on the report of the Special Rapporteur on the unilateral acts of States, expressed the view that the 'Special Rapporteur's attempt to draw analogies with the law of treaties was not always convincing. For example, concerning the concept of promise, he might have done better to seek private-law analogies.'[273]

- *Statements in which deference is given to domestic rules*

160. A particularly strong form in which statements in favour of the applicability of domestic principles and rules arise is that in which specific deference is given to such principles and rules. While relatively rare, examples do exist. Hence, during the debate on State responsibility, held in 1990, Mr. Tomuschat commented on the requirement to pay compensation that such 'compensation would be reduced in cases where the victim had contributed to the emergence of the damage. The rule corresponded to established principles of private law from time immemorial and no different solution could be applicable in public international law.'[274]

B.2. *Statements disputing the applicability of domestic rules*

161. As in the case of statements about the *general* relationship between international and domestic law, the records of the International Law Commission also reveal numerous instances where members expressly ruled out the application of domestic principles or rules *in specific contexts*. In 1951, Mr. Scelle, during the initial discussions on the law of

---

[270] A/CN.4/SR.836, para. 17

[271] A/CN.4/SR.1019, para. 38.

[272] A/CN.4/425 and Corr.1, and Add.1 and Corr.1, in *Yearbook of the International Law Commission*, 1989, Vol. II (Part One), p. 11, para. 32 (emphasis added).

[273] A/CN.4/SR.2596, para. 7.

[274] A/CN.4/SR.2170, para. 9.

treaties, discussed the wide connotation enjoyed by the doctrine of the abuse of rights: '[a]buse of rights occurred not only where there was an intent to cause harm, but also in the case of merely frivolous acts. In international law it might perhaps be going too far to admit such an extension.'[275]

162. The same member expressed a similar concern in the context of the work on the law of the sea, five years later (1956), when he indicated his inclination to correct an erroneous impression given by the Special Rapporteur and Mr. Sandstrom 'both of whom had based their argument on a concept of private law.'[276]

163. In his second report on the law of treaties, of 1957, Sir Gerald Fitzmaurice remarked that

> [t]here are few questions of treaty law more controversial, and more controverted, than that of the place to be given to essential (or vital) change of circumstances as a ground of termination, on the basis of the principle of *rebus sic stantibus (conventio omnis intellegitur rebus sic stantibus).* Within certain limits, analogous principles find a place in many systems of private law, but in the international field, although much discussed in the literature of treaty law, the doctrine is accorded a mixed reception, compounded of attraction in theory and fear as to the practical consequences of admitting it.[277]

164. He took a similar position the following year, in his third report, when dealing with the question of the essential validity of treaties, when he observed that 'a large part of the private law on the essential validity of contracts—which has been evolved mainly with reference to the position and actions of individuals rather than of corporate entities—is inapplicable or inappropriate to the case of States, international organizations and other entities that may possess a certain treaty-making capacity […]'[278] In his fourth report, issued in 1959, Sir Gerald Fitzmaurice also cast doubt as to the applicability of private law concepts when coming to the doctrine of legitimate self-redress: '[…] analogies drawn from private law do not hold in this case, for private law has nothing corresponding to the international law doctrine of legitimate self-redress in certain circumstances, by way of counter-action or reprisals.'[279]

165. In 1963, the Special Rapporteur Waldock, in his second report, explaining his proposal for the effect of treaties void *ab initio*, indicated that

> It could perhaps be urged that in the case of a treaty void *ab initio* for conflict with a rule of *jus cogens,* the private law principle *in pari delicto potior est conditio defendentis* should be applied. But it is believed that a rule requiring the parties to be restored as far as possible to their previous positions would be more suitable for treaties between States and more conducive to the general international interest.[280]

---

[275] A/CN.4/SR.86, para. 116.
[276] A/CN.4/SR.356, para. 73.
[277] A/CN.4/107, para. 141.
[278] A/CN.4/115 and Corr.1, para. 3. See too, para. 39 dealing with error and lack of consensus ad idem ('the sheer inapplicability in the international field of many of the private law doctrines of contract on which these concepts are based').
[279] A/CN.4/120, para. 88.
[280] A/CN.4/156 and Add.1-3, in *Yearbook of the International Law Commission*, 1963, Vol. II, p. 94, para. 2.

166. Several further examples of similar stances being taken vis-a-vis the applicability of private law are to be found in the debate on the law of treaties that year. Hence, Mr. Gros, indicated that '[t]here seemed to be no justification for transferring to international law a case of defect in consent in private law […] It would indeed be hazardous to take rules applicable to contracts between private persons and apply them to treaties between States which, as the Commission's discussions in 1962 had shown, were not the same as ordinary contracts.'[281] Mr. Ago was of the same opinion, when he stated that 'there was a great temptation to transfer to international law the principles of private law relating to unreality of consent. But there were wide differences between the practical situations to which private law and international law applied[…]'[282] For his part, Mr. Amado, when considering the question of error, indicated that '[t]he parties' intentions, which were a key factor in private law, could not carry equal weight in international law.'[283]

167. The following year (1964), Sir Humphrey Waldock, in his third report, considered the origin of exceptions to the rule *pacta tertiis nec nocent nec prosunt*, and indicated that

> it is by no means clear that the admission of exceptions to the *pacta tertiis* rule in State practice or in the jurisprudence of international tribunals has been based directly upon an analogy from private law rather than upon the consent of States and the requirements of international life…while taking due note of the analogies which exist in national systems of contract law, the Commission should base its proposals on State practice and on the jurisprudence of international tribunals.[284]

168. That year, Mr. Tunkin, who doubted that representation of one State by another in the conclusion of treaties was a normal practice, indicated that '[t]here appeared to be a tendency to discuss representation on the analogy of private law, but the situation in international relations was completely different from that obtaining under municipal law.'[285] On the question of the rights of third parties, Mr. Ago expressed his view that '[i] n private law, the right of the third party derived from the law, not from the contract. He himself did not believe that practice proved the existence of such a rule in international law.'[286] Mr. El-Erian further stated that '[t]he starting point should not be the principle of a stipulation in favour of another, drawn from private law.'[287] On the question of amendment of treaties, Mr. Rosenne, also in 1964, noted that '[a]lthough a strict parallelism between rights and obligations was a concept that was deeply rooted in private law, in the present context it was not really necessary, because the process of amendment was essentially one that was governed by political considerations.'[288]

169. During the second reading of the articles on the law of treaties, held in 1966, Mr. Rosenne 'suggested that the Commission refrain from introducing […] any subtle distinctions drawn from private law, and from requiring any investigation into the state of

---

[281] A/CN.4/SR.678, para. 18.
[282] Id., para. 46.
[283] A/CN.4/SR.680, para. 56.
[284] A/CN.4/167 and Add.1-3, in *Yearbook of the International Law Commission*, 1964, Vol. II, p. 20, para. (1) of the commentary to draft art. 62.
[285] A/CN.4/SR.733, para. 19.
[286] A/CN.4/SR.737, para. 35.
[287] Id., para. 52.
[288] A/CN.4/SR.744, para. 28.

mind of a State.'[289] Mr. El-Erian recalled the debate held during the first reading on the effects of treaties vis-a-vis third parties, and observed that 'while the principle *pacta tertiis nec nocent nec prosunt* appeared originally to have been derived from Roman law, in international law the justification for the rule did not rest simply on a general concept of the law of contract, but on the sovereignty and independence of States.'[290] Mr. Pessou, in referring to general principles of law such as *lex posterior derogate priori* or *pacta sunt servanda*, considered them to be 'principles […] taken from private law [which] were not very apposite.'[291] For his part, Mr. Tunkin, on the question of restitution, indicated that '[s]ome members might have had in mind obligations of a type to be found in private law when the rule of complete restitution would be relevant, but treaties could impose obligations of a very different character […]'[292]

170. Several years later (1968), Mr. Bedjaoui, Special Rapporteur for the work on succession of states in respect of rights and duties resulting from sources other than treaties, referred to the inherent differences between succession under private law, and that as conceived in international law.[293] In his second report, issued the following year, Mr. Bedjaoui, in considering the possibility of an acquired right to compensation and the doctrine of unjust enrichment, noted that '[t]his doctrine, which has been carried over from municipal private law, is open to methodological objections based on the principle of such transposition. Above all, however, it is largely inapplicable in the case of succession resulting from decolonization.'[294]

171. A similar discussion was held that year (1969), in the context of the work on State responsibility. Mr. Kearney, discussing the question of available remedies for harm caused by transboundary pollution, stated that '[t]he usual procedure for righting wrongs of that kind was to restore the situation to what it had been before; under the common law system of private law, that might take the form of issuing injunctions to prevent persons from taking certain undesirable kinds of action. It was extremely difficult, however, to construct such a system of remedies at the international level […]'[295] The following year (1970), Mr. Yasseen, during the debate on the succession of States with respect to treaties, expressed support for the proposed definition of succession, because 'it avoided the enormous difficulties which would have arisen if the definition had been based on traditional considerations of private law.'[296]

172. In 1976, Mr. Kearney expressed the view, during the debate on State responsibility, that 'it did not appear appropriate to import into international law as an analogy the private law antithesis between tort law and contract law […]'[297] Mr. El-Erian agreed that 'it was not possible to use the analogy of the private law system of responsibility, which

[289] A/CN.4/SR.825, para. 9.
[290] A/CN.4/SR.853, para. 17.
[291] A/CN.4/SR.857, para. 20.
[292] Id., para. 68.
[293] A/CN.4/204 and Corr.1, in *Yearbook of the International Law Commission*, 1968, Vol. II, p. 102, para. 53.
[294] A/CN.4/216/REV.1, in *Yearbook of the International Law Commission*, 1969, Vol. II, p.95, para. 127.
[295] A/CN.4/SR.1012, para. 26.
[296] A/CN.4/SR.1071, para. 50.
[297] A/CN.4/SR.1365, para. 26.

drew a distinction between criminal liability and liability at tort, to use the common law terminology. The position in municipal law was less complex than in international law.'[298] A decade later, Mr. Calero Rodrigues expressed the same view when he stated that '[i]t should be remembered […] that the position was very different from that obtaining under a system of private law, where the injured party could sue the author of the wrongful act directly in the ordinary courts. Where a State claimed to be injured by an internationally wrongful act committed by another State, it was necessary to enter into negotiations.'[299] Two years later (1988), Special Rapporteur Arangio-Ruiz, in his preliminary report on State responsibility, confronted the complexities arising from the question of legal impossibility, and noted that 'municipal law is not part of international law and its rules are not really relevant as legal rules.'[300] During the ensuring debate, he explained further that 'the validity of the [private law] analogy was reduced very considerably by the high degree of relativity of international legal rules, situations and relationships.'[301]

173. The following year (1989), Mr. Barsegov, also in the context of the work on State responsibility, referred to the difficulties arising from the concept of restitution as follows:

> [s]pecific problems arose from the private-law form of the institution, which led in his view to some confusion between the notions and institutions relevant to legal relations of a public character and those relevant to private civil law. Although he had reverence for the legal genius of Rome and the highest regard for Roman civil law, the possibility of importing the concepts of that law into the totally different area of inter-State relations had its limits as considerable difficulties would arise with respect to the content of those concepts.[302]

174. For his part, Mr. Al-Baharna, in 1990, remarked that '[h]e had occasionally noticed in the Commission's deliberations a tendency to look to the law of torts for guidance in developing the international rules of State responsibility and he was somewhat skeptical about the value of that tendency.' His doubts were rooted elsewhere however. In his view,

> [t]he law of torts, as it had developed, was for the most part a Western contribution, and even in the West it differed from country to country, depending on the state of the economy, industrial growth, trade unionism, group action, judicial review, etc. In developing countries, the law was still in its primitive stage and it would therefore be injudicious to develop international rules on State responsibility by analogy with the present principles of tort law. Such development would run counter to the interests of the developing countries, which formed the overwhelming majority of nations.[303]

175. In 1996, Mr. de Saram, commenting on the work of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, was of the view 'that there had been excessive reliance on procedures of consultation and private law remedies.'[304]

---

[298] A/CN.4/SR.1370, para. 7.
[299] A/CN.4/SR.1953, para. 30.
[300] A/CN.4/416 & Corr.1 & 2 and Add.1 & Corr.1, in *Yearbook of the International Law Commission*, 1988, Vol. II (Part One), pp. 28–29. para. 86.
[301] A/CN.4/SR.2082, para. 5.
[302] A/CN.4/SR.2104, para. 51.
[303] A/CN.4/SR.2174, para. 37. See also the view of Mr. Koroma, at para. 57 ("[i]nternational law did not, of course, make the same sharp distinction between private-law and public law remedies as did municipal law.").
[304] A/CN.4/SR.2472, para. 62.

176. In his fourth report on diplomatic protection, issued in 2003, the Special Rapporteur, Mr. Dugard, referred to the doubts that had been expressed among authorities 'as to whether it would be appropriate to apply […] private law tests [concerning the nationality of corporations] to a problem of public international law.'[305] The Special Rapporteur on unilateral acts of States, Mr. Rodríguez Cedeño, in his ninth report (issues in 2006), made a similar observation as to the points of view among authorities, when he indicated that 'attempts to extrapolate certain concepts emanating from internal law have given rise to some doubts in the literature.'[306]

II.2.b Criminal law[307]

177. Criminal law is public law *par excellence*. On the understanding, however, that the reference in the Study Group's mandate to 'private law principles' is to the 'general principles of law recognized by civilized nations' referred to in article 38(1)(*d*) of the Statute of the ICJ, it is possible to seek to identify in the field of international criminal law some reliance on general principles of criminal law more or less common to national criminal justice systems.

178. The focus of this section of the study is on the reliance in treaties and other international instruments, as well as in draft international instruments, law reform proposals and the like, on such general principles of criminal law.[308]

II.2.b.i International treaties and draft instruments

179. The ILC's commentary to the *Draft Statute for an international Criminal Court* (as finally adopted in 1994) points out that[309]

> In drafting the statute, the Working Group did not purport to adjust itself to any specific criminal legal system but rather, to amalgamate into a coherent whole the most appropriate elements for the goals envisaged, having regard to existing treaties, earlier proposals for an international court or tribunals and *relevant provisions in national criminal justice systems within the different legal traditions*. (emphasis added)

180. However, the commentary mainly refers to international instruments and decisions of international criminal tribunals. As an example, the commentary to Draft Article 42.1-2 ('*Non bis in idem*'), which is almost identical to article 20.2-3 of the eventual Statute of the International Criminal Court (ICC), provides in relevant part:[310]

> (1) The maxim *non bis in idem* […] is an important principle of criminal law, recognized as such in article 14, paragraph 7, of the International Covenant on Civil and Political Rights.

---

[305] A/CN.4/530 and Add.1, in *Yearbook of the International Law Commission*, 2003, Vol. II (Part One), p. 12, para. 33.

[306] A/CN.4/569 and Add.1, in *Yearbook of the International Law Commission*, 2006, Vol. II (Part One), p. 153, para. 13.

[307] Based on the analysis provided by Roger O'Keefe.

[308] No position is taken here on whether the principles discussed are indeed general principles of law within the meaning of article 38(1)(*d*) of the ICJ Statute. What matters for present purposes is that they could reasonably be claimed to be so.

[309] *YILC 1994*, vol. II/2, 26, para. 84.

[310] Id., 57.

> (2) Article 14, paragraph 7, of the International Covenant has been interpreted as limited to trials within a single jurisdiction. The Commission believes that a greater degree of protection against double jeopardy is required under the statute and article 42 gives effect to this view, drawing heavily on article 10 of the statute of the International Tribunal [for the former Yugoslavia], with minor modifications to take account of the possibility of a previous trial in another international court or tribunal.

181. Similarly, the commentary to Draft article 39, on the 'Principle of legality' (*nullum crimen sine lege*), provides in relevant part:[311]

> (1) The principle *nullum crimen sine lege* is a fundamental principle of criminal law, recognized in article 15 of the International Covenant on Civil and Political Rights. Article 39 gives direct effect to this principle in the particular context of the statute.
> […]
> (4) Having regard to subparagraph (a), there may be circumstances in which an individual could be convicted for a crime under international law in an international court although the same person could not be tried in a national court—although these cases will be rare. The position is different in the case of treaty crimes under subparagraph (b), since the mere existence of a treaty definition of a crime may be insufficient to make the treaty applicable to the conduct of individuals. No doubt such cases (which are also likely to be rare, and may be hypothetical) might raise issues of the failure of a State to comply with its treaty obligations, but that is not a matter which should prejudice the rights of an individual accused.

182. Also the ILC's commentary *Draft Code of Crimes against the Peace and Security of Mankind* (as finally adopted in 1996) contains only a minor reference to domestic legal systems. E.g., when dealing with Article 11 on 'judicial guarantees':[312]

> The difficulty of reconciling the different rules for conducting criminal proceedings in the civil law and the common law systems has been encountered by the Commission in elaborating the draft statute for an international criminal court.

183. The commentary mainly refers to general principles of public international law as recognized by international instruments and decisions of some international criminal tribunals. As an example, the commentary to draft article 12 ('*Non bis in idem*') reads in relevant part (without reference to domestic principles but to 'justice' and to the ICCPR):[313]

> (2) […] The possibility of multiple trials conducted in the national courts of different States as well as an international criminal court raises the question of whether the *non bis in idem* principle should be applicable under international law. The Commission recognized that this question involved theoretical and practical issues. In theoretical terms, it was noted that this principle was applicable in internal law and that its implementation in relations between States gave rise to the problem of respect by one State for final judgments pronounced in another State, since international law did not make it an obligation for States to recognize a criminal judgment handed down in a foreign State. […]
> (3) […] This fundamental guarantee protects an individual against multiple prosecutions or punishments by a given State for the same crime and is reflected in the International Covenant on Civil and Political Rights (art. 14, para. 7). […] To impose such a punishment on an individual on more than one occasion for the same crime would exceed the requirements of justice.

---

311 Id., 55–56.
312 *YILC 1996*, vol. II/2, p. 34.
313 Id., para. 50.

> (4) The Commission decided to include the *non bis in idem* principle in the article subject to certain exceptions which were intended to address the various concerns regarding the principle. […]

184. Similarly, the commentary to Article 13 ('Non-retroactivity') contains no reference to domestic principles but to several international instruments:

> The prosecution and punishment of an individual for an act or omission that was not prohibited when the individual decided to act or to refrain from acting would be manifestly unjust. The prohibition of the retroactive application of criminal law is reflected in the principle *nullum crimen sine lege.* This principle has been embodied in a number of international instruments, such as the Universal Declaration of Human Rights (art. 11, para. 2), the International Covenant on Civil and Political Rights (art. 15, para. 1), the European Convention on Human Rights (art. 7, para. 1), the American Convention on Human Rights (art. 9) and the African Charter on Human and Peoples' Rights (art. 7, para. 2).[314]

185. Also the comments and observations received from Governments on the draft Code mainly quote international instruments and the references to general principles of criminal law do not clearly involve domestic principles. As example, regarding comments to Draft Article 14 as adopted on the first reading by the Commission:

- Paraguay stated that[315] '[d]efences (justifications, grounds for inculpability and for non-imputability) are so important a matter in criminal law that to refer to "general principles of law", thereby leaving a great deal to the judge's discretion, seems inappropriate.'
- Brazil stated that[316] '[a]s far as article 14 is concerned, what is stated about the "defence and extenuating circumstances under the general principles of law" seems to be insufficient. The provisions are somewhat vague since it is difficult, based only upon "the general principles of law", to indicate which circumstances should be taken into account. As a matter of fact, the large number of such broad-ranging provisions seems to be one of the most difficult problems hampering the Commission's effort to codify.'
- Belgium stated that[317] '[t]he question thus arises whether it would be preferable to delete article 14. Hypothetically, a judge could invoke the general principles of criminal law, such as extenuating circumstances, when having to assess the situation in which the crime was perpetrated.'

186. Nevertheless, there are references to domestic principles of criminal law in the preparatory works of the ILC to the draft code. E.g. in the fourth report on the draft code, by Mr. Thiam, Special Rapporteur,[318] it is mentioned (with a single footnote quoting only one book),[319] in relation to the content of attempt in internal law:[320]

> 137. The question then arises whether it is commencement of execution which constitutes attempt. That is the solution adopted, for example, in the French Penal Code, which regards

[314] Id., 38–39, para. (1).
[315] A/CN.4/448 and Add.1, in *YILC 1993*, vol. II/1, 92.
[316] Id., 73.
[317] Id., 71.
[318] A/CN.4/398 and Corr. 1-3, in *YILC 1986*, vol. II/1, 53 ff.
[319] I. Andrejew, *Le droit pénal comparé des pays socialistes*, Pedone, 1981.
[320] *Supra* note 321, 68-69.

as attempt any commencement of execution which failed or was halted only because of circumstances independent of the perpetrator's intention. Even so, it is necessary to determine what constitutes commencement of execution. It is not easy to draw a distinction between commencement of execution and preparatory acts. Some turn to objective criteria: the acquisition of the physical means for committing the crime, for example, would constitute a preparatory act, but when one "starts to make use of them", that is the commencement of execution. Others turn to subjective criteria: the intention to use those means.

138. Certain national legislations did not, at first, concern themselves with these subtleties. Soviet law, for example, in the Leading Principles of Criminal Legislation of the RSFSR (1919) specifically stated that "the stage of execution of the intention of the perpetrator does not in itself influence the penalty, which is determined by the extent of the danger which the offender" (art. 20) "and the act he has committed represent" (art. 21). In a circular relating to the draft penal code of 1920, it was stated that "the outward forms of execution of the act, the degree to which intentions were realized, the forms of complicity in violating the law lose their meaning as limits necessarily defining the extent of the punishment or the penalty itself". Today, the Fundamental Principles of Criminal Legislation of the USSR and the Union Republics (1958) provide for the penalization of both attempt and preparatory acts, and the court is obliged to take into consideration "the nature and degree of social danger of the acts committed, the extent to which the criminal intent is realized and the factors which prevented the offence from being perpetrated" (art. 15)

139. As regards the penalization of attempt, the socialist countries can be divided into three groups. The first group consists of those which abide by the general principle of penalizing attempt and preparatory acts. Apart from the USSR, these include Albania, Czechoslovakia, the Democratic People's Republic of Korea and Poland. In the second group, attempt is penalized as a general rule, but preparatory acts are penalized only in the cases provided by law: this is the case, for example, of the Bulgarian Code (art. 17) and the Hungarian Code (art. 11 (1)). In the last group, attempt and preparatory acts are penalized only in the cases stipulated by law. For example, in Yugoslavia, the 1951 Penal Code (art. 16) and the 1976 Penal Code (art. 19) penalize attempt to commit offences that are punishable by imprisonment of five years or more.

