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Book Review

A Quantum of Solace: Guzman on the Classical Mechanics of International Law

Matthias Goldmann



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The length of contributions is not restricted. However, we recommend a maximum of 15,000 words. Contributors are requested to insert a short abstract to their submission. Contributions should be saved in MS Word (any version through 7.0) format. Authors should be prepared to supply any cited sources upon request. The full Author Style Sheet is available online at <http://www.gojil.eu/>.

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Vol. 1, No. 1 (2009)**Editorial**

During the past months, the world indulged in the rhetoric of “change”. President Obama heralded a new era through his speeches and his election. What a perfect time to start a new journal, especially in the field of international law where there is so much need for “change”. As many regions of the world are shaken by conflict and humanitarian crisis, as the global economy is threatened by the collapse of the financial markets, and as environmental degradation is not a territorially limited phenomenon any more, the desire for international legal rules becomes stronger. This calls upon scholars to explore the potential of international law for the solution of these problems on a global scale.

If a new era in thinking about international law is to start, the next generation of academics has to be included. One motivation to start this Journal is the observation that there exists only limited opportunity for young international lawyers in Europe to take part in scholarly debate. The established journals can publish only a limited number of contributions. They are forced to reject a large number of high quality submissions. More than this, the journals’ policies determine the debate and not only the actual contributions. Thus far, young scholars in continental Europe have had only few opportunities to work on the board of a law journal and co-determine its policy. We sensed, therefore, the need for a journal, which would allow the new generation to benefit both from the experience of selecting, reviewing and editing the work of experienced academics, and from the opportunity to publish their own work. This is the basic idea underlying the Göttingen Journal of International Law (GoJIL). At the same time, it will be a valuable addition to the international debate. As an e-journal, published exclusively in English, the GoJIL can be accessed free of charge – the best way for reaching the broadest possible audience. We are also of the opinion that open access to academic research is essential for the future of legal scholarship. In the process from submission to publication, the GoJIL can be

both quick and thorough by saving the time for printing and sending contributions by ordinary mail.

Our aim is to publish a journal that fosters debate among scholars of the diverse fields within international law, while, concurrently, facilitating contributions to the debate from related disciplines. In the future, the GoJIL will publish two types of issues. The first type is a semi-annual “regular” issue. For this, we encourage submissions addressing general international law and employing methodologies from neighbouring disciplines such as international relations, history, or economics. The Journal also welcomes contributions emanating from specialised branches of international law such as international criminal law, international humanitarian law, and international economic law, in particular if they address issues, which are of relevance for a large number of scholars. For this purpose, the GoJIL issues an open and ongoing call for papers. In the review and selection process, the primary criteria will be the quality of work and significance of the topic for academic discourse. We invite and encourage all scholars in the field of international law to submit their manuscripts for publication in the Journal.

In addition to the semi-annual issue, there will be special issues of the GoJIL focused on a specific topic. Related to the recent events on the international scene with regard to Russia, our first issue of this type will be about “Russia and International Law”. It will appear during Spring 2009. Our special issues offer all the advantages of an electronic journal and provide an immediate forum for the debate of current developments in international law.

In forming the organisation and structure of the GoJIL, the team was inspired by American, student-run university law journals. However, since this practice is not firmly established among legal scholars in Europe, we have chosen a somewhat different approach. While a number of advanced young scholars recruited for our Scientific Advisory Board are in charge of the peer review to ensure the high academic quality of the Journal, the Editorial Board is composed of students at the University of Göttingen Law School. These students are responsible for the overall policy of the Journal, as well as for its daily management, including the editing process. The Editorial Board decides on the final composition of each issue of the GoJIL and, advised by the Scientific Advisory Board and the Advisory Board, determines the subject of the special issues. Furthermore, the Institute of International and European Law in Göttingen and the “Göttinger Universitätsverlag” cooperate with the GoJIL Editorial Board in order to guarantee high academic standards of the Journal.

The provenance of this Journal was born out of the exceptional conditions for public international law that the University of Göttingen provides. The law faculty has a high number of scholars with an interest in public international law. The Institute of International and European Law maintains chairs in general public international law, international economic law, and European law. In addition, Göttingen is one of the few places with a chair dedicated to the emerging field of international criminal law.

In the past, the name of Göttingen has always been well known in the field of public international law. Georg Friedrich von Martens, one of the pioneers of international legal positivism, was *Professor des Natur- und Völkerrechts* at the Georgia Augusta from 1783 to 1808. He published the first edition of the *Recueil Martens* in 1789, a great collection of international treaties. The first seven volumes were published in Göttingen. Another famous scholar, Lassa Francis Lawrence Oppenheim, received his doctorate in law at the Georgia Augusta in 1881. Oppenheim also belonged to the positivist school of international law. He was author of the standard manual of public international law of the time, *International Law: A Treatise*. Until this day, the “Oppenheim” is the authoritative English language manual. Martens and Oppenheim, as scholars and publishers, serve as examples to the university and especially to the Journal. While positivism was the challenge of their times, the GoJIL takes up the challenge of present-day methodological pluralism.

After more than one year, we now finally present the first issue of the GoJIL. It is the result of endless board meetings, brainstorming sessions, office hours, and raids for funding. This certainly would not have been possible without the help and support that we have received from so many, who are expressly named in our Acknowledgments. The first issue covers a range of topics, which illustrates the Journal’s wide scope of interest. We are proud to announce that the Honourable Judge Thomas Buergenthal, after reviewing our plan for the Journal at the inauguration of the Thomas Buergenthal Library in Göttingen, immediately agreed to write a foreword for the first issue of the GoJIL. Likewise, Professor Jutta Limbach, former President of the *Bundesverfassungsgericht* as well as the *Goethe-Institut* and member of the Foundation Council of the University of Göttingen, has contributed a comment on “Human Rights in Times of Terror - Is Collective Security the Enemy of Individual Freedom?”. Her article introduces the topic of the GoJIL International Student Essay Competition 2008. The winning piece of the competition, written by Evelyne Schmid, about the right to a fair trial in times of terrorism with regard to Article 14 ICCPR,

suggests the principle of consistency as a tool to identify the minimum standard of non-derogable fair trial rights.

The subsequent articles in this premier issue of the GoJIL address a wide variety of fields within international law. Robert Cryer contributed an article on recent developments in international criminal law with regard to the prosecution of top-level perpetrators of international crimes, entitled "Prosecuting the Leaders: Promises, Politics and Practicalities". Diane Desierto detailed the issue of exceptionalism in human rights as it relates to the Asian geo-political and economic organization ASEAN in her article, "Universalizing Core Human Rights in the 'New' ASEAN: A Reassessment of Culture and Development Justifications Against the Global Rejection of Impunity". Moreover, the political scientist Dimitris Chrysochoou provided a look at the transformation of state sovereignty in Europe in his „The European Synarchy: New Discourses on Sovereignty." The article aims to yield a deeper understanding on the evolution of sovereignty relations within the EU as an institutionalized system of "co-governance" and further represents an attempt to make sense of the totality of what has been achieved so far.

In order to take full advantage of the electronic form of publication, the Editorial Board has decided to include the category "Current Developments in International Law". In this category, young scholars have the opportunity to publish short comments and reviews on recent developments in public international law. For the first issue, Tobias Thienel passes comment on the recent first Order from the ICJ in the dramatic, ongoing case between Georgia and Russia. That Order combined aspects of the Court's provisional measures jurisdiction with some early insights into the merits, particularly on the highly relevant issue of extraterritorial human rights protection. We hope that this will stir interest for our upcoming special issue on Russia. Sebastian Recker examines the Kadi-Judgment of the European Court of Justice on the question of review of the lawfulness of regulations based on UN Security Council resolutions. Jörn Müller presents the USA-India Agreement on civilian nuclear cooperation and its implications for the legal regime against the proliferation of nuclear weapons. Katrin Arend evaluates the implications of the FIAMM judgments on the question of the existence of non-contractual liability of the EC in cases of lawful acts and the relation of the EC to the WTO with its dispute settlement mechanism. Finally, Matthias Goldmann reviews Andrew Guzman's book "How International Law Works: A Rational Choice Theory", which refutes Jack Goldsmith's and Eric Posner's thesis about the limits of international law.

On behalf of the members of the GoJIL Editorial Board, we hope that this debut issue will exceed your expectations and pick curiosity about future issues of the Journal, such as "Russia and International Law", GoJIL's Spring 2009 special issue.

The Editors

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Without the incredible support and help of the following people, we would not have been able to accomplish this ambitious project. We would like to thank:

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Foreword

Judge Thomas Buergenthal*

It is truly a great pleasure for me to welcome the publication of the Göttingen Journal of International Law (GoJIL). As is already apparent from the high quality of the articles appearing in this, its first issue, the GoJIL is on its way to becoming an important voice in seeking to promote the exchange of creative ideas and research in the field of contemporary international law.

In its conception and execution, the GoJIL is in many ways unique as a German international law publication: it is student-edited, it is available only on the Internet and it is published in English. In the performance of their editorial functions, the student editors will work under the academic supervision of the law faculty of the University of Göttingen – the Georgia Augusta University – which has a long tradition of scholarly distinction in the international law field. The editorial responsibility will rest with the student editors, while the high academic standard is guaranteed by a thorough peer review.

In establishing the GoJIL as a student-edited journal, the editors of the GoJIL have opted for the American law review model where the vast majority of these journals is student-edited. Of course, their quality differs in that some are excellent, while others do not quite measure up to the highest professional standards. But the same is also true of those American law journals that are not student-edited. Some are excellent, among them for example, the American Journal of International Law, while others are by no means as good in terms of their professional quality as the leading student reviews. In short, student-edited journals can meet high professional standards, provided they enjoy the academic encouragement and professional support of distinguished law school faculties, which can

* Judge, International Court of Justice; Lobingier Professor of Comparative Law and Jurisprudence (Emeritus), The George Washington University Law School.

certainly be expected the law faculty of the University of Göttingen will provide.

Today most, if not all, American law schools publish at least one student-edited law review and some even publish more than one. The latter are usually specialized law journals that deal with subjects such as international law, environmental law, intellectual property law, poverty law, etc. There are good reasons why student-edited law reviews are to be found in almost all American law schools: law school faculties consider the student-edited law review an integral and important part of their academic program. As a rule only the best students are selected to work on the law reviews. Students in their final law school year supervise those that are behind them. They teach them how to edit the articles submitted to the journal, they require them to undertake small research projects, to write so-called student Comments – short pieces usually consisting of an analysis of a recent judicial decision or some statutory provision – and Notes. The latter are more substantial research papers usually written by senior student editors. An important aspect of student-edited law journals in the US is that they have full discretion to publish or not to publish articles submitted to their journals, even with regard to articles submitted by their professors.

Having served as a faculty adviser on a number of law reviews at different American law schools during my long academic career, I am convinced that student-edited journals do play a valuable role in the education and professional development of future lawyers. They stimulate student interest in legal research and writing and they provide them with the necessary hands-on experience to develop these skills. It is an experience that is difficult to duplicate effectively in the normal classroom setting. I am sure, therefore, that the GoJIL will not only serve to encourage important scholarly discussions on critical international law issues among the community of international lawyers, it will also enrich the learning experience of its student editors. The Law Faculty of the University of Göttingen should be complimented on having encouraged this initiative.

The fact that the GoJIL will be published and available on the Internet and in English will give it an almost immediate worldwide exposure and enable it to address current developments and problems of concern to the international law community. I am sure that the decision to publish the GoJIL in English, given that it is being published in Germany by a German university, was by no means easy for the editors and the law faculty. They were wise, however, to recognize that they could not realistically hope to have a worldwide audience for their journal unless they chose English as its working language and the Internet as its mode of publication. By opting for

this approach, the GoJIL also offers the German international law community a much wider and more immediate international exposure than would otherwise be open to it.

The proliferation in recent years of international courts and tribunals, the growth in the number of inter-governmental international organizations, and the increasing impact of international law on the activities of governments, multinational corporations and individuals, has made the development and study of all aspects of this branch of the law more important than ever before. That is also why the decision to publish the GoJIL is so timely and welcome. It offers a vehicle for a scholarly exchange of ideas among and between academic international lawyers and practitioners, be they government lawyers, international civil servants and judges. At the same time, it gives the law students of the University of Göttingen the opportunity to get valuable international law experience while participating in and contributing to the development of that law.

It would not surprise me if other law faculties in Europe and elsewhere in the world begin to follow the example of the University of Göttingen and establish student-edited international law journals. While the United States already has a very large number of such publications, that is certainly not true in most other countries. The fact that such journals can serve as important training tools for students interested in pursuing careers in international law, should encourage other law faculties to provide them with opportunities similar to those now available at the University of Göttingen.

18 November 2008

Human Rights in Times of Terror¹

Is Collective Security the Enemy of Individual Freedom?

Jutta Limbach *

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¹ This comment is based on a speech the author held in Jerusalem on 28 November 2007.

* Jutta Limbach is professor of civil law at the Freie Universität Berlin since 1972. From 1989 to 1994 she was Senatorin für Justiz (state attorney general) for Berlin. In 1994 she was appointed to the Bundesverfassungsgericht (Federal Constitutional Court of Germany), where she served as chief justice until 2002. From 2002 to 2008 Jutta Limbach was the President of the Goethe Institut.

Abstract

I have chosen a subject that concerns our two states - Israel and Germany - and that time and again poses a challenge to our courts: the respect of human rights in times of terrorism. In Israel as in Germany there exists a firm consensus on the need to fight terror. In both states there is much controversy regarding the best way to conduct this fight. The question is raised whether collective security is the enemy of individual freedom. As **Aharon Barak** rightly stated: "Fighting against terrorism in an effective manner entails finding the right balance between security and public interests, on one hand, and the need to safeguard human rights and basic freedoms, on the other."²

This dilemma is well known to the Israeli legal system. Since its foundation, the state of Israel has been the target of threats to its existence and of terrible terrorist activities. Therefore the Israeli experience - not only in the legal-judicial field - is important for those, who are involved in the fight against terrorism. I have to thank my former colleague Aharon Barak, who informed me regularly, and with regard to my speech today, of the decisions of the Supreme Court concerning torture, the separation fence and other questions in this context.

A. The State's Reaction to Terrorism

Seven years after September 11, 2001, the tension between freedom and security is still of unbroken topicality. Not only have the terrorist attacks in Madrid and London shown that the danger of fanatical terror is everywhere. An attack on the German Railways, which was planned two years ago, but failed, has shown that the Federal Republic of Germany also is a target of Islamic extremist terrorists.

What motivates them is not the wish for retaliation for the war in Iraq. The targets of their attacks are the western-style secular democracies, which are based on the principles of human dignity, the fundamental rights and the

² *Aharon Barak*, Introduction: The Supreme Court and the Problem of Terrorism, in: *Israel Supreme Court* (ed.), *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*, 2005, 5.

principle of the rule of law. It is less the desire for violence but rather the intention to destroy these fundamental values that makes the fanatics spread fear and terror through their attacks on human lives.

In the western democracies, politicians are about to fall into this trap and to compromise the boundaries of human rights and fundamental freedoms. With a view to the threat posed by Islamic extremist fanatics, the politicians argue, that the European Convention on Human Rights³ has to be seen in a different light. The post 9/11 legislation in France, the UK and Germany is justified on the ground that it is the overriding duty of any government to secure the safety of the people. There is one right that matters more than any other, and that is the right to life. Freedom in this context seems to be of minor importance.

Here, the vulnerability of the free and democratic state founded on the rule of law in times of crisis becomes evident. In the fight against terrorism, human rights and citizens' rights have been repealed in many places all over the world.

B. The Hunt for Terrorists in the Data Network

In early 2002, a law was enacted in Germany with the objective of combating terrorism.⁴ The law aims to put an end to the activities of potential terrorists as early as possible. This is only the beginning. There is an unbroken line of political activism in the fight against terrorism. A whole series of laws and new suggestions to this effect have been (and are being) produced. The Federal Minister of the Interior, an advocate of rigorous precautionary measures, demands the employment of the Bundeswehr in domestic territory, the targeted killing of suspected terrorists and the surveillance of e-mail correspondence. A member of the German Bundestag calls for creating a register of converts to Islam, and the Federal Minister of Defence wants to be vested with the competence to order the shooting down of hijacked aircraft that are used as terrorist weapons.

If public protest arises, the respective suggestion is not pursued any further for the time being, because the government wishes to win favour

³ European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, 4 November 1950, 213 U.N.T.S. 222.

⁴ Gesetz zur Bekämpfung des internationalen Terrorismus, 9 January 2002, (Terrorismusbekämpfungsgesetz), Bundesgesetzblatt (BGBl.) I 361, 3142.

with the electorate. But political imagination comes up with new suggestions all the time.

Since 9/11, the competence of the security authorities has been expanded many times. In most cases, the respective measures are covert ones; they remain hidden from the citizens. They include computerised profile searches, the employment of undercover agents, acoustic surveillance of homes and the localisation of mobile phones. The persons concerned are not informed of the surveillance before or after the measure. They therefore cannot take recourse to a court for judicial review of the admissibility of the measure.

The more preventive action is intensified in an effort to enhance the country's internal security by methods such as computerised profile searches, undercover agents and electronic surveillance (eavesdropping). The focus has been put on combating crimes, while the use of judicial controls designed to protect suspects have been reduced. One should bear in mind that modern methods of surveillance do not merely monitor those suspected of being criminals.

Take, for example, the computerised profile searches in the aftermath of September 11. Using a rather abstract set of criteria (which boiled down to young, male Muslims who travelled frequently and had studied a technical subject), the data from a large number of people who have never before been in trouble with the police and who cannot be qualified as troublemakers or dangerous, is being 'filtered'.

This all shows that computerised profile searches and electronic surveillance may even bring uninvolved outsiders to the attention of the public prosecutor. The more instruments of investigation are expanded to encompass uninvolved outsiders, the sooner the category of (concrete) suspicion loses its legitimate, limiting power.

A law that was recently adopted by the Bundestag permits the retention of communication data.⁵ The law obliges all telecommunication companies to store the connection data from telephone, e-mail and internet traffic for six months. This law implements a European Union directive.⁶ However, two European Union Member States have brought an action

⁵ Gesetz zur Neuregelung der Telekommunikationsüberwachung und anderer verdeckter Ermittlungsmaßnahmen sowie zur Umsetzung der Richtlinie 2006/24/EG, 21 December 2007, BGBl. I, 3198.

⁶ Directive 2006/24/EC of the European Parliament and of the Council, O.J. L105/54 (2006).

before the Court of Justice of the European Communities to have the directive declared void.

This law irritates not only computer freaks. It is criticised, with rare unanimity, above all by journalists. They fear their professional confidentiality and for the protection of their sources. In the Federal Republic of Germany, no scandals have been brought to light by public prosecutors; they have always become known to the press by its informants. In the future, informants could be intimidated by such laws, which would prevent them from revealing information to the press. It is obvious what this would mean for the control of state authority.

C. A Right to Security

Let there be no doubt about it: protection against crime and terrorist attacks is part of the responsibility of the state. Under the regulative idea of the social contract, the desire for security justifies the necessity of the state. Humans join together for the mutual protection of their lives, freedom and property within a state system, and place themselves under the rule of government. They refrain from taking matters into their own hands, in favour of the state's monopoly on the use of force. Legal certainty and legal protection are accordingly necessary elements of the authorisation and legitimation of public power.

In contrast to the European Convention on Human Rights the German Constitution⁷ does not recognise a right to security. Despite the silence on this issue by the Constitution, the state has an obligation to take action for the security of its citizens stemming from the overall rationale of the Constitution, especially from the principle of the rule of law (Rechtsstaatsprinzip) and the right to life. Accordingly, the Parliament and the government who are attempting to counter the danger of terror, are fulfilling an assignment substantiated by the Constitution.

D. Prevention versus Liberty

The question of whether terror should be combated is not controversial. What is controversial, however, is *how* this should be done.

⁷ Grundgesetz, 23 May 1949, BGBl. I 1, latest amendment, 28 August 2006, BGBl. I 2034.

How can we find a balance between the security needs and the human rights of those suspected of terrorist activities?

The conflict between collective security and individual freedom raises the question: which of these two principles takes priority? In view of the new dimension of terrorism and of the danger for the life and limb of many people, the historian Quentin Skinner argues that the primacy of security is a concept that is evident. Juridical methodology rightly warns of regarding any concept as evident. For in most cases, concepts which claim that certain insights are obvious, have no informing function. They only convey the spirit of those who created or operated them. To those who take decisions, these concepts merely serve to solve their problem on the basis of common sense, whatever common sense may mean. In the interpretation of such maxims, one unknown is usually replaced by another unknown.

Neither domestic security as an aim of the state nor the individual freedom rights are to be conceded primacy from the outset. The German Federal Constitutional Court has enshrined both interests – the security needs and the human rights of those suspected of terrorist activities – in the principle of the rule of law. The Court points out the mutually opposing interests harboured by this very constitutional principle.⁸ Yet, highlighting its Janus-faced nature does not get us very far. The main question is still left unanswered – namely whether and how a balance can be struck between these opposing principles. Since an either/or decision is out of the question, the need for collective security and the individual right to freedom must somehow be placed in relation to each other.

E. The Means of the Rule of Law

Judges cannot restrict themselves to describing the conflict of values between security and freedom in nice-sounding phrases. They must solve the conflict and in doing so, they must specify their criteria. If the Constitution and the legal measures available merely highlight the abstract aim but not how it can be achieved, there is nothing for it but to list those aspects which need to be taken into account when reconciling rival principles.

The Federal Constitutional Court examines the question along the lines of the rule-of-law criteria of clarity and definiteness of statutes, of

⁸ Bundesverfassungsgericht (German Federal Constitutional Court), BVerfGE 57, 250, 276.

suitability, necessity and appropriateness. The Israel Supreme Court, which had to deal, very concretely, with the issues of torture and of the security fence, performs its review according to similar principles. In the judgments of both courts, the principle of proportionality of the measures taken or planned plays an important role.

The anti-terror measures drawn up need to be examined with regard to the following questions:

- Are they actually suitable for successfully combating fanatical terrorism?
- Is the resulting loss of freedom out of all proportion with the severity of the intervention?
- Might the intended measures result in unwanted side effects?

These three questions are by no means all the conceivable questions which could be asked. But the main question is, whether the post-9/11 legislation has in fact made us safer. The suitability and proportionality of the instruments that are used in the fight against terrorism must be reviewed strictly. The planned measures must be examined to find out whether they are at all suitable for successfully combating fanatical terrorism and whether the loss of freedom that goes with them is proportionate to the security gained by them, not forgetting the undesired incidental consequences.

The new legal instruments that have been introduced to combat illegal drug traffic and other forms of organised crime urge us to give special attention to these questions because these questions often play a very subordinate part in everyday judicial work. In the Federal Republic of Germany, telephone surveillance has resulted in a profusion of information and language problems. The profusion of information also applies to computer searches. In her latest data protection report, for instance, the Commissioner for Data Protection of the state North-Rhine/Westphalia, critically comments in her assessment of the computer search that has been carried out in the wake of 9/11, that through computer search, thousands of innocent citizens have come into the focus of police attention, and have been made subjects of police checks, without any measurable success in the search for potential Islamic extremist terrorists.

F. Fighting Terrorism Within the Law

In Israel, as in Germany, it is the task of the judges to protect human rights against excessive demands for security. The Israel Supreme Court

decided that interrogators cannot use torture in order to protect the people against a “ticking bomb” situation and that the security fence, in some parts, is illegal. With regard to torture, the Israel Supreme Court emphasised in accord with international treaties, that the use of cruel, inhuman and degrading treatment is prohibited. “These prohibitions are ‘absolute’. There are no exceptions to them and there is no room for balancing.”⁹ That means: no room for the principle of proportionality.

The Federal Constitutional Court has decided that acoustic surveillance of the home must not encroach upon the core area of private life. According to the Federal Constitutional Court, this results from the inviolability of human dignity. In a manner that is comparable to the line of argument of the Israel Supreme Court regarding torture, the Federal Constitutional Court emphasises the following: a weighing according to the principle of proportionality is out of the question here.¹⁰

The Federal Constitutional Court has repeatedly restricted encroachments on the freedom of the press and the secrecy of telecommunications. According to the Federal Constitutional Court, such encroachments are only justified if they serve to prosecute a crime of considerable importance and if there is a concrete suspicion. There must also be sufficiently secure indications that a connection exists between the person who is affected by the surveillance measure and the person charged with a crime.¹¹

As concerns electronic profile searches, the Federal Constitutional Court has decided that they are only compatible with the fundamental right to informational self-determination “if there is a concrete danger to important objects of legal protection such as the existence and security of the Federal Government or of a state, or to the life, limb and freedom of a person. In advance of acts averting danger, electronic profile searches are out of the question.”

“A general situation of threat such as has existed without interruption with regard to terrorist attacks since 11 September 2001, or tense situations in foreign policy, are not sufficient for

⁹ The Israeli High Court of Justice, HCJ 5100/94 *The Public Committee Against Torture in Israel v. The State of Israel*; reprinted in: *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*, 43.

¹⁰ BVerfGE 109, 279.

¹¹ BVerfGE 107, 229.

a court order of an electronic profile search. Instead, there must be concrete facts that indicate that terrorist attacks are being planned or carried out.”¹²

In these decisions, the Federal Constitutional Court has also pointed out the side effects of the security measures. It argues as follows: if citizens are to expect state agencies to listen in on their communication, the naturalness of the use of modern communication technologies is endangered. But also the quality of the communication in a given society is impaired, if the spread of the investigation measures leads to risks of misuse, and to a feeling of being kept under surveillance. The legal precautions created to protect the individual are also of benefit to the confidence of the general public.¹³

In its decision on electronic profile searches, the Federal Constitutional Court states: “Whoever cannot assess with sufficient certainty which information in certain areas are known to his or her social environment, and whoever is not in a position to reasonably assess what possible communication partners know about him or her, can be considerably impeded in his or her freedom to plan and to decide out of his or her own self-determination.”¹⁴

“Individuals are affected the more intensively in their freedom that flows from fundamental rights the less they have given grounds for state encroachment. Apart from this, such acts of encroachment can have intimidating effects, which can impair the exercise of one's fundamental rights. [...] such a deterrent effect must be avoided not only in order to protect the individual. It also impairs the common good because self-determination is a basic condition for the functioning of a free and democratic polity. The naturalness of behaviour is endangered if the spread of investigation measures contributes to a feeling of being kept under surveillance.”¹⁵

¹² BVerfGE, 115, 320.

¹³ BVerfGE, 107, 229, 328.

¹⁴ BVerfGE, 115, 320, 342.

¹⁵ BVerfGE, 115, 320, 354 – 355.

As is generally known, a democratic political culture lives on its citizens' participation and their willingness to speak their minds. This requires courage. If state security authorities assess the inhabitants of the country according to biometric criteria, if they draw up data profiles of them and if they record their activities – such as, for instance, the books that they borrow, such courage is lost. Martin Kutscha hit the nail on the head when he said: “Wherever a climate of surveillance and spying prevails a free and democratic process cannot take place.”¹⁶ With such strategies, a body politic does harm to itself. It loses its credibility as a modern constitutional state.

G. A Classical and Necessary Dispute

The experience that has been gained in the prosecution of the Red Army Faction terrorists in the Federal Republic of Germany should serve as a warning against resorting to symbolic policies. At that time, the struggle against the terrorism of the Red Army Faction was seen as a question of the Federal Republic's fate and very survival. The political system reacted with measures all passed at breakneck speed, which chiefly signalled activity but hardly tackled the root of the problem. Yet despite their low practical value, the legislative measures still proved extremely persistent.

In spite of this experience, the domestic policymakers, the security authorities and the public prosecutors have been almost insatiable in their striving for more and more new instruments and responsibilities. This professional enthusiasm, which results from the task that must be done, can only be kept at bay by counterforces. In a state under the rule of law, judges, lawyers and Ministers of Justice are the natural antagonists of those who are responsible for domestic security. The dispute between these groups of professionals is, as Martin Klingst points out, "as classical as it is necessary."¹⁷ The continued existence of our state founded on the rule of law also depends on the members of the judiciary not letting themselves be swayed in their spirit of opposition and in their faithfulness to the fundamental rights.

Let us give Aharon Barak the last word:

¹⁶ *Martin Kutscha*, *Mit Riesenschritten auf dem Weg in den Überwachungsstaat, Das Sicherheitspaket der Bundesregierung: Schutz oder Gefährdung der Demokratie?*, Frankfurter Rundschau, (7 November 2001).

¹⁷ *Martin Klingst*, *In der Sicherheitsfalle*, *Zeit Online*, 44 (2001) available at http://www.zeit.de/2001/44/200144_1._leiter.xml (last visited 8 August 2008).

“This is the destiny of a democracy it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one arm tied behind its back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of its security stance. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.”¹⁸

¹⁸ HCJ 5100/94 *The Public Committee against Torture in Israel v. The State of Israel*, 53 (4) PD 817, 854.

The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non- Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights

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Abstract

Contrary to what is often asserted in debates on the “war on terror”, international law provides specific rules on what is allowed in bringing suspected terrorists to trial. This article suggests a method to identify the minimum fair trial rights which have to be provided to every accused, irrespective of his or her status in international law and irrespective of whether the situation amounts to an armed conflict or not. This essay proceeds from the assertion that human rights law applies in peacetime as well as in times of emergency, including in armed conflict. Because the International Covenant on Civil and Political Rights prohibits any derogation measures inconsistent with the State’s other obligations under international law, the so-called principle of consistency lends itself as the tool to identify which aspects of Article 14 of the Covenant must be considered non-derogable. The article concludes that those aspects of fair trial which are common to the legal regimes dealing with both types of armed conflict – international and non-international – are also part of customary international law and provide the minimum yardstick from which no reduction is permissible.

A. Introduction

This article suggests a methodology of how the non-derogable aspects of the right to a fair trial can be identified. It provides a recommendation as to how to compile the list of judicial safeguards which have to be provided to every accused, irrespective of his or her status in international law and irrespective of whether the situation amounts to an armed conflict or not. The main point of the present essay is that current legal discussions about the applicable law in the “war on terror” do not sufficiently recognize that a minimum level of due process must be provided to all accused; regardless of whether humanitarian treaty law applies or not.

This minimum level of due process is identified with the help of the so-called principle of consistency. The principle of consistency is the prohibition of derogation measures “inconsistent with [a State party’s] other obligations under international law”.¹ This essay focuses on the reasons why

¹ International Covenant on Civil and Political Rights, 16 December 1966, Art. 4(1), 999 U.N.T.S. 171 [ICCPR].

I suggest the principle of consistency as the most adequate tool for identifying the minimum, non-derogable, judicial guarantees.

Derogations under exceptional circumstances allow a State to temporarily curtail some human rights. The effect of a valid derogation is to allow a State to take measures that would normally be a violation of its obligations. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) is the Covenant's Article dealing with fair trial. It is not listed among the categorically non-derogable rights such as the prohibition of torture or slavery.² But recognizing that Article 14 in principle is derogable does not imply that States facing an emergency can depart from the right to a fair trial as they see fit. Because the Covenant does not specify which of the aspects of fair trial can never be dispensed with,³ this article suggests that the non-derogable aspects of Article 14 can and should be identified with the help of the principle of consistency.

If this logic is accepted, arguments on the qualification of an act of terrorism as an armed conflict or the legal status of detainees become less important because an elaborate list of fair trial guarantees has to be provided in all circumstances and to all individuals by virtue of their nature as non-derogable safeguards. This framework provides a strong contention against arguments that certain individuals are situated in legal gray zones between human rights law and international humanitarian law. Whether and which parts of humanitarian treaty law apply to a detainee caught in the "war on terror"⁴ is, of course, not irrelevant. However, it is crucial to acknowledge that a considerable number of judicial guarantees can never be dispensed with.

The article proceeds as follows: Section A explains why the ICCPR is the right instrument to start the analysis as to which minimum judicial standards are applicable in times of terrorism, and indeed, any other circumstances. Section B outlines the criteria of valid derogations, in particular the prohibition of derogations inconsistent with the State's other obligations under international law. Section C suggests applying the principle of consistency to the administration of justice and explains how

² Id., Article 4(2).

³ The exception is the prohibition of retroactive criminal laws which is explicitly non-derogable. Id., Article 4(2).

⁴ I employ the term "war on terror" to designate the current strategies, activities and doctrines employed to counter terrorism. I do, however, reject the idea that all counter-terrorist measures automatically take place in the framework of armed conflict.

the non-derogable aspects of Article 14 of the ICCPR can be derived by reference to those rights common to both types of armed conflict and part of customary international law. A cursory discussion of recent developments reveals both the legal and practical benefits of enhancing attention to the derogation regime (Section D).

The article will conclude that the principle of consistency is a useful tool to identify the non-derogable judicial safeguards which are – at the very minimum – applicable in times of terrorism.