140. This is a solution closely related to that adopted in the French Penal Code, which lays down the general rule that attempt is punishable only in the case of criminal offences, but that attempt to commit correctional offences may be qualified as an offence only in the cases stipulated by law.

141. It is clear, therefore, that legal systems vary. As for the content, some legislations draw a distinction between attempt and preparatory acts, with each category being the subject of separate provisions. Other legislations do not draw this distinction and make attempt a crime only in the case of serious offences; others make attempt a crime without drawing a distinction between serious offences and other offences. All, however, recognize attempt as a juridical concept.

187. In the same report, it is mentioned in relation to the principle of *nullum crimen sine lege, nulla poena sine lege*[321]

151. The content of the rule *nullum crimen sine lege, nulla poena sine lege* may vary according to the sources of law cited.

152. According to a legalistic conception preferred in certain systems of law, the only law is written law. According to this school of thought, a system of law based on custom necessarily ignores the principle *nullum crimen sine lege*, because custom is not law, just as general principles, natural law and moral or philosophical maxims and prescriptions are not law. […]

[321] Id., 70.

> 153. The rule first appeared in France during the Revolution, and spread throughout Continental Europe. Even though it disappeared for a time in certain countries (in Germany, for example, under the National Socialist regime, with the application in 1935 of article 2 of the Penal Code, which introduced "the sound instinct of the people" as the source of criminal law),or underwent certain changes when recourse was made to interpretation by analogy, the rule *nullum crimen sine lege* has remained a fundamental principle of Continental criminal law and of the legal systems based on it. […]

188. In addition, while several international treaties contain an express reference to general principles of criminal law, or incorporate a similar content without mentioning the principle, it is not clear to what extent domestic principles where considered. E.g.:

a. Regarding the principle of ('*Ne bis in idem*'):
   - Article 20 of the Rome Statute of the ICC;
   - Article 10 ('*Non-bis-in-idem*') of the Statute of the ICTY, which terms are identical, *mutatis mutandis*, to Article 9 ('*Non bis in idem*') of the Statute of the International Criminal Tribunal for Rwanda (ICTR);
   - Article 9 ('*Non bis in idem*') of the Statute of the Special Court for Sierra Leone (SCSL);
   - Article 5 ('*Non bis in idem*') of the Statute of the Special Tribunal for Lebanon (STL);
   - Several instruments adopted by the Council of Europe such as: Article 9 ('*Ne bis in idem*') of the European Convention on Extradition[322] and the European Convention on the Punishment of Road Traffic Offences,[323] Article 7 of the European Convention on Supervision of Conditionally Sentenced or Conditionally Released Offenders 1964,[324] Article 8 of the European Convention on Insider Trading 1989,[325] Article 18 of the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990,[326] Article 28 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005,[327] Section 1 ('*Ne bis in idem*') of Part III ('International effects of European Criminal Judgments') of the European Convention on the International Validity of Criminal Judgments,[328] Part V ('*Ne bis in idem*') of the European Convention on the Transfer of Proceedings in Criminal Matters 1972[329] and Section 4 ('*Ne bis in idem*') of Part V of the European Convention on offences relating to Cultural Property 1985[330] (not in force);
   - Chapter 3 ('Application of the *ne bis in idem* principle') of Title III of the 'Schengen Convention' contains a detailed regime of horizontal *ne bis in idem*. In 2009, the Council of the EU adopted Council Framework Decision

[322] Paris, 13 December 1957, ETS No. 24.
[323] Strasbourg, 30 November 1964, ETS No. 52.
[324] Strasbourg, 30 November 1964, ETS No. 51.
[325] Strasbourg, 20 April 1989, CETS No. 130.
[326] Strasbourg, 8 November 1990, CETS 141.
[327] Warsaw, 16 May 2005, CETS No. 198.
[328] The Hague, 28 May 1970, CETS No. 70.
[329] Strasbourg, 15 May 1972, CETS No. 73.
[330] Delphi, 23 June 1985, CETS No. 119.

2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings. As among the member states of the European Union (EU), extradition has now been replaced by the regime of the 'European arrest warrant', as provided for in Council Framework Decision 2002/584/JHA of 13 June 2002, which articles 3.2 and 4.2-5 contain provisions dealing with the *ne bis in idem* principle.

- Article 9(*a*) The Inter-American Convention on Mutual Assistance in Criminal Matters 1992;[331]
- African union (formerly Organization of African Unity), Article 8(3) of the Convention on the Prevention and Combating of Terrorism 1999;[332]
- Bilateral extradition treaties between certain states contain provisions on prior prosecution in another state. For example, Article 5 ('Prior Prosecution') of the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America 2003;[333] or Article 11(1)(*d*) of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters 2009;[334]

b. Articles 22 ('*Nullum crimen sine lege*') and 23 ('*Nulla poena sine lege*'), ICC Statute;
c. Article 22(2) of the ICC Statute, regarding the principle of *in dubio pro reo*;
d. Paragraph 2 of Article 24 ('Non-retroactivity *ratione personae*') of the ICC Statute.

189. The same problem can be found in several draft international instruments. E.g.:

a. Articles 3 and 4 of the 1990 UN General Assembly so-called Model Treaty on Extradition.[335]
b. Paragraph 1 of Principle 9 ('*Non Bis In Idem*/Double Jeopardy') of the Princeton Principles on Universal Jurisdiction,[336] developed by the Princeton Project on Universal Jurisdiction, a private initiative of scholars and other jurists. The commentary to such Principle reads:[337]

> There was no objection among the participants as to desirability of such safeguards. Several of the participants, however, questioned whether the prohibition on double jeopardy—*non bis in idem*—was a recognized principle of international law. Under regional human rights agreements, *non bis in idem* has been interpreted to apply within a state, but not between states. It was noted, however, that the importance of the doctrine of *non bis in idem* is recognized in almost all legal systems: it qualifies as a general principle of law and, as such, could be said to apply under international law.

---

[331] Nassau, 23 May 1992, OASTS No. 75.
[332] Algiers, 14 July 1999, 2219 UNTS 179.
[333] Washington, 31 March 2003, UKTS No. 13 (2007), Cm 7146.
[334] Brussels, 30 November 2009, OJ L 39/20, 12.2.2010.
[335] UNGA res. 45/116, 14 December 1990, para. 1. The UN Model Treaty is annexed to the resolution.
[336] Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* (2001).
[337] Id., page 54.

c. In its resolution entitled 'International crimes and domestic criminal law' adopted at the XIV[th] International Congress on Penal Law (Vienna, 1989), the International Association for Penal Law (*Association Internationale de Droit Pénal* or AIDP) stated that 'multiple prosecutions before domestic courts of different states for the same offence should be avoided by international recognition of the principle *ne bis in idem*'.[338] At the XVI[th] International Congress, in a resolution entitled 'International Criminal Law', the AIDP took the view that '[t]he principle of *ne bis in idem* should be regarded as a human right that is also applicable on the international or transnational level'.[339] Finally, at the XVII[th] International Congress, the AIDP adopted a resolution entitled 'Concurrent National and International Criminal Jurisdiction and the Principle "*Ne bis in idem*"'.[340]

II.2.b.ii International instruments establishing national courts

190. Pursuant to its Regulation 2000/15 of 6 June 2000, the United Nations Transitional Authority in East Timor (UNTAET) established panels within the District Court in Dili with exclusive jurisdiction over the offences of genocide, war crimes, crimes against humanity, murder, sexual offences and torture (in many cases, the wording is similar to the ICC Statute).[341] It contains references to several general principles of criminal law but, once again, is not clear to what extent domestic principles where considered:

a. Section 11 ('*Ne bis in idem*');
b. Sections 12 ('*Nullum crimen sine lege*') and 13 ('*Nulla poena sine lege*');
c. The second sentence of Section 22.2 ('*in dubio pro reo*');
d. Paragraph 2 of Article 3 ('Applicable law');

II.2.b.iii Discussion

191. It is not obvious that the various principles relied on in the above contexts are always or, for that matter, ever relied on specifically in their putative quality as 'general principles of law recognized by civilized nations' within the meaning of article 38(1)(d) of the ICJ Statute – still less as general principles of domestic law as such. When it comes to the unadorned provisions of treaties and other international instruments, there is no explicit indication of why a particular principle has been incorporated in the text. As for those instances in which a commentary or some other discursive text is available, the indications are ambivalent. Reference is commonly made to terms like 'general principle', but the meaning remains unstated.

---

[338] XIVth International Congress on Penal Law (Vienna, 1989), 'International crimes and domestic criminal law', part II.5, in J. L. de la Cuesta (ed.), *Resolutions of the Congresses of the International Association of Penal Law (1926–2004)*, Éditions érès, 2009, 146.

[339] XVIth International Congress on Penal Law (Budapest, 1999), 'International Criminal Law', part B.4, in id., 183.

[340] XVIIth International Congress on Penal Law (Beijing, 2004), 'Concurrent National and International Criminal Jurisdiction and the Principle "*Ne bis in idem*"', part II, in id., 203.

[341] See UNTAET Regulation 2000/15 on the Establishment Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, s. 1.

192. Moreover, and more significantly, the confounding factor in any analysis in this regard is that two major principles —*nullum crimen sine lege* and *ne bis in idem*—are also international human rights guarantees, as expressly recalled in the relevant commentaries and similar documents. As such, it would be more likely than not that the aforementioned principles are being relied on in this more specific and more overtly normative quality of international human rights guarantees, rather than in their arguable quality as general principles of criminal law.

193. The method (for want of a better word) of reliance on general principles of law in the context of international criminal law is significantly different from the method of such reliance in other fields of public international law. Reliance in other fields of public international law is traditionally by way of analogy between the position of natural and legal persons under domestic private law and the position of states under public international law. A degree of modification of the relevant principles is required for them to fit within the interstate environment. In the criminal context, however, no recourse to analogy is needed. Under both national and international criminal law, the subject-matter of the relevant rules is the repression of punishable conduct committed by individuals; as such, principles pertinent in the domestic legal sphere can be more directly translated to the international one. That being said, questions always remain as to how these principles ought to apply within a system of overlapping competences (i.e. overlap amongst respective national jurisdictions, amongst respective international jurisdictions, as well as between national and international jurisdictions), and within a system where the relevant rules may apply only as amongst States parties to a particular treaty.

194. The role of reliance on general principles of law in the development of international criminal law is significantly different in the context of prospective law-making via treaties and similar international instruments than in the context of the essentially retrospective exercise that is adjudication. In the prospective law-making context, reliance on general principles does not perform a gap-filling function. Rather, general principles serve merely as the inspiration for positive rules, in the same way elementary notions of justice or specific international human rights standards may do. In this context, general principles signal desirable policy—policy which may eventually be embodied in a binding legal form.

195. There are no specific problems implicated in the reliance on general principles of law in the context of prospective law-making in the field of international criminal law. In most instances, it comes down to a simple policy choice by the drafters as to whether and how the principle in question is to be reflected. This is often as much a question of competing views on the precise content of the general principle in the first place as it is of its appropriate translation to the international plane. Specific principles may pose specific challenges, but these are not challenges inherent in the reliance on such principles for the prospective development of international criminal law.

II.2.c Financial/Trade[342]

196. Domestic law principles are also used to develop new international/transnational rules[343] in fields where domestic legal systems have gathered extensive experience and where an international regulation is needed; in particular in the financial/trade area (intellectual property,[344] financial regulation, etc.). The chances of general acceptance by States are greater if established domestic practices support the content of the international rule. In a 1992 ILA Resolution, the term 'transnational law' is equated, among other things, to 'general principles of law and principles common to several jurisdictions' and juxtaposed to particular national law. However, in this context the approach appears to be more of looking for the lowest common denominator or the recognized best practices among domestic legal systems. As a consequence, the role and weight of each domestic legal system may vary considerably depending on the subject matter.

197. Some relevant examples would be:

– the OECD Anti-Bribery Convention,[345] which is the result of a comparative legal analysis of a domestic institution to address an international problem;
– the UNCTAD's Principles on Promoting Responsible sovereign Lending and Borrowing.[346] The project, launched in 2009, aimed to develop a set of principles to establish internationally recognized principles that promote and reinforce responsible sovereign lending and borrowing practices. Those principles (the result of collaborative effort involving experts from the academia, civil society and financial institutions, as well as governments) relied on existing domestic legal concepts (such as insolvency) and agency patterns, while still going beyond a mere codification of existing practice (which is rarely consistent).[347]

II.2.d Global Administrative Law[348]

198. Domestic public law principles are also progressively implemented at the international level in particular following the institutionalization of international relations and the growing powers of international organizations. International institutions have an incentive to comply with domestic standards if non-compliance induces a risk that their

[342] Based on the analysis provided by Régis Bismuth and Michael Waibel. For additional references, see C. Brummer, *Soft law and the global financial system: rule making in the 21st century*, CUP, 2012; T. Büthe & W. Mattli, *The new global rulers: the privatization of regulation in the world economy*, Princeton University Press, 2011.

[343] On transnational rules, see P.C. Jessup, *Transnational Law*, Yale University Press, 1956; D.F. Vagts and H.J. Steiner, *Transnational Legal Problems*, The foundation Press, 1976; O. Dilling, M. Herberg and G. Winter, Transnational Administrative Rule-Making, Hart Publishing, 2011.

[344] See the current debate on the intersection of patent and international investment law in *Eli Lilly and Company v. Canada* (ICSID Case No. UNCT/14/2).

[345] http://www.oecd.org/corruption/oecdantibriberyconvention.htm

[346] http://unctad.org/en/Docs/gdsddf2011misc1_en.pdf

[347] For critical study on whether the Principles reflect existing or emerging general principles of law, guiding principles recognized in domestic jurisdictions, emerging principles, or mere structural principles, see M. Goldmann, "Responsible Sovereign Lending and Borrowing: The View from Domestic Jurisdictions", 2012, available at http://unctad.org/en/PublicationsLibrary/gdsddf2012misc3_en.pdf

[348] Based on the analysis provided by Régis Bismuth and Diana Louise.

decisions might be challenged or ineffective at the domestic level. An illustration of such a risk refers to the implementation of UN Security Council sanctions in Europe and their subsequent challenges before European courts because of due process deficiencies.[349] Therefore, particularly in relation to certain international standard-setting processes, international institutions that have increased the transparency of their functioning tend to implement administrative consultation procedures similar to those existing at the domestic level.

199. This 'Global Administrative Law' system (in the context of global governance) differs from what traditionally was considered as 'international administrative law' (dealing with the internal law of international organisations, mainly in relation to employment relationships).[350] The structure of this growing field has developed an irregular shape. While domestic experiences of public authority were used as a model, the relevance of domestic principles is not absolute. As argued by Von Bogdandy, '[t]here is a presumption that an established principle of domestic public authority raises an issue to which the law of an international institution should provide a principled answer, which, however, in most cases will differ from that given in domestic legal orders.'[351]

200. As an example, the operation of a pluralist model in the governance of international trade can be traced in the regulation of genetically modified organisms (GMO). The regulation provides how accountability mechanisms in global administrative law differs from these of domestic settings. The United States adopted a 'permissive approach' which opposes restrictions on the production unless there are scientifically proven risks for human health. Meanwhile, Europe adopted a 'precautionary' approach insisting restriction in production because of uncertainty and potential serious risk. Nevertheless, those two approaches co-exist and only conflict in trade-related institutions.[352] However, there is no overarching, hierarchically ordered scheme as would exist in domestic administrative law systems.

201. The constraints weighing on international institutions involved in standard-setting processes in the field of international financial regulation have driven them to gradually implement domestic administrative rules and principles at the international level. As an example, the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissions (IOSCO) and the International Associations of Insurance Supervisors (IAIS)[353] all decided to follow UK and US administrative procedures that are considered as the most stringent in this area. Arguably, they have done so because there is an inherent incentive to comply with the strictest procedures in order to

---

[349] Case C–402/05 P and C–415/05, P. *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I–6351; *Nada v. Switzerland*, App no. 10593/08 (ECtHR judgment of 12 Sept. 2012); *Al-Dulimi and Montana Management Inc v. Switzerland*, App no 5809/08 (ECtHR Judgment of 26 November 2013).

[350] See "Symposium: Global Governance and Global Administrative Law in the International Legal Order" 17 EJIL (2006) 1.

[351] A. von Bogdandy, "General Principles of International Public Authority: Sketching a Research Field", 9-11 German Law Journal (2008), 1917-1918.

[352] See *EC — Approval and Marketing of Biotech Products.*

[353] For a general overview of these institutions, see, R. Bismuth, La Coopérat*ion Internationale des Autorités de Régulation du Secteur Financier et le Droit International Public*, Bruylant 2011.

ensure the effectiveness and a smooth implementation of their international standards at the national level.

III. PROVISIONAL CONCLUSIONS

202. As a result of the empirical study of the current practice, the Study Group reached the following provisional, tentative conclusions:

- *Clear reference*

203. It will often be helpful if decisions of the relevant decision-maker(s) make it clear that it is referring to the general principles of domestic law, avoiding ambiguities. An example of such ambiguity could be found in the *Klöckner* case, as pointed out by the *ad hoc* committee on annulment:

> Furthermore, the reference to "other national codes which we know of," to the "particularly appropriate" character of the rule "in more complex international ventures, such as the present one" (p. 105) and to the particular importance that "universal requirements of frankness and loyalty … be applied in case such as this one" *seem to indicate* that the Tribunal *may have wanted to base, or thought it was basing, its decision on* the, general principles of law recognized by civilized nations, as that term is used in Article 38(3) of the Statute of the International Court of Justice.[354] (emphasis added)

- *How to identify the principles*

204. The comparative method could be used. In doing so, however, the interpretative evolution of the principles should also be considered. One of the primary comparative law methods is functionalism:[355] comparisons should focus on legal institutions with similar functions within the legal system (regardless of their external characteristics, the compared legal institutions are designed to address similar legal problems). More importantly, all the reasoning process should be summarised in the decision, including supporting evidence, in order to facilitate a later review.

> It is impossible to answer this question by reading the Award, which contains no reference whatsoever to legislative texts, to judgments, or to scholarly opinions. In this respect the contrast is striking between Section 2 (on the "duty of full disclosure") and Section 3 (on the *exceptio non adimpleti contractus*, pp. 109-114 and pp. 118, 124, 126, etc). Section 3 contains a great number of references to scholarly opinion (doctrine) as well as, directly or indirectly, to case law (jurisprudence). One could therefore assume that in the case of Section 2, regarding the duty of frankness, the arbitrators either began a similar search for authorities but found it unproductive or, more likely, thought that a search for positive law was unnecessary.[356]

205. In addition, the identified general principle should fit into the international context and be able to address the specific legal problem at international level. As an example, in the *Status of South West Africa*, the ICJ stated that

---

[354] *Klöckner v. Cameroon*, Decision on Annulment, 3.5.1985, ICSID Case no. Arb/81/2, para 69.

[355] See generally, R. Michaels, "The Functionalist Method of Comparative Law", in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (2006), 339.

[356] See *Klöckner*, *supra* note 357, at 71.

> The mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object […] It is therefore, not possible to draw any conclusion by analogy form the notions of mandate in national law or from any other legal conception of that law.[357]

206. International courts and tribunals seem to rely quite often on previous decisions of other international courts and tribunals that have declared the existence of a general principle of law, without discussing such categorization and without further analysis. Some arbitral tribunals had also referred (of their own motion or at the request of the parties) to some useful compilations of principles of contractual obligations, such as the UNIDROIT Principles of International Commercial Contracts. While previous decisions and internationally recognised compilations could be useful as supporting evidence, it should not excuse the absence proper discussion by the adjudicating body explaining how they reach to the confirmation of the general principle and its fitness to the specific legal problem.

- *The problem of their universality*

207. It could be argued that the search of unanimity is a utopia. The analysis must be extensive (widespread) and representative, without necessarily being universal. The general principles should reflect the main forms of civilization and of the principal legal systems of the world (a general principle could be deemed to exist if it is recognized by a prevailing - or at least a significant - number of nations within each legal culture). This dichotomy – required reflection of the main forms of civilizations and legal systems - influenced article 9 of the ICJ Statute and was recognised by Judge Weeramantry ('the integrated values of any civilization are the source from which its legal concepts derive […] international law would require a worldwide recognition of those values')[358] and Judge Jennings ('[…] important to stress the imperative need to develop international law to comprehend within itself the rich diversity of cultures, civilizations and legal traditions[…]').[359]

208. Therefore, it is also not enough to 'identify' a general principle among the main legal systems if there is not enough civilizational representation, e.g. a general principle shared by Civil Law countries in Europe, should also be identified in other Civil Law countries located in different geographical areas and belonging to different civilizations.

209. While Article 38(1)(c) literally refers to principles as such, not to their expression in specific legal rules, in 1984 the ICJ stated that in its opinion the terms 'rules' and 'principles' can be considered as 'a dual expression to convey one and the same idea.'[360] Therefore, it could be argued that if there is a specific legal rule generally accepted, then there is probably also some common principle behind it. The particular common legal rule could thus be seen as an expression of the common principle.

---

[357] *International Status of South-West Africa*, Advisory Opinion, I.C.J. Rep 1950, p. 128, at 132.

[358] *Case Concerning the Gabcikovo-Nagymoros Project*, Order of 5 February 1997, 1997 ICJ Reports, Separate Opinion of Judge Weeramantry, p. 245.

[359] R.Y. Jennings, "Universal International Law in a Multicultural World", in *International Law and the Grotium Heritage*, TMC Asser Institute, The Hague, 1985, 195.

[360] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States of America), Judgment of 12 October 1984, ICJ Reports 1984, 246, at 288-290, para.79

210. Similar to the existence of regional customary law, there could also be considered the existence of regional general principles. As an example, the European Court of Justice often refers to principles found in the domestic legal systems of its Member States.

- *How the principles should be applied*

211. There is a general understanding that the principles should sometimes be adapted since the conditions of the international legal system sometimes differ from those prevailing in the domestic systems. As suggested by Judge McNair in his much-quoted separate opinion to the International Status of South West Africa Advisory Opinion:

> the way in which international law borrows from this source is not by importing private law institutions "lock, stock and barrel," ready made and fully equipped with a set of rules [...] the true view of the duty of international tribunals [...] is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.[361]

212. In addition, general principles of law - unless and until reflected in a specific rule of customary international law convincingly evidenced by sufficient and sufficiently representative state practice and *opinio juris* - remain general principles of law. They are not, once identified, transmuted into rules of customary international law.

[361] *Supra* note 360, p. 146, at p. 148.