B. Armed Conflict, States of Emergency and the “War on Terror”

The argument of this paper is that the principle of consistency can be used to determine the implicitly non-derogable aspects of Article 14 of the ICCPR. Before I explore the use of obligations under customary law to review whether anti-terrorist measures are consistent with a State’s other obligations under international law, this section affirms that the ICCPR is the right instrument to identify the criteria of valid derogations. Because human rights law continues to apply in times of armed conflict and other situations of emergency, the derogation regime of the ICCPR is the most relevant place to start our inquiry. The system of the derogation clause – Article 4 of the ICCPR – was put in place to safeguard the rule of law in times of extraordinary challenges. Recent case-law has confirmed that while acts of terrorism may be such an extraordinary challenge, terrorism does not warrant a re-interpretation of the extent of possible derogations.⁵ Also

⁵ See for instance: *A and Others v. Secretary of State for the Home Department*, Appellate Committee of the House of Lords, UKHL 56 (2004). The UK court was asked to consider whether the Anti-Terrorism, Crime and Security Act of 2001 were in breach of the UK Human Rights Act giving effect to the European Convention on Human Rights (ECHR). On appeal, the judges by a majority upheld the possibility of derogation but decided that the provisions in the Anti-Terrorism Act were in breach of the Convention because of their discriminatory nature and because the measures were not held to be "strictly required by the exigencies of the situation". While the court does not interpret the derogation regime of the ICCPR, but the one of the ECHR, the case illustrates that courts have deemed it adequate to apply the established rules of the game with regard to derogations. See also: *Public Committee Against Torture in Israel v. the State of Israel*, Supreme Court of Israel, HCJ 769/02 (2005). Upholding the non-derogability of the prohibition of torture and cruel, inhuman or degrading treatment or punishment, the court rejected the Government's arguments on possible

according to the Venice Commission of the Council of Europe, terrorism does not justify a departure from the framework of international law in general and the derogation regimes in particular.⁶

As confirmed by the International Court of Justice (ICJ), if an armed conflict is found to exist, human rights law does not cease to apply. The derogation regime determines if a partial departure from human rights law is acceptable. Whether or not – or under which circumstances – international terrorism amounts to an armed conflict, and if so, what type, is hotly debated. But since the derogation regime was designed to deal with *all* “public emergencies which threaten the life of the nation”,⁷ the consideration of the principle of consistency can be made for all states of emergency, irrespective of whether the specific emergency amounts to an armed conflict. This is precisely why the recourse to Article 4 of the ICCPR is a convenient tool to identify the minimum safeguards applicable in all circumstances. At the same time, it must be stressed that this paper does not address which higher standards simultaneously apply to authorities in bringing suspected terrorists to trial, especially in light of the fact that since September 11, 2001, no State except the United Kingdom has notified a derogation, and the UK derogation refers to Article 9 and not Article 14 of the Covenant.⁸

C. The Applicability of Human Rights Law

The Bush Administration originally attempted to argue that the “war on terror” was “something completely different from anything that States had to deal with before”.⁹ By considering the war on terror as a *sui generis*

justifications for the employment of physical means during the interrogation of individuals suspected of hostile terrorist activities.

⁶ European Commission for Democracy Through Law, Opinion on the Protection of Human Rights in Emergency Situations Adopted by the Venice Commission at its 66th Plenary Session, Venice, 17-18 March 2006, CDL-AD(2006)015, para. 30.

⁷ ICCPR, Art. 4(1) (*supra* note 1). While the United States of America did not invoke a derogation after September 11, 2001, the 9/11 attacks would probably have qualified as an “emergency threatening the life of the nation”. It, however, remains doubtful whether the Human Rights Committee would accept claims that such an emergency exists today in the USA or whether allied States such as the United Kingdom could benefit from the derogation provision.

⁸ Declaration contained in a Note Verbale from the Permanent Representation of the United Kingdom, dated 18 December 2001, *available at* http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (last visited 27 September 2008).

⁹ The quotation referring to the distinct nature of terrorism is from: *Jeffrey Kovar*, (Legal Adviser, US Mission to the United Nations), “US Views on International

category in international law, the application of the rules of international humanitarian law as well as the derogation clauses has been denied. The claim that the Geneva Conventions were generally inadequate in the various situations related to the “war on terror” was vehemently challenged by the US. Its current view towards international humanitarian law now rather focuses on the argument that humanitarian law supplants human rights law in the circumstances under review.¹⁰ It is argued that while the ICCPR and its derogation provision are irrelevant, the detainees do not qualify for specific protections under international humanitarian law.¹¹ This interpretation of the *lex specialis* doctrine is however inconsistent with treaty law as well as with judicial decisions and the teachings of highly qualified publicists.¹² The wording of Article 4 of the Covenant refers to a

Humanitarian Law and the War on Terror”, Lecture delivered at the Graduate Institute of International Studies, *Point d'Actualité HEI*, Geneva, 15 May 2007. Although not speaking on the legal qualification of terrorism but on the issue of self-defense against non-state actors, President Bush emphasized that “new threats also require new thinking”: *George Bush*, “Remarks by the President at 2002 Graduation Exercise of the United States Military Academy in Westpoint”, 1 June 2002, *available at* <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html> (last visited 11 November 2008).

¹⁰ Claiming that the Inter-American Commission acted without basis in requesting precautionary measures in the case of detainees in Guantánamo, the United States argued that it is humanitarian law, and not human rights law, that governs the treatment of the detainees and that the Commission did not have the competence to apply international humanitarian law. See Response of the United States to Request for Precautionary Measures - Detainees in Guantánamo Bay, *International Legal Materials* 41 (2002), 1015. See also Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantánamo Bay, Cuba, 10 March 2006, 22-24, *available at* <http://www.asil.org/pdfs/ilib0603212.pdf> (last visited 29 September 2008).

¹¹ *Jay S. Bybee*, US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 (7 February 2002), reprinted in *Karen J. Greenberg & Joshua L. Dratel* (eds), *The Torture Papers: The Road to Abu Ghraib* (2005), 136-143. For an outline of US arguments on international humanitarian law after September 11, see *David Forsythe*, *The United States and International Humanitarian Law*, *Journal of Human Rights* 7 (2008) 1, 29.

¹² See for instance *Theodor Meron*, *Human Rights in Time of Peace and in Time of Armed Strife: Selected Problems*, in *Thomas Buergenthal* (ed.), *Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn*, (1984), 1-21. *Louise Doswald-Beck & Sylvain Vité*, *International Humanitarian Law and Human Rights Law*, *International Review of the Red Cross* 293 (1993), 94-119. *William A. Schabas*, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict*, *Israel Law Review* 40 (2007) 2, 592-613.

“public emergency which threatens the life of the nation” and it seems difficult to claim that situations of armed conflict or terrorism were not included in the ordinary meaning of these terms. Indeed, armed conflict and terrorist violence were specifically discussed by the drafters of the Covenant when they negotiated the wording of Article 4.¹³

The ICJ has ruled several times on the application of human rights law in armed conflict. It held that the question whether a human rights provision applies during armed conflict should be answered by looking at the derogation regimes. The ICJ confirmed in the *Nuclear Weapons Opinion*,¹⁴ as well as in the *Wall Opinion*¹⁵ that as long as a State has not validly derogated from a provision, the norm applies irrespective of the existence of an emergency. The ICJ affirmed the simultaneous application of international humanitarian law and human rights law in the *Democratic Republic of the Congo (DRC) v. Uganda* case and concluded that international humanitarian law and human rights obligations were binding on the Ugandan troops occupying the DRC.¹⁶

In his separate opinion in the *DRC v. Uganda* case, Bruno Simma noted that “no gaps exist in the law that would deprive the affected persons of any legal protection”.¹⁷ Judge Simma stressed that the victims of the attacks by Congolese soldiers at the Kinshasa airport in 1998 remained legally protected against maltreatment, irrespective of their nationality, by international human rights and international humanitarian law. Furthermore, according to him, Uganda would have had standing to raise these violations before the ICJ, because such minimum protections were obligations owed *erga omnes*.¹⁸

In short, given that human rights law continues to apply in times of emergency, the protections of the ICCPR remain applicable. Following from

¹³ David Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, Chapter 4 (2001).

¹⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J.Reports 1996, 226-267, 240 (para. 25).

¹⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, 134-203, 178 (para. 106).

¹⁶ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Jurisdiction of the Court, Judgment, I.C.J. Report 2005, 1-104, 71 (para. 220) [hereinafter *DRC v. Uganda*].

¹⁷ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Separate Opinion of Judge Simma, 5 (para. 19).

¹⁸ *Id.*, 10 (paras 32-35).

the ICJ's words in the two Advisory Opinions, the derogation regime constitutes the hinge between human rights law and international humanitarian law. Therefore, to determine if a State can validly depart from judicial safeguards contained in Article 14 of the Covenant, we shall have recourse to Article 4 of the ICCPR. Article 4 contains the conditions of valid derogations. The next section in particular introduces the condition of consistency.

D. The Criteria of Valid Derogations from the ICCPR

Derogation clauses safeguard the right of national governments to deal with public emergencies. Article 4(1) stipulates that derogations can only be made in officially proclaimed emergencies which threaten the life of the nation; the measures must be strictly required by the exigencies of the situation; they must be non-discriminatory and must not be inconsistent with the State's other obligations under international law. Article 4(2) lists the articles from which no derogation is ever allowed (such as the prohibition of slavery). Interestingly, the United States' delegation during the drafting of the Covenant originally advocated an inclusion of the entire fair trial provision among the explicitly non-derogable rights.¹⁹ This article does not go as far as to suggest that States do not have any leeway with judicial procedures during emergencies. But it underlines that there is no legally sound argument allowing States in countering terrorism – or in any other situation – to depart from the minimum judicial safeguards that apply even in the worst forms of emergencies.

The last paragraph of Article 4 contains procedural requirements. The disagreement as to whether failure to comply with the notification requirements automatically invalidates the derogation is unresolved.²⁰ But

¹⁹ UN Doc. E/CN.4/325 (13 June 1949). Proposal of the United States that “[t]he rights and freedoms set forth in [...] article 13 [14], article 14 [15] and article 15 [16], of this Covenant shall not be subject to any limitation”. U.N. Doc. E/CN.4/SR.195 (29 May 1950), para. 140. The United States were voting in favor of accepting the proposal to include the full fair trial provision among the non-derogable rights. For a summary of the *travaux préparatoires* of Article 4, see *David Weissbrodt, The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, Chapter 4 (2001).

²⁰ *Sarah Joseph, Human Rights Committee: General Comment 29, Human Rights Law Review* 2 (2002) 1, 81, 95-96; Apart from the United Kingdom, no State notified derogations from the Covenant. UN bodies interpreted the absence of formal derogation from the US and rejected the possibility of a *de facto* derogation; see also:

even if a *de facto* derogation was accepted, the principle of consistency ensures that a number of aspects of fair trial are effectively non-derogable.

E. The Principle of Consistency

My proposition is that the principle of consistency is the central tool to identify the non-derogable aspects of Article 14. A State can only derogate from provisions of the ICCPR insofar as the measures are consistent with all its other obligations under international law,²¹ including customary international law.

The drafting history of the principle of consistency supports using it to identify the non-derogable aspects of Article 14. The idea of consistency was first introduced in 1950 by the US delegation. Eleanor Roosevelt mentioned on behalf of her delegation that the conduct of States in emergencies had already been regulated in the 1949 Geneva Conventions.²² The US delegation thus advocated that the drafters of the Covenant take advantage of this legislation, instead of trying to work out which aspects of due process should be entrenched from derogation. This logic was accepted by consensus.²³ The explanation of the US proposal explicitly referred to the methodology employed throughout this article: “the State’s other obligations” such as those due under humanitarian law provide the answer to what aspects of the right to fair trial can not be derogated from. The drafters accordingly intended that reference to humanitarian standards should be made when considering the consistency of a derogation measured against a State’s other obligations.

The next section considers what “other obligations under international law” are relevant in determining which aspects of the fair trial provision are non-derogable.

Situation of the Detainees at Guantánamo, UN Doc. E/CN.4/2006/120 (15 February 2006) (prepared by *Leila Zerrougui et al.*).

²¹ ICCPR, Art. 4(1) (*supra* note 1).

²² *Summary Records of the Commission on Human Rights*, Fifth Session, R. 195, para. 45, UN Doc. E/CN.4/SR. 195 (29 May 1950) (Remarks of *Eleanor Roosevelt*).

²³ *Jaime Oraá*, *Human Rights in States of Emergency in International Law* (1992), 191.

F. “Other Obligations Under International Law”: Juxtaposing the two Additional Protocols to the Geneva Conventions and Customary Law

It is possible to identify which aspects of Article 14 of the Covenant must be considered non-derogable by analyzing the customary “other obligations” incumbent on all States. The argument is based on the idea that those guarantees which are non-derogable for both types of armed conflict – the most serious emergencies – must also be considered non-derogable in all other situations of exigency. Those aspects of due process are also part of customary international law. Any derogation from these aspects is inconsistent with “a State’s other obligations under international law”, and therefore invalid. The characterization of certain obligations as part of the customary international law applicable in both types of armed conflict entails the applicability of those norms to all types of emergency. Because they are part of a “State’s other obligations”, measures departing from these obligations contravene the principle of consistency in Article 4(1) of the Covenant. From my point of view, if a standard of fair trial applies in both types of armed conflict, there is no good reason that a State should be allowed to provide lower standards if faced with an emergency which does not amount to an armed conflict.

The reader may legitimately ask why this essay emphasizes that certain aspects of Article 14 are non-derogable only to say that these non-derogable aspects are congruent with obligations of States under customary international law. It is true that one could simply point out that, for instance, the US Military Commissions Act violates customary international law. However, given the views held by some that there are gaps in the law and that the existing international legal framework is unsuitable to address challenges posed by terrorism, the derivation of the same results from the machinery of one of the most widely ratified international treaties provides a strong confirmation that certain standards of fair trial can never be dispensed with. After all, the derogation regime was specifically designed to be applicable in times of extraordinary challenges. The suggested method also preventively answers arguments that customary international law may also allow derogations. By analyzing which judicial standards have to be provided even in the worst forms of emergency – those standards common to both types of armed conflict and at the same time part of customary law – the non-derogable aspects of fair trial can be identified. This is the minimum

level of due process applicable in the “war on terror” to all accused individuals under a State’s control.

The convergence of the fair trial articles in the two 1977 Additional Protocols to the Geneva Conventions provides a sound basis for an assessment of the customary minimum standard of a fair trial.²⁴ Additional Protocol I (AP I) regulates international armed conflicts and Additional Protocol II (AP II) extends protection to victims of internal conflicts. Broadly speaking, those judicial standards which are common to both protocols are applicable in both types of armed conflict.²⁵

The principle of consistency only refers to the standards of the Geneva Conventions and their protocols in those cases in which the treaties are applicable and to those individuals to which they apply *ratione personae*. An emergency which does not amount to armed conflict does not justify the application of the conventions as treaty law. However, the minimum obligations of humanitarian law are also part of customary international law and, as mentioned above, part of the State’s other obligations under international law in all types of emergency. The debate as to the relationship between *opinio juris* and State practice for the creation of custom in the field of human rights and humanitarian law falls outside the scope of this article. I therefore suggest taking advantage of the monumental study on customary international humanitarian law conducted by the International Committee of the Red Cross (ICRC).²⁶ The study carefully assesses both State practice and *opinio juris* relating to the norms under review. As a subsidiary means for the determination of rules of law,²⁷ the ICRC study facilitates the task of identifying the judicial standards applicable in all armed conflicts.

²⁴ Stavros had the same idea more than a decade ago: *Stephanos Stavros*, The Right to a Fair Trial in Emergency Situations, *International and Comparative Law Quarterly* 41 (1992) 2, 343-365.

²⁵ A skeptical reader may point out that AP II only covers non-international armed conflicts of a certain intensity. A more detailed discussion of this aspect is beyond the scope of this article, but suffice it to say that in respect of the administration of justice, it seems to be safe to conclude that the judicial safeguards of Article 6 of the second protocol are implied by Common Article 3 to the Geneva Conventions which applies to non-international armed conflicts in general.

²⁶ *Jean-Marie Henckaerts et al.* (eds), *Customary International Humanitarian Law*, (2003), Volumes 1 – 3.

²⁷ Statute of the International Court of Justice, Art. 38(1)d, 26 June 1945, 59 Stat. 1031, 3 Bevans 1179.

Article 75 of AP I provides a list of fair trial rights which State parties must afford to everyone affected by the conflict.²⁸ As treaty law, Article 75 only applies if the Additional Protocol applies as a whole. Even if it is plausible that the vast majority of fair trial guarantees in Article 75 are part of customary law, some might not warrant the same claim. This concern stems from the fact that the laws of non-international armed conflict allow lower standards in some respects. Interestingly, US Legal Advisors previously took the position that the entirety of Article 75 was customary in nature.²⁹ But as long as there are potentially some aspects of Article 75 which may not be part of customary law, I suggest comparing Article 75 with its sister article, Article 6 of AP II.³⁰ The list of safeguards which are common to both protocols provides the most authoritative source of the customary minimum level of due process from which no derogation is allowed. As outlined above, this is because judicial standards applicable in both types of armed conflict apply to all States by virtue of being part of general international law. The length of this essay precludes the comparison of each sub-paragraph of Article 14 with the two protocols and the results of the ICRC study. Elsewhere, I found at least twelve elements of Article 14 to be effectively non-derogable.³¹

G. Current Developments and Some Thoughts on the Relevance of the Derogation Regime

In reality, however, measures relating to the administration of justice in the context of the “war on terror” continue to disregard non-derogable safeguards and the Guantánamo fiasco may only be the tip of the iceberg.

²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Art. 75, 1125 U.N.T.S. 3.

²⁹ *Michael Matheson*, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University International Law Review* 2 (1987), 415, 420 and 427.

³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, Art. 6, 1125 U.N.T.S. 609.

³¹ *Evelyne Schmid*, The Right to a Fair Trial in States of Emergencies: Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights, 15 April 2008, available at <http://fletcher.tufts.edu/research/2008/Schmid.pdf> (last visited 29 September 2008).

As recently confirmed by the US Supreme Court in the case of *Boumediene et al. v. Bush*, the American military commissions post *Hamdan v. Rumsfeld*³² still fall short of domestic constitutional guarantees and a majority of the US Supreme Court held that the prisoners detained in Guantánamo had a right to a review of their detention and that the US Military Commissions Act of 2006 was an unconstitutional suspension of that right.³³ In the concluding paragraph of the Court's opinion, Justice Kennedy emphatically writes that "the laws and the Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law."³⁴ Although the Court's decision obviously analyzes the Military Commissions Act and the Detainee Treatment Act with reference to the US legal system, the majority's conclusion echoes the idea that some rights are too fundamental to ever be dispensed with. The US "Combatant Status Review Tribunals" are also inconsistent with the non-derogable judicial standards of international law and, in my view, have been counterproductive to the aim of reducing the threat of violence.