STUDY GROUP ON THE USE OF DOMESTIC LAW PRINCIPLES FOR THE DEVELOPMENT OF INTERNATIONAL LAW

WORKING SESSION

Wednesday, 10 August 2016, 2.00pm

Chair: Professor André Nollkaemper (Netherlands)

The Chair welcomed attendees and introduced the panel, composed of the Rapporteur (Dr Alejandro Carballo) and three other members of the Study Group (Ms Diana Constantinidou, Dr Hilly Moodrick-Even Khen and Mr Arnold Pronto.

The Chair marked the borders of the work of the Study Group by stating that, while there were sometimes general principles of law that were used as analogies in the international law space, the aim of the Study Group was to articulate the use of domestic principles in the development of international law. There was an interaction between domestic law and international law, to the extent that international law had sometimes borrowed domestic legal principles such as the principle of responsibility, force majeure and good faith. Sometimes, these principles were used as general principles and at other times as analogies. That said, the focus of the Study Group was to critically analyse the use of domestic principles in the development of international law. During the session, the panel would present on aspects of the report of the Study Group's work. The Chair called on the Rapporteur to introduce the Study Group, the background to its work, and the methodology that the Study Group employed.

Dr Alejandro Carballo (Spain) noted that the purpose of the study group was to survey and understand if still nowadays domestic principles were identified and applied by international adjudicating bodies and law making bodies, and if so, how it was done. The Study Group focused on domestic legal principles and conducted a survey to ascertain what was going on in practice, focussing on what principles were being used, and how they were being used by international adjudicating and law making bodies. The Study Group also aimed to reflect the current use of domestic principles and their influence in developing new rules of international law with the view to develop some general rules or guidelines in the use of domestic principles. The result of these guidelines would be to have a more uniform and predictable application of general principles derived from domestic law. With regard to terminology, the Study Group had avoided the use of the term "private principles" to define their work since the study also covers principles derived from the public domain of domestic legislation.

The composition of the Study Group was broad and reflected geographical diversity. It had members from South Africa, China, Argentina, Israel, and the United Kingdom, among others. It also had members with diverse backgrounds and expertise and included people who viewed the subject of the Study Group in different ways. He traced the working journey of the Study Group, which held open sessions in The Hague in 2010, and in Sofia in 2012, as well as other working sessions in Cambridge in 2012 and Madrid in 2013. The group prepared a preliminary report stating what the current situation is, the general problems it observed, and how domestic principles were used in specific areas like the judgments of the ICJ, in international criminal law, and international law making. The Rapporteur noted that the number of members of the group, though diverse, was

small and the expertise was limited so they could not address all areas of international law. Still the group managed to cover those areas that were considered more relevant for the study. The group therefore looked forward in the discussion segment to receive criticisms, comments and suggestions about what the group was missing in its work and what could be improved.

The Chair explained that the conclusions of the report, which were very interesting, would be shared and discussed after the presentations. He requested that questions and comments be limited to the mandate or working methods of the Study Group.

Ms Mariija Đorđeska (Slovenia) asked the Study Group to elaborate on the methodology it used for its study since there were only two paragraphs in the report that discussed it. She was concerned that the Study Group relied on the individual opinion of Judge Tanaka of the ICJ in the *South West Africa Case* determining its methodology.

Dr Carballo responded that in different sections of the report, different methodologies are used. Each section explained the methodology used, while the introduction contain a simple overview. In particular, he explained that a different methodology was used in respect of international bodies that focused on international adjudication and those involved in the law-making phase at international level. Reference to Judge Tanaka's dissenting opinion was just to outline why the group did not focus only on "private" principles but also considered "public" principles derived from domestic legislations.

Mr Arnold Pronto (US) explained that the Study Group had to conceptualise its work and tighten its scope, focusing primarily on domestic principles. There were a series of forks in the road during the research. The focus of the Study Group was domestic law principles, however there was a difference of approach in typology but a necessity in choosing a path between general principles of international law and principles of law. It was clear from the presentations that there were different views on this and there was an intensive debate about whether they were actually different. The work of the Study Group could be likened to throwing the net, catching some fish or the information, and organising all of the information obtained. The Study Group discovered that the same typology could not be used to analyse all the information that was gathered, hence the use of different methodologies to analyse the information gathered.

The Chair stated that the Study Group focused on identifying and analysing the use of domestic principles at the adjudication phase and at the law-making phase. It did not look for particular principles, rather it tried to ascertain whether there was an explanation or reasoning behind the use of general principles and the approached that was adopted by the particular body. He introduced Dr Hilly Moodrick-Even Khen to present on the application of domestic principles in international adjudication.

Dr Hilly Moodrick-Even Khen (Israel) began her presentation by noting that she would be examining international law making as well as adjudication.

She emphasised that the international criminal law should be distinguished from other branches of international law when analysing the topic of general principles of law. The difference is that reference to general principles in other fields of law was done by analogy. However, in international criminal law, an approach using analogy was very often not required because the subject matter of the relevant rules of international criminal law

was punishing the conduct of individuals. Thus the principles of domestic criminal law could be transposed into international criminal law.

Another difference could also be seen from the approach adopted by international tribunals and international courts. There was a tendency for these international tribunals and courts not to extrapolate principles from domestic legal systems, but from the rich corpus of international criminal law. The courts had seized the opportunity to craft those legal principles. The outcome was that most of the general principles were extrapolated from other international courts and tribunals. Hybrid courts had gone even further. These courts, which had mixed characteristics and features of domestic and international law, included Bosnia and Herzegovina War Crimes Chamber (BWCC), the Special Panel for Serious Crimes in the District Court of Dili (East Timor Court- SPSC), the Extraordinary Chamber in the Court of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL). There was a tendency for these courts to use similar approaches and go further to refer to the jurisprudence of the International Criminal Court. The hybrid courts were neglecting the idea that general principles should come from domestic courts because they were striving for legitimacy. Dr Khen noted that the Study Group discovered that there were a lot of instruments in international law and human rights law that contained general principles of law, for example, the principle of *nullum crimen sine lege* in international criminal law.

With regard to lawmaking in international law, she noted that there were many instruments in international law that contained these general principles and that emphasised the need to apply domestic principles.

Ms Đorđeska asked how it was possible to look at domestic principles if the Study Group was considering, as a base of the survey, the jurisprudence of international courts and tribunals.

Dr Rob McLaughlin (Australia) shared his understanding of the methodology to be a cross- pollination between the international criminal courts and tribunals. But what about the initially used general principles drawn from domestic legal systems at the stage of setting up the international criminal law? International Law did not have a strong tradition of criminal law concepts relevant to individual criminal responsibility. The ICC Statute and other instruments of international criminal law had to draw on domestic criminal law principles to set up the basics. Examples included the concepts of individual self-defence, of physical and fault elements in criminal offences, and the defence of duress.

Dr Moodrick-Even Khen (Israel) noted that the focus of the Study Group was on general principles of law, not on domestic law *simpliciter*. In international criminal law, one could not really talk about domestic principles. In international criminal law, domestic principles might be directly transposed into international law. There were some domestic principles, for instance the principle of "conviction beyond reasonable doubt", which might have different interpretations and application in common law systems, in a manner different from how it was applied in the civil law systems. For this reason, the Study Group preferred to focus on general principles instead of on domestic law principles. In this regard, she referred to the practice of international criminal tribunals detailed in her earlier intervention.

The Chair invited Mr Pronto to present on the lawmaking aspects of the report.

Mr Pronto stated that the purpose of the Study Group was not to find a uniform approach to the question but rather to match the different views and draw conclusions from what already existed. It was clear that there were many differences of opinion regarding the role of general principles and the role of domestic law principles. Thus, the Study Group agreed to respect diversity.

He noted that the part of the report devoted to lawmaking focused on the work of the ILC, particularly the influence of "private law principles" (domestic law) on its lawmaking process. He emphasised that this part of the report did not involve a study of general principles but rather a study of domestic principles. The idea here was that there had been some influence of private law sources on the work of the ILC. It was a short paper that attempted to find out if there were references to private law in the work of the ILC. The findings of the study was that it was very rare to find any references to private law principles in the working of the ILC. ILC commentaries on its texts tended to forget about the origin of the idea and described the concept in terms of international law.

Mr Pronto said he looked at the "background views" of the ILC members and whether or not there was any evidence of reliance on private law in the eventual outcome of the international law decisions. He emphasised that he could not make a definitive statement at this stage that the ILC depended on domestic law principles. As a matter of methodology, Mr Pronto specified that he was reluctant to draw general conclusions from individual opinions because this was dangerous. From the research done, he stated that he could not say that the ILC depended on domestic law principles and as a result he used an inductive approach to examine the work of the ILC.

In terms of typology, the word "private law" was used as the search word because it produced the most hits. This was not private law in the Roman Law sense.

Mr Pronto listed several examples from different texts where the ILC referred to private law in its work. He noted that, going through the typology and the examples, there was an overlap between the general views on private law sources as well as the applicability of private law principles in international law, which led to favourable and sometimes unfavourable outcomes. He noted that the words "private law" had a special meaning and he used private law in that sense throughout this report. Delving further into the typology, he stated that there were general statements which were made by members of the ILC which were either favourable or unfavourable to the applicability and use of domestic law principles in international law. He referred to some of these statements, which were extracted in the report.

The idea was to try to flesh out the various views in one body in relation to private law. The Study Group tried to focus on principles and to identify them, but it was not clear whether what was being studied was a rule or a principle. The rules in each country were different but principles could be the same. It was difficult to sort out the difference.

Mr Dipak Bhattacharyya (India) stated that if the meaning of "private law", "domestic law principles" and "international law" was referring to private international law outside the purview of international law, then private law principles underlying the domestic law principles should be dealt with under domestic law principles. For example, the domestic law principles of matrimonial law in India did not envisage "irrevocable breakdown of marriage" as a ground of divorce, whereas it was accepted as a ground of divorce. His

intervention was to request that this should be examined in the background of the topic of discussion.

Ms Đorđeska emphasised that when referring to private international law, courts or bodies might also be referring to customary international law not only to general principles.

She further questioned the relevance of looking at what the ILC members said rather than looking at the drafting of the policy statutes where the general principles were first used as a source of international law. The reason for drawing attention to this was because the title of the Study Group was domestic principles and their contribution to the development of international law. If one did not have a definition of what domestic principles were, how could the Study Group see whether they had developed the law or not?

Mr Pronto responded to these interventions by flagging that the ILC had a mandate to work in private international law but it had never done so. It had only worked in public international law. Therefore, the Study Group did not look at private international law. Further, for clarification, the purpose of the Study Group was not an attempt to see how specific national rules had influenced international law. It was a study on how domestic principles had influenced international law. If it was to focus on national rules, the mandate would have been too broad. The scope of the study was narrowed to domestic principles. The idea was to take an inductive approach and gather different opinions and find a definition through what existed in practice.

With regards to customary international law, Mr Pronto said that it was possible for private law principles to influence the existence of customary law rules. This question, however, was another layer of analysis which was most certainly interesting but was not something which the Study Group had the capacity to focus on or assert.

The Chair introduced Ms Constantinidou to present on the part of the report relating to the findings of international administrative tribunals and global administrative law.

Ms Diana Constantinidou (Cyprus) informed attendees that one of the questions that had engaged the attention of the Study Group was whether domestic public law principles were being implemented at the international level. It was clear that global administrative law was not yet a very tangible area.

Ms Constantinidou introduced the International Labour Organisation Administrative Tribunal. Over time, the ILOAT had applied general principles of law without reference to Article 38 of the ICJ Statute. There was therefore a need to fill the gap in the absence of relevant principles in the internal regulations/statutes of the organisation, which stipulated the application of international law. In the absence of relevant principles, then the general principles would apply. However, if there was a conflict between the existing internal rules and general principles, they would attempt to interpret it, and it was likely then that general principles would prevail.

Ms Constantinidou concluded her presentation by asking attendees for examples of general principles and enquiring where they came from. For her part, Ms Constantinidou considered that a survey of practice indicated that general principles came from domestic administrative law or principles of other area of domestic law, such as force majeure, unjust enrichment and estoppel.

Ms Đorđeska made three points. First, she queried whether this part of the report was talking about domestic principles or about general principles of law. The use of the term "principles" in the report was not quite clear. Secondly, courts usually did not refer to Art 38 of the ICJ Statute when citing treaties and customary international law. It should therefore not be surprising that administrative tribunals were not referring to it in the context of general principles. Ms Đorđeska suggested that this could clarify exactly whether the report sought to portray in making the observation about the lack of reference to Art 38. Thirdly, in connection with the principle of estoppel, Ms Đorđeska queried whether Ms Constantinidou was using the same methodology that Dr Carballo explained earlier, noting that estoppel was not necessarily referred to as a principle in ICJ jurisprudence. She expressed concern that the methodological approach within the report was not consistent.

Dr McLaughlin queried whether there was any evidence of the whole concept of administrative law being based around domestic law concepts of due process, or whether there was international law that underpinned it.

Ms Constantinidou responded to these interventions by stating that the report presented was not the final work of the Study Group and that constructive criticism was welcome. With regards to terminology, nothing was crystallised and there was nothing that could be categorised as a definition.

Dr Carballo emphasised again that the study group had not made a comprehensive overview of every single instance where a body used general principles even without referring clearly to them. The group mainly looked generally at cases where institutions referred somehow to principles/general principles (or used similar formulations). Only in some cases, it was possible to identify additional situations where the institution invoked (or pretended to invoked) a general principle without clearly stating so. The key question was whether the reference to general principles was consistent and whether there was a systematic approach to the use of general principles.

Mr Pronto observed that the research so far might not be comprehensive but it was clear that the concept varied. The Study Group had included many examples of this in its report to illustrate this. It was discernible from the research that the relevant bodies, such as the ILC, adopted a much more fluid, dynamic approach. They did not characterise the use of the term "principle", and it was hard to learn from the record whether they were referring to domestic principles. He opined that they might be tactically avoiding a direct reference to domestic principles lest their audience not be receptive to what they were saying. On the issue of estoppel, Mr Pronto noted that the Study Group was not saying that it was a principle; rather, they were giving examples of domestic principles used. The Study Group had emphasised the descriptive element of the work of the ILC and tried not to impose their own views so that they did not miss a lot of "stuff".

Ms Constantinidou added that the issue of a definition was whether in practice there was a need to have a definition. The Study Group had noted that in practice that was important, and would take these interventions into consideration in carrying out its further research.

The Chair requested Dr Carballo to state the conclusions of the Study Group so far.

Dr Carballo noted that the conclusions could be the basis for the final report of the group. These were very broad, general conclusions. First, decisions of the relevant

decision-maker(s) should make it clear that there is a reference to the general principles of domestic law, avoiding ambiguities. Secondly, in identifying common principles, we should not focus on the names used but look closely at the function that the particular principle invoked is performing, and whether they are used in a common or similar manner in other jurisdictions. More importantly, all the reasoning process should be summarised in the decision, including supporting evidence, in order to facilitate a later review. While previous decisions and internationally recognised compilations could be useful as supporting evidence, it should not excuse the absence of proper discussion by the adjudicating body. Thirdly, there was a need to ask the question whether these potential principles fit into the international law context and are able to address the specific legal problem at international level. There was no uniform approach to the use of principles. It could be argued that the search of unanimity is a utopia. The analysis must be extensive (widespread) and representative, without necessarily being universal. The general principles should reflect the main forms of civilization and of the principal legal systems of the world. There was also the need to consider the probability of having regional principles. Finally, he noted that there was a general understanding that the principles should sometimes be adapted since the conditions of the international legal system sometimes differ from those prevailing in the domestic systems. In addition, general principles of law - unless and until reflected in a specific rule of customary international law convincingly evidenced by sufficient and sufficiently representative state practice and *opinio juris* - remain general principles of law. They were not, once identified, transmuted into rules of customary international law.

The Chair invited opened the floor for further interventions.

Dr Pauline Collins (Australia) commented that Dr Carballo mentioned taking domestic principles and *applying* them in international law. She stated that the focus of the group should be on how domestic principles *developed* international law, not just whether or not they were applied.

Mr Bhattacharyya encouraged the entire topic to be viewed from a holistic approach. The recommendations of the Study Group should be only on the consideration of the interests of justice, defined as per the views of the sample who were working on it.

Ms Đorđeska asked the Study Group to explain the relationship between the sources of international law. She stated that general principles of law could also be part of customary international law. This was in response to Dr Carballo's remark that a general principle of customary international law could be either customary international law or a general principle. In her view, the ICJ cited general principles which were not necessarily found in domestic law. That meant that the research of the Study Group was not representative of the entirety of the third source of international law. In her two and a half years of research, she had applied the inductive method and found a definition of general principles by surveying the entire jurisprudence of the ICJ and the Permanent Court of International Justice, as well as decisions of the ICTY. It was therefore possible to have greater clarity and it was not as complicated as it was made out by the panel.

Dr Gentian Zyberi (Albania) posed three questions. The first was whether, according to the research done by the panel, the use of domestic legal principles was more an individual or an institutionally sanctioned choice. Some lawyers seemed to use domestic legal principles as a matter of course (comparative approach); some used them in extreme

situations (to avoid a *non liquet*); some contended that private law was not suitable for use in developing international law. Secondly, he asked whether it was more substantive principles or procedural principles that were being taken up from the domestic to the international level. Thirdly, he asked whether domestic legal principles were "meta" general principles of international law.

Dr Carballo clarified the point about general principles and customary law and stated that what he meant was that when you find a general principle, it just should not be directly equated to be customary international law. Of course in some cases a general principle could also reflect customary law, but not automatically. He also noted in response to other questions that the study group focused on how domestic principles are identified and applied, and clearly, there is a difference between international law making and adjudication. He stressed that the group did not focus on principles derived from international law but rather on principles coming from domestic systems. He added that most of the principles invoked were procedural though there were still some of substantive nature.

Mr Pronto stated that, anecdotally, there was a sense that the subject of "principles" was seen or used more in the process of formulating rules of international law. For instance, if there were fifteen people who had spoken about a principle, two of them might have used the term "domestic principles" while thirteen might have completely ignored it.

It might be interesting to look at a sociological study, but the members of the Study Group were not experts in every field. There was a belief that international law had matured to a level that it did not rely on domestic law, or that international law was so technical and detailed that decision makers did not need to turn to the domestic law.

All member of the Study Group wanted to focus on some aspects of the work, so a compromise was struck and the Study Group focused on the breath of the work to be covered rather than the depth. Essentially, each person would have had to write a thesis on each area if the necessary depth was considered for each section. The Study Group might not have done this, and there was a bit of extrapolation going on, but this was by design not by defect. There was enough information and research gathered in order to gather the trends. The Study Group was not able to state that its report was a definitive matrix. This was reflective of a broad trends and the aim was to present a broader understanding.

Ms Đorđeska made her final comment, which drew the session to a close. She clarified Dr Carballo's statement on her comment regarding customary law. She stated that a rule which was a general principle could also be part of customary international law simultaneously, whereas the report stated (at para 212) that a norm could either be a general principle or customary international law.

Reporters: SarahJane Frith and Ernest Yaw Ako

STUDY GROUP ON THE CONDUCT OF HOSTILITIES AND INTERNATIONAL HUMANITARIAN LAW

WORKING SESSION

Thursday, 11 August 2016, 9.00am

Chair: Professor Noam Lubell (UK)

The Chair welcomed attendees and invited Dr Robert Heinsch (CoRapporteur) to present an overview of the recent work of the Study Group.

Dr Robert Heinsch (Germany) explained that, at the Sofia Conference in 2012, the Study Group had identified three main areas of interest in modern warfare:

- the relationship between international human rights law and international humanitarian law in the conduct of military operations;
- the use of new technologies, drones, lethal weapon systems, cyber warfare; and
- the general principles in the conduct of hostilities (i.e., Hague Law).

A 2013 workshop of the Study Group at Leiden University (Netherlands) mapped the field and highlighted various questions. 25 colleagues and expert guests participated in the workshop, with each colleague covering specifically the areas of interest identified in Sofia.

At the Washington Conference in 2014, the Study Group presented a report that included feed-back from participants. A subsequent twoday workshop took place in Berlin (Germany) where participants presented papers with the aim of finding solutions to the challenges previously identified. The main topics included:

- temporal and geographical scope of application of the law of armed conflict;
- the relationship between IHL and international human rights law; and
- general principles of the conduct of hostilities.

At the Berlin workshop, the Study Group decided to narrow the focus to one of those areas. Given the work of other ILA Committees and expert processes, the most valuable contribution would be in the area of the classic principles of the conduct of hostilities, which had not been done in a comparative way for a long time. Later on, the Study Group organised a meeting at the University of Oslo (Norway), where attendees were divided into three groups to discuss on the topics of military objectives, proportionality and precautions.Representatives from the military and the International Committee of the Red Cross (ICRC) participated and all attendees had the chance to comment on the papers presented.

A detailed report of the work of the Study Group should now be ready for publication within the next two or three months.

Professor Heinsch explained that in general it had been discussed over the last four years whether new approaches were needed as the type of conflict had changed while the written rules had not always been adapted; rules which originally were designed to regulate classic conflict situation between States, whiletoday, we are facing new actors,

new technologies, and the "war on terror". There were also new concerns relating to law enforcement involvement and human rights issues. However, it is important to stress that overall the study group came to the concusion that notwithstanding the challenges posed by contemporary types of conflicts, IHL is applicable and capable of adequately addressing these challenges.

Professor Robin Geiss (Geiss) said that the program of the Study Group was ambitious in scope but modest because it had not aimed to present a set of rules agreed to by all members of the group but rather a clear assessment of contemporary challenges, the status quo of the legal debate and options to move forward.

There were a number of manuals touching upon the conduct of hostilities all having standing and reason. However, the total sum of manuals intending to clarify the law added to the complexity of the law. So the Study Group did not aim to add another version of consensus. Instead, the idea was to identify areas to move forward after interacting with the various players. The Study Group concluded that the issue of precautions was under-researched and was an area where added value lay.

Professor Geiss recalled how, during the International Conference of the Red Cross and Red Crescent in December 2015, the ICRC proposed modest compliance projects with regard to detention, which were rejected by States. Ambitious projects regarding the conduct of hostilities would likely have the same fate. In light of this context, the Study Group remained modest in its approach.

Professor Geiss presented some examples of the analysis done by the Study Group with regard to the question of "military objectives". In Art 52 of *Additional Protocol I to the Geneva Conventions* (AP I), the definition of "military objectives" was twofold: (i) contribution to the military objective; and (ii) whether there was a military advantage. Professor Geiss questioned whether these were two different questions or, for practical purposes, whether they were one and the same question. He then asked where the two questions might arise as a different issue. He explained that it would be great to have a two-fold definition as this way there would be greater limits on the use of force. He cited some examples to think about the question: (i) the case of the bombing of a bridge where there was no hostility; (ii) in cyberspace, destroying one server where there was an endless number of servers. In this case, the attack would not necessarily bring a military advantage. The ICRC promoted a two-fold definition. The question was complex. Various considerations came into play, like the purpose of the location or the objective, whether its purpose was defined by its nature or the intrinsic characteristics of the object, or by the use given to the object. Was the object military by nature, or intrinsically military like a war plane?