Just as the US Supreme Court in *Boumediene et al. v. Bush* mentions how the framers of the Constitution decided that some rights must always be a part of the law,³⁵ the drafters of the ICCPR spent considerable time and thought on regulating what a government should be allowed to do in difficult situations. Armed conflict and terrorism were very much part of what they understood as "an emergency threatening the life of the nation".³⁶

³² *Hamdan v. Rumsfeld*, 548 US 557 (2006), Supreme Court of the United States. The Court is concluding that the military commissions to try Guantánamo detainees violated Common Article 3 of the Geneva Conventions.

³³ *Boumediene et al. v. Bush*, 553 US (2008), Supreme Court of the United States, 6.

³⁴ *Id.*, 70.

³⁵ *Id.*, 70.

³⁶ The original proposals of the derogation clause explicitly referred to "the time of war and other public emergency". See UN Doc. E/CN.4/188 (16 May 1949) and UN Doc. E/CN.4/SR.127, 12 (17 June 1949), where the wording was provisionally adopted. Because the UN was established with the aim to prevent war, the delegates later suppressed the mention of war and preferred to adopt a broad term instead (UN Doc. E/CN.4/SR. 330 (1 July 1952)). In 1962, a study by the UN Commission on Human Rights summarizes the circumstances which could justify the proclamation of a state of emergency. Even if the list does not contain the word "terrorism", it includes circumstances such as the defense or security of the State or parts of the country, civil war, rebellion, insurrection, subversion, harmful activities of counter-revolutionary elements, disturbances of peace, public order or safety, danger to the constitution and authorities created by it, etc. See *UN Commission on Human Rights, Study of the*

It is therefore not warranted to claim the inappropriateness of international law. Rather, we need to stress the advantages of the framework of the legal regulation of emergency measures.

For instance, abiding by the derogation regime and strictly safeguarding non-derogable rights would increase the prospects of international law enforcement cooperation much needed in the “war on terror”. Other States will be more willing to use evidence gained by foreign authorities in their domestic courts if they are confident that the evidence was gained without involving cruel, inhuman or degrading treatment or even torture. The Hamburg Terror Trials involving suspected organizers of the 9/11 attacks are a good illustration of the importance of transatlantic judicial cooperation. The legal and practical ramifications of the unavailability of the key witness, a detainee in US custody not allowed to travel, and the impossibility of disclosing the interrogation records provided by the CIA most probably impacted the outcome of the proceedings.³⁷ Had the US notified a derogation shortly after the 9/11 attacks and had that derogation strictly abided by Article 4 of the ICCPR, not all difficulties might have been solved, but most commentators would probably have granted the right to derogate at that time, and the measures would at least have been based on the framework of the rule of law. This may in turn have avoided the series of *ad hoc* policies relating to the trials of foreign terrorist suspects and the damage in terms of reputation and credibility.

Even if negative in tone, derogations are a form of validation for governments invoking emergency powers. This legitimization was however voluntarily conditioned by the drafters of the Covenant. It is problematic for the international rule system that this legitimization model seems to have lost its attraction for the most powerful member and the original force behind the regime in question. The ambiguities surrounding the concept of armed conflict in the “war on terror” emphasize the need for a more rigorous approach on the part of treaty bodies overseeing the validity of the assertion of a state of emergency and the measures taken.³⁸ Moreover, as underlined by Judge Simma in his separate opinion to the *DRC v. Uganda* case, other States are far too hesitant to assert the community’s interest in ensuring that “ongoing attempts to dismantle important elements of these

Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc. E/CN.4/826/Rev.1 (1962), 257.

³⁷ Timo Kost, Mounir El Motassadeq – A Missed Chance for Weltinnenpolitik?, German Law Journal 8 (2007) 4, 443-454.

³⁸ Joan Fitzpatrick, Speaking Law to Power: The War Against Terrorism and Human Rights, European Journal of International Law, 14 (2003) 2, 252.

branches of international law [human rights and humanitarian law] in the proclaimed ‘war’ on international terrorism”³⁹ are addressed.

H. Conclusion

The reactions to the September 11 attacks have renewed the debate on what is permissible in situations of exigency. This article has suggested a methodology to determine the minimum list of fair trial guarantees to be provided to all suspects. It has examined which judicial standards have to be provided in all situations by virtue of customary international law relating to both types of armed conflict and the prohibition of derogation measures which are inconsistent with the minimum humanitarian level of due process. States have voluntarily accepted this minimum level of fair trial rights when they designed the procedures laid out in Article 4 of the ICCPR. This essay has elaborated on the Human Rights Committee’s holding that certain fundamental principles of fair trial can never be dispensed with if torture and other explicitly non-derogable rights shall be effectively protected.⁴⁰ In its second most recent General Comment, the Human Rights Committee has confirmed that “deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.”⁴¹

Derogation clauses were included in the ICCPR to allow a State to defend its population from extraordinary threats. At the same time, derogation clauses contain a number of criteria concerning the extent to which the temporary curtailment of rights is tolerable.

The principle of consistency contained in Article 4(1) of the ICCPR requires that derogation measures are consistent with a State’s other international legal obligations. Based on the principle of consistency, I have argued that those aspects of fair trial which are common to the legal regimes dealing with international armed conflict on the one hand and internal armed conflicts on the other must be provided in all types of emergency, including in emergencies which fall short of the legal threshold of an armed conflict. Any derogation from these aspects would be inconsistent with the customary law which remains applicable even in the worst cases of emergency, and therefore invalidate the derogation. Applying this

³⁹ *Simma*, 12 (para. 38) (*supra* note 17).

⁴⁰ Human Rights Committee, *General Comment 29*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 11.

⁴¹ Human Rights Committee, *General Comment 32*, UN Doc. CCPR/C/GC/32 (2007), paras 6 and 19.

methodology leads to a list of non-derogable judicial safeguards and a strong contention against all arguments that certain individuals are situated in an unspecified gap between two bodies of law.

Prosecuting the Leaders: Promises, Politics and Practicalities

Robert Cryer*

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A. Introduction

Given recent developments in relation to the prosecution of international crimes,¹ it might be thought that one of the last bastions of sovereignty has been breached, and international criminal law has not only entrenched itself in international law. Indeed further to this, it has assumed a supranational position that stands entirely above States, promising justice for all and as a trump card over depredations committed in the name of State sovereignty. After all, Charles Taylor from Liberia is standing trial before the Special Court for Sierra Leone, Slobodan Milošević only escaped judgment by the International Criminal Tribunal for the former Yugoslavia (ICTY) by dying before the end of his trial, Saddam Hussein was prosecuted and sentenced to death before the Iraqi High Tribunal, and Omar al-Bashir has recently been the subject of a request for an arrest warrant from the Prosecutor of the International Criminal Court. Surely international criminal law reaches its iconographic apogee with the prosecution of such leaders,² brought down to size by the majesty of the law (if not the grandeur of the often aseptic courtrooms)?

Of course, in fact, the picture is far more complicated. Although it is too early to come to any judgment on the Taylor case, his appearance before the Special Court was as much a function of States tiring of him continuing to meddle in Liberian politics than a commitment to seeing him stand trial. Milošević was for many years apparently kept beyond the reach of the ICTY for reasons of ensuring peace in former Yugoslavia, then domestic political reasons, and his trial was itself one from which we might admit,³ lessons can be learned.⁴ The trial and punishment of Saddam Hussein is largely seen as having been mishandled, and inconsistent with the relevant

¹ As Ruti Teitel has said: “There have never been more leaders in the dock, or, under the shadow of its threat”, *Ruti Teitel*, *The Law and Politics of Contemporary Transitional Justice*, *Cornell International Law Journal* 38 (2005), 837-862, 837.

² See *Maya Steinitz*, *The Milošević Trial-Live: An Iconical Analysis of International Law’s Claim to Legitimate Authority*, *Journal of International Criminal Justice* 3 (2005), 103-123, 103; *Martti Koskenniemi*, *Between Impunity and Show Trials*, *Max Planck Yearbook of International Law* 6 (2002), 1-35, 1.

³ The same could well be said of Franjo Tuđman, who managed to avoid indictment for various reasons, until his death, see: *Victor Peskin*, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (2008), 118.

⁴ See in general: *Gideon Boas*, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (2007).

human rights norms,⁵ and possible proceedings against al-Bashir have led to considerable controversy, with the African Union requesting deferral of the International Criminal Court's (ICC) processes relating to him, and the Security Council finding itself somewhat torn on the matter.⁶ As such we must be careful not to present what Georg Schwarzenberger described as the chocolate box version of international law and society.⁷ Some of the difficulties are referable to the nature of the international legal order, some of which are referable, on the other hand, to insalubrious forms of politics. It remains the case that the international legal order is torn between two imperatives, what Hedley Bull would have described as the pluralist and the solidarist views,⁸ and the difference between an international society and an international community.⁹ Nonetheless, some are simply problems of political will, and others are overstated, and the simple fact that it is possible to speak of the problems attending bringing leaders to justice rather than dismissing its possibility is in itself a development from the position soon enough ago that most international criminal lawyers can still remember it.

This piece will seek to explain some of those problems involved in prosecuting leaders (including those of States)¹⁰ and those who, if we agree that we will see it as the general thrust of international criminal law, bear the

⁵ *M. Cherif Bassiouni*, Post Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal, *Cornell International Law Journal* 38 (2005), 327-390. 364; *Michael Scharf*, The Iraqi High Tribunal: A Viable Experiment in International Justice?, *Journal of International Criminal Justice* 5 (2007), 258-263, 259; *Miranda Sissons & Ari S. Bassin*, Was the Dujail Trial Fair?, *Journal of International Criminal Justice* 5 (2007), 272-286, 272; *Nehal Bhuta*, Fatal Errors, The Trial and Appeal Judgments in the Dujail Case, *Journal of International Criminal Justice* 6 (2008), 39-65, 39.

⁶ See the African Union Communiqué of the 142nd Peace and Security Council, 21 July 2008 and SC Res. 1828 (31 July 2008) UN Doc S/PV 5947, alongside the statements attending its adoption. See *infra*.

⁷ *Georg Schwarzenberger*, The Misery and Grandeur of International Law, *Current Legal Problems* 17 (1964), 184-210, 185-186.

⁸ For modern expositions see *Barry Buzan*, *From International to World Society? English School Theory and the Social Structure of Globalisation* (2005), 46-62 and *Nicholas Wheeler*, *Saving Strangers: Humanitarian Intervention in International Society* (2000), Chapter 1.

⁹ See *Jason Ralph*, *Defending the Society of States: Why the US Opposes the International Criminal Court* (2007), 13-20.

¹⁰ By which this piece means those who are heads of State, heads of government, or other top-ranking officials (including those at such levels in rebel or cognate movements).

greatest responsibility for international crimes,¹¹ those at the apex of the command structure, in particular, heads of government. In doing so, though, it will do so with an eye to remembering that while international criminal law cannot live up to all its promises, it still keeps at least as many as most leaders do, and they are not the only international criminals deserving of punishment.

B. International Criminal Law: Is There an Imperative to “Aim High”?

International Criminal law, at least in the 20th century, has often looked to prosecute leaders. For example, the 1919 Inter-Allied Commission was empowered to investigate the responsibility of the “authors of the war”.¹² Indeed, the commission suggested that high officials, including the Kaiser, be tried for war crimes, *inter alia* on the basis of command responsibility.¹³ The two major mid-century international criminal tribunals, which form the basis of modern international criminal law, the Nuremberg and Tokyo International Military Tribunals (IMT), were both created for the prosecution of high-ranking offenders.

The Nuremberg IMT was created to implement the Moscow declaration, which promised “the major criminals whose offences have no particular geographical location and [...] will be punished by a joint declaration of the governments of the Allies”.¹⁴ Similarly, Article 1 of the Nuremberg IMT Charter stated that “there shall be established an International Military Tribunal (hereinafter called “the Tribunal”) for the just and prompt trial and punishment of the major war criminals of the European Axis.”¹⁵ Although the Tokyo IMT was created pursuant to the Moscow declaration, which, in the relevant parts, merely promised “stern

¹¹ The ICTY has consistently held that abuse of authority is an aggravating factor, see e.g. *Prosecutor v. Blaškić*, Judgment, IT-96-14-A, 29 July 2004, para.727; *Prosecutor v. Babić*, Judgment, IT-03-72-A, 18 July 2005, para.81.

¹² The Report of the Commission is reprinted in (1920) 14 *American Journal of International Law* 95-145.

¹³ *Id.*, 116-117 and 121.

¹⁴ Declaration of Moscow, 1 November 1943, available at <http://avalon.law.yale.edu/wwii/moscow.asp> (last visited 8 December 2008).

¹⁵ 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Power and Charter of the International Military Tribunal, Art. 1, 82 U.N.T.S 279.

justice shall be meted out to war criminals”,¹⁶ Article 1 of the Tokyo IMT’s Statute reads “[t]he International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East.”¹⁷

More recently, although there is no gravity threshold for the jurisdiction of the ICTY and ICTR, they have been required by Security Council Resolution 1534 to focus on “the most senior leaders suspected of being most responsible for crimes” in the Tribunal’s jurisdiction.¹⁸ This is, however more to do with the fact that the Council wishes them to finish up their business quickly than a principled view of the appropriate role of international prosecutions.¹⁹

Similar financial and logistical concerns led the Secretary-General, at the insistence of the Security Council, to provide, in the Statute of the Special Court for Sierra Leone Article 15(1)²⁰ that “[t]he Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law [...]”²¹ In the *AFRC* Appeal,²² one defendant, Kanu asserted that this was a jurisdictional requirement, and that the Trial Chamber failed to

¹⁶ Potsdam Declaration, reprinted in *Neil Boister & Robert Cryer* (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (2008) 1, 1-2.

¹⁷ Tokyo IMT Charter, reprinted in *id.*, 7, 7.

¹⁸ *Dominic Raab*, Evaluating the ICTY and Its Completion Strategy, *Journal of International Criminal Justice* 3 (2005) 82-102, 87; *Darryl A. Mundis*, The Judicial Effects of the “Completion Strategies” on the ad hoc International Criminal Tribunals, *American Journal of International Law* 99 (2005) 142-158, 142; *Larry D. Johnson*, Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity, *American Journal of International Law* 99 (2005) 158-174, 158.

¹⁹ Equally, the judges had, early in the life of the ICTY, expressed disquiet about the low-level perpetrators being indicted. See *Antonio Cassese*, Judge of the International Criminal Tribunal for former Yugoslavia, in: *Timothy L.H. McCormack and Cheryl Saunders* (eds), *Sir Ninian Stephen: A Tribute* (2007) 192.

²⁰ Available at Official web-site of the Special Court for Sierra Leone: <http://www.scs-sl.org/Documents/scsl-statute.html> (last visited 8 December 2008).

²¹ There is a similar requirement in the Cambodian mixed chambers, see Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art. 1, available at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf (last visited 8 December 2008):

²² *Prosecutor v. Brima, Kamara and Kanu*, Judgment, SCSL-04-16-A, 3 March 2008 (AFRC Appeal).

establish that he did bear the greatest responsibility before convicting him.²³ The Appeals Chamber was firm with any such suggestion, stating that

The only workable interpretation of Article 1(1) is that it guides the Prosecutor in his exercise of prosecutorial discretion. That discretion must be exercised in good faith, on the basis of sound professional judgment...it would also be unreasonable and unworkable to suggest that is to be exercised by the Trial Chamber or Appeals Chamber when the at the end of the trial [...] it would be inconceivable that after a long and expensive trial the Trial Chamber could conclude that although the commission of serious crimes has been established beyond reasonable doubt against the accused the indictment ought to be struck out on the ground that it has not been proved that the accused was not one of those who bore the greatest responsibility [...] Kanu's interpretation of Article 1 is a desperate attempt to avoid responsibility for crimes for which he had been found guilty [...] [and is] [...] therefore without any merit.²⁴

Hence, the requirement that the Prosecutor focus on those who are leaders (and thus bear the greatest responsibility) is a guide, not a jurisdictional requirement, as international criminal law cannot provide for acquittals on the basis of relative culpability in the manner which has been suggested. This seems a sensible middle path to draw. As will be returned to later, leaders are not the only people who deserve punishment.

A similar path has been taken in relation to the ICC. The Prosecutor of the ICC has himself said that his focus is not on the "small fry", but on those that bear greatest responsibility for international crimes, and that he will not be concerning himself with lower-level offenders unless perhaps they have committed particularly egregious crimes.²⁵ This is consistent with the fact

²³ *Id.*, paras 272-4 The Trial Chamber's discussion is *Prosecutor v. Brima, Kamara and Kanu*, Judgment, SCSL-04-16-T, 20 June 2007 paras 640-659.

²⁴ *AFRC Appeal*, paras 282-285.

²⁵ Paper on some policy issues before the Office of the Prosecutor, September 2003, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf 7 (last visited 8 December 2008).

that the preamble of the Rome Statute of the International Criminal Court²⁶ which states that the Court is for the most serious crimes of concern to the international community of States as a whole, and Article 17(1)(d) of the Statute provides for the inadmissibility of the case when it is not sufficiently grave to justify the use of the Court.²⁷ This was thought by a Pre-Trial Chamber of the ICC to opine that the gravity test needed to be applied against the background of the fact that it applies within the, already serious, class of international crimes over which the ICC has jurisdiction, and therefore a relevant criterion for the gravity determination was whether or not the defendant bore the greatest responsibility, and was therefore (in practice) was in a senior leadership role.²⁸ This was, in part, on the basis of the assumed deterrent value of focusing on such leaders:

In the Chamber's opinion, only by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximised because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.²⁹

As such, the Trial Chamber sought to make the Prosecutor's (non-binding) policy of going for leaders a binding requirement upon him.³⁰

²⁶ Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (Rome Statute, Statute).

²⁷ See generally *John T. Holmes*, Complementarity: National Courts versus the ICC, in: *Antonio Cassese, Paula Gaeta and John R.W.D. Jones* (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002), 667. For discussion (and critique) of the early practice of the ICC on point, see *Kevin Jon Heller*, Situational Gravity Under the Rome Statute, in: *Carsten Stahn and Larissa van den Herik* (eds), *Future Directions in International Criminal Justice* (2009) (forthcoming).

²⁸ *Situation in the Democratic Republic of Congo*, Decision on The Prosecutor's Application for Warrants Of Arrest, Article 58, ICC-01/04-196, 10 February 2006, paras 52-55.

²⁹ *Id.*, para.55.

³⁰ *Id.*, para.63. It was on the basis that Bosco Ntaganda was not senior enough that the Pre-Trial Chamber to refuse an arrest warrant, on the basis that the gravity threshold was not reached, *id.*, para.89. Some support for such a position can be found in: *David M. Crane*, White Man's Justice: Applying International Criminal Justice After Regional Third World Conflicts, *Cardozo Law Review* 27 (2005-2006), 1683-1688, 1683- 1684.

This result, and the type of reasoning leading to it, found stern response from the Appeals Chamber. To begin, they determined that it was not for the Pre-Trial Chamber to determine admissibility unless there are specific reasons for doing so.³¹ The additional grounds of gravity created by the Pre-Trial Chamber, however, were the subject of very severe criticism from the Appeal Chamber, probably their greatest ire was directed at the requirement of seniority the Pre-Trial Chamber introduced. Not least they questioned the idea that deterrence ideas led to the requirement that the gravity threshold excluded all others than the most senior leaders:

It may indeed have a deterrent effect if high-ranking leaders who are suspected of being responsible for having committed crimes within the jurisdiction of the Court are brought before the International Criminal Court. But that the deterrent effect is highest if all other categories of perpetrators *cannot* be brought before the Court is difficult to understand. It seems more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is *per se* excluded from potentially being brought before the Court [...] The imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved [...] The predictable exclusion of many perpetrators on the grounds proposed by the Pre-Trial Chamber could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court, by announcing that any perpetrators other than those at the very top are automatically excluded from the exercise of jurisdiction by the Court.³²

As the Appeals Chamber also noted, provisions such as Article 33 of the Rome Statute (which provides for a limited defence of superior orders), and Article 27, which provides that the Statute “shall apply equally to all

³¹ The examples of situations in which this might be appropriate were “instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of proprio motu review” *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled Decision on The Prosecutor’s Application for Warrants Of Arrest Article 58, ICC 01/04-169-US-Exp, 13 July 2006, para.52.

³² *Id.*, paras 73-5.

persons without any distinction based on official capacity” imply that the drafters of the Rome Statute did not consider that only the most senior leaders may appear before the Court.³³ As they concluded:

[T]he preamble to the Rome Statute mentions “most serious crimes” but not “most serious perpetrators”. The preamble to the Statute in paragraphs five and six respectively states “perpetrators” and “those responsible for international crimes”. The reference in paragraph five of the Preamble to “perpetrators” is not prefixed by the delineation “most serious” or “most responsible”. Such language does not appear elsewhere in the Statute in relation to the category of perpetrators. Had the drafters of the Statute intended to limit its application to only the most senior leaders of being most responsible they could have done so expressly.³⁴

This seems correct, there are reasons that lower level offenders need punishment. The first of these is quite simple, people at the local, ground, level often see leaders as far away, and want to see the people who turned them from their homes, killed their families, and abused them, prosecuted rather than walking around their home towns. Any reconciliative function that international criminal law can have can be undermined when people are expected to reconcile with their neighbours and erstwhile persecutors on the basis of a trial of someone who sat in the capital.³⁵ It must be remembered that reconciliation is an individual process at least as much as a societal one.³⁶ Next is the problem, for many perpetrators, even those of a fairly high level, who are part of a bureaucratic system dedicated to the commission of international crimes, but who are, in Hannah Arendt’s memorable phrase about Adolf Eichmann, although evildoers, “banal” evildoers,³⁷ who allow themselves to become unthinking cogs in a machine. At least part of the answer to this is that it is important to recapitulate that allowing that to

³³ *Id.*, para 78.

³⁴ *Id.*, para 79.

³⁵ As *Catherine MacKinnon* has said “to every woman who is raped, the fish who did it is plenty big”, *Catherine MacKinnon*, *The ICTR’s Legacy on Sexual Violence*, *New England Journal of International and Comparative Law* 14 (2008), 101-110, 106.

³⁶ See, in part, *Arne J Vetlesen*, *Evil and Human Agency, Understanding Collective Evildoing* (2005), 272-281.

³⁷ *Hannah Arendt*, *Eichmann in Jerusalem, A Report on the Banality of Evil* (1994). Although see *Jacob Robinson*, *And the Crooked Shall be Made Straight* (1965).

occur is, in itself, considerable wrongdoing. The message ought to be brought home, in part through the expressive function of punishment, that such persons are responsible for that wrongdoing, as has been said by Alain Finkelkraut³⁸ and Arne Vetlesen,³⁹ amongst others. This point retains its vitality, in spite of the fact that Arendt was probably wrong in relation to Eichmann himself, who was not the banal, unreflective bureaucrat he was portrayed as by his defence team.⁴⁰

Nonetheless, debate often concentrates on why it is important to prosecute those most responsible, (i.e. those at the highest levels). As was common ground between the Pre-Trial and Appeals Chamber, those at the highest level are in the best place to prevent large scale crimes. In addition, there are important didactic aspects of trying those at the highest level, in particular to demonstrate that no-one is above the law, a point which is a fundamental tenet of the rule of law.⁴¹

If it is a legitimate aim of international trials to tell the story of the conflict,⁴² then trials of those at the highest level are most likely to be able to do so whilst remaining sufficiently linked to the culpability of the particular defendant before the court. This is important, as it is inappropriate, not least as it is (usually) prejudicial to the accused to stray beyond the facts relevant to the charges in the indictment. To do so is also perilous from the point of view of ensuring an expeditious trial for the defendant,⁴³ and risks imposing on a defendant the burden of dealing with issues that do not bear on their personal culpability, or, if not, attempting to write on broader aspects of the relevant conflict without the benefit of argument on both sides. Also on a pragmatic level, one argument for prosecution of those at the highest level of authority is an incapacitative one, in other words that such people are most likely to instigate renewed conflict, and as such are best removed from public life. Although this is a deeply

³⁸ *Alain Finkelkraut*, (Roxanne Lapidus trans.), *Remembering in Vain: The Klaus Barbie Trial and Crimes Against Humanity* (1992).

³⁹ *supra* note 36, *Vetlesen*, Chapter 5.

⁴⁰ *Id.*, Chapter 2,

⁴¹ See e.g. the allusion to this in *Crane*, note 30, 1683.

⁴² *Mark Osiel*, *Mass Atrocity, Collective Memory and the Law* (1997), Introduction, 13; although see *José Alvarez*, *Rush to Closure: Lessons of the Tadić Judgment*, *Michigan Law Review* 96 (1998) 2031-2112, 2044; *José Alvarez*, *Lessons from the Akayesu Judgment*, *International Law Students' Association Journal of International and Comparative Law* 5 (1998-1999) 359-370, 359.

⁴³ A right protected, *inter alia* by Art. 14 (3)(c) of the International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S., 171, 177.

controversial justification of punishment,⁴⁴ it is one that has some pedigree in international criminal law, if not always its practice.⁴⁵

There is also the matter of the paradox that a person who kills one person is more likely to be prosecuted than one who has killed thousands,⁴⁶ which threatens to undermine some of the other aims of international criminal justice. The fact that prosecutions (frequently in democracies, it must be said) of low ranking officials rather than the devisers of policies that lead to international crimes, have led to critiques of the legitimacy of such prosecutions which, whilst they do not undermine the legality of such trials, do have some effect on their legitimacy.⁴⁷ Hence, although there are questions about precisely how well prosecutions can fulfil all the aims they are said to have,⁴⁸ there is much to be said for those aims, and as such, it is at least as important to prosecute leaders as it is to prosecute others, in spite of the difficulties that attend such prosecutions.

International criminal law, as can be seen, has to take account of the countervailing imperatives that show the necessity of prosecuting those at all levels of responsibility, whilst also encouraging the prosecution of those at the apex of responsibility. The modern International (and internationalised) Criminal Tribunals have dealt with the matter sensibly, noting the imperative of prosecuting those at the highest level possible, whilst ensuring that this does not become a legal requirement that would imply that those who are not at that level do not bear any responsibility. That said, let us move on to the specific difficulties that attend the

⁴⁴ It is even more controversial when the person has not been proved to have committed any such crime, such as those in Guantánamo Bay, see e.g. *Diane Marie Amann*, Guantánamo, *Columbia Journal of Transnational Law* 42 (2003) 263-348, 263.

⁴⁵ For an early assertion of this view at the Tokyo IMT see the Separate Opinion of the Member from the Netherlands, reprinted in *Neil Boister & Robert Cryer* (eds), *supra* note 16, 701

⁴⁶ The paradox is referred to, with regard to the gallows humour that it has engendered in conflict situations, in *Geoffrey Robertson*, *Crimes Against Humanity: The Search for Global Justice*, 3rd ed. (2006), 372.

⁴⁷ For a forceful discussion of the responsibility of high-ranking members of the Bush administration, and a critique of the limitation of prosecutions to low ranking perpetrators, see e.g. *Jordan J. Paust*, *Beyond The Law: The Bush Administration's Unlawful Responses to the War on Terror* (2007). This type of critique is one with considerable historical pedigree. For one classic of the genre see *Telford Taylor*, *Nuremberg and Vietnam: An American Tragedy* (1970).

⁴⁸ See generally *Robert Cryer, Håkan Friman, Darryl Robinson & Elizabeth Wilmshurst*, *An Introduction to International Criminal Law and Procedure* (2007), Chapter 2.

prosecutions of those at the highest level, and begin with the specific criminal law problems that have to be dealt with when international criminal law engages with such persons.

C. Bringing Leaders to Justice: The Legal Problems

There are a number of legal difficulties with prosecuting leaders; some relate to the criminal law aspects of international criminal law, in particular the principles of liability that are used to link leaders to the physical perpetration of crimes. Others can be found in more general aspects of international law, such as the difficulties of ensuring co-operation in an international legal system that is not especially conducive to ensuring such co-operation, and the immunities that attach to high-level government officials. Let us begin with the former.

I. Principles of Liability

Criminal law is, understandably, focussed primarily on the physical perpetrator of offences, such as the person who pulls the trigger, otherwise administers the fatal blow, or sells drugs to users. However, as William Schabas has noted, international criminal law tends to have a greater focus on those who are not direct perpetrators in this manner, but those who lead, order or permit offences from on high.⁴⁹ However, this is by no means a simple matter: for the most part, leaders are far away from the actual offences, and pursuant to policies of plausible deniability tend not to write their orders down, but let others know their wishes in less permanent manners. Nazi Germany and (at times) Saddam Hussein's Ba'ath regime were exceptions in this regard. Most leaders do not seek to sully themselves with either direct perpetration of crimes, or evidence of their ordering of such offences. For similar reasons, they also are often careful not to provide clear evidence of their acquiescence in them (or ensure that any such

⁴⁹ *William A. Schabas*, *Enforcing International Humanitarian Law: Prosecuting the Accomplices*, *International Review of the Red Cross* 842 (2001), 439-458, 440. Although in certain civil law systems, the *Hintermann* idea is used to consider the director of offences committed by others to be perpetrators: *Claus Kreß*, *Claus Roxin's Lehre von der Organisationsherrschaft und das Völkerstrafrecht*, in: *Goldammer's Archiv für Strafrecht* (2006) 304. The recent development of co-perpetration in the ICC appears to reflect something of this, see: *e.g. Thomas Weigend*, *Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges*, *Journal of International Criminal Justice* 6 (2008), 471-487.

evidence is destroyed before it can be brought to the attention of international prosecutors).⁵⁰ High level international criminals are rarely stupid, naïve or unintelligent: demagogues without intellect do not frequently last long enough for liability to attach to them, those that last longer are usually perfectly aware of the mechanisms by which they may plausibly deny international crimes.

Therefore for the vast majority of cases against high level perpetrators, as the Prosecution found in the *Milošević* case, a considerable evidential hurdle has to be overcome to link those in lofty positions to the offences committed on the ground. This issue was precisely what split the Majority and Judge Pal (and, on occasion, Judge Röling) at the Tokyo IMT.⁵¹ As a result of this difficulty, two doctrines have been developed that seek, in addition to reflecting the way in which collective action crimes, which many if not most international crimes are, tend to be committed: Command (Superior) Responsibility and Joint Criminal Enterprise.⁵² Neither is uncontroversial.

II. Command Responsibility

Command responsibility is the liability that attaches to those in a position to prevent or punish international crimes committed by their subordinates. It applies to both civilian and military superiors.⁵³ It is reasonably well explained for present purposes by Article 7(3) of the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute.

⁵⁰ This includes witness evidence, as the killing of possible witnesses, including perpetrator-witnesses has not proved uncommon.

⁵¹ See *Neil Boister & Robert Cryer*, *The Tokyo International Military Tribunal: A Reappraisal*, (2008) Chapters 7-8.

⁵² The literature on both is huge, for a sample see: *Albin Eser*, *Individual Criminal Responsibility*, in: *Antonio Cassese et al.* (eds), *Commentary on The Rome Statute of the International Criminal Court* (2002), 767; *Mark Osiel*, *The Banality of Good: Aligning Incentives Against Mass Atrocity (The Banality of Good)*, *Columbia Law Review*, 105 (2005), 1751-1862; *Elies van Sliedregt*, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003); *William. H. Parks*, *Command Responsibility for War Crimes*, *Military Law Review* 62 (1973), 1-104; *Mirjan Damaška*, *The Shadow Side of Command Responsibility*, *American Journal of Comparative Law* 49 (2001), 455-496.

⁵³ See: Tokyo IMT Judgment, 48, 442-7; *US v. Karl Brandt et al. (The Doctors' Trial)* IV LRTWC 91-3. Keep the two originals, but add *The Prosecutor v. Ignace Bagilishema* (Appeal Judgement: Reasons), ICTR-95-1A-A, International Criminal Tribunal for Rwanda (ICTR), 3 July 2002, para.52

The fact that [crimes were] committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁵⁴

This article has three major aspects, first, a superior/subordinate relationship; second, the “mental element”; and third, a failure to take reasonable measures to prevent or punish violations of international criminal law.⁵⁵ Importantly, it is an offence that can be proved by proof, not of giving orders, but by an omission, and does not even require proof that the leader knew of the offences, merely that he had reason to know or should have known of them. Notably, however, for civilians, the Rome Statute provides that the leader must have known, or “consciously disregarded information that clearly indicated” that crimes were being committed or about to be.⁵⁶ This raising of the *mens rea* requirement is unfortunate for cases against high-level government officials, leaving a loophole that they (alongside their usually expensive lawyers) are almost certain to seek to exploit.

The principle is an important one, but as, mentioned above, it is not without controversy. In its initial formulation, in the *Yamashita* case, one of its justifications was brought into the open, the court found that he either must have tolerated them, or secretly ordered them.⁵⁷ Some criticise this, on the basis that failures in evidence should not lead the development of new inculpatory doctrines.⁵⁸ This is true, but it must be remembered that the

⁵⁴ Article 7(3) of the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute, Art. 6(3) of the International Criminal Tribunal for Rwanda (ICTR) Statute and Art. 6(3) of the Special Court for Sierra Leone (SCSL) Statute are essentially the same. Article 28 of the Rome Statute is slightly different, especially on the mental element required for civilian superiors and causation. The difference need not detain us here, however.

⁵⁵ *Delalić, Mucić, Delić and Landžo (Čelebići Camp)*, ICTY Judgment of the Court, IT-96-22-A, 11 November 1998, paras 344, 346; *Gerhard Werle*, *Principles of International Criminal Law* (2005), 136-137.

⁵⁶ Rome Statute, Article 28. This is not the customary position, see *Bagilishema* (Appeal Judgement, para.52).

⁵⁷ Trial of *General Tomoyuki Yamashita*, *Law Reports of Trials of War Criminals* (LRTWC) IV (1945), 34.