Professor Geiss mentioned that the *HPCR Manual on International Law Applicable to Air and Missile Warfare* said that there were two subsets to this question: objects could be temporarily military by nature or permanently military by nature. He added that there was the default "use" criteria, i.e., whether the object served a military objective like the use of a bridge by armed forces to cross a river in a military endeavour. The difficulty in this case was that as it referred to future use, it remained a subjective analysis and more questions followed: What evidence served to make the assessment? What would be the standard? Was there a reasonableness test to assess the decisions of the commander?

These were very problematic questions, particularly in the current contexts where civilians were mixed in conflict.

Professor Geiss mentioned current situations adding to the complexity, namely asymmetric warfare, urban violence, and the blurring of civilian and military objectives.

Professor Geiss offered some examples. The first example was a situation in which part of a school was being used as an arms depot. The Study Group found that, if making the distinction was feasible, when the depot was separable, it was possible to look at the specific part of the school rather than the whole school for the purposes of the qualification as a military objective and the proportionality assessment. The second example concerned the use by armed forces of a certain percentage of capacity of the electricity grid. The marginal use of electric wires could turn the object into a military objective but the loss of civilian functionality should be taken into consideration in the proportionality analysis.

Professor Geiss mentioned that the Study Group found the principle of distinction in the realm of cyberspace to be potentially difficult. In cyberspace, an entire area could be turned into a military objective. There was unease about this reflected in the ICRC reports. The ICRC was no longer ruling out new rules to address this reality. Some scholars held the view that data should be considered a military objective, but others believed it to be intangible and beyond the scope of IHL. Data should be protected. If there was a protected person, like a wounded soldier, then the data of that protected person was also protected.

Professor Geiss noted that war sustaining elements did not constitute a military objective. He referred to economic elements or economic actions related to the conflict. With regard to the destruction and seizure of property, if military necessity required, Art 52 AP I was the applicable provision. He clarified that there was no override to Art 52 AP I, and one could not turn to Art 23 of the Hague Regulations.

Professor Geiss proceeded to examine the question of precautions. Precautions, compared to proportionality and distinction, were not much researched. One issue was whether it was feasible to take precautions, if practically possible given military and civilian considerations. When making the assessment, what were the considerations? Did finances play a role? What if, for example, precaution indicated that it was best to use a more sophisticated weapon but it was costly to acquire it?

Professor Geiss referred to Professor Marco Sassòli, who argued that financial considerations should not be considered because they were too broad. But were these not strategic considerations? This was an area of ambiguity which could not be easily resolved. These considerations were dangerous to make.

Professor Geiss then posed the question as to whether one could consider force protection in assessing feasibility of precautionary measures. This was the case when the measures would put military forces at risk. But even if self-protection is a relevant consideration it is only one of the factors to be considered and it cannot automatically override the protection of civilians.

Professor Geiss said that the Study Group considered that precautions could be taught differently in the training of soldiers. Now, they were presented in opposition to the

military objective. It might be of military advantage to avoid hurting civilians to win their hearts and minds. This should be emphasised in the training of troops.

As regards precautions in attack, there was a general obligation to exercise care to spare civilians and there was a requirement to make warnings to keep collateral damage to a minimum. Little emphasis was placed on the first aspect of this obligation which was a mistake. The emphasis was usually placed on the warning aspect of the obligation. Broader security measures should be highlighted during the conduct of hostilities as a whole.

Professor Heinsch discussed the proportionality principle. Here, the Study Group was dealing with attacks that were prohibited even when targeting a military objective, because the collateral damage was anticipated to be excessive in relation to the military advantage. Some actors say that they the proportionality is so complicated that they only can judge disproportionate attack in the moment when they really see it, which illustrated how subjective the test was. The question is nevertheless based on customary and treaty law.

The components of proportionality are as follows:

1. damage to civilians and civilian objects (AP1, Art 51); which is
2. excessive compared to the military advantage anticipated (AP1, Arts 51 and 57).

Professor Heinsch noted that the term "disproportionate" was not the choice of word used in the treaty text but "excessive". There were discussions and disagreement during the negotiations about the use of proportionality. He queried what was to be included in this calculation (e.g., the military advantage anticipated?), including the question of force protection. The different types of conflict were also a consideration and that the incidental loss of civilian lives and damage to civilian objects were part of this analysis. Proportionality referred to damage of a nonmilitary nature. It was necessary to look at the effects of an attack. The opinions given were: (i) strict view – to consider only the direct effects, such as death, physical injury, destruction of the civilian object etc.; and (ii) to include indirect effects which only developed after the attack in the long run. These effects could be equally dramatic for the population, such as water pollution, and the destruction of medical systems. The Study Group did not develop a consensus in this context. Considering that one of the key components of proportionality was the protection of civilians, this was however a crucial element.

Professor Heinsch concluded that foreseeability was necessary to assess the proportionality of the attack, but there was a certain disagreement so far. Even an object which did not qualify as a military object might be taken into account with respect to the proportionality test. But if it was not a military objective, it could not offer a military advantage, and therefore the test could not be applied. The situation was different if the non-military objective could become a military objective in the future.

Professor Heinsch raised the question of other groups of protected persons like medical personnel, soldiers hors de combat, and civilians participating in hostilities. Civilians losing the protection for participating in hostilities would not count as civilians for the purposes of the proportionality test and were therefore not considered as collateral loss.

Professor Heinsch referred to the case of prisoners of war and injury to mental health. There was the suggestion that psychological injury should be taken into account. Not merely psychological trauma, but rather something like terrorising the civilian population. Reference was made to a report published by the New York University on the suffering of civilians caused by drone strikes, their constant fear, and the effects on their mental health.

Professor Heinsch then mentioned the case of human shields. What if a civilian acted voluntarily? If there had been a warning, for example, was the civilian excluded from the proportionality count? The precaution measures might help assess the situation. This was in contrast with the general rule, in Article 52(1) of AP I, that everything that was not a military objective is a civilian object. Therefore, it is rather doubtful whether civilians would lose their protection under the proportionality principle, even when they are seen as (voluntary) human shields. In addition, it was stated that the environment was a civilian object, for example.

Professor Heinsch addressed the issue of excessiveness in the attack. He queried what quantified as excessive, and whether it was the same as disproportionate at a high level. The principle of proportionality was relative, and there were two elements to it, namely injury to civilians, and military advantage. Comparing them was difficult, like comparing apples and oranges. The Study Group agreed that it was not as simple as comparing five civilians against five soldiers. Equal proportionality did not always work. If the soldiers were strategic leaders, an equal count might work, but this was not necessarily the case. Qualitative factors should be taken into account. If there was only very little military advantage, an equal count would not prevail. It was difficult (and maybe dangerous) to list indicators to assist the military.

Professor Heinsch spoke about concrete and direct military advantage. “Substantial and close” might have a higher threshold in the proportionality analysis than the standard when assessing military objectives.

Professor Heinsch said that the majority of the Study Group had concluded that force protection was a factor to be considered in assessing proportionality, but not as an overriding force crashing the protection of civilians. Others wanted to exclude force protection from the equation because the aim of the principle was to protect civilians, and it would be cynical to exclude their protection. Yet the majority was clear that the principle inherently balanced military necessity and the protection of civilians, and force protection would be part of this analysis.

Professor Heinsch added that proportionality applied equally in different types of conflict, and that the sudy group also discussed whether, in law enforcement situations, human rights aspects played a role in the proportionality test.

Professor Heinsch concluded that there remained areas of disagreement alongside other areas of consensus among members of the Study Group after four years of work.

The Chair opened the floor to interventions:

One attendee (US) suggested including the environment in the “use” criteria.

Professor Heinsch replied that the environment was both part of the background and at times the military objective.

Another attendee (Germany) suggested that the Study Group improve the example of the sniper on the hill.

Professor Heinsch replied that the only point of the example was that self-preservation was one (of several) element(s) in the equation. It was difficult to do an academic analysis with such technical and singular precision.

The attendee then commented that, if it was difficult for academics to reach agreement, imagine what it would be like for armed forced in the field under pressure. He then queried whether, given the omnipresence of satellites, States were obliged to use satellites as a means of precaution? Médicins Sans Frontières recently claimed that members of the Security Council attacked medical installations. Should these members not have used satellites?

Professor Geiss replied that military legal advisers had a dilemma. Today, thanks to technology, armies had more readily available access to advice. This was not the case for soldiers in the battle field. The precautions obligations were due diligence obligations, which also depended on the resources available. The degree of responsibility was not always the same.

Professor Heinsch noted that the responsible commander had to implement the decision from above, and even if on the ground, he would have to take all elements into account when deciding. Legal academics would necessarily have different opinions because they were discussing the principle in the abstract. In the end, the way that proportionality was formulated entailed a certain amount of openness. The lack of certainty should however not discourage armies from using strict definitions to apply to concrete situations. ICRC had started a project to find positive examples of compliance with IHL, which might help in the future to give more concrete examples.

Professor Geiss added that a lack of certainty was not always disadvantageous for civilians. Rules of engagement and policy considerations were in fact often stricter than what IHL required.

The Chair pointed out that there was a spectrum of reasonableness in the analysis.

An attendee (Australia) asked about the definition of warship, and whether this covered training ships or ocean cartographic vessels. The final issue was whether there was combat at sea. What if people were rescued by a warship? If they were no longer shipwrecked, were they entitled to protection?

Professor Heinsch said that the aggressive and defensive aspects of the action were relevant in the analysis. The hors de combat ship might equally be a plausible example, though not all examples could be analysed as there was a page limit to the report.

Professor Geiss reiterated that the two-fold question in the military objective test was really just onefold. However, in cyberspace and urban warfare, the twoprong test might be relevant. High altitude attacks were still subject to proportionality rules. High altitude attacks risked causing more collateral damage. Long distance attacks saved ground

forces. The issue was to balance force protection and collateral damage of choice of attack. Self-preservation versus civilian protection.

The Chair noted an example of relevance for the question in relation to the two-part test for military objectives: if there was a specific civilian home regularly used for command meetings of an armed group, then the first premise might be satisfied. But if the armed group would simply be able to move their meetings to the house next door, would the second part have been satisfied?

An attendee (US) suggested effectiveness, temporality, and contingencies as other elements which assisted in analysing particular situations. Was effective contribution a criterion to add? Economic considerations inspired policy decisions. Why not consider compensation to collateral damage regardless of proportionality? This would be an incentive to reduce collateral damage as it would be a strategic consideration. A good idea since it was difficult to offer clear criteria. It was a practical way of accomplishing the objective to protect civilians without having to engage in long studies which could not provide clear answers because they depended on contextual and varied circumstances on the ground.

Professor Geiss mentioned that procedural aspects were looked at, and the conclusion was that not all substantial problems were solved through the procedure. The Study Group even looked at the entire process. The attack started from the moment that the soldiers were being trained.

As for economic considerations, they were indeed always relevant. But war sustaining economics did not determine the military advantage of an attack. Therefore, compensating victims would not necessarily work for the purposes of the test. As for military assets far away from the zone of combat, they were a valid target, but might not offer a military advantage because they are too far away. Under IHL, could not destroy the tanks of the adversary unless they were posing a threat. One could attack if there was a military advantage.

Professor Heinsch said, regarding the financial implications of warfare, that they were valid questions, but beyond the scope of work of the Study Group. Military advantage was not necessarily mostly qualitative. But the point was not to focus on just one aspect, but to include both qualitative and quantitative considerations.

Professor Heinsch thanked the members of the Study Group who participated in all sessions. Their work contributed immensely to the results. There had been a great working atmosphere. He informed attendees that the three officers of the Study Group were stepping down as the report was finished and the Study Group might engage in different questions.

The Chair thanked the CoRapporteurs and attendees for their participation and closed the session.

Reporter: Maria del Pilar Vanegas Guzman

SOVEREIGN BANKRUPTCY STUDY GROUP

7-11 August 2016

Members of the Study Group

Chair: Phillip Wood (UK)
Rapporteur: Professor Michael Waibel (Austrian)

Professor Freya Baetens (Belgian)
Milos Barutciski (Canadian)
Jens Benninghofen (German)
Lee Buchheit (US)
Brett House (Canadian)
Brian Hunt President (Canadian)
Marcus Jewett (Canadian)
Professor Rosa Lastra (UK)
Professor Cynthia Lichtenstein (US)
Yannis Manuelides (UK)
Professor Manuel Monteagudo (HQ)
Professor Rodrigo Olivares-Caminal (UK)
Jeremiah Pam (US)
Professor Christoph Paulus (German)
Professor Kunibert Raffer (Austrian)
Antonio Sainz de Vicuna (Spanish)
Professor Hal Scott (US)
Andrew Yianni (UK)
Deborah Zandstra (UK)

Other contributors

Mathias Audit, Law Professor and Partitionner, Fondation de l'Université Paris Ouest Nanterre La Defense, and Steering Law Firm, Université Paris Ouest Nanterre La Défense
Michael Doran, Partner, White & Case LLP
Valerie Hughes, Director of Legal Affairs, World Trade Organisation
Laura Segni, Banca IMI
David Skeel, Professor, University of Pennsylvania Law School
Hung Tran, Executive Managing Director, Institute of International Finance

Observers

Sean Hagan, General Counsel, International Monetary Fund
Benu Schneider, Chief of International Finance, Debt and Systemic Issues Unit, United Nations
Azam Taiyeb, Associate Lawyer, Clifford Chance, London

The observers were observers and did not participate in the paper which does not necessarily represent their views.

INTRODUCTION

This paper presents some high level conclusions and recommendations of the Sovereign Bankruptcy Group of the International Law Association as to the way forward for the legal approach to sovereign bankruptcies. The paper follows on work done some years ago by the Sovereign Insolvency Study Group of the International Law Association, which had a somewhat different makeup from the present group. The predecessor Group

presented an interim paper at the Hague Conference of the ILA in 2010 setting out some issues but without coming to a conclusion on how they should be dealt with. The purpose of this paper therefore is to produce so far as we can more specific proposals. It is not a final report.

You may say that bankruptcy policy should find a balance between protecting creditor rights and enhancing the prospects of the debtor's recovery. A platitude, for sure, but still true, even though its implementation has to be worked out.

Our approach

Our Group is composed of leading practitioners, academics in this field and other experts representing a variety of opinions. We however share some common beliefs, one of which is that the law is one of the most important ideologies in the world and that it is not possible to have a society without law. The law is one of the moral regimes which sets the credentials of a civilisation and what it stands for.

We regard the field of sovereign bankruptcy of major importance for the world and certainly one of the most difficult of all the arenas of the law.

We suspect that not all of the members of the Group share all of the views expressed in this paper but are too courteous to say so and we nevertheless hope that the paper will be a useful contribution to the state of the art and the Group has benefited enormously from the diversity of opinion.

It is with these considerations in mind that we approach our topic.

Hague Report 2010

The Hague Report 2010 of our predecessor Sovereign Insolvency Study Group noted that there was no international bankruptcy law covering the insolvency of sovereign states. The outcome therefore depended upon negotiations between the parties. In most cases the negotiations were successful. The paper identified some of the main differences between a sovereign bankruptcy and the prescriptive rules for domestic corporate bankruptcy in order to contrast the two traditions, while noting the principal differences between the status of sovereign states and the status of ordinary domestic corporations.

In particular, the paper noted that two of the major differences between the law governing sovereigns and that governing private law corporations were that the assets of sovereign states were in practice mainly immune from creditor attachment or realization. Domestic assets are immune because they are usually made immune by a domestic statute. Most foreign assets are de facto immune because these assets are typically held by separate state-owned corporations, such as a central bank, which are not responsible for the debt of the sovereign and protected by the veil of incorporation. In addition, apart from IMF conditionality, it is not feasible for an independent person analogous to an insolvency administrator to take over the financial affairs of the sovereign state. In these two respects, sovereign states are to some degree immune and protected from the law applicable to private parties and are therefore in a privileged position legally in relation to bankruptcy compared to ordinary subjects of the law. It would not appear to be possible in practice to bridge that gulf, but the disparity affects debtor-creditor positions.

The disparity affects debtor-creditor positions because creditors argue that their legal position as against debtors is much worse than is the case with the bankruptcy of individuals or corporations. Creditors further argue that it follows from this that the immunities of sovereign debtors should not be increased. They say it is a general principle of the rule of law that nobody, including sovereigns, should be immune from the law applicable to other debtors. They would further maintain that the principle underlying the de-immunisation of sovereigns in commercial transactions is that if sovereigns descend to the market place, they should accept the sanctions of the market place like the rest of us. The sovereign states would argue that they are different and need to maintain their protections against creditors, eg because they can represent a very large number of people and because of the damage a sovereign bankruptcy can do to those people. They say that the fact that sovereigns have more room for manoeuvre is justified by their special position.

In this context, it is ultimately the task of lawyers to justify why the immunities given to sovereign states (in terms of de facto and legal immunity from creditor attachments and immunity from absolute control from an insolvency administrator) should be maintained or decreased in the case of bankruptcy.

The Hague Report broadly identified four ways forward:

1. A voluntary, contractual regime leaving the resolution for sovereign insolvency to contracts adopted by issuers and bondholders, with or without some official prodding.
2. The adoption by treaty or statute of a limited provision for creditor voting on a plan
3. The adoption by treaty or statute of a wider bankruptcy regime that so far as possible reflected the relevant aspects of corporate insolvency reorganisation practice and statutes.
4. The adoption of measures to strengthen creditor positions and to dilute the protections for insolvent states.

These options were accompanied by a list of the advantages and disadvantages of each proposition and, in the case of statutory or treaty regimes, by outline drafting of what the articles of agreement might say, plus commentary.

We shall see later that the increasing use of collective action clauses in bonds is a major step forward in the effective resolution of sovereign bankruptcies and dramatically changes the landscape.

WHAT HAPPENS IN PRACTICE?

Introduction

This section sets out the typical course of events where a sovereign state becomes bankrupt, ie when it is unable to pay its debts when they fall due, usually its debts expressed in a foreign currency. Naturally, each case tends to be different but there are some classic patterns and generally the International Monetary Fund ("IMF") seeks to distinguish between cases where the problem is one of liquidity only and cases where the debt stock is too high (a "solvency problem"). An example of a case which did not follow this pattern was Greece in 2012 because of the involvement of the euro area states, as well as the IMF. There have been other departures. The reason that we tell this story is that it makes

the understanding of the realities of a sovereign bankruptcy easier to understand and identifies where the problems are which call for a solution.

Most sovereign bankruptcies result from a quite slow accumulation of financial adversities over a number of years or even longer including typically such matters as fiscal deficits and over-borrowing, often exacerbated by prejudicial economic conditions, rises in interest rates or the like. It does not often happen that a sudden cataclysmic event out of the blue destroys the finances of a state, although this has happened.

When the situation becomes so serious that the sovereign is unable to meet its obligations on its bonds, the politicians and officials in the sovereign state are typically in a state of denial, notwithstanding urgings by the IMF that they need to take action immediately.

Entry of the IMF

If the IMF thinks that the financial problems can be overcome if the sovereign state adopts corrective measures in consultation with the IMF and receives short term funding from the IMF to tide the debtor over its immediate problems, then there is no need to involve either other official sector creditors (namely other governments who have lent money to the debtor) or to involve the private sector, typically bondholders.

However, if the IMF thinks that, notwithstanding an austerity programme and some interim funding from the IMF, the sovereign state will still not be in a position to meet its debt obligations, i.e. the debt load is unsustainable, then the IMF will conclude that the official sector and the private sector have to be involved. This usually means they have to provide some debt relief by way of extension of maturities (reprofiling) or reduction of the amount owing, commonly called "haircuts". The IMF has policies about the circumstances in which they will lend into arrears and about the evaluation of sustainability. One of their concerns is that their money will simply be used to pay off private creditors and there is no burden-sharing.

In some cases the debtor sovereign approaches the private sector bondholders before the IMF, especially if it thinks that the bondholders will accept a reduction of principal (a haircut) in a case where the IMF will propose a rescheduling without principal reduction.

However, it should also be noted that sovereign debt restructurings may proceed without IMF and Paris Club involvement. Noteable examples are Argentina in 2005 and 2010 and Ecuador in 2009.

Paris Club

In cases where the IMF is involved, what happens next is important in practice because it tends to determine everything else which follows. The IMF consults with the Paris Club (see below) about the depth of the problems being encountered by the sovereign debtor and what needs to be done in terms of rescheduling and haircuts. Practically every state in the world is a member of the IMF which therefore is the representative of the official sector. Its advice carries great weight with creditor countries and the on-going economic surveillance role played by it is generally accepted as being both important and helpful by its members. The IMF is generally seen as experienced, notwithstanding the reservations some governments have about voting control in the IMF and its corrective programmes

for sovereigns experiencing a financial crisis. Others have complained that its operations are insufficiently "transparent".

The Paris Club was set up initially in 1956 under the chairmanship of the Minister of Finance of France as an informal arrangement to deal with the insolvency of Argentina and is composed of significant creditor nations, mostly the developed countries. It was not established as a standing institution and yet has become a central player in sovereign debt restructurings through the creation of soft law norms. Many members of the Paris Club will hold claims against the sovereign debtor arising either from bilateral loans or more typically from guarantees by their export credit agencies which have been called by the beneficiaries so that the exporting countries are left with a claim for reimbursement against the sovereign debtor.

The IMF makes available to the Paris Club members its analysis of the situation, including its view of what is needed for debt sustainability. The Paris Club holds a meeting attended by representatives of the sovereign debtor and the official creditors at this meeting inform the sovereign debtor of their proposals for the rescheduling of their official sector debt. Often there is little negotiation because over many years the Paris Club has developed standardised approaches to rescheduling. Deviations from standardised approaches are unusual (e.g. Poland 1991 and Iraq 2004).

The proposals are then recorded in a minute which is agreed by the Paris Club creditors and the sovereign debtor setting out the terms of the rescheduling, including the necessity for the sovereign debtor to enter into a standby or other financing arrangements with the IMF whereby the IMF will make available funds on prescribed terms and the sovereign debtor will agree to carry through an economic programme agreed with the IMF which usually includes structural reforms.

This agreed minute contains an extremely important clause which provides in effect that the sovereign debtor must not give any of the other creditors involved in a rescheduling, whether official or private, a better deal. A typical clause will read as follows:

> 'In order to secure comparable treatment of its debt due to all its external public or private creditors, the Government of the Republic of Sealandia commits itself to seek promptly from all its external creditors debt reorganisation arrangements on terms comparable to those set forth in the present Agreed Minute, while trying to avoid discrimination among different categories of creditors.