⁵⁸ *Kai Ambos*, *Superior Responsibility*, in: *Antonio Cassese et al.* (eds), *The Rome Statute for the International Criminal Court: A Commentary* (2002), 823.

doctrine is linked strongly to the duty of a superior to prevent international crimes over which he has control. A failure in this regard can be appropriately criminalised.⁵⁹

Nonetheless, as it stands, command responsibility is problematic, perhaps because it covers too many different forms of liability. It moves from knowing failures to intervene despite a duty, which is close to traditional complicity ideas, to, in essence, negligent dereliction of duty.⁶⁰ They are, simply speaking, very different things, a fact recognised by the German law relating to the subject, which deals separately with failure to know of offences in dereliction of duty, failure to report an offence, and knowing tolerance of offences when there is a duty and ability to intervene to prevent it. By treating all forms of command responsibility the same, the ICTY⁶¹ and the Rome Statute unfortunately distort the various concepts in a manner which “display[s] a measure of insensitivity to the degree of the actor’s own personal culpability”.⁶²

III. Joint Criminal Enterprise⁶³

Despite the prominence Command Responsibility is thought to have in leadership trials, the more frequent approach by the ICTY prosecutor, including in the *Milošević* case, is Joint Criminal Enterprise. This is a doctrine which was derived, not without controversy, from a few post-war

⁵⁹ See *Robert Cryer*, General Principles of Liability in International Criminal Law, in: *Dominic McGoldrick et al.* (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004).

⁶⁰ For an extremely useful discussion of this matter, see: *Damaška*, *supra*, note 52, 460-471.

⁶¹ The ICTY has recently recast command responsibility in a different light, not as responsibility for the underlying crimes, but as a *sui generis* form of liability for the omission itself (This began in *Prosecutor v. Hadžihasanović*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, IT-01-54-AR72, 16 July 2003, Dissenting Opinion of Judge Shahabuddeen, para.78; and (seemingly) achieved majority acceptance in: *Prosecutor v. Hadžihasanović and Kubura (Appeal Judgment)*. IT-01-47-A. International Criminal Tribunal for the former Yugoslavia (ICTY). 22 April 2008, para.39; but this is not how the principle has traditionally been seen, nor has it been so seen by the Rome Statute. See e.g. *Christopher Greenwood*, Command Responsibility and the *Hadžihasanović* Decision, *Journal of International Criminal Justice* 2 (2004), 598-605.

⁶² See, *supra*, note 52, *Damaška*, 456.

⁶³ This sub-section builds upon the relevant section of Chapter 15 of *Cryer, Friman, Robinson & Wilmshurst*, see *supra*, note 48, 304-307.

cases in the *Tadić* decision. It is a principle of liability which lies somewhere between conspiracy and aiding and abetting and covers three situations: “co-perpetration,⁶⁴ where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent).[...] so-called “concentration camp” cases,” and “type three” joint criminal enterprise, where crimes are committed by members of the group, outside its common purpose, but as a foreseeable incident of it.⁶⁵ It determined that all three types shared a common *actus reus*, namely that there was:

- i. A plurality of persons.
- ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.
- iii. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.⁶⁶

The mental element is probably where the controversy really comes in, it extends to

the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.⁶⁷

⁶⁴ Co-perpetration, as a separate principle of liability has recently become prominent in the ICC, *supra*, note 49.

⁶⁵ *Prosecutor v. Dusko Tadić (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, para.220; See also: *Sylvestre Gacumbitsi v. The Prosecutor (Appeal Judgement)*, ICTR-2001-64-A, International Criminal Tribunal for Rwanda (ICTR), 7 July 2006, Separate Opinion of Judge Shahabuddeen, para.40.

⁶⁶ *Id.*, para.227.

⁶⁷ *Id.*, para.228.

From the point of view of fairness to the defendant, the vague, “elastic” nature of the doctrine has led to claims that it is overbroad, thus reliant on prosecutorial discretion rather than law to keep it in check.⁶⁸ Fears have also been expressed about the extent to which it encourages prosecutors to bring indictments that assert joint enterprises in a very general manner, making preparation difficult for the defence.⁶⁹ Turning to the *mens rea*, a person can be convicted of specific intent crimes such as genocide even if that person did not have the relevant *mens rea* for that offence, but the crimes were a natural and foreseen incident of the enterprise he or she was involved in on the basis of joint criminal enterprise.⁷⁰ This has led to criticisms of joint criminal enterprise liability, as it allows the prosecution to circumvent the proper *mens rea* requirements for such serious crimes,⁷¹ especially as the ICTY considers Joint Criminal Enterprise as a form of perpetration rather than a separate principle of liability.⁷² The principle does go some way to describing the joint nature of many international crimes and explaining the culpability of some participants not otherwise easily brought under the ambit of criminality, in spite of their blameworthiness.⁷³

As can be seen, though, both of these ways which have been used in an attempt to circumvent the evidential problems that arise when prosecuting leaders and reflect the way in which they participate in international crimes. Despite their positive aspects, we also have to accept that they are not always used or interpreted with sufficient care with respect to the principle of individual culpability. This is only one example of Mark Osiel’s point that it is difficult to prosecute high-level offenders within a liberal framework⁷⁴ (although the difficulty is no reason not to prosecute, or to abandon a liberal framework for prosecution).

⁶⁸ Osiel, *The Banality of Good*, *supra*, note 52, 1799-1802.

⁶⁹ Guénaél Mettraux, *International Crimes and the ad Hoc Tribunals* (2005), 293.

⁷⁰ *Prosecutor v Brđanin*, Decision on Interlocutory Appeal, IT-99-36-A, 19 March 2004, para. 6.

⁷¹ Mettraux, *supra*, note 69, 265; Osiel, *The Banality of Good*, *supra*, note 52, 1796.

⁷² *Prosecutor v. Odžanić et al*, Decision on Motion on Jurisdiction-Joint Criminal Enterprise, IT-99-37-AR72, 21 May 2005, para. 20.

⁷³ Mettraux, *supra*, note 70, 292; Osiel, *The Banality of Good*, *supra*, note 52, 1786-1790, but see 1802.

⁷⁴ Mark Osiel, *Why Prosecute, Critics of Punishment for Mass Atrocity*, *Human Rights Quarterly* 22 (2000), 118, 123-125. See also: Darryl Robinson, *The Identity Crisis of International Criminal Law*, *Leiden Journal of International Law* 21 (2008), 925-963, 926.

D. Co-operation

I. Persuading the Perpetrators to Help

This leads to a large problem, that of obtaining both evidence and defendants.⁷⁵ Everything that has been said so far implies that the person concerned is actually already before the court and that there is (admissible) evidence against them. As is well-known, this is not always the case. The ICTY and ICTR both have strong powers to order compliance, whilst the ICC has somewhat weaker powers here.⁷⁶ Irrespective of the powers they have in theory, though, it is difficult to obtain people or evidence without some state co-operation, or a resort to irregular rendition (as occurred in a number of cases before the ICTY such as *Dokmanović*).⁷⁷ In this area, a sympathetic *locus delicti*, as Rwanda has, usually⁷⁸ proved in relation to Hutu defendants, means that co-operation is infinitely more likely to be forthcoming than in situations where it does not feel that it is in its interest to comply.⁷⁹

When a sitting head of State or high ranking government official (or someone with information about them) is being sought, the State is essentially certain to decide it is not, and to weather the costs. It is only after Milošević was deposed in the wake of local protests that he was handed over to the ICTY, and then only after a large IMF loan was mothballed until he was handed over. Similarly, it is unthinkable to Rwanda to co-operate with any investigations into the possible liability of high-ranking members of the new government, and it has even been alleged that attempting to initiate such investigations cost Carla del Ponte her job as Prosecutor of the ICTR.⁸⁰ Where the *locus delicti* is unwilling, co-operation coming from

⁷⁵ See generally: *Peskin's* excellent study, *supra*, note 3, *passim*.

⁷⁶ As can be seen, for example, by comparison of Articles 29 ICTY Statute (28 ICTR Statute) and Articles 86, 89 and 91 Rome Statute. See also: *René Blattmann & Kirsten Bowen*, Achievements and Problems of the International Criminal Court, *Journal of International Criminal Justice* 6 (2008), 711-730, 722-723.

⁷⁷ *Prosecutor v. Mrkšić Kvočka, Radić, Žigić and Prcać*, Decision on the Motion for Release by the Accused Slavko Dokmanović, IT-95-13a-PT, 22 October 1997.

⁷⁸ For an instance to the contrary see: *William A. Schabas*, *Barayagwiza v. Prosecutor*, *American Journal of International Law* 94 (2000), 563-571.

⁷⁹ See generally: *Rod Rastan*, Testing Co-Operation: The International Criminal Court and National Authorities, *Leiden Journal of International Law* 21 (2008), 431-456.

⁸⁰ *Luc Reydam's*, The ICTR Ten Years On: Back to the Nuremberg Paradigm?, *Journal of International Criminal Justice* 3 (2005), 977-988, 978-979.

third States relies on the happenstance of the person or evidence being found in that State and the State being willing to co-operate with the relevant tribunal or requesting State. Sometimes, as in the *Pinochet* litigation,⁸¹ this is the case, at other times, such as with respect to Charles Taylor during his Nigerian exile, prior to the Liberian request that he be handed over to the Special Court, it is not.

The politics of co-operation are exceptionally important, and require the Prosecution to tread a fine line of ensuring that States remain friendly enough to the Court to co-operate, whilst safeguarding (real and perceived) prosecutorial independence and ensuring that crimes by all sides may be prosecuted.⁸² It is interesting that in this regard, the Prosecutor of the International Criminal Court has had very little luck obtaining any co-operation at all from Sudan in relation to the possibility of prosecuting high-level government officials, to the extent to which this fed in to his recent, and controversial, request for the an arrest warrant for the President Omar al-Bashir.⁸³

II. Immunities⁸⁴

This request itself brings us to the vexed question of immunities. Al-Bashir is a sitting head of State (as was Charles Taylor at the time of his indictment), and in relation to high level governmental officials (precisely

⁸¹ *Regina v. Bow*, Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) All England Law Reports 2 1999, 97. *Rosanne van Alebeek*, The Pinochet Case: International Human Rights Law on Trial, British Yearbook of International Law 71 (2000), 29-70, 69.

⁸² See: *Peskin*, supra, note 3; *Steven Roper & Lillian Barria*, State Co-operation and the International Criminal Court: Bargaining Influence in the Arrest and Surrender of Suspects, Leiden Journal of International Law 21 (2008), 457-476, 457; *William Burke-White*, Bargaining for Arrests at the International Criminal Court: A Response to Roper and Barria, Leiden Journal of International Law 21 (2008), 477-482, 477.

⁸³ See: e.g., Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005) 5 December 2007 paras 3, 6; Public Redacted Version of the Prosecutor's Application Under Article 58 Filed on 14 June 2008, ICC02/05, 12 September 2008, especially paras 411-2. For a very useful explanation of the context of this action see: *Alex de Waal*, Darfur, the Court and Khartoum: The Politics of State Non-Cooperation, in: *Nicholas Waddell & Phil Clark* (eds), *Courting Conflict: Justice, Peace and the ICC in Africa* (2008), 29.

⁸⁴ For a recent detailed study see: *Rosanne van Alebeek*, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008).

which ones remains a matter of debate),⁸⁵ as the ICJ reaffirmed in the *Yerodia* case,⁸⁶ they retain their personal immunity before courts (especially national courts) even when there are allegations of international crimes. There is an exception to this, such persons do not retain their immunity before “certain international tribunals”. The ICTY and ICTR are clearly covered by this, as, according to Article 27 of the Rome Statute, is the ICC. This exception was controversially interpreted by the Special Court for Sierra Leone in the Taylor case to include that Court, even though its basis was a treaty between the UN and Sierra Leone, to which Liberia was not a party.⁸⁷

Normally, though the personal immunity of high level governmental officials extends, absent any special applicable provision to the contrary, to arrest and detention for the purpose of arrest or transfer to international tribunals. The ICTY and ICTR are exceptions to this, but this can be put down to the fact that their Statutes were passed by Security Council Resolutions (827 and 955 respectively), under Chapter VII, and which, by virtue of Article 103 of the UN Charter, trumps those immunities. For parties to the Rome Statute, it is broadly accepted that parties have waived their immunity before foreign courts for the purposes of co-operation with the Court. For non-State parties, however, Article 98(1) of the Rome Statute requires State parties not to violate the immunities accepted in international law.⁸⁸ All of which renders obtaining co-operation in the surrender of high-ranking officials even harder, although it ought not be forgotten that there are good reasons for personal immunities.⁸⁹

It is, of course, the case that ex-leaders (and, of course, rebels or other erstwhile allies who have fallen from favour), do not have immunity, either before domestic courts or international tribunals. This is perhaps the closest

⁸⁵ See, e.g. *Colin Warbrick*, Current Developments, Public International Law, Immunity and International Crimes in English Law, Comment on Mofaz, International and Comparative Law Quarterly 53 (2004), 771-774.

⁸⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, I.C.J. Reports 2002, 3-35.

⁸⁷ *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, SCSL-2003-01-I-A, 31 May 2004, paras 43-59.

⁸⁸ See further: *Cryer, Friman, Robinson & Wilmshurst*, *supra*, note 48, Chapter 20.

⁸⁹ For (good) arguments to the effect that Al-Bashir and other Sudanese officials would not be covered by this see: *Dapo Akande*, The Bashir Indictment: Are Heads of State Immune From ICC Prosecution?, Oxford Transitional Justice Research Working Paper, available at <http://www.csls.ox.ac.uk/documents/Akande.pdf> (last visited 8 December 2008).

that international criminal law can come to balance impunity and stability (on which more later), but, it has its own problems. First, it gives those in power a reason to cling on to it. Second, and related to this, as the *Milošević* case showed at the international level, and at least arguably the *Pinochet* precedent evidenced domestically,⁹⁰ the longer a person can avoid arrest, the less likely they are to be fit enough to face the type of justice that does not rely on the existence of a perfect metaphysical realm.⁹¹ As Hilaire McCoubrey made clear, old age is no legal or moral defence to international crimes,⁹² but procedurally, it is a more difficult to ensure trials for a defendant who has been immune for a many years. After all, here we are talking of leaders who may have been in power for more than twenty years, and may not have been in the first flush of youth in when they ascended to high office. In addition, time can fade witnesses' memories.

Finally, there is another problem. This relates to the fact that it is, for a variety of reasons, easier for a prosecutor, given the relevant rules on immunity (when added to the difficulties related to obtaining State co-operation) to proceed against those who do not have such immunity or political bars related to prosecution. This is understandable, since co-operation in relation to such suspects at least ought to be easier to obtain. This, in the short term, may seem like a good idea. Those who are not covered by immunity or political patronage might be thought to be a more ready sense of defendants, and thus work, for any court or tribunal seeking to establish its own legitimacy (and justify its continued existence (and budget)). Still, this runs the risk of appearing to be taking sides in conflicts, in particular, on the government side, a criticism that has been made of the ICC Prosecutor already.⁹³

⁹⁰ There are those who were unconvinced that Pinochet was really unfit to stand trial, but this must remain a matter of conjecture.

⁹¹ As *Sluiter* notes, the fact that Radovan Karadžić has claimed he is in good health gives grounds for "modest optimism". *Göran Sluiter, Karadžić on Trial: Two Procedural Problems*, *Journal of International Criminal Justice* 6 (2008), 617-626, 618.

⁹² *Hilaire McCoubrey, The Concept and Treatment of War Crimes*, *Journal of Armed Conflict Law* 1 (1996), 121-139, 133.

⁹³ *William A. Schabas, Prosecutorial Discretion v. Judicial Activism and the International Criminal Court*, *Journal of International Criminal Justice* 6 (2008) 731-761, 751-753.

E. Peace v Justice: The Old, Hard, Chestnut

Such considerations lead us to a, perhaps the, central problem that has plagued the ICC with respect to its early situations. This is the well-known, and frequently referred to Peace v Justice “paradox”. When it comes to the law, some, such as Geoffrey Robertson, the ex-president of the Special Court for Sierra Leone, have gone as far as to say that international law has developed to the level that although at times amnesties for lower level offences may be granted, there is a current norm prohibiting any amnesty for those at the top level.⁹⁴ This may (in relation to crimes not covered by treaty based obligations to prosecute) be *lex ferenda* rather than *lex lata*.⁹⁵ The accurate position was restated by the Special Court for Sierra Leone in the *Kallon and Kamara* decision, “that there is a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law is amply supported by materials placed before the Court [but the view] that it has crystallised may not be entirely correct [...] it is accepted that such a norm is developing under international law”.⁹⁶ In any event, as Louise Mallinder has noted, “amnesties for both international and non-international crimes continue to be a political reality in the modern world”.⁹⁷

As a preliminary matter, it must be noted that this is not the place in which the problems of peace and justice are going to be given a solution, but there are a few relevant points that ought to be borne in mind. The first of these is that those most likely to be in a position to demand amnesty as a price for laying down their arms (or leaving power), are leaders, and that at times amnesties for such people are taken seriously. It cannot be ignored that just prior to the Iraq war, Saddam Hussein was offered some form of

⁹⁴ *Prosecutor v. Kondewa*, Decision on Lack of Jurisdiction/Abuse of Process, Amnesty Provided by Lomé Accord, SCSL-2004-14-AR72(E), 25 May 2004, Separate Opinion of Justice Robertson, paras 32-34.

⁹⁵ Although for modern arguments that amnesties are now prohibited in international law, see *Lisa J. Laplante*, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, *Virginia Journal of International Law* 49 (forthcoming 2009).