Consequently, the Government of the Republic of Sealandia commits itself to accord all categories of creditors and in particular creditor countries not participating in the present Agreed Minute, and private sector creditors treatment not more favourable than that accorded to the Participating Creditor Countries for credits of comparable maturity.'

Thereafter the members of the Paris Club enter into their own bilateral treaties with the sovereign debtor setting out the commonly agreed terms of the rescheduling.

The effect of the above clause is that the IMF via the Paris Club has committed the sovereign debtor to a rescheduling of other official creditors and the private sector bond-holders on terms that the sovereign debtor will not give a better deal to any of these other creditors from their point of view. There must be equality of burden-sharing. Hence, when the other creditors approach the Ministry of Finance of the debtor, he or she has to

explain that he or she has no choice in the matter. They will all have to be rescheduled and the terms of their rescheduling are not to be more favourable to the creditors than what the Paris Club has required. At least this is the result which the IMF would typically enjoy, but is not always able to achieve.

One of the features which has changed over recent years is that the Paris Club creditors often do not include other governmental creditors, e.g. China (which is however an observer) and those from mid-range or developing countries who may have advanced large sums to the sovereign debtor, e.g. for the purposes of defence or to shore up a political ally. It may be that one or more of these creditors might join the Paris Club so as to fall in with the Paris Club consensus. But sometimes this is not the case and so these other official creditors are not bound by the rescheduling and on occasions have refused to be rescheduled, i.e. they become an official "hold-out" creditor. One result of this is that the negotiation of a rescheduling can get delayed. Another result is that the IMF has now developed policies as to whether in this situation it is prepared to still lend to the sovereign debtor even though the sovereign debtor is in arrears. The previous policy was that the IMF would not lend to a sovereign debtor if the sovereign debtor had not agreed a rescheduling with the official creditors. The object was to ensure that the sovereign debtor did comply with the Paris Club requests and did enter into a standby with the IMF. But now the IMF is prepared to do so subject to various conditions in order to ensure that the IMF can provide the necessary funding to preserve stability, even though an official creditor is holding out.

Some complain that non-Paris Club, sovereign creditors and also the private sector have not been heard in the decision as to the extent of the rescheduling.

Moratorium

Occasionally at this point, but not always (Greece in 2012 for example), as debts mature for payment, the sovereign debtor declares a de facto moratorium for, say, 90 days. This declaration states that the sovereign debtor will not pay any of the relevant creditors within those 90 days and will in the meantime negotiate with its creditors in order to arrive at an agreed solution.

This statement of a moratorium is the functional equivalent of an order for a corporate bankruptcy in the sense that they both impose a freeze on creditors. The difference is that the corporate freeze or stay on creditor actions has legal force whereas the moratorium declaration by the sovereign does not have legal force in any sense: creditors are not bound by the moratorium. One of the issues therefore is whether there should be the possibility of a moratorium which has legal force: we discuss this question later. In practice creditors do not usually take enforcement action at this stage – even if there were any assets to attach – provided that the debtor is negotiating in good faith.

IMF standby

A further feature to note is that the official sector will usually not agree to any form of rescheduling unless the sovereign debtor has signed up to a standby with the IMF which contains conditions ("conditionality"), especially conditions about an austerity programme. We use the term "standby" to include other facilities and credit lines. The power of the IMF accordingly stems from the fact that generally official creditors will

insist on the IMF programme which has the effect that there is a degree of creditor intervention via the IMF over the fiscal affairs of the debtor. It has already been noted that one of the major differences between a sovereign bankruptcy and a corporate bankruptcy is that, in the case of a corporate bankruptcy, the creditors can appoint an insolvency administrator over the debtor and this administrator runs the finances of the debtor either totally or by having a veto over significant decisions. The IMF is therefore a very broad equivalent of an administrator exercising surveillance powers, notwithstanding that the powers actually exercised by the IMF are substantially less than the powers which would be exercised by a corporate insolvency administrator. This flows from the principles of national sovereignty which play a major role in the political attitudes of sovereign powers and their relative refusal to permit any interference in their internal affairs from other sovereign states.

An IMF corrective programme will typically require a reduction in welfare spending and subsidies, better tax collection, an increase in taxes or reduced exemptions, the privatisation of state-owned businesses, decreases in state employees and pensions and better governance, plus a number of quite micro reforms. These programmes are commonly contentious, particularly with the domestic population of the sovereign and the government in power.

IMF policies

The IMF has recently been implementing changes to some of its policies as they relate to sovereign debt. In December 2015 the IMF introduced some tolerance of official sector arrears where, inter alia, there is a need for prompt IMF assistance, the debtor country is making good faith efforts to reach agreement with the creditor and the absence of a debt restructuring is due to the unwillingness of the creditor to reach an agreement consistent with the parameters of the IMF-supported programme. Prior to this change, the IMF was prevented from lending to countries if they owed unresolved arrears to official bilateral creditors, unless the arrears were covered by a Paris Club agreement or the creditor consented to the IMF providing financing.

Furthermore, the IMF has also introduced changes to its exceptional access lending framework which deals with circumstances where the requested financing amounts exceed normal IMF lending limits. Under the old framework, the IMF could lend above its lending limits under exceptional circumstances when certain conditions were met, one of which was that there was a "high probability" that the member country's debt was sustainable. If the high probability bar was met, the IMF could lend without requiring any debt reduction operation. In the case of Greece in 2010, because the IMF did not assess Greece's debt to be sustainable with high probability, the framework required an upfront debt reduction. Due to concerns about severe contagion in the euro area and beyond, at the time the IMF created a "systemic exemption" for cases where there were significant uncertainties around debt sustainability. In January 2016, this systemic exemption was removed on the basis that it could encourage moral hazard and did not mitigate against the contagion the systemic exemption was meant to address. Furthermore, a reprofiling option which extended debt maturity without an upfront reduction was proposed for cases where debt is assessed to be sustainable but not with high probability.

Currently, the IMF is continuing its work on the reform of the lending into arrears policy in respect of private sector debt.

Private sector

The private sector creditors are commonly bondholders holding bonds originally issued by the sovereign debtor. These holders are mainly in the typical case banks and insurance companies. Their underlying importance is that they hold the savings of the citizen, either in the form of deposits or in the form of pension pots or pension commitments, so that a loss to them is ultimately a loss to the citizen. In particular, a threat to banks can become systemic by contagion so that a large sovereign insolvency or series of insolvencies can have a domino effect in creditor countries.

At this point, hedge funds may well buy bonds at a very low price resulting from the financial crisis in the hope of recovering substantially more in due course: effectively they provide liquidity, enabling holders to sell out. The tactics of these hedge funds generate much controversy but in practice the usual experience is that hedge funds do not take enforcement action at this point unless the sovereign debtor refuses to negotiate reasonably. Any enforcement action would be disruptive and prejudice a successful deal.

Negotiations generally commence between the bondholders and the sovereign debtor. In some cases, discussions involve a steering committee of the bondholders and a sovereign debtor. Occasionally several competing committees spring up when the sovereign debtor admits its inability to pay, or even before, but these committees often, after the initial shock, coalesce into a single committee broadly representing the largest bondholders by amount. The members are usually a mix of banks and insurance companies and may include hedge funds. Occasionally a set of procedural rules are agreed but more generally the creditors reserve their legal rights and act by consensus. The sovereign debtor, sometimes only after initial skirmishing, typically recognises the committee as a negotiating party but often argues about the payment of their fees and those of their advisers.

Negotiating the financial terms

The deal agreed with the bondholders and the sovereign debtor may comprise a simple extension of the maturities of principal without a reduction in nominal amount or a reduction in the principal amount ("haircut"), a change in the interest rate, occasionally a change in the currency and very occasionally the issue of GDP warrants whereby the holders are paid more if the debtor's GDP goes over certain thresholds showing it is recovering from the debacle. Often bondholders are presented with a menu of options. We call all of these methods a restructuring.

A common approach of creditors is to argue that they should suffer the minimum losses and also that the losses should not be suffered all at once but rather bit by bit. The purposes of this "short-leash" approach is that in practice debt sustainability is impossible to forecast with precision and that the debtor will not comply with corrective policies unless it requires extra relief or new money in the future, although as mentioned later, GDP-linked payments could offer a way out by simulating equity. The short-leash approach helps creditors maintain bargaining power. In contrast, sovereign debtors obviously seek the largest possible relief and seek to escape austerity policies. Debt sustainability (meaning that the sovereign will as a result of the restructuring be able to pay its debts as they

fall due) needs to be viewed in this light. In addition, these are hard negotiated positions when so much is at stake for either party. Exactly the same process occurs in most corporate work-outs and judicial restructurings and so this process is completely routine. It may be added that the above approach of creditors is not merely that of private creditors but is very often the approach taken also by official creditors. A dramatic example of the short-leash approach was that adopted by official euro area creditors in the case of the Greek bankruptcy starting in 2010.

Later we will discuss market clauses for the appointment of these bondholders committees and the delineation of their powers. All that we need to say here is that the negotiations are carried out directly between the steering committee of creditors and representatives of the sovereign debtor (including their financial advisers) as well as bilaterally. The IMF does not formally participate in these negotiations since, as shown, the IMF has already set the rules so that the shadow of the IMF is cast over the negotiations. The governments having jurisdiction over bondholders may assert official pressures if they can which can sometimes be done in the case of large banks and insurance companies but not hedge funds.

If any of the bonds contain provisions for meetings of bondholders whose resolutions on a rescheduling can bind the minority, then the meetings are duly called by the issuer and the bondholders to vote. The majority may therefore get their way and bind the dissentient bondholders.

Exchange of bonds

The next step is that, with the help usually of an offering circular containing a description of the deal and a description of the sovereign debtor and its finances, the issuer offers to exchange existing bonds for new bonds reflecting the new deal e.g. the re-profiling or rescheduling, the changed interest rate or currency and any haircut. The offer may have minimum participation thresholds to encourage acceptances.

Subsequently, if there have been no provisions for binding minority bondholders or the resolution has failed to pass in respect of one or other bond issue, creditors who have not accepted the exchange offer will take whatever action they can, including the obtaining of enforcement orders in the courts of any countries having jurisdiction. They are usually able to do this because of express jurisdiction clauses in the bonds and because of express waivers of immunity in the bonds. But, as discussed, there are usually no or very small available assets to satisfy the claims of these holdout creditors outside the debtor's country. They can, however, chill the return of the sovereign debtor to the capital markets by virtue of the fact that they are taking legal proceedings to enforce the debts and by virtue of the fact that technically they may be able to levy attachments over the proceeds of fresh issues of bonds by the issuer or any return payments of interest or principal, unless some method of shielding these proceeds has been set up.

In practice most of these exchanges have been accepted by more than 90 per cent of bondholders with very few exceptions. Argentina was one such exception because in the initial stages Argentina declined to negotiate and imposed a haircut on creditors of 75 per cent or so which creditors considered to be too steep.

It would be seen therefore that the actual transaction is extremely simple – just an exchange of bonds. This transaction is vastly simpler than a typical corporate work-out or reorganisation which is far more complicated by a large measure. There are various reasons for this including the fact that corporate reorganisations often involve many classes of creditor other than bondholders and creditors, e.g. employees, suppliers, pensioners, the tax authorities, lessors of land or equipment, tort claimants and so on.

Points to note on the process

There are a number of comments that we can make at this stage upon the above recital of the practice.

Sovereign bankruptcy involves a workout

The first relevant point is that a sovereign bankruptcy is resolved by a negotiation over a contract, not a judicial proceeding. In fact, it is probably the case that ordinary corporate bankruptcies are in 90 per cent of the cases resolved by private negotiations and not by a judicial proceeding. There is a judicial proceeding in two main cases, namely, when the position is quite hopeless in which case the debtor must be liquidated: this is not applicable to sovereign states. The second case is where a private workout is solemnised by a judicial order in a short form judicial reorganisation, often called a pre-packaging. The judicial stamp gives greater legal validity than would be the case with a private agreement. Again in the case of sovereign states there is no background bankruptcy law which compels the parties to adopt certain positions in their agreed workout, e.g. to respect a ladder of priorities.

Bargaining power

It follows from the fact that the ultimate resolution is negotiated that the bargaining position of the parties is crucial.

It is almost invariably the case that each side thinks they have the worse negotiating position. Creditors tend to think that they have got no leverage whatsoever over a recalcitrant sovereign debtor. Debtors similarly think that they are exposed and vulnerable to predatory creditors.

The facts are rather different, i.e. that in this game of cards, neither side has any aces. At most, they have a two of diamonds or a three of spades. Everybody's cards are poor so that at least there is an equality of misery. On the creditors side, they have virtually none of the legal rights which a creditor of a bankruptcy corporation has. They cannot force a liquidation or a judicial corporate reorganisation. They cannot attach assets of any significance belonging to the sovereign debtor. As mentioned, domestic assets are invariably immunised, and the foreign assets are typically held by state-owned corporations, such as the central bank which are protected by the veil of incorporation from seizure to satisfy the debts of the states. In the absence of sovereign guarantees, these state owned corporations are not responsible for the debt and therefore creditors cannot seize their assets to pay the debts of someone else. In addition, it is not possible for creditors to appoint an insolvency administrator to take control of the sovereign debtor's financial affairs. Therefore you could say that creditors have thin legal rights and that sovereigns are

relatively immune as regards these points in a way that other debtors whether individual or corporate, are not.

Other creditor risks are that the insolvency may give rise to contagion and that official pressures are brought to bear on creditors to settle by reason of the political importance of the country.

On the debtor side, unlike corporations, the debtor has limited protections against hold-out creditors who refuse to accept the exchange offer and whose litigation effectively closes out the debtor from future public international borrowings.

The debt is perpetual and there is no bankruptcy release, subject to the expiry of limitation periods. Interest does not stop on the declaration of bankruptcy, as it effectively does in the case of corporation (where post- commencement interest is generally subordinated to other claims and therefore in practice never gets paid). In the case of sovereign states, the capitalised interest can mount up to large sums, eventually exceeding the principal. In addition, the sovereign debtor can have problems importing essentials such as medicines, food and oil. The banks may collapse. There may be civil disorder. Inflation may break out and unemployment increases. Public services almost invariably need to be cut. Many corporations slide into bankruptcy. The citizens may suffer losses and in extreme cases be thrown into destitution. The sovereign will be excluded from the public market and sometimes obliged to borrow, if at all, from private sources at very high interest rates, thereby exacerbating the problem.

Classes of sovereign debt

It is usually only the foreign bonds held by bondholders and payable in a foreign currency which are rescheduled, as well as official debt. Nowadays, the amount of bank debt under syndicated credits tends to be small, but there may be some, especially where banks lending to a state-owned company, such as a project company, are guaranteed by the state.

It is less usual for domestic currency sovereign debt to be rescheduled, even if held by foreigners, unless, say, the currency is the euro, as in the case of Greece. The reason for this exclusion is that firstly the sovereign can print enough money effectively to pay the debt, although with inflation and other consequences. This monetary solution may be prohibited by an IMF standby. Further, since the domestic debt is generally in the local currency and governed by local law, the debtor can impose a legally binding moratorium or write-down which will be recognised in most foreign countries by reason of the fact that creditors contracting under a specific system of law are subject to changes in that law and their recognition. Thus, an exchange control would generally be recognised elsewhere. The rule in the United States is somewhat different but often to the same effect. Hence, the purpose of a foreign governing law is to insulate the debt from exchange controls, moratoriums and write-offs legislated into force unilaterally by the sovereign debtor.

Nevertheless there have been cases of the restructuring of local currency, even when the external debt is left untouched, eg Jamaica.

Degree of disorganisation

It is often said by commentators on this subject that sovereign bankruptcies are chaotic and long drawn out and that therefore an iron statute is needed to introduce discipline.

This is considered doubtful. Corporate bankruptcy laws are generally highly prescriptive with precise and disciplined procedures. Nevertheless it is common experience that any large bankruptcy in its initial stages is characterised by resentment and rancour on both sides and by every signs of anarchic disorder. It is often only later in corporate reorganisations that the parties ultimately settle down to the realities of the situation. For example, the work-outs which preceded the judicial prepackaging in the case of General Motors and Chrysler went on for many years, characterised by disagreeable arguments and controversy. The judicial corporate run-downs of Enron and the Emirates-based bank BCCI went on for many years (25 years in the case of BCCI) and it has been estimated that the judicial bankruptcy of Lehmans will take in excess of 15 years.

The Argentinian pari passu case

We should mention the "pari passu" case in the New York courts between Argentina and a hedge fund around 2012 which caused much disarray in the sovereign bond markets and had a major adverse impact on the attitudes of sovereign debtors. To cut a long story short, a hedge fund bought up Argentinian bonds from holders who had not accepted the Argentine exchange offer in the 2000s whereby Argentina offered bonds worth only about 25 per cent of the outstanding defaulted bonds. They persuaded a New York court, upheld on appeal, that Argentina had violated a standard pari passu clause in the bonds which provided in effect that the bonds ranked pari passu with other external indebtedness of Argentina because Argentina had not paid those holding original bonds (which contained the relevant pari passu clause) equally with the new bonds issued as part of the restructurings in 2005 and 2010. Part of the reasoning was that Argentina had done so because it had passed a law – the Lock Law – declaring it illegal to pay the hold-out creditors who did not accept the exchange offer and because the clause meant that Argentina must pay its external creditors equally. The court ordered in effect that Argentina must not pay any of the new bonds issued in 2005 and 2010 unless it also paid the hedge fund holding original unpaid bonds. So when the debt of the exchanged bonds fell due, the order was that Argentina had to pay the hedge fund in full.

The first surprise in this case was the court's interpretation of the pari passu clause as an equal *payment* clause as opposed to – as the market had hitherto believed – a clause requiring only that the claims *ranked* legally equal by rule of law and would not be subordinated by a legal rule. The second surprise was that the court in effect enjoined a sovereign state – which became therefore subject to contempt of court penalties if it disobeyed the injunction – to pay a creditor if it paid another creditor. Normally a breach of a bond clause just gives rise to an event of default and a claim for the debt, not a semi-criminal penalty.

Commentators pointed out that if a court interpreted the clause that way and issued that kind of injunction it would be very difficult to carry through an agreed exchange because the hold-out creditors holding a non-exchanged bond could force the debtor to pay them in full if it paid the exchanged bonds. So nobody would agree to a rescheduling. There were other adverse effects too.

Some commentators would argue that this case is of reduced significance because the court emphasised that it was not a precedent but a special case justified by Argentina's behaviour and because Argentina had by the Lock Law technically breached the pari passu clause. It is also considered that the English courts would not interpret the clause in the

same way as the New York court and would not issue that kind of injunction. However, be that as it may, the case is at the heart of recent policy developments in this area. Together with lessons learnt from the Greek debt crisis, it led to a major collaboration between relevant stakeholders, including the IMF, US Treasury and the International Capital Market Association ("ICMA") in strengthening the contractual framework to address collective action problems in sovereign debt restructuring.

Despite this major collaboration between the public and private sector (see Collective action clauses with aggregation below), the view remains, in some quarters, that the Argentinian case is typical of all sovereign bankruptcies, e.g. involving very aggressive tactics by hedge funds and very aggressive judgements by a foreign court. Whilst the Argentinian case is not typical of sovereign bankruptcies but rather an exception, it has also framed renewed interest among other multilateral institutions such as the UN and UNCTAD (see Anti-vulture statues and UN resolutions below).

The outcome of the Argentina case was ultimately settled by agreement in 2016, after Argentina elected a new president. More broadly in the sovereign debt sphere, the impact of the Argentinean case is effectively overridden by the new pari passu and collective action clauses discussed below so hopefully the case is likely increasingly to become of historic interest only. That said, there is still a significant transition period before all outstanding sovereign debt features the new pari passu and collective action clauses.

Contract or treaty

There has been considerable discussion as to whether the objectives of a regime for sovereign bankruptcy should be achieved by contract in the bonds themselves or should be achieved by treaty or some other legislative method.

It has often been pointed out that a treaty solution could be achieved by, for example, an amendment to the IMF Articles of Agreement, to which nearly all countries are a party, or by a model law or by an international treaty or at least an international treaty between the main creditor nations. There could be a half-way process whereby a model bankruptcy law is imported into bond issues by agreement between the issuer and the bondholders. Many commentators have pointed out also that the US has a blocking veto to amendments of the IMF agreement and appears presently to oppose an international bankruptcy set of clauses. Some think that the negotiation of a treaty would take many years, even if agreement could be reached at all.

Further, it has been noted that a treaty solution should bind all creditors, including official creditors and not just private bondholders. An example of an official creditor seeking judgment for sovereign debt is Russia against Ukraine in 2016.

Legislation proposed to cover the financial difficulties of Puerto Rico in 2016 show how bankruptcy legislation can replicate corporate bankruptcy statutes. In the Puerto Rico case the legislation proposed that external officials should be mandated to run the financial affairs of Puerto Rico and to override Puerto Rican laws and that these independent officials should be able to dispose of Puerto Rican assets by privatisations. Although an IMF programme may intervene in the financial affairs of sovereign states and propose privatisations, the appointment of independent administrators actually to take over the

financial operations of sovereign states would presumably be difficult to negotiate as a remedy of general application.

We doubt that we would need to debate these points because we think that the method for the procedural achievement of the desired result is a secondary issue. The first issue is to decide what the rules for the resolution of state bankruptcies should be in substance and then, if relevant, to debate the mechanical procedure of how they would be achieved. As shown, the achievement of a proper regime for state bankruptcies could well be a mix of contract and model law or treaty law which in turn would depend on the agreement of the parties to the substantive provisions of the regime. This mix is in fact typical of the famous pre-packagings in corporate work-outs which are then statutorily solemnised by a court order under a judicial reorganisation statute.

In addition, the contract/treaty contest has to a large extent been rendered of much lesser concern because of the advent of creditor voting on a plan under collective action clauses as discussed below.

Bankruptcy is ferocious, splitting those involved into bitter and passionate opposition. Drafting a bankruptcy treaty is not like drafting an investment treaty or a free trade agreement. Thus, the Europeans took only a few years to draft a treaty on civil jurisdiction and the mutual recognition of civil judgments. The EU insolvency treaty took 40 years.

For those interested in what a full-scale sovereign bankruptcy law might look like, there is a suite of articles in the Hague Report of 2010 which cover the main aspects of a rescue bankruptcy regime on the lines of prescriptive corporate judicial reorganisations, with commentary. The articles cover the initiation of bankruptcy, the stays or freezes on creditor actions, disclosure of the debtor's financial affairs, the appointment of a creditor committee, voting on a reorganisation plan, the scope of a plan and the debt which can be covered and the establishment of a resolution institution.

COLLECTIVE ACTION CLAUSES WITH AGGREGATION

Background

Collective action clauses ("cacs) are terms whereby bondholders can vote by majorities so as to bind all bondholders. These clauses have been routinely used in English law governed sovereign bonds for many years. Following an industry initiative launched after IMF staff proposed a Sovereign Debt Restructuring Mechanism in 2001, collective action clauses in New York law governed bonds because the norm for new issuances from mid-2003 onwards.

Cacs in this form involved voting on a basis confined to a particular series of bonds, thereby still leaving a sovereign vulnerable to individual bondholders building a blocking position within individual series of bonds (as occurred in the Greek case). The Argentine and Greek crises led to a renewed focus within the euro area and more broadly on the possibility of aggregating multiple series of bonds to make it more difficult for blocking positions to be acquired.

Following work undertaken after the Greek crisis the members of the euro area committed themselves to including the area's form of aggregated cac in all new government securities issued after 1 January 2013 with a maturity above one year. ICMA also published

in 2014 a new model form of cacs with aggregation features that can be used by any sovereign issuer issuing instruments under English or New York law. The publication of these standard form cacs followed two consultations amongst ICMA's members, as well as extensive discussions with other key stakeholders, including the Institute for International Finance ("IIF") and the working group referred to earlier convened by US Treasury staff consisting of representatives from the official sector, including the IMF, legal experts, market participants, practitioners, academics and issuers.

Use of ICMA's cacs is not an overnight solution to all the problems in sovereign debt restructuring. Amongst other matters, it will take some years before a critical mass of any sovereign issuer's bonds contains the cacs. But, with the passage of time, the use of ICMA's cacs should assist countries facing financial difficulties to seek an accommodation with their bondholders and should facilitate debt restructuring while minimising the risks posed by holdout creditors.

In 2014, the IMF published a paper (*Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debt Restructuring*) recognising that, while it cannot mandate the use of cacs, it would play an active role in promoting their inclusion in international sovereign bonds. The IMF concluded that the design features in ICMA's cacs address collective action problems effectively while affording adequate safeguards for bondholders. The G20 has also endorsed the use of cacs with aggregation as has the IIF.

Pros and cons of cacs

The arguments in favour of collective action clauses included: improved creditor equality: if there are no cacs binding holdouts, holdouts would be paid in priority to accepting bondholders; holdouts have little incentive to accept offers without a mechanism for binding minorities; although holdouts may have to accept the prospect of years of litigation, if the issuer is prepared simply to default on the claims of the holdouts, minority holders can chill future access to the market by issuers; the clauses prevent holdouts from claiming rateable payment on the basis of the pari passu clause (if successfully operated for all eligible claims); market clauses reduce the need for a treaty solution; and the clauses reduce the risk of the IMF or other official sector creditors having to pay holdouts to preserve stability.

Arguments put forward against collective action clauses have included: the threat of holdouts may induce the issuer to make a better offer; the clauses might further weaken creditor bargaining power; holdouts are not considered by everyone to be a major problem (between 1997 and 2013, hold-out creditors exceeded 10% of total debt in only two or three cases out of nearly 20 and in most cases creditor participation was for 90% or more); and the clauses would not bind all creditors, e.g. official creditors or bank lenders, leading to potential discrimination.

These arguments have now been overtaken by the widespread adoption of cacs in new issues.

The new market cacs are a fundamentally important advance and solve a great many of the problems. These cacs are basically the equivalent of creditor voting on a corporate reorganisation plan. They install a financial democracy which vests the power to decide

in a super-majority of creditors in a manner consistent with domestic reorganisation practice. Where available and if used to the full, they overcome the problem of hold-out creditors and in that case surmount the problems of the Argentinian pari passu case. They can function like a no-action or standstill clause (discussed next).

Description of clauses

ICMA's cacs offer a sovereign three options to restructure its debts, a choice it would make at the time of restructuring:

- modification of a single series of bonds;
- modification of multiple series of bonds, with a requirement that the restructuring be approved both by all bondholders voting together and by bondholders voting within their particular bonds ("two limb voting");
- modification of multiple series of bonds, with one aggregated vote amongst all bondholders ("single limb voting").

In all cases the voting is different for **reserved matters** and ordinary matters. Reserved matters include such items as changing or rescheduling principal or interest.

The ICMA **voting majority for a single series** on reserved matters is at least 75% of the total principal amount of the outstanding bonds (same for a written resolution). The euro area voting for reserved matters is not less than 75% of the aggregate principal of the bonds represented at the meeting (66⅔ for written resolutions).

Both the euro area and ICMA clauses provide for an **aggregate vote** on all affected bond issues. They each have protections to ensure there is no discrimination against a particular single series. In the case of the euro area aggregated clauses, a resolution is passed by two sets of voting, one by 75% of all bonds affected and represented at separate meetings (66⅔ for written resolutions) plus a vote of 66⅔% of those represented at a meeting of each separate series affected (50% for written resolutions). This is called "two limb" voting to make sure that each separate series has a vote and is not overruled by all the other series. Each such cross-series modification can be of some or all of the various series of bonds, as selected by the issuer in advance, but each holder must get the same menu of options.

As mentioned above, the ICMA cacs are more comprehensive. All series can be bound by a single vote provided the proposal is Uniformly Applicable to all the affected debt securities. The protection for bondholders against a majority imposing on any particular series that might be unfair or oppressive to that series, is that any proposal with single limb aggregated voting must meet the Uniformly Applicable requirement. This requirement is that the terms offered to the holder of the bonds affected by the restructuring must be the same or, at least, involve a choice from the same menu of options. As a result, the holders of bonds in a series that form an overall majority cannot vote that their series should receive, say, new bonds equal to 80% of the face value of their existing holding while other series receive only 1%.,

The Uniformly Applicable requirement does not mean that a net present value calculation must be made in order to ensure that the financial outcome for the holders of each series of bonds is identical. That would have been complicated given the infinite number of

possibilities and would leave a risk of disputes. Rather it means that, after the restructuring, all bondholders must hold the same instruments (or have had the option to hold the same instruments).

In the case of both the ICMA and euro area cacs the issuer and certain parties related to the issuer are disenfranchised from voting.

In addition the general law of many countries imposes other bondholder protections, e.g. to prevent oppression of the minority by the majority and to invalidate votes procured by secret bribes. Disputes in this area can be decided by the applicable courts stated in the bonds.

Gaps in cacs

There are gaps in the coverage of these cacs, including:

- **The legacy bond issues**. It is thought that legacy bonds amount to about $900 billion. But many of these have single series cacs and a large proportion of these bonds may be bonds issued by countries not likely to suffer financial problems. Exit consents (changes to the non-financial terms so as to depreciate the bond) can be used for US legacy cases if they have cacs allowing changes other than to principal or interest. Exchange offers can also be used under which legacy bonds can be exchanged for new bonds containing the new cacs.
- **Only private bondholders are bound**, not the official sector or bank loans, etc.
- The ICMA clauses only apply to **English and New York international bonds** of over one year, not where the governing law is Japanese, German or Swiss.
- **Domestic law debt** is not covered by the new ICMA aggregated cacs. Domestic debt is divided into two main classes – domestic bonds which are bought by international investors and those which are held mainly by residents. One solution is for sovereigns to apply ICMA or euro area type clauses to domestic debt. Another is for sovereign states to pass bondholder community statutes for their domestic debt on the same lines as the ICMA clauses, as was done in the case of the euro area. The euro area clauses were in fact legislated into member state law in a number of cases. Domestic debt is usually less important for various reasons compared to foreign currency debt (e.g. the sovereign can change its terms by unilateral statute).
- The euro area cac requires a vote in favour under each individual series as part of the "two limb" approach and euro area members are therefore more vulnerable to the risk of blocking positions being acquired in individual series of bonds.
- A country may have a **small number** of bond issues (e.g. emerging countries), therefore facilitating blocking by hedge funds.
- **Pre-emptive strikes** by bondholders. Until satisfied by an attachment of assets, the judgment debts could be bound by the voting if so provided (in practice, unusual).
- **Pari passu clauses** As of 2014, there is also an ICMA model clause clarifying the meaning of the pari passu clause so that it is clear that it covers only legal subordinations and does not require equal payment in fact. The problems raised by the New York Argentina judgment on pari passu clauses is overcome by bondholder voting, if the requisite voting majority is obtained so that all relevant holders are bound by the restructuring. Accordingly, subject only to the above gaps, this should deal with most of the problems otherwise caused by the New York court interpretation of the

pari passu clause in Argentina's case. Market reaction has been complex. In some cases investors in new bonds do not want a clarifying pari passu clause overriding the New York court interpretation of the Argentina pari passu clause because investors in bonds containing the new pari passu clause think they are worse off than investors in old bonds – without the clarificatory element in the pari passu clause on the basis that the old bondholders have a better litigation advantage. Some solutions proposed have been to just take out the pari passu clause (but there has been market resistance) or for immunity legislation to be amended to prevent injunctions against sovereign states or to leave things as they are. We are doubtful that there is a major problem: the New York Appeal Court said Argentina was a special case, not necessarily a precedent. Under English law pari passu clause are generally likely to have a more limited impact because of the approach likely to be taken by the English courts as to their meaning.

The substantial implementation of the ICMA cacs and the New York equivalent published by ICMA is a market success and should help allay fears that markets are not capable of dealing with this class of problem.

Recommendation

We think that the market cacs with the crucial aggregation clauses have solved a great many of the obstacles in the way of resolving sovereign bankruptcies and we recommend that there universal use should be encouraged in international issues. The utility of cacs in domestic issues should be kept under review.

STANDSTILL CLAUSES

Background

There is quite a variety of clauses under this head.

The typical international bond no-action clause provides that a bondholder vote of 25% is required to accelerate bonds on an event of default. This does not prevent bondholders enforcing for any unpaid amount of an instalment for principal for interest. Nor does the clause require further bondholder voting to take enforcement action after acceleration: each individual bondholder can enforce separately. In practice, acceleration is the key step.

Where there is a trustee, the typical English clause requires a bondholder vote not only to accelerate but also to take enforcement action (20% if the trustee does not act), subject to an indemnity to the trustee. The trustee may act at its discretion but in practice trustees rarely take enforcement action unless directed to do so by a bondholder direction.

It would be possible to draft full standstill clauses which block bondholder action and accelerations without a bondholder vote but these are not currently market practice.

These clauses are the equivalent of corporate insolvency stays on commencement of a judicial insolvency proceeding.

Pros and cons of clauses

The advantages of these clauses include: they prevent the race of the most diligent and potential preferential payments; they avoid multiplicity of suit; and they avoid destabilising

action by holdouts seeking to disrupt a negotiated workout. Effectively they replicate bankruptcy stays and corporate standstill agreements.

The disadvantages of the clauses include: they could tilt bargaining power away from bondholders, a bargaining power which is already often legally weak compared to corporate debtor; their absence might induce issuers to make a better offer and to negotiate in good faith; in practice creditor actions are very unusual, unless the issuer repudiates or fails to negotiate in good faith; not all creditors would be bound, eg, the official sector and bank lenders, thereby possibly leading to discrimination.

The more aggressive freezes and stays, eg, on set-off, on security enforcement and on contract cancellations are not considered appropriate in the sovereign context.

Current no-action clauses probably do dampen down litigation but one view is that they are too weak, e.g. because typically only 25% is required to authorise individual bondholder action or because they only cover accelerations or because there is no pro rata sharing clause unless there is a trustee – which often there is not.

It is argued by some that sovereign states should have the benefit of a unilateral right to be able to impose a legal freeze or enforceable moratorium on certain events such as inability to pay their debts as they fall due. On the other hand experience seems to show that a legal moratorium which precedes negotiations has not in practice been necessary provided that the sovereign debtor is negotiating in good faith. It seems to have been unusual that bondholders take action by attaching assets where negotiations are continuing unless the sovereign debtor refuses to negotiate. Ultimately litigating creditors can be blocked by cacs.

Although many domestic corporate reorganisation statutes allow the debtor to initiate the procedure unilaterally, such as the US Chapter 11, there are disincentives for the debtor, eg they become subject to examination, lose control of the process in whole or in part to independent insolvency administrators and are subject to intrusive court orders. It would be hard to replicate these disincentives in the case of sovereign states so that a self-induced stay would merely become a unilateral right to defeat creditors, a dramatic extension of existing immunities.

Standstill clauses would have significant implications for the triggers in credit default swaps, for credit ratings, for accounting impairment and for the trading of bonds. It can be difficult to set the triggers, to decide how subjective or objective they can be and, where applicable, who makes the determination.

Recommendation

We recommend that further work is done on the possible development of standstill clauses by markets voted on by creditors. At present, creditor litigation prior to an exchange of bonds if the debtor is negotiating with creditors seems very unusual but the situation should be monitored to assess whether or not disruptive and unjustified creditor action becomes a threat to the resolution of sovereign bankruptcies.

We do not think that sovereign states should be entitled to immunise themselves further by unilaterally imposing a unilateral moratorium or stay on creditor enforcements or accelerations of debt.

TRUSTEES

Background

The appointment of a trustee for public debt governed by local law is rare and trustees, if there are any, tend to be confined to international issues governed by foreign law. A minority of bond issues by sovereign debtors have over the past few years been constituted by a trust deed appointing a trustee for the bondholders. Historically the use of trustees was more prevalent in the New York market, although, until recently, this fell out of favour. The euro area model clauses do not require or recommend the appointment of a trustee.

In the English market the most common practice as it relates to sovereign debt is to use a fiscal agent rather than a trustee.

Pros and cons of trustees

The advantages of trustees include: a trustee is useful for carrying out administrative tasks, such as monitoring the issuer, monitoring the no-action clause, convening bondholder meetings, liaising with the issuer and other activities; there is greater flexibility for minor modifications and waivers; trustees can be used to administer pro rata payments to bondholders after a default; and it is easier to add new issues under an existing master trust deed.

The disadvantages of trustees include: in many cases trustees require an additional indemnity before they will act and this can delay the process. The main utility of trustees is to slow down disruptive action by individual bondholders because of the requirement for an indemnity before taking action, the requirement for a bondholder vote and because under trust structures recoveries are distributed pro rata so that individual grabs have to be shared, thereby discouraging the incentives for creditors to act individually.

Trustees in the past have also been criticised for not being pro-active (which has been used by their detractors to undermine one of the advantages of their use). In practice, in pursuing remedies against a defaulted sovereign a trustee will be guided by the instructions it receives from the requisite number of bondholders and if none are forthcoming it will not pursue claims against the sovereign debtor based on any contractual discretions.

Recommendation

We believe that trustees for bondholders play a useful role.

The appointment or otherwise of a trustee should be considered seriously on a case-by-case basis. They are a communication link with the sovereign and can limit maverick litigation. The fact that they have to distribute proceeds pro rata is a disincentive to aggressive action by a bondholder to secure sole recovery.

To do their job, it is sometimes said that trustees should be bolder and that they are disincentivised by liability risks. From the perspective of issuers, the minor additional cost carries with it significant potential benefits in times of financial distress. Further work could be undertaken to standardise documentation in this respect.

Creditor committees and creditor engagement

Some bonds have provided in advance for the mechanics of appointment of a bondholder committee to represent bondholders if the issuer gets into financial trouble, for the role and powers of such a committee, and for information requirements plus a good faith negotiation clause.

Pros

The advantages of a contractual mechanism under which the issue is required to recognise a committee which bondholders from ("creditor engagement clause") include

- A small group recognised by the sovereign debtor is essential for negotiating a deal (some debtors refuse to recognise a committee as being authorised or representative) and the subsequent appointment process of a committee could lead to bureaucratic and delays
- A committee can examine the economics of a deal and reflect bondholder opinion;
- The clause mitigates the risks of competing committees; if not agreed in advance, it is difficult for a self-appointed committee to negotiate a commitment from the issuer to pay its costs at the time.
- The evidence suggests that information sharing and close cooperation are key elements in quick and successful debt restructuring arrangements and this means less time and effort for all involved.
- As sovereign debt restructurings occur frequently it is preferable to put a structure in place for creditor engagement upfront.
- There has been institutional support for "good faith" discussions by the IIF, the IMF, and the UN General Assembly.
- This structure helps ensure that hold-outs do not undermine the outcome.
- Putting a structure in place immediately means that there is more prospect of calm and order rather than trying to build ad hoc committees in times of crisis.
- Engagement by both sides helps to ensure the necessary information is clear and helps maximise successful restructuring.
- The use of a committee should improve take-up of the restructuring proposal.
- The creditor engagement clause specifies that the debtor will only engage with one committee and if multiple committees are formed that a steering group should be established.

Cons

- Debtors do not want to pay the costs of a committee, although though this may be cheaper than the alternative.
- Debtors are worried that bringing creditors together gives them more power.
- Debtors are worried about specifics such as unanimity, though there is no requirement for this to be reached.
- They are also worried about:
  - the determination of "good faith" (though there is much judicial guidance in this area) and whether it binds only the debtor;
  - coordination of the different constituencies of bondholders;
  - membership changing over time;
  - access to price-sensitive information;

– whether committees are representative;
– some debtors wish to have a veto on committee members.

An argument often made against the inclusion of creditor engagement clauses in sovereign bonds is that, unlike the cacs, neither the sovereign nor the bondholders are prevented from the recognition or creation of an ad hoc committee of bondholders if the bonds of the sovereign do not include a creditor engagement clause.

At present the take-up of the ICMA creditor engagement clause updated in 2014 (to take into account the aggregation feature in the enhance cacs) has been patchy (with greater take up under English law governed bond documents). This has probably been because issuers are reluctant to agree to pay expenses in advance or to agree to the extensive disclosure and other obligations, because issuers think that the potential disorganisation of bondholders might favour their position and because arrangers believe that in practice the ad hoc formation of committees at the time has worked reasonably well in practice, though not without some frustrations.

The IIF in its Principles of Stable Capital Flows and Fair Debt Restructuring recommends cooperative and good faith negotiation.

Recommendation

Some members of the group endorse the use of creditor engagement clauses but others are less convinced. We recommend that further work is done to see whether engagement clauses could be adapted so as to be routinely acceptable to issuers and bondholders. The Group considers that creditor engagement clauses should be promoted.

PRIORITIES

Ladders of priorities

In corporate practice, there is typically a bankruptcy ladder of priorities comprising six generic steps or rungs: (1) super-priority creditors, mainly comprising claimants with a set-off or collateral or claim under a trust, (2) priority creditors, typically comprising taxes, employee benefits, occasionally emergency last resort new money and always post-commencement expenses, (3) senior unsecured creditors such as banks, bondholders, trade and others, (4) subordinated creditors, (5) equity shares, and (6) expropriated claimants, eg, claims for foreign taxes or penalties or for foreign currency depreciation.

There is no formal ladder in relation to sovereign bankruptcies although there are practices, eg, that the IMF and other multilaterals have a preferred status. It is not possible for a sovereign bankruptcy to arrange priorities as an entitlement to layers of realisation proceeds. The priorities have to be achieved by an order of maturity. Thus if a debt falls due on Tuesday and is paid, then the debt which falls due on Wednesday may not be paid so that Tuesday's debt has priority in practice. The euro area claims preferred status for emergency bail-out loans to euro area countries by treaty.

Despite the absence of a formal ladder by law, the sovereign priorities are often as follows:

1. Creditors with a set-off or a security interest – usually unimportant in sovereign cases

2. Employees of the state and their pension and domestic trade creditors – if in local currency and if they are paid at all
3. Domestic currency bondholders – they may be paid in inflated currency
4. Foreign currency trade creditors and some small creditors who are typically excluded from a rescheduling
5. Official and private hold-out creditors, if small
6. IMF
7. Other recognized multilateral creditors such as the World Bank and the regional development banks. A number of other multilaterals, such as the European Investment Bank and the European Stability Mechanism, claim this preference
8. Other official creditors for foreign currency loans to bail out the sovereign, if payable before the private sector bonds
9. Rescheduled private sector foreign currency bonds and official sector loans rescheduled by the Paris Club
10. The bonds, if any, of expropriated creditors who are paid compensation in new state bonds.

The fact that there is in practice a long ladder shows that general admonitions that the plan should be fair and equitable or the like are not likely to clarify the situation.

An important issue is whether new money advanced to the sovereign to bail it out should have priority. The desirability of the priority of such funding is controversial in the sovereign context although it is generally accepted in relation to the IMF liquidity assistance. The effect of this financing is to subordinate other senior bondholders if the rescue fails. A few national corporate bankruptcy statutes contemplate the enforced priority of new money subject to conditions, but the general international consensus is that this must be agreed at the time. In recent cases there seems to have been little market appetite for priority new money financing from the private sector but official sector new money was very substantial in the case of Greece: much of it initially ranked prior to the rescheduled bondholders in terms of maturities.

There also does not seem to be market appetite at the moment for sovereign coco bonds of the type developed for banks. These are contingent convertible bonds under the terms of which the bond is subordinated to other bondholders. In addition such instruments would have a number of other features akin to bank or insurance company hybrid capital instruments, for instance, interest or maturity deferral triggers. Further, there would also be a feature comparable to the equity conversion element in the corporate sphere, for instance, issuance of further bonds or a GDP-linked instrument.

Nor is there currently much market appetite for GDP-linked bonds whereby the amount of principal or interest payable varies according to the annual rises or falls in the GDP of the sovereign. These bonds would in function be similar to private equity shares. See also GDP-linked bonds and coco bonds later in this paper.

Recommendation

We recommend with some reluctance that the ladder of priorities be left to negotiation by the official and private sector creditors on a case-by-case basis. In most cases it seems to work satisfactorily or is politically acceptable. If the private sector objects to the ladder in

a particular case, they can decline to participate in an exchange and so in effect have some say on priorities. We believe that international formal agreement on a fixed prescribed ladder involving both official and private debt would take many years to achieve, if it could be achieved at all.

International sovereign bankruptcy court

Many commentators have suggested the establishment by treaty of an international sovereign bankruptcy court or arbitral tribunal or non-judicial venue to engage in sovereign bankruptcies (though with a more agreeable title). So far however there has been little agreement on the scope of the functions of such an institution.

The assumption of functions would oust the jurisdiction of domestic courts chosen by the parties in the bonds. It does not seem to be proposed that the tribunal should have jurisdiction to order payment of a debt by a sovereign and its enforcement.