⁹⁶ *Prosecutor v. Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, SCSL-2004-15-AR72(E) & SCSL 2004-16-AR72(E) 13 March 2004, para.82.

⁹⁷ *Louise Mallinder*, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, 1st ed. (2008), 404.

amnesty,⁹⁸ and the issue has risen again very strongly in relation to the possible arrest warrant that is pending before a Pre-Trial Chamber of the ICC for the Sudanese President Omar al-Bashir. This latter process has led to considerable international comment. Entirely unsurprisingly, it led to howls of protest from Sudan,⁹⁹ raising arguments about neo-imperialism,¹⁰⁰ but also with none-too veiled threats to the peace process. Sudan argued that the peace in the North-South conflict, as well as peace in Darfur rested on a knife edge, and that any such indictment would undermine those peace processes. As a result, there have been suggestions that the Prosecutor has over-reached himself, and that the Security Council ought to, at least, defer any further action in relation to al-Bashir.

Most notably, following the Prosecutor's issue of the request to the Pre-Trial Chamber the African Union issued a communiqué in which they requested the Security Council to issue a request under Article 16 of the Rome Statute for proceedings with respect to al-Bashir to be deferred.¹⁰¹ This request was noted by the Security Council in Resolution 1828 (31 July 2008), with language that was by no means clear:

Taking note of the African Union (AU) communiqué of the 142nd Peace and Security Council [...] [which asked the Security Council issue a deferral request compliant with Article 16 of the Rome Statute] [...] *having in mind* concerns raised by members of the Council regarding potential developments subsequent to the application of the Prosecutor of the International Criminal Court of 14 July 2008, and *taking note* of their intention to consider these matters further [...].¹⁰²

⁹⁸ Michael P. Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, Washington and Lee Law Review 63 (2006) 339-378, 340.

⁹⁹ See Simon Tisdall, *Man blamed for Darfur crisis says "I am in peace with myself"*, The Guardian (4 December 2008) 28-29.

¹⁰⁰ This is not to say that such arguments are justified, but they are not without resonance for many.

¹⁰¹ Art. 16 Rome Statute reads: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

¹⁰² SC Res. 1828, 5947th mtg., SC UN Doc. S/RES/1828 (31 July 2008), 2.

Sudan seemed pleased with this outcome, its representative at the Security Council asserting that:

The Security Council should provide [...] cooperation; give highest priority to the peace process; and allay all threats to the process, such as the measure undertaken by the Chief Prosecutor of the International Criminal Court (ICC) [...]. The African Union is not a foreign element; in fact, it is an inherent partner in all matters related to Darfur. In commending the role of the African Union, the principal partner in all issues concerning peace and stability of Darfur, we also commend the very important adoption by the African Union, at the emergency ministerial meeting of its Peace and Security Council at Addis Ababa, of a resolution that seeks to rise above the impediments and complexities created by the unfortunate and tragic action taken by the Chief Prosecutor of the ICC against one of the greatest leaders of the African continent, who has put an end to the longest-running conflict there and brought about peace between the South and the North of the Sudan. [...] We should move beyond the measure taken by the Chief Prosecutor, which is a recipe for destruction and ruin and poses a catastrophic danger to the stability, security and unity of the Sudan, the region as a whole and even the entire African continent.¹⁰³

The language, vague though it was, led the US, rarely the ICC's greatest supporter, to abstain from the vote on this resolution and to express its displeasure at the possibility of the Council deferring any proceedings by virtue of Article 16 of the ICC Statute, as it "would send the wrong signal to Sudanese President Al-Bashir and undermine efforts to bring him and others to justice".¹⁰⁴ It is true that the African Union is the UN's partner on the

¹⁰³ Meeting Record, 5947th mtg., SC UN Doc. S/PV.5947 (31 July 2008), 12.

¹⁰⁴ *Id.*, 12; See also the statement by Belgium, *Id.*, 10, that: "The Sudan's obligations and responsibilities in Darfur are clear. They have been set out in all previous resolutions, as well as in this one. Belgium will continue to work in the Security Council to ensure respect by the Sudan for all Council resolutions. We owe it to the population of Darfur, but we also owe it to the cause of international justice". This statement is itself an interesting example of what Frédéric Mégret has described as the emancipation of international criminal justice from narrow focuses on peace and security, see *Frédéric Mégret*, *The Special Tribunal for Lebanon: The Security Council and the*

ground in Darfur, and its views are worthy of respect. However, this does not mean that al-Bashir is in fact the force for peace he claims to be.¹⁰⁵ The Darfur conflict has been ongoing for over five years now, and al-Bashir has a vested interest (as do most leaders) in placing themselves in the role of the necessary part of the peace process.¹⁰⁶ As was said in a slightly different context,

Washington's efforts to downplay Milošević's culpability in war crimes in order to make him a palatable partner matched Milošević's own efforts. The Serbian leader was often careful to keep diplomatic channels open and appear committed to reach a negotiated solution. Milošević had an uncanny ability, Power notes, of cultivating the impression from the very start that of the conflict that "peace was right around the corner". Milošević's personal charm, fluent English, and ability to present a moderate image helped drive Western diplomats' wishful thinking about his true intentions.¹⁰⁷

There is more than a little to this, indeed, in some instances it may even be the case that some level of continued instability is quite conducive to their continuation in power. When questions of peace and justice are spoken of, the interests of the actors in portraying themselves as the peacemakers (whether they can or are taking on that role) must not be forgotten.

In this regard it ought to be also noted that interests can be more than simply political. Many leaders responsible for crimes (or their supporters) may also have personal interests in protecting themselves and their friends from investigation and prosecution. As was well explained by Steven Ratner in relation to the politics of the Cambodian situation:

Hun Sen wished to protect certain members of his government who had once been leading Khmer Rouge offenders who might

Emancipation of International Criminal Justice, *Leiden Journal of International Law* 21 (2008) 485-512, 485.

¹⁰⁵ *BBC News*, Sudan Declares Darfur Ceasefire (12 November 2008), available at <http://news.bbc.co.uk/2/hi/africa/7724220.stm> (last visited 8 December 2008).

¹⁰⁶ *Multi NGO report*, Rhetoric v. Reality: The Situation in Darfur (December 2008) available at http://www.hrw.org/sites/default/files/related_material/darfur1208.pdf (last visited 8 December 2008).

¹⁰⁷ See: *supra*, note 3, *Peskin*, 37.

well face trial. Second, Hun Sen had made certain deals with ex-Khmer Rouge leaders, including senior 1970s-regime leaders Ieng Sary, Khieu Samphan and Noun Chea, granting them *de facto* (and, in Ieng Sary's case, *de jure*) amnesty in exchange for their political support. He did not wish to renege on these deals and argued that they were necessary to prevent a return to civil war. In fact, we found no evidence of any support for these ex-Khmer Rouge leaders from their former cadres and no danger that they could mobilise actions against the government. The deals may well have been financial in nature, involving mutual respect of the spheres of influence of Hun Sen and the ex-Khmer Rouge, as each seeks to engage in off-the-books illegal mining and timber gathering.¹⁰⁸

Finally, given that indictments can also serve to affect the relative position of parties, it may simply be that predictions about the impact of indictments on peace are very difficult.¹⁰⁹ As such, it is an area in which even realists (or those who consider themselves such) need to tread carefully, and evaluate all the evidence more carefully than simply accepting at face value the participants' assertions.¹¹⁰ This is not to say some people are not, or cannot be peacemakers, but their statements are to be treated with caution. After all, the Dayton talks worked without Karadžić.

¹⁰⁸ Steven Ratner, Chair of the United Nations Group of Experts for Cambodia, in: Timothy L. H. McCormack & Cheryl Saunders (eds), Sir Ninian Stephen: A Tribute (2007) 206-219, 211.

¹⁰⁹ See the exchange of views on point in: Stephen Oola, Bashir and the ICC: The Aura or Audition of International Justice in Africa? (15 October 2008), Oxford Transitional Justice Research Working Paper available at <http://www.csls.ox.ac.uk/documents/OolaFin.pdf> (last visited 8 December 2008) (Bashir and the ICC); Lutz Oette, Another Piece in the Puzzle: Accountability and Justice for International Crimes in Sudan (20 August 2008), Oxford Transitional Justice Research Working Paper available at <http://www.csls.ox.ac.uk/documents/OetteFi.pdf> (last visited 8 December 2008); Yvonne Malan, The Force of Law and the Problem of Impunity (28 July 2008), Oxford Transitional Justice Research Working Paper available at <http://www.csls.ox.ac.uk/documents/Malan.pdf> (last visited 8 December 2008); Phil Clark, If Ocampo Indicts Bashir, Nothing May Happen (13 July 2008), Oxford Transitional Justice Research Working Paper, available at http://www.csls.ox.ac.uk/documents/Clark_Final.pdf (last visited 8 December 2008).

¹¹⁰ See in particular: Susan Dwyer, Reconciliation for Realists, Ethics and International Affairs 13 (1999) 81-98, 83-84.

The prosecutor, who has been criticised for playing politics at times, has recently been taking great pains to say that amnesties and the like, are not really part of his remit, opining (with respect to choice of situations):

The Statute provides a clear framework to select situations and cases to investigate. [...] I have to apply the law. Nothing more, nothing less. The decision that ending impunity will endure lasting peace and security was taken in Rome. I should not, and I will not take into account political considerations.¹¹¹

Of course, politics can enter into the equation under the Rome Statute in two ways, the most direct way being by virtue of Article 16.¹¹² This, of course, provides for the Security Council to cause the Court to defer investigations or proceedings for a (renewable) one year period. The factors that may militate in favour of amnesty however, are for the Security Council to appraise, and only if there is sufficient agreement in the Council for a resolution requesting deferral. This in itself is quite a high threshold. What is perhaps most interesting about Article 16 is that it means that the process can only be deferred (and only for as long as the Security Council continues to issue yearly resolutions). Accountability cannot be bargained away in a quiet, or permanent, manner if the ICC has jurisdiction and the Prosecutor becomes involved. This, in itself, is a shift in international relations.

It is true that the Prosecutor, when exercising his discretion under Article 53 of the Statute, may take into account the concept of the “interests of justice”, which gives some elbow room for him to decline to become involved in certain circumstances. This could include a situation in which an amnesty is being negotiated or has been granted.¹¹³ However, as he has made clear, and was noted above, where here is a basis to believe that

¹¹¹ *Luis Moreno-Ocampo*, Address to the Assembly of States Parties, 14 November 2008, 2-11, 6. This provides an interesting return to the initial position adopted in the OTP, see: *Benjamin J. Schiff*, Building the International Criminal Court (2008) 111-115.

¹¹² See generally: *Morten Bergsmo & Jelena Pejić*, Article 16, in: *Otto Triffterer* (ed.), Commentary on the Rome Statute: Observers' Notes, Article by Article, 2nd ed. (2008).

¹¹³ *Michael Scharf*, The Amnesty Exception to the Jurisdiction of the International Criminal Court, Cornell International Law Journal 32 (1999) 507-528, 507-508; *Darryl Robinson*, Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court, European Journal of International Law 14 (2003) 481-505, 483-488.

crimes under the jurisdiction of the Court have been committed, prosecution is meant to be the default option. The Prosecutor has taken the view, understandably, given the upshot of the Rome Statute, that it is only in truly exceptional situations that the interests of justice ought to lead him not to pursue prosecutions. Furthermore, as has been said by the Prosecutor, the interests of justice are not necessarily the same as the interests of peace.¹¹⁴ Although this does undermine in a small way his assertion that the role of the Prosecutor is an entirely apolitical one, in itself, the idea that the default position is prosecution is a positive step. On top of this, if a State or the Security Council referred the matter to the Prosecutor, then a decision not to proceed with an investigation, any decision of the Prosecutor not to proceed is subject to review by a pre-Trial Chamber.¹¹⁵ The fact that such discretion is subject to judicial review is, again, important, insofar as it ensures that any decision on point is transparent.¹¹⁶

F. The Practical Problems

I. Prosecution Strategy

Even if a leader finds their way to the dock, there is another practical issue, which has recently arisen with respect to the trials of Slobodan Milošević and Saddam Hussein. This is the ambit of the indictment. Should the prosecutor move to indict a person, as the OTP of the ICTY did with charges that span the entire set of crimes for which they are thought to bear responsibility, or proceed, as the Prosecution in the Saddam Hussein proceedings did, and attempt to focus on one or more easy cases?

Both strategies have their advantages. The idea of the large indictment, which of course was the approach taken by the Nuremberg and Tokyo International Military Tribunals. These have the advantage, if it is one, of being able to provide a large narrative of the conflict(s-) as a whole, and one of the asserted benefits of criminal trials is that they help combat denial (and some go further to say promote reconciliation) by subjecting the facts to forensic scrutiny.¹¹⁷ They also, where the charges are adequately

¹¹⁴ International Criminal Court - Office of the Prosecutor, Policy Paper on the Interests of Justice (September 2007) 1-9, 1.

¹¹⁵ Art. 53(3) Rome Statute.

¹¹⁶ It must be admitted thought that not all of the early ICC practice is defensible on point.

¹¹⁷ *E.g.*: Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, 1st ed. (1997).

proved, provide, so far as is possible, for retribution at the appropriate level to the offences committed. This is linked to the idea that all the person's victims will be given some satisfaction and have their suffering recognised. It also has the advantage of treating all the charges together, and in instances of crimes against humanity and, to some extent, genocide, where the contextual elements are of the essence in proving the charges, litigating broader aspects of the conflicts can be important.

Nonetheless, there are pitfalls to this, it can lead to long, unwieldy trials, and give large leeway to the defence for dilatory tactics, either to delay proceedings excessively, or in the hope that the Tribunal will react in a manner that can be turned to their advantage and such that they can claim violations (sometimes justified) of breaches of fair trial rights.¹¹⁸ In addition, since leaders are often advancing in years by the time they reach trial there is always the risk of their death during the trial, which leaves a taste of futility in the mouths of many. It also encourages prosecutors to issue indictments which mix charges which are not as supported as others, and each acquittal serves to undermine part of the narrative that the prosecution was seeking to set up.¹¹⁹ As noted above, there are inculpatory doctrines specific to international crimes which deal in some way with evidential problems, but they are risky, if they are expanded too broadly, they ignore culpability, and will be subjected to critique.

The virtues of the smaller charge, with the possibility of further charges later, approach are largely the converse of the critiques of the larger trial, they are comparatively simple, quick, and easy to run. The prosecutor in this instance is likely to investigate a number of different incidents, and begin with the case which is the strongest. This is what happened in the *Dujail* trial. Still, they are not free from problems, the first being it can only partially reflect what the person is suspected of doing, and cases like *Dujail* tend to be chosen not because they are especially representative, or comparatively serious, but because the prosecutor knows that he or she is going to be able to prove it. As a result, only a small part of the overall story

¹¹⁸ See, generally: *Göran Sluiter*, Karadžić on Trial: Two Procedural Problems, *Journal of International Criminal Justice* 6 (2008) 617-626; *Marko Milanović*, The Arrest and Impending Trial of Radovan Karadžić, *International and Comparative Law Quarterly* 58 (forthcoming 2009); *Michael P. Scharf*, Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials, *Case Western Reserve Journal of International Law* 39 (2006-2007), 155-170; It cannot be forgotten that leaders are used to manipulating processes and posturing, and are often good at it, at least in the eyes of many in their intended (usually home) audiences.

¹¹⁹ On all the above aspects, see, for example, *Boas supra* note 3.

gets told, and many victims will not have their tales told. It is true that there may be the possibility of further trials, but, where, as with the Saddam trial, the person is sentenced to death, this is impossible. In this particular case this means that the Kurds and the Iranians, as well as the Kuwaitis and Coalition personnel who were mistreated in 1991 will never see Saddam stand trial for offences against them. Even where this reprehensible punishment is not imposed, further trials will probably take a long time, longer than even a large trial is likely to, as the process has to go through all the relevant stages again.

Given the problems of both of these, it must be said, a prosecutor is offered a difficult choice, and is in some ways caught on the horns of an almost insoluble dilemma. Perhaps the best way forward is to try at least to deal with a manageable number of representative instances, where the evidence is strong. Fortunately, since the death penalty is unavailable in the International Criminal Court, the problem of killing the defendant before the possibility of further trials is, at least, excluded.

G. Conclusion

The above may sound rather negative. If so, it must be emphasised that it is not intended to be, similarly nor is it counsel in favour of not attempting to prosecute leaders. It is precisely the opposite. The swing towards justice is an exceptionally important legal (and moral) development, and just as something is difficult does not mean that it ought not to be pursued with vigour. It is worth, however, doing so with an awareness of the possible pitfalls that such prosecutions face. It is only by facing such problems that progress can be made.

In a statement released just after the Rome Conference, Amnesty International averred that:

[t]he true significance of the adoption of the statute may well lie, not in the actual institution itself in its early years, which will face enormous obstacles, but in the revolution in legal and moral attitudes towards the worst crimes in the world. No longer will these crimes be simply political events to be addressed by diplomacy at the international level, but crimes which all states have a duty to punish themselves, or, if they fail to fulfil this

duty, by the international community in accordance with the rule of law.¹²⁰

This statement sums up a great deal of the importance of the ICC and international criminal law in general. Recent practice, including the creation of the ICC reflects, and contributes greatly to, a significant cultural turn to accountability for those crimes which are universally condemned. Fifteen years ago, most of those accused of international crimes could sleep soundly, fairly sure that they would not be required to stand trial for their conduct. It is unlikely that Augusto Pinochet or Hissene Habré thought that international law would impinge upon their dotage. Both of them, to different extents, have been proved wrong, even if, on the basis of what had occurred since Nuremberg and Tokyo, their opinion had an empirical basis. If nothing else, we are now in the situation where ex-statespeople who have been complicit (or more) in international crimes may have to reassess their situation.