Financial terms

Some commentators have suggested that an international debt institution should have jurisdiction over the financial terms of a restructuring, e.g. the degree of postponement of maturities, the interest rate, currencies and any haircut or conversion into GDP warrants. The dominant view of our Group is that these economic and political questions are not appropriate for an arbitral tribunal. The tribunal would be ill-equipped to make these decisions in the normal case. The financial terms have to be settled by negotiation of the sovereign debtor and the creditors. For example, debt sustainability (the future ability of the state to be able to pay) involves a somewhat difficult prediction about the future and also a political judgment as to whether the sovereign debtor will carry out a corrective programme.

Domestic bankruptcy tribunals are often mandated to decide whether a bankruptcy rescue procedure is feasible (as in the case of the UK administration) or whether a reorganisation plan is likely to avoid liquidation (as in the case of Chapter 11). But in these broad-brush decisions the court relies on evidence produced by experts and the decision is completely different from deciding the actual financial terms themselves. So far as we are aware no international arbitral tribunal does make decisions of this type – not ICSID and not the WTO. In these latter cases the tribunal typically interprets a treaty.

Domestic bankruptcy courts often decide whether a plan is fair and equitable. This is not a view on the commercial terms, but rather whether the plan satisfies the basic requirements of the law, eg it observes the ladder of priorities and whether there is something hopelessly unconscionable or discriminatory.

It seems doubtful that sovereigns or creditors would agree to submit financial and economic issues to a binding adjudicator. The tribunal would in substance displace a primary role of the IMF.

Arbitration

External lenders, whether governments or banks or bondholders, typically are not generally sympathetic to arbitration as a method of resolving disputes, even in light of the New York Arbitration Convention of 1958. Their view is that there is nothing to arbitrate

and that arbitration leads to delays and costs. International arbitrations in particular may be much slower than proceedings in the English or New York courts. If a sovereign institution had wide jurisdiction, the process might become politicised.

Few non-enforcement disputes

In practice the restructuring of sovereign debt is generally simpler compared to corporate workouts in the private sector in terms of the execution, though it can have large ramifications. It simply involves an exchange of bonds and legal disputes about this process seem to be extremely unusual. We have already pointed out that sovereign restructurings typically are more easily and quickly resolved than very large corporate bankruptcies enacted under the aegis of corporate bankruptcy laws. The number of disputes, apart from enforcement, is tiny. It is hard to see what the institution would have to occupy itself.

Governing law insulation

Both international bond issues and syndicated bank credits generally choose an external governing law and forum with the main objective of insulating the obligations of the sovereign debtor from a moratorium, exchange control, haircut or the like unilaterally imposed by the bankrupt sovereign. This is necessary since most significant domestic courts will recognise a change to the obligations made by a statute of the debtor country if the agreement is governed by the law of the debtor state, although the US position is somewhat more nuanced (the position depends on whether the debt is "located" within the territory of the sovereign debtor).

It would clearly be inequitable if the sovereign debtor by its own law could unilaterally impose a restructuring on creditors. This was a major point in relation to the 2012 Greek restructuring: Greece proposed that the new bonds to be issued under the restructuring in exchange for existing instruments, would be governed by Greek law. The bondholders successfully negotiated for them to be governed by English law so as to protect them against the risk of a unilateral change to the terms (through legislative Greek law changes) as far as feasible. This concern was justified in view of the reliance Greece was placing on change of domestic law to include cacs in its previously issued domestic law governed bonds, a key feature of the Greek restructuring.

This issue of insulation would be a major question in relation to a sovereign debt institution. In the field of commercial arbitration, arbitration rules sometimes prescribe that the arbitrators will apply the governing law of the contract. The issue of the applicable conflict of law rules is often left open and is legally controversial e.g. law of the seat of the arbitration or governing law of the bonds? By contrast, the English courts apply their own conflict of laws rules, regardless of governing law, so that the law of the forum applies.

Domestic courts

The English and New York courts act as international public utilities as an available choice of law and courts for private and official loans, along with other domestic legal systems.

Notwithstanding the Argentine case, these courts are generally regarded as reliable and just.

Recommendation

We believe that a case still needs to be made out for an international sovereign bankruptcy court having jurisdiction over sovereign bonds to pronounce on restructuring terms or to oust the general judicial jurisdiction of the national courts chosen in the bonds.

Other bankruptcy topics

We briefly allude here to a few other bankruptcy topics.

Preferences

One of the most ancient and well-developed principles of municipal bankruptcy law is that relating to the recovery of fraudulent preferences, typically payments or transfers made by the debtor preferentially in the suspect period after the onset of actual insolvency, and sometimes before if made with deliberate intent to prefer, which are prejudicial to creditors, such as a gift or advance payment to one creditor which deprives the others.

There does not appear to be sufficient abuse by sovereign debtors to justify the development of this doctrine in relation to sovereign bankrupts.

Anti-vulture statutes

Some countries have contemplated an anti-vulture fund statute whereby creditors falling within the definition of a vulture fund are not entitled to claim from the sovereign debtor more than they paid for the bond – usually a very low figure since they buy when insolvency is looming. Only Belgium has passed such a statute in its proper sense although a UK statute had a similar but limited effect in relation to the existing debt of highly indebted countries.

So far as we are aware no state has enacted such a statute in relation to corporate debt although complaints that speculators were buying up the debt of bankrupts cheaply with a view to making a large profit go back for centuries.

There are doubtful aspects of statutes on the Belgian lines (though the UK statute is thought to have achieved a useful result). One reason is that bond debt changes in value according to current interest rates and it would be impracticable to trace all these fluctuations in price. Another is that the idea of a claim, whether for debt or equity, is founded on the assumption that the claim is payable in its full principal amount or rather that the full principal amount is the amount of the claim on which dividends are paid in bankruptcy, not some reduced amount. Yet another is that the definition of a vulture fund can be too broad. A further reason is that it seems undesirable to exclude a creditor because of its character.

Odious debt

There has long in this field been discussion as to whether the odious debt of a sovereign is claimable in a sovereign bankruptcy. Odious debt is debt incurred by an unlawful or despotic government or the proceeds of which are used for some wrongful purpose such as the subjugation of the people.

This category of debt has rarely been recognised in modern practice. The invalidation of this class of debt should be left to ordinary principles of law as to unlawful debt which are well developed in relation to ordinary corporate bankruptcies.

Measures to reduce risk

The issue here is whether the architecture for the resolution of sovereign bankruptcies can be mitigated by measures taken in advance. In the case of corporate insolvency, these have included such matters as greater disclosure, rules about corporate governance such the composition of the board, and the personal liability of directors who deepen the insolvency. Most of these measures have not been particularly successful and most are inappropriate for a sovereign. However, a number of other measures could be considered, as discussed below.

Capital adequacy

The risk weights of bonds issued by sovereigns and held by banks, insurance companies and other regulated entities should reflect such matters as large deficits and over-borrowing. At present government bonds of a sovereign belonging to a particular club, such as the OECD, may have a zero risk weight even though the actual credit risk may vary substantially. Some regard this as inconsistent with the object of risk-weighting. Any changes should be considered carefully in view of the implications for financial institutions holding such debt and the extensive use of sovereign debt as collateral.

Disclosure

As regards disclosure, some offering circulars already contain a vast amount of data about the sovereign issuer drawn from many sources, including the IMF and rating agencies while others are extremely thin. The preparation of an offering circular for a new issuer which is an emerging country typically takes between one and two months. In general there is no continuing disclosure obligation either in the bonds themselves or under the listing rules of most exchanges (with a limited SEC exception). This is probably because there is already a wealth of information available from other sources. The time when accurate data is lacking tends to be when the sovereign is in difficulties. Some jurisdictions exempt sovereigns from normal disclosure and market abuse and there is a question as to whether this is appropriate any longer. If there is no disclosure, there is no due diligence.

Probably one of the main problems with disclosure is that the accounting standards may leave considerable gaps and are not uniform, e.g.as regards contingent exposures, provinces and municipalities, and future pension liabilities. It is generally not feasible to include debt for which the sovereign may be de facto responsible, such as by having to bail out the banking system (which usually collapses if the sovereign state is insolvent).

Two other points are worthy of note.

First, one significant problem with disclosures is that in some instances, e.g., in the euro area, there is often virtually no disclosure, even of the terms and conditions of the bonds so that most investors do not know of their legal rights.

Secondly, the IMF has done much work in promoting data dissemination standards. The Special Data Dissemination Standard was established by the IMF to assist its members who raise funds in the international markets in the provision of their economic and financial data to the public. Subscription to the SDDS is voluntary.

Early warning triggers

It is almost a universal complaint that sovereign debtors approach their creditors with a view to rescheduling too late. This has also been a constant complaint over many decades in relation to corporate debtors, i.e. that insolvencies could be mitigated if the corporation stopped early enough and rescheduled its debts in good time. A great many devices have been deployed to deal with this in the corporate sector, usually to no avail, e.g. increased disclosure, senior officer liability for financial statements, personal liability of directors for deepening an insolvency and obligations of management to petition for judicial re-organization or bankruptcy if the company is or is likely to become unable to pay its debts as they fall due or is balance sheet insolvent. These remedies do not appear to be practicable for sovereign states. Too little and too late may therefore just be a reality of human nature, overcome only by pressures at the time.

As regards early warning contract triggers, bonds contain events of default, notably non-payment, non-compliance with covenants, a cross-default relating to other external bonds with thresholds, a moratorium, illegality, repudiation and sometimes an IMF clause (membership of the IMF kept in good standing). Material adverse change clauses in bonds are extremely rare outside World Bank documentation. In general things have to be quite serious before there can be intervention by bondholders as a result of an event of default – impending problems on the horizon are not enough. This balance is probably right and is a matter for the particular circumstances.

Covenants in bonds

The covenants in international bonds are very limited – for most emerging market issues typically only a pari passu clause (sometimes limited to external bonds and the like) and a negative pledge prohibiting the grant of security to other creditors, also almost invariably limited to external bonds and the like (thereby permitting collateral in favour of banks, official creditors and others, although the grant of collateral is rare). The insertion of financial ratios governing, for example, budget deficits and debt to GDP ratios or interest coverage are virtually unheard of in normal bonds. These are regarded as sovereign matters and are generally not acceptable to sovereign issuers. If they were inserted, a great many developed countries would soon find themselves in trouble. However, there is a case for reconsidering the use of financial covenants in appropriate cases, even if they do not lead to an event of default.

In substance, at present the main deterrent is that a worsening financial situation makes it difficult for the sovereign to continue borrowing and ultimately the sovereign is cut off from access to external funds.

Waivers of immunity

Bonds usually contain a comprehensive waiver of immunity clause, but domestic assets are almost invariably exempt from creditor attachment by local law, and foreign assets are typically shielded by the veil of incorporation. The de-immunisation of domestic assets does not seem feasible, nor does it seem appropriate to pierce the veil of incorporation in the case of state bonds.

Listing

It would be theoretically possible to exclude defaulting sovereigns from listing in the main financial centres for a period after the default. This would severely inhibit the access of sovereign issuers to the market because many bonds investors, such as insurance companies, can only invest in listed debt or because listed debt has a more favourable capital treatment.

We doubt that this measure would be to the advantage of bondholders since one of the main objects of a rescheduling is that the sovereign issuer should be rehabilitated.

GDP warrants and coco bonds

We believe that coco bonds and GDP-linked bonds could serve a more useful function and further work should be done on their development. Though different in concept, they could very broadly simulate debt-equity conversions common in corporate restructurings but there are issues to resolve.

A very small number of countries have issued bonds with GDP-linked warrants. Particularly in an era of exceptionally low yields, the possible sweetener may result in enthusiastic take-up. GDP-linked bonds would provide flexibility to the sovereign issuer which would be reflected in a higher cost of issuance. The real challenge will therefore become making them available to middle income and developing countries at a manageable cost.

In the view of the Group, it would be a substantial international public good if a few AAA rated sovereigns were to issue such bonds and begin the creation of a market into which weaker sovereign credits could also issue. If attractively priced, large institutional asset owners that are currently constrained from holding them owing to their equity-like characteristics might see these constraints lifted. For an important study, see the joint Bank of Canada - Bank of England paper "Sovereign Default and State-Contingent Debt" (2013).

UN resolutions

The United Nations and the United Nations Conference on Trade and Development have been active in the area of sovereign debt, in the form of presenting principles of sovereign debt.

The General Assembly passed three resolutions regarding sovereign debt restructuring since 2014:

A/68/304 — "Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes" [Sept. 2014 – 124 votes in favour; 11 against; 41 abstentions]
A/69/247 — "Modalities for the implementation of resolution 68/304, entitled "Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes"" [Dec. 2014 – 128 in favour; 16 against; 34 abstentions]
A/69/L.84 — "Basic Principles on Sovereign Debt Restructuring Processes" [Sept. 2015 – 136 in favour; 6 against; 41 abstentions]

Those voting against or abstaining were mainly advanced countries so that there was a divide between developed and developing countries in the voting, a resurgence of the patterns of the 1970s.

For example, the most recent resolution of the UN, A/69/L.84, sets out nine principles, relating to such matters as the right of sovereigns to design their macroeconomic policies free of abusive measures, good faith and transparency, impartiality, equitable treatment, sovereign immunity, legitimacy, inclusiveness, observance of the rule of law, sustainability, timely and efficient restructuring, human rights and majority restructuring.

In addition to the UN principles, UNCTAD put forward a paper entitled "Roadmap and Guide for Sovereign Debt Workouts" in April of 2015. The paper includes five principles of sovereign debt workouts, namely legitimacy, impartiality, transparency, good faith, and sustainability.

It is not clear at this point what effect – if any – these principles will have upon sovereign debt generally and future restructurings, or the practical implications. They appear to have largely been ignited by the Argentine case which we believe was idiosyncratic. It seems that further work and expertise would be needed to develop the principles into specific proposals

Sovereign Debt Forum

We believe there is scope for the establishment of a forum which would specialise in the study of sovereign debt issues and which would be staffed by persons knowledgeable in this field. The forum would publish papers and organise conferences. It would lobby relevant participants in markets and the official sector. It would lead in the thinking on this topic. It would hold itself ready to advise on particular cases and to offer expert assistance. A forum on these lines has been suggested by Richard Githin and Brett House and we endorse their proposal.

The forum would require funding from official or private sources.

Recommendation

We recommend the establishment of a Sovereign Debt Forum serving the above purposes.

Conclusion

Our overall conclusion is that the introduction of the revised pari passu clauses and aggregated creditor voting via cacs with aggregation features in international sovereign bonds has been a major advance in facilitating orderly future sovereign debt restructurings. The implementation of the clauses not only potentially overrides hold-out creditors but also overcomes the possible major adverse effects of the Argentine case on the pari passu clause. Nevertheless there are still gaps in the coverage of these pari passu and collective action clauses and we think that the situation should be carefully monitored in order to ascertain whether these gaps do in fact turn out to be prejudicial – which is not what we would expect at the moment.

In addition, we believe that further work should be done on other clauses and instruments as discussed above and again that the market situation should be reviewed from time to time with a view to establishing whether further progress is needed. In that event further consideration should be given as to the most suitable method of implementation, that is whether by market contract or, if that fails, by treaty or other similar method. Broader market access implications for sovereigns would also need to be considered.

STUDY GROUP ON UN SANCTIONS AND INTERNATIONAL LAW

WORKING SESSION

Thursday, 11 August 2016, 9.00am

Chair: Professor David Stewart (US)

The Chair welcomed attendees and introduced the panel, comprised of the Professor Larissa J van den Herik (Chair of the Study Group) and Professor John Dugard, Professor Christian Tams, and Professor Antonios Tzanakopoulos.

The Chair expressed his view that the topic of the Study Group was of increasing importance, not just from the UN perspective but also from a bilateral perspective. It was increasingly a matter of discussion among academics as well as government officials.

Professor Larissa J van den Herik (Netherlands) pointed out that the Study Group was only launched a year earlier in June 2015. Consequently, the Study Group did not have a fully-fledged report to present. The purpose of the panel was essentially to introduce the Study Group. Its focus and work so far was to locate UN sanctions in a broader landscape of sanctions, noting the existence of civil society sanctions and third party sanctions. The question was then where did UN sanctions fit, how did they relate to these other sanctions, and what was the future of UN sanctions in this broader setting.

In the last 25 years, there had been approximately 24 UN sanctions implemented with different episodes. Within this time, significant developments and transformations had transpired. First, there had been a move away from comprehensive "erupt" type sanctions to targeted sanctions. Secondly, there have been a diversification of sanctions, which impacted the many types and situations in which sanctions were employed.

Sanctions were still in transition, which could be captured in three ways, namely individualisation, formalisation (regulation) and interplay:

- Individualisation referred to the implication of sanctions directly on the individuals rather than on the States in the form of travel band. Individual sanctions gave rise to various problems. These problems were well known and had been addressed in depth by scholars. Accordingly, it was not necessary for the Study Group to revisit these issues; rather, the Study Group would be addressing new issues. Here, private actors such as banks and insurance companies had become overequipped in dealing with sanctions. In implementation practices, these actors were often guided by different motivations as compared to States. These institutions often adopt a "better safe than sorry" approach, resulting in the phenomenon of over compliance.
- Formalisation of sanctions regarded the insertion of legal standards in sanctions regimes and increased proceduralization. Also, the integration of informal arrangements could be discussed under this heading.
- Interplay concerned the interaction between UN sanctions and with other areas and regimes of international law and its effect on the design and interpretation of the UN sanctions regimes.

Professor John Dugard (South Africa) stated that, because the ILA was meeting in South Africa, something should be said about the South African experience in relation to

sanctions. Sanctions in the South African context contributed to ending Apartheid. The UN was particularly active in opposing Apartheid, as exemplified by the recommendation of the arms embargo on South Africa by the Security Council in 1963 followed by a mandatory arms embargo in 1977. The General Assembly also passed sweeping resolutions in the early 1960s calling on States to impose all sorts of sanctions against the Apartheid regime (such as trade relations and sport and cultural boycotts). The Security Council gave its endorsement towards resolutions of this kind to impose the recommended adoption of sweeping sanctions against South Africa only later in the late 1980s. UN sanctions alone had little impact. On a diplomatic level, African States refused to enter into diplomatic relations with South Africa, but these were recently decolonised States, and therefore such action had very little impact on South Africa itself. South African Airways were prohibited from flying throughout Africa but were able to fly around Africa. Until 1986, the US government adopted measures resulting in the termination of flights between the US and South Africa. These measures had implications for South Africa. But most sanctions during the Apartheid years were carried out and implemented by civil society. Professor Dugard briefly explained how sports sanctions were tremendously important. These were imposed by the non-governmental sporting environment. A similar impact was felt by cultural boycotts.

As a result, South Africa became isolated culturally as well as academically. The years of Apartheid resulted in banks withdrawing credit, and this undoubtedly had a major impact on South Africa. US withdrawal of investments in pension funds had a major impact so the churches, universities and civil society generally mobilised very strongly against apartheid. On the one hand, there were UN imposed sanctions and sanctions imposed by foreign governments, on the other hand there was civil society, which was very actively opposed to Apartheid. It was important to stress that, although UN sanctions alone were not effective, they did authorise the actions of civil society and they encouraged civil society to mobilise against Apartheid.

It was interesting to compare that situation with the present action taken by States to suppress boycotts against Israel, particularly States that had enacted legislation to prohibit advocating boycotts. In the case of South Africa, no such action was taken, and civil society did not have to contend with legislation that prohibited advocating sanctions.

The South African experience showed that UN sanctions and the actions of civil society went hand in hand. UN sanctions needed the support of civil society to be effective. Legislation enacted by States was not really sufficient to implement sanctions. Therefore, it was necessary to mobilise civil society to enable the effective implementation of sanctions. South Africa became completely isolated as the result of the actions of civil society in many European States and in the US. But in order for civil society to be effective, it needed the "blessing" of the UN in the form of UN resolutions authorising actions that prevented States from acting otherwise.

Professor Christian Tams (UK) stated that he approached the topic with much hesitation, partly because the Study Group would not be focusing on countermeasures, something which had divided the international debate for years, partly because he believed his approach was old fashioned after listening to Professor Dugard's presentation on the involvement of civil society in the implementation of sanctions. Professor Tams noted that the theme of his presentation tied in with the presentation of both Professor Dugard

and Professor Van den Herik in so far as they dealt with matters such as interplay and linkage on the various levels. The focus of his presentation was on smart sanctions, and notsosmart sanctions, and on the different layers of legality.

It was safe to say that the legal regime was controversial, complex, and often confusing in respect to sanctions adopted by States in response to breaches of international law by other States. This was an area where the Study Group might make some useful contributions.

Unilateral sanctions were controversial, and it was well established that there was disagreement on this. The South African experience was usually credited for showing promise, concerning international sanctions adopted not only within but going moderately outside the UN sanctions context. The opposite view was that this was a pretext for power; however, this was outside the Study Group's mandate. International debate on this issue had reached a deadlock.

Whereas Professor Van den Herik mentioned category interactions and Professor Dugard mentioned institutional, regional and unilateral level interactions, his presentation would add two more interactions, which he believed could break through the deadlock:

- First, as Professor Dugard mentioned and illustrated, on some level, the UN was not authorising sanctions but rather recommending them. Could that recommendation justify a breach of international law?
- Secondly, the UN or other international institutions could provide factual evidence of breaches which might help overcome the problems that affect the debate and provide some sort of accountability.

He reiterated that the topic was controversial and complex, but emphasised that the Study Group could make good contributions. With regards to the UN sanctions, there was no problem in knowing what they were going to do; the greater problem came from assessing the evidence, and upholding the standards that we wanted to achieve.

Professor Tams finally stated that decentralised sanctions were outside the mandate of the Study Group and that it was important that the Study Group had decided not completely to ignore them but to look at them through the prisms of linkages. This approach had much promise. Further to the conclusion drawn by Professor Dugard, Professor Tams added that decentralised and institutionalised sanctions also went hand in hand.

Professor Van den Herik invited Professor Antonio Tzanakopoulos to deliberate on the future of UN sanctions.

Professor Antonios Tzanakopoulos (UK) started by expressing uncertainty as to whether he could deal with the topic and preferred to adopt a more reactionary approach, joking that his beard was not white enough yet for future gazing.

He continued by playing off a couple of things that Professor Tams had mentioned. The first thing was to emphasise the centrality of the concept of the wrongful act. The whole point was that, whatever measure was taken as a sanction, from a legal perspective, it needed to somehow constitute a wrongful act. Otherwise it was an act of retorsion, which was certainly an unfriendly act, but a completely legal act.

He asked what would happen when one would have to actually violate the law in order to react. The common thing shared by countermeasures and sanctions was that, essentially, they were a sword and a shield. Countermeasures were a sword insofar as an injured State was reacting to the breach of an international obligation. At the same time, countermeasures acted as a shield because they protected a State from responsibility. In reality, however, this was not how it worked.

This was important because the history of UN sanctions had something to tell us about them being used as a sword and as a shield. In the 1990s, the Security Council did not truly realise what it was dealing with. So, instead of using sanctions as a sword, it used them as a sledge hammer and completely crushed Iraq with completely comprehensive sanctions that hurt Iraq's civil society. The reactions of civil society around the world forced the Security Council to consider the introduction of humanitarian exceptions and to target the sanctions so as to limit the "bloodiness" of the sledge hammer approach.

This targeting took place with regards to goods (eg, timber and diamond), but by the end of the 1990s, it was focussing on individuals. Once the Security Council started disconnecting the position of sanctions with a threat to the peace located somewhere specifically but started dealing with global threats to the peace like terrorism and started implementing targeted individual sanctions against those associated with terrorists, it could be said that the Security Council over sharpened the sword and over broadened the shield. One started seeing the States realising what sort of weapon and shield they had in their hands and used the Security Council to do those things that they could not do back home.

Professor Tzanakopoulos affirmed the view that the anti-terrorist sanction regimes were atrocious. It essentially involved the blacklisting of individuals on the basis of a dodgy beard and name. The shield of Article 103 was that it justified State action; "we hate to do this to you, but we have to implement this as mandated by or international obligations". What this essentially meant was that there was nothing inherently good or bad in sanctions and that they could be used for good, but they needed the support of civil society (as in the case of South Africa). They could also be used for dangerous adventures too, but in such cases civil society was needed to stand up and not support sanctions.

Professor Tzanakopoulos concluded by stating that the future of sanctions depended on civil society and the inter-linkage of civil society either supporting them for effectiveness when the consensus was that one actually needed the sanctions to be effective. Furthermore, it depended on civil society, including academic society, reacting and forcing the Security Council to take a step back and think twice about whether it was going the right way. Without civil society, the future would be quite grim.

The Chair thanked the panellists for their presentations and opened the floor to interventions.

Professor Van den Herik added that she was particularly interested in comments pertaining towards the future of the Study Group, but comments did not need to be confined to that.

Jeremy Carver (UK): thanked the panellists for their presentations, adding that Professor Van den Herik had defined very cleverly the scope of the work of the Study Group. He

recommended that the Study Group deal with the lawfulness of UN sanctions. In this regard, Mr Carver drew attention to the drafting of Art 41 of the UN Charter, which contained very clear limitations that had persistently been ignored. He distinguished measures aimed at excommunicating a State deemed to constitute a threat to international peace and security and measures aimed correcting, easing and resolving threats to international peace and security. He also referred to Art 50 of the UN Charter, which acknowledged the damaging effects of such measures on the target States as well as on its neighbours.

Mr Carver suggested that mistakes had been made in implementing UN sanctions after 1990, whereby measures were converted into lawful State measures. He suggested that the Study Group go back to the roots of the limitations in the UN Charter and study what States could do and what the Security Council could not do.

Ambassador Ihor Turyanskiy (Ukraine) drew attention to another violation of international law by Russia, specifically by provocation with the aim to justify its future possible aggressive actions against Ukraine. Concentration of Russian weaponry, armaments and military forces on the temporarily occupied Guinea Donkas as well as along the Ukrainian-Russian border was a cause or particular concern. Ukraine rejected all accusations from Russian, which were completely groundless. It was a threat to peace and stability not only in Ukraine but also in the entire region. Ukraine urged the international community to take all possible political and diplomatic steps to exert the influence on Russia to prevent a new round of aggression against Ukraine and another violation of norms and principles of international law reflected in the UN Charter.

Professor Math Noortmann (UK) noted that the topic of sanctions took him back to the late 1980s, when he was a PhD student researching the concept of countermeasures in international law. He feared that not much had changed as far as the substantial rules and debates on "sanctions" were concerned.

As the Chair of the ILA Committee on Non-State Actors, he applauded the focus of the Study Group on the role of the intergovernmental and non-governmental, which characterised the practice of sanctioning as transnational not international. At the same time, he agreed with Professor Tams that the State could not be completely cut out of a sanctioning process, which started with UN decision-making and ended with civil society implementation.

It was here that the law of State responsibility and ILC discussions on the purpose of and requirements for countermeasures entered the debate once again. Everyone knew that the term 'countermeasures' as used by the ILC in its Articles on the Responsibility of States for Internationally Wrongful Acts was a term of convenience, adopted to avoid the terms "sanction" or "reprisal". The substance of the debate was still relevant, namely the controversies on the functionality of sanctions (symbolic, enforcing or punitive) and such requirements as proportionality and dispute settlement.

The State could be both an enabler and disabler of civil society actions such as boycotts. Moreover, the questions of due diligence could arise if and when the boycotts or embargoes of civil society or other private actors violated relevant UN Security Council resolutions. If there was an interplay between intergovernmental organisations and civil

society organisations including NGOs and multinational corporations, the State would often act as a conduit and questions of State responsibility might enter the debate.

Professor Rainer Hofmann (Germany) congratulated the Study Group for bringing forth the role of civil society in the implementation of sanctions. Civil society was ultimately better situated than States when it came to topping up sanctions and on keeping them more individualist.

Patryk Labuda (Poland) queried whether the Study Group had a mandate to explore the interplay between sanctions in the International Criminal Court and individual criminal responsibility.

Professor Van den Herik responded that when the Study Group was established, there was some discussion about focusing on different types of interplay.

Professor Christina Cerna (US) suggested that, with regards to the future of the UN sanctions regime and perhaps under the heading of prolonged disobedience to sanctions, the Study Group consider international human rights law and specifically the decision of the European Court of Human Rights in *Al-Dulimi and Montana Managment Inc. V Switzerland*, which held that the relevant UN sanctions violated fundamental rights.

Marija Đorđeska stated that she would like to echo the suggestion of Professor Tzanakopoulos that the Study Group address the realities of individuals who might have been unjustifiably placed on sanctions. It would not only produce a great study but would also provide a useful tool to practitioners.

Professor vVan den Herik expressed her appreciation for the final interventions and spoke about the interplay, individualisation as well as delisting of sanctions on specific people. She thanked attendees and panellists for their contributions.

Reporters: Alya Rhode and Charmaine Awolaja

CLOSING SESSION

SANDTON CONVENTION CENTRE

Thursday, 11 August 2016, 3:00pm

The Right Hon Lord Mance, Chairman of the ILA Executive Council welcomed attendees to the closing session. He congratulated the organisers of the conference and thanked them for what had been an excellent programme and a successful conference. He congratulated those Committees and Study Group that had produced reports. He thanked the Steering Committee, which had worked on the reports with the chairs and rapporteurs of the Committees and Study Groups. He thanked Alexander Kunzelmann for coordinating the team of reporters, and thanked the reporters for reporting the open session. Finally, he thanked the indefatigable Juliet Fussell and Natalie Pryor, who received a round of applause from attendees.

Lord Mance then invited the ILA scholars to come forward to receive a certificate. He thanked the scholars for their participation and enthusiasm, and hoped for much fruitful collaboration in the future.

Lord Mance raised a number of additional matters:

1. One vicechair position had been vacated, and two other positions would soon be vacated, with Dr Kamal Hossain and Professor Cynthia Lichtenstein reaching the end of their respective terms. Dr Hossain and Professor Lichtenstein had each been a tower of strength and assistance to Lord Mance and the ILA, and Lord Mance was sorry to see them retire. Lord Mance marked their services my inviting a round of applause. It was open to any branch to nominate a candidate for the position of vicechair. Lord Mance invited the branches and Executive Council members to consider who might appropriately fill the positions. The person occupying the position of vicechair was expected to provide wisdom and support both intellectual and physical (ie, presence at conferences and other events). There was a possibility for the office holder to take on a more active role.
2. With regard to the academic work of the ILA, Lord Mance suggested that it might be necessary for the ILA to consider how the system of quality control over substance and language might be further improved in the future. This might involve encouraging Committees to produce reports earlier, even by the end of year before the biennial conference, to allow a permanent steering committee to review them. This was a tentative suggestion, and Lord Mance welcomed other suggestions. At present, a lot of last minute work was being carried out ahead of the biennial conference.
3. The ILA scholars had proposed establishing a social media network for young lawyers. The network would be of a collegiate nature and would operate as an internal think tank, exchanging ideas, preparing for membership of Committees, and feeding those Committees, entirely consistent with ILA structure. The network would be composed of members, and would be a continuation of the enthusiastic collaboration that scholars had demonstrated during the present conference. It might be known as the “Johannesburg network of scholars”. This was something on which to build. It

pursues a fundamental aim to rejuvenate the ILA and to get younger people involved in international law. The proposal needed to be worked out further, and Mr Bruce Mauleverer (UK) had undertaken to present a more formal proposal at the Executive Council meeting in November 2016.

Lord Mance recounted that he had not had an opportunity to really see Johannesburg, but that he did have the opportunity to visit the Constitutional Court, which was worth visiting. It had a remarkable art collection, whose central theme was art and justice. He recited the following quote from former Justice Albie Sachs:

> *Art and justice are usually represented as dwelling in different domains: art is said to relate to the human heart, justice to human intelligence. Rationality is sometimes seen as inimical to art, and passion as hostile to justice. The [Constitutional Court] shows how art and human rights overlap and reinforce each other. At the core of the Bill of Rights and of the artistic endeavour represented in the Court is respect for human dignity. It is this that unites art and justice.*

There was something adversarial about the law, not necessarily associated with an understanding of diversity or conviviality. These biennial conferences demonstrated the opposite. This was not just a group of academics and practitioners interested in international law. It was a fellowship. All attendees were striving to the aims of international law that sought peaceful cooperation and coexistence worldwide. On that thought, Lord Mance commended the closing of the conference. He offered his best wishes for next two years, and hoped to see attendees at the next conference in Sydney, Australia.

Professor Hennie Strydom, President thanked Lord Mance for his words. Lord Mance spoke of collegiality and friendship; to this, Professor Strydom added solidarity and cooperation. He had received much of that during the conference in the form of pleasant words and words of support, as well as in handshakes and other forms. This meant a lot. A conference could only work if the components worked together. The approximately 400 delegates that attended made this possible. He thanked attendees for their presence, and wished them a pleasant onward stay in South Africa. To those not attending the gala dinner that evening, he wished a pleasant return journey and hoped to see them in Sydney.

Professor Strydom then thanked Juliet Fussell and Natalie Pryor for their support. He thanked Alexander Kunzelmann for coordinating the reporters, and encouraged the reporters to become involved in the ILA.

Professor Strydom noted that it was good to see old friends at the conference and to make new ones. He thanked them all for their support in coming to South Africa. He added that he had been in contact with several scholars from Uganda, who had indicated that they were establishing a branch of the ILA in Uganda. The South African Branch of the ILA (SABILA) would work closely with these individuals to see the branch established and to assist it along the way. He hoped that this example would be followed elsewhere in Africa.

Professor Marcel Brus, Director of Studies made a few brief observations:

1. The conference ran smoothly. All rooms were available and the catering was excellent. This was only possible due to Professor Strydom and the team behind him. He

thanked SABILA for organising a terrific parallel programme. For the ILA, there were 23 Committees holding sessions at the conference, together with eight Study Groups and one Interest Group. There were almost too many to attend; at times, there were eight or nine parallel sessions. These sessions were only possible due to the attendance and preparation of the officers and members of the Committees and Study Groups. Professor Brus thanked them and the session chairs.

2. Six Committees had prepared resolutions. Professor Brus assured attendees that there were many good plans for the coming two years for the development of exciting reports and resolutions. Sydney was therefore set to be a worthwhile event based on those discussions alone.
3. Three Committees would be dissolved after the conference, and three Study Groups had finalised their work. Two more Study Groups were expected to finalise their work in the coming six months. The Committees and Study Groups would be formally dissolved by the Executive Council. As a result, a number of topics would disappear from the ILA work programme. Other topics might return in the form of new Committees or Study Groups, provided that proposals came forward. Professor Brus invited suggestions for new Committees and Study Groups.
4. There had been a small innovation in that Study Group could now put forward brief resolutions, for adoption by the ILA, to finalise their work.
5. The 9 members appointed by the Executive Committee to the Steering Committee were critical to the success of the conference. It was essential that ILA texts withstand international scrutiny and reflect the ILA. The Steering Committee had worked closely and intensely with Committee officers on the proposed resolutions. However, undertaking this scrutiny during the conference was too late. It allowed insufficient time to address any issues of substance that might arise. Professor Brus echoed Lord Mance's call to consider how quality checks could be better done in future. Professor Brus thanked the members of the Steering Committee for the time that they had spent in the boardroom discussing proposed resolutions at the cost of not sitting in on the various sessions of the conference. Professor Brus added that the principal mode of quality control was for the Committee's to prepare their reports well in advance so that members could read and discuss them critically at the conference. Recording interventions during the sessions ensured that those studying the reports afterwards were aware of the differing views expressed thereon. However, with an increase in the number of Committees, critical reflection on the reports was not taking place. This was an issue that needed to be considered seriously. It was in everyone's interest that the quality of the ILA's output was such as to maintain its authority in the future.
6. Finally, Professor Brus thanked the 32 reporters for their work recording interventions during the working sessions of the various Committees and Study Groups. He acknowledged the role of Alexander Kunzelmann in organising the reporters and the assistance of SABILA. Professor Brus also echoed thanks to Juliet Fussell and Natalie Pryor, noting that theirs was a difficult job that was not to be underestimated. He ended encouraging young scholars to come forward to participate in the workings of the ILA. He hoped to continue performing the role of Director of Studies in the coming years, and looked forward to the Sydney conference.

Lord Mance invited the chairs of the various working sessions to put forward the proposed resolutions.

Professor Rainer Hofmann (Germany) introduced draft resolution no 1 that was proposed by the Committee on International Protection of Consumers. He described the history of the Committee under the leadership of Professor Cláudia Lima Marques. The proposed resolution reflected the work of the Committee over the past four years, which was highlighted during the working session of the Committee by presentations given by Ms Ana Cândida Muniz, Dr Luciane Klein Vieira, Ms Maria Goretti Sanches Lima, and Professor Hector Valverde Santana. Clearly, consumer protection was important in Brazil!

The proposed resolution included four recommendations as well as four model rules relating to the law applicable to international consumer contracts. While the Committee preferred the fourth rule, it thought it preferable for States to be presented with all models. The other model rules were based on precedents in the European Union, China and Brazil.

Lord Mance opened the floor to comment before pronouncing the resolution adopted *nem con*.

Professor Willem van Genugten (Netherlands) introduced draft resolution no 2 that was proposed by the International Human Rights Law Committee. The mandate for the present Committee was established at the 2008 conference in Rio de Janeiro. There had always been a Committee on human rights, and would always be one, even though the present Committee would soon be dissolved. The key rapporteur for the latest report of the Committee was Professor Stefan Kadelbach (Germany). The report received the full support of all members attending the working session. Recalling earlier remarks about quality control, Professor van Genugten affirmed that there was a considerable degree of quality control with the report of the Committee, and the working session included a very good Q&A session. The work of the Committee was truly well done.

Lord Mance opened the floor to comment before pronouncing the resolution adopted *nem con*.

Professor Robert Paterson (Canada) came forward, in the absence of the Chair of the session, to introduce draft resolution no 3 that was proposed by the Committee on Cultural Heritage Law. The resolution marked the end of the work of the Committee, which had been established well over 20 years earlier. He commended the productivity of the Committee, which counted among its accomplishments the drafting of the *UNESCO Convention on the Protection of the Underwater Cultural Heritage*. The resolution presently being proposed contained a series of recommendations regarding cultural landscapes.

Lord Mance agreed that the Committee had been constructive. He opened the floor to comment before pronouncing the resolution adopted *nem con*.

Mr Jeremy Carver (UK) introduced draft resolution no 4 that was proposed by the Committee on International Commercial Arbitration. The Committee was one of the ILA's more durable committees that had produced remarkably good work over the years.

Mr Caver added that this area of the ILA's work first engaged Mr Carver some 43 years earlier.

The Committee was in a slightly odd position at the present conference; it had completed its work on the important area of the powers of arbitrators prior to the 2014 conference in Washington, where the report of its work was presented, but its recommendations did not withstand the scrutiny of the Steering Committee. As a result, the work of the Committee had been frozen between the 2014 and 2016 conferences. As the work of the Committee at the Johannesburg conference was substantive, not many members of the Committee attended.

The powers of arbitrators had become increasingly complex and confused as international commercial arbitration had proliferated, grown and diversified, spawning new bodies with new rules. This was one of the most fertile areas of international legal endeavour, attracting an increasing number of lawyers from all over the globe. The emphasis of the Committee on this area was timely, and the report produced by the Committee was commended in Washington as it was in Johannesburg.

The conclusions of the Committee attempted to characterise the powers of arbitrators into three categories, as listed in paragraph 7 of the proposed resolution. The recommendations were addressed to arbitral panels and to courts that had to decide matters concerning the exercise of powers by arbitrators. The Steering Committee at the Johannesburg conference was delighted with the changes that had been made to the resolution.

Even if the work of the Committee at the Johannesburg conference was not substantive, the Committee did not waste any time. It considered 12 topics for future work, and 19 of the 22 members had expressed support for considering the topic of reasoning of commercial arbitral decisions. The situation had changed from the early days, when awards were short and there was a small group of arbitrators who knew one another and just wanted the answer. Now, there was a much bigger pool of arbitrators and an acknowledgment that reasoning must be given. The Committee would produce its work on this topic for discussion at the conference in Sydney.

Lord Mance opened the floor to comment before pronouncing the resolution adopted *nem con*. Before moving to the next proposed resolution, Lord Mance invited Dr Christopher Ward, President of the Australian Branch, to present on the conference in Sydney.

Dr Christopher Ward (Australia) showed attendees a promotional video for Sydney. After the video, Dr Ward, on behalf of the Australian Branch, invited all attendees to attend the Sydney conference, which was scheduled for 2024 August 2018. It was a delight and an honour that Sydney had been allowed to host the conference. It was a great responsibility that the Australian Branch took very seriously. Australia was deeply engaged with international law, through litigation and the provision of lawyers to international institutions. The conference would work many aspects of Australia in a seamless fashion. Dr Ward acknowledged that Australia was a long way from anywhere else, with the exception of New Zealand, but the flight was well worth it. The organisers wanted to bring together many people from many countries in one of the world's most beautiful cities.

As the incoming hosts, Dr Ward added that it was appropriate for the Australian Branch to move a expression of thanks to SABILA for hosting the 2016 conference (even if

South Africa had knocked Australia out of the rugby at the 2016 Olympic Games the night before). He acknowledged that the 2016 conference had been difficult to organise, but Professor Strydom had done a marvellous job. The hosts had looked after attendees superbly and with kindness, and the academic work had been first class. SABILA had set a high bar, but a bar that the Australian Branch looked to meet and exceed!

Professor Andreas Ziegler (Switzerland) introduced draft resolution no 5 that was proposed by the Committee on International Monetary Law. He was impressed by the plethora of topics covered by the Committee during its working session, including the role of the courts in the global financial crisis, the role of central banks as the lender of last resort, the EU Banking Union, virtual currencies, and the regulatory challenges posed by crowd funding. The Study Group on Sovereign Bankruptcy also presented its report during the session.

The resolution proposed was devoted to the ethical culture of financial services. The issue was reported in detail by the Committee. Professor Ziegler read out the action items listed at the end of the proposed resolution.

Lord Mance opened the floor to comment before pronouncing the resolution adopted *nem con*.

Professor Stephan Hobe (Germany) introduced draft resolution no 6 that was proposed by the Committee on Non-State Actors and International Law. Professor Hobe acknowledged the work of the successive rapporteurs of the Committee, Professor Cedric Ryngaert (Belgium) and Dr Veronika Bílková (Czech Repulbic). The Committee had looked into diverse groups of nonState actors, the diverse roles that they played, and their increasing importance in international lawmaking and monitoring implementation and compliance. Discussions at the Johannesburg conference revealed difficulties with finding a legal definition for the term "nonState actor" and the importance of developing a specific typology of nonState actors.

Lord Mance opened the floor to comment before pronouncing the resolution adopted *nem con*. He then invited the Secretary General to introduce the resolutions proposed by the Study Groups.

Professor Antonios Tzanakopoulos, Secretary General explained why the ILA had moved to adopting resolutions regarding the work of the Study Groups. It was an initiative of the Director of Studies that had been endorsed by the Executive Council and the Steering Committee. The proposed resolutions were short and not substantive; the ILA did not adopt the actual work of the Study Groups. The purpose of adopting these short, nonsubstantive, resolutions was essentially to draw the attention of members and stakeholders to the work of the Study Groups in discharging their respective mandates. The resolutions would be published in the report of the conference and would be uploaded to the website. All three resolutions being proposed were not quite boilerplate but were close to it.

The Study Groups concerned were those on the principles on the engagement of domestic courts with international law, on due diligence in international law, and on preferential trade agreements. The proposed resolution with respect to the latter Study Group noted the wish of the Study Group that the Executive Council establish a Committee to

continue the work on the topic of preferential trade agreements. The Executive Council would consider this wish.

Lord Mance added that the resolutions were sensible. He opened the floor to comment before pronouncing the resolutions adopted *nem con*. He then asked the Secretary General to take the floor again to introduce the proposed constitutional amendments.

Professor Tzanakopoulos noted that the proposed amendments introduced relatively minor changes to the ILA's Constitution, some of which were dearly needed. He confirmed that the notice requirements set out in the Constitution for proposed amendments had been met.

Professor Tzanakopoulos went through each amendment:

- the change to Art 3.2.7 acknowledged that the ILA could disseminate relevant documents otherwise than in print (ie, via the website);
- the change to Art 5.4 moved from requiring all Officers to be trustees for the purposes of UK law on charities to requiring that at least three of the Officers be so; this amendment allowed flexibility in case an Officer could not, or did not, wish to be a trustee;
- new Art 6.12 introduced a change to the working methods of the Executive Council; essentially, it allowed the Executive Council to consider and decide matters intersessionally (noting that the Executive Council only met twice each year); and
- the change to Art 11.2 allowed the Executive Council to set not only the amount but also the timing of the annual subscriptions paid by national branches; this would avoid branches taking certain liberties in the timing of their payments.

Lord Mance drew attention to the terms of Art 14 of the Constitution, including the requirement for a vote of two-thirds of the members present for any amendment to the Constitution. He invited members present to vote on the proposed amendments. In the absence of any indication of opposition, Lord Mance pronounced an affirmative vote that met the requirements of Art 14, and thanked Professor Tzanakopoulos and attendees for speedily dealing with this item.

Lord Mance then proceeded to call the conference to a close.

Reporter: Alexander Kunzelmann (Australia)