The criticism of the ICC that it is causing leaders to fear prosecution, and thus cling on to power rather than possibly face a flight to the Hague¹²¹ may, optimistically, be viewed as the growing pains of international justice, and that the next generation of leaders, rather than committing crimes then fearing prosecution, might think twice before committing international crimes, and prevention is better than cure. Some will, nonetheless, commit such crimes, the lure of the end justifying the means is a siren song that too often proves irresistible.¹²² But criminal law can never eradicate crime, and if fewer leaders succumb to this temptation, international criminal justice will have proved itself worthwhile.

¹²⁰ Quoted in: *William Pace & Mark Thieroff*, Participation of Non-Governmental Organizations, in: *Roy S. Lee* (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999) 391-398, 396.

¹²¹ See *supra*, note 123, *Oola*, Bashir and the ICC.

¹²² For a judicial position coming close to this, see: *Prosecutor v. Fofana and Kondewa*, Judgment, SCSL-04-14-A, 28 May 2008, Partially Dissenting Opinion of Judge George Gelaga King, paras 26-31 & 90-94.

Universalizing Core Human Rights in the “New” ASEAN: A Reassessment of Culture and Development Justifications Against the Global Rejection of Impunity

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Abstract

This paper responds to the defences of “culture” and “development” rights as justifications for exceptionalism in human rights obligations in Southeast Asia, particularly against the context of the passage of the Association of Southeast Asian Nations (ASEAN) Charter. Under the new ASEAN Charter, Member States have the general obligation to abide by the Organizational Principles of “adherence to the rule of law, good governance, the principles of democracy and constitutional government”, as well as “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice”. More importantly, it is now the specific obligation of ASEAN Member States to “take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the Charter and to comply with all obligations of membership”, including the above-stated Organizational Principles.

The paper shows the normative, conceptual, and empirical weaknesses of the “culture” and “development” justifications for creating exceptions to the observance and protection of core human rights norms. Assessing the right to culture as an exception to human rights observance, the paper asserts the ideological imprecision of the “right to culture” as an exception to human rights observance, noting that the porous definition of “culture” should not be equally valued in its assertion against core human rights norms which form part of general international law (e.g. *jus cogens* prohibitions, crimes against humanity, war crimes, egregious violations of human rights, obligations *erga omnes*) and which can be modified only by a subsequent norm of the same character. The cultural exception also suffers from teleological incoherence, since the protection of core human rights norms bears a greater immediacy and proximity to human dignity and personhood – a fundamental value that should be more conceptually valuable than the porous construct of culture. Turning to the “right to development” as an exception to human rights observance, the paper contends that there is empirical uncertainty and/or indeterminacy in the concept of “development” that undermines its legal-philosophical value as an exception to human rights observance. Moreover, contrary to the assertions of development exceptionalism to human rights observance, there is no linearity in the claim that human rights protection “impedes” development. Rather, as shown in

recent economic analysis, there is a stronger claim for human rights protection as a necessary precondition for development.

Further reinforcing these refutations of “culture” and “development” justifications for human rights exceptionalism is, however, the emergence of a customary international law norm rejecting impunity for serious violations of human rights (specifically, civil and political rights), which has gained recognition from the forty-year independent practice (primarily seen in treaty ratifications and implementation) of Southeast Asian states. Despite variances in the degree of ASEAN Member States’ practices, there is at least consistent *opinio juris* that redress for serious human rights violations should not be met with *non liquet* in remedial processes, whether domestic or international. The passage of the ASEAN Charter therefore marks a convergence of ASEAN towards “universalizing” core human rights norms as now seen in its Organizational Principles and the new requirements of ASEAN membership obligations.

A. Introduction

The conclusion of a Charter for the Association of Southeast Asian Nations (ASEAN),¹ formalizing greater economic integration² forty years after ASEAN’s inception under the 1967 ASEAN (Bangkok) Declaration,³ is indeed a landmark achievement for the Southeast Asian region. In the

¹ Full text of the ASEAN Charter can be found at: <http://www.asean.org> (last visited 1 December 2008). This paper is based on a public Lecture and Roundtable Discussion on the Draft ASEAN Charter held on 31 August 2007, at the University of the Philippines, with corresponding modifications based on the final Charter text. As of this writing, seven out of the ten ASEAN Member States have ratified the Charter: Brunei Darussalam, Malaysia, Singapore, Laos, Viet Nam, Cambodia, and most recently, Myanmar. Thailand, the Philippines and Indonesia publicly declared that they were withholding ratification of the Charter until Myanmar completed its ratification processes. See: Christopher Bodeen, “Myanmar Ratifies ASEAN Charter: Isolated Myanmar Regime Ratifies Regional Charter Including Human Rights Body,” Associated Press, 21 July 2008, at <http://abcnews.go.com/International/wireStory?id=5414011> (last visited 23 January 2009).

² See: Ong Keng Yong, Secretary-General of the ASEAN, “ASEAN and Pan-Asian Integration”. Found at: <http://www.aseansec.org/18861.htm> (last visited 23 January 2009).

³ See Declaration of ASEAN Concord, Bali, Indonesia, 24 February 1976. Found at: <http://www.aseansec.org/1216.htm> (last visited 23 January 2009).

words of the ASEAN Secretary-General, Mr. Ong Keng Yong, the new ASEAN closely tracks ASEAN’s record of increasing economic integration, but would still be well short of the economic union envisaged under the European Union:

“ASEAN economic integration is currently in progress, but the results are not as fast as what the ASEAN Leaders and the business sector wants. The problems of implementation and coordination of ASEAN economic initiatives requires urgent attention. Deeper and accelerated economic integration entails deeper and broader cross-sectoral coordination as well as expeditious implementation of economic integration initiatives. [...]

Although the end goals of the ASEAN Economic Community have been defined in ASEAN Vision 2020 and Bali Concord II, it is crucial to underscore that ASEAN is not constructing an economic community along the lines of the European Union (EU). While EU ensures the free movement of goods, services, capital (including investment) and people across the territories of its Member States, ASEAN seeks to create a unique single ASEAN market where there is a free flow of goods, services, investment, skilled labour, and a freer flow of capital.

While ASEAN pursues economic integration, it is also committed to making the region attractive to its partners for economic activities. Indeed, ASEAN integration will open up more opportunities for these partners. At the same time, it will further strengthen ASEAN’s external trade with them. The commitment to open regionalism and inclusive approach to its external economic engagement has made ASEAN attractive to many countries, both in the region and beyond. ASEAN is currently at different stages of FTA and EPA negotiations with its partners namely, China, India, Japan, Republic of Korea and Australia/New Zealand.”

The passage of the ASEAN Charter carves new directions for, and bears serious implications to, the political-economic rights and duties of ASEAN Member States. For an international organization long accustomed to abiding by the rule of

“consensus,”⁴ the sovereign equality of states, and non-interference with “internal” or domestic matters,⁵ a more “integrated” ASEAN implies a marked retooling of ASEAN’s unique status as an international organization. More importantly, the passage of the ASEAN Charter and the creation of a “new” ASEAN, opportunely provoke analytical discourse on ASEAN Member States’ commitments to uphold international human rights obligations.⁶

These developments in the Southeast Asian region lend urgency to the reassessment of a debate long dormant since the last decade. Should the envisioned “new” ASEAN – refashioned towards tighter integration and oriented towards global participation – “universalize” core human rights now, and veer away from the exceptionalism of cultural relativist and developmental justifications of “Asian culture and values” and “Asian development”?

The controversy between the “universality” of human rights (as well as their enforcement) and claims to “exceptions” in the form of the competing “right to culture” and the “right to development” first drew a worldwide audience in 1993, when several Asian delegations at the Vienna World Conference on Human Rights declared that human rights have to be seen “in the context of particular cultures.”⁷ However, the final text of the Vienna Declaration and Program of Action, which was approved by a consensus of the representatives of the 171 participating States (including the Asian delegates), ultimately affirmed the universality of human rights.

⁴ The conventional basis for ASEAN is found in the Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976. Found at: <http://www.aseansec.org/1217.htm> (last visited 23 January 2009). The twenty (20) provisions of the TAC map out the parameters of ASEAN cooperation since 1976.

⁵ See Declaration of ASEAN Concord II (Bali Concord II), Bali, Indonesia, 7 October 2003, which emphasizes the principles of sovereign equality of states and non-interference as a key principle governing the ASEAN Community, composed of the ASEAN Security Community, ASEAN Economic Community, and ASEAN Socio-Cultural Community.” Found at: <http://www.aseansec.org/15159.htm> (last visited 23 January 2009).

⁶ See *Amando Doronila*, “Out of Step with ASEAN”, *Philippine Daily Inquirer*, 3 August 2007. Found at: <http://www.inquirer.net/specialreports/40amm/view.php?db=1&article=20070803-80298> (last visited 23 January 2009), which criticizes that during the 40th ASEAN Ministerial Meeting hosted by the Philippines, ASEAN Member States merely agreed by consensus to establish, “in principle”, a human rights commission – without providing for its composition, functions, or sanctions.

⁷ *Louis Henkin*, *Human Rights* (1999), 107.

The one hundred-article Vienna Declaration categorically dispensed with the asserted “exceptions” of culture and development, stating in no uncertain terms that:

“5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

[...]

10. The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.

As stated in the Declaration on the Right to Development, the human person is the central subject of development.

While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.”⁸ (Emphasis supplied)

This paper does not intend to resurrect old themes and tensions already extensively treated in the wealth of literature on universalist-cultural relativist/development theories on human rights.⁹ Rather, the intention is to recast these twin justifications of “culture” and “development” in light of

⁸ Vienna Declaration and Programme of Action, Distr. GENERAL A./CONF.157/23, 12 July 1993. Found at: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument) (last visited 23 January 2009).

⁹ For a broad spectrum of universalist and cultural relativist claims, see *Jack Donnelly*, *Universal Human Rights in Theory and Practice*, 2nd ed. (2003), 89-106; *Randall P. Peerenboom* (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian countries, France, and the U.S.* (2004), Preface (x-xxiii), and 1-55; *Li Xiarong*, *Asian Values and the Universality of Human Rights*, *Philosophy and Public Policy Quarterly*, 16 (1996) 2, 18-23.

ASEAN's new status as a more integrated international organization alongside its corresponding obligations in the enforcement and protection of human rights. The fundamental argument here is that, apart from the inherent normative, conceptual, and empirical weaknesses of the "culture" and "development" justifications, ASEAN's internal and external spheres of international human rights obligations have altered radically since ASEAN's inception forty years ago. A potent customary international law norm rejecting impunity for serious violations of "core" human rights (specifically, civil and political rights) has emerged, one that even most ASEAN Member States themselves acknowledge as express obligations under the major human rights treaties (especially the International Bill of Rights), most of which ASEAN Member States have already ratified. Accordingly, the challenge for the new ASEAN is to ascertain if it can "universalize" these core human rights (by way of recognition, codification, heightened multilateral enforcement, or any combination of these processes throughout the ASEAN regional framework), and ultimately dispense with cultural and developmental "exceptions" used to justify individual nations' selective (or non)enforcement of human rights norms. In this manner, the individual human rights compliance of ASEAN Member States can be monitored and modulated through the prism of specific ASEAN membership obligations mandating compliance with international human rights norms. The ASEAN Charter is the litmus test for the capacity of ASEAN Member States to adapt to their new roles under an international organization subject to international human rights law.

I submit that ASEAN's new status as a more integrated international organization foregrounds ASEAN's acceptance of the customary international law norms on "core" human rights (international civil and political rights). The acceptance of these core human rights norms is not an alien concept to the region, particularly in light of ASEAN's record over the past forty years. As will be subsequently shown, most, if not all, of the ASEAN Member States themselves already recognize these norms, expressly (by signature, treaty ratification, accession) or in individual or collective practice. This "internal sphere" of ASEAN, therefore, already reflects ASEAN Member States' *opinio juris* on the obligation to comply and observe international human rights law, and a concomitant obligation of states to reject impunity for core human rights violations (and/or *jus cogens* violations) such as torture, crimes against humanity, war crimes, apartheid, racial and sexual discrimination, and serious violations of child and women's rights. For "impunity," I adopt the threshold of *de jure* or *de facto* impossibility in bringing human rights violators to account - whether civilly,

criminally, or administratively – either under: 1) the ASEAN Member States’ own legal orders through a comparable Bill of Rights set forth in their respective Constitutions; 2) through the international processes and mechanisms available or accessible from the major human rights treaties some, any or all of which have been ratified by ASEAN Member States (e.g. ICCPR’s Human Rights Committee, the ICESCR’s Committee on Economic, Social and Cultural Rights, the CERD’s Committee on the Elimination of Racial Discrimination, CEDAW’s Committee on the Elimination of Discrimination against Women, the CAT’s Committee Against Torture, CRC’s Committee on the Rights of the Child).; or 3) through emergent joint initiatives for prosecution coordinated or facilitated between ASEAN, the member State, and the United Nations (e.g. most recently seen in the Cambodia War Crimes Tribunal and the Commission for Reception, Truth and Reconciliation in East Timor). Undoubtedly, these mechanisms are not without their attendant limitations, particularly in the scope and types of relief afforded. Nevertheless, these limitations do not militate against the proposition that the rejection of impunity reflects the ASEAN Member States’ deliberate refusal to condone a situation of *non liquet* in remedial processes for obtaining redress against human rights violations.¹⁰

On the other hand, ASEAN forty years from inception finds itself in an international sphere that more strictly emphasizes the United Nations Charter’s purpose of “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.¹¹ With the proliferation of international criminal prosecutions for war crimes, torture, crimes against humanity, and other serious breaches of “core” human rights norms on civil and political rights and codification of various international instruments outlawing these breaches, an international consensus has largely emerged towards the rejection of impunity for these serious human rights violations. ASEAN’s “external sphere” itself descriptively expands the scope of ASEAN and its

¹⁰ Jorge E. Viñuales, *Impunity: Elements for an Empirical Concept*, *Law & Inequality* 25 (2007) 1, 115-145, 117-119; see also Milena Sterio, *Seeking the Best Forum to Prosecute International War Crimes: Proposed Paradigms and Solutions*, *Florida Journal of International Law* 18 (2006) 3, 887-906, 889; M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, *Human Rights Law Review* 6 (2006) 2, 203-279, 218-223.

¹¹ Charter of the United Nations, Chapter I, Article 1(3), full text in Ian Brownlie, *Basic Documents in International Law*, 5th ed. (2002), 2-26.

Member States' international legal obligations towards human rights protection.

The “push-and-pull” effect,¹² therefore, of ASEAN's “internal” and “external” spheres reinforces an equilibrium-imperative upon ASEAN to reject impunity by “universalizing” core human rights norms. Under this equilibrium-imperative, the new ASEAN should be expected to rely less (or not at all) on the twin exceptions of “culture” and “development” to the universality of human rights.

Part I of this paper examines ASEAN as an international organization under its current framework, and synthesizes distinct innovations under the ASEAN Charter, specifically in aspects of recognition, enforcement, and/or protection of human rights in the Southeast Asian region. Parts II and III then respectively scrutinize the twin justifications of “culture” and “development” from an interdisciplinary orientation, showing the inherent philosophical-conceptual and empirical weaknesses of these justifications as normative standards or “exceptions” to “core” human rights norms. Part IV describes the respective “internal” and “external” spheres in which the new ASEAN will operate as an international organization. The present “internal” sphere of ASEAN is depicted in light of ASEAN Member States' recent express and implied recognition of “core” human rights norms (*jus cogens* norms and/or first generation civil and political rights) alongside ASEAN's wider international human rights obligations due to its retooled nature as an international organization subject to international human rights law. Thereafter, I depict ASEAN's “external” sphere considering the emergence of customary international law rejecting impunity for violations of “core” human rights violations. Despite variances in degree, ASEAN Member States' separate practices of recognition and/or enforcement of these core human rights norms - combined with the acceptance of broader human rights obligations and firmer commitments to democracy under the new rule-based ASEAN – should be seen an inevitable path towards, or mode of universalism in normative rights discourse and institutional protection.

The conclusion drawn is deliberate. Considering ASEAN's “internal” and “external” spheres, the new ASEAN cannot afford to maintain its previous position of virtual silence on international obligations concerning the recognition and enforcement of “first generation”¹³ rights such as civil

¹² The heuristic is analogized from the interplay of Keynesian economic concepts of “cost-push inflation” and “demand-pull inflation”. For an illustration of the interplay of these two forces, see also *Joseph E. Stiglitz, The Roaring Nineties* (2003), 3-28.

¹³ For a thorough synthesis of the provenance and distinctions between “first generation” rights (civil and political rights such as those codified under the International

and political rights. While mutual respect for diversity remains a keystone in the *realpolitik* between ASEAN members, the recognition and enforcement of these core human rights need not be seen as a radical departure from ASEAN’s consensus-building orientation. The universalization of core human rights in ASEAN is not incompatible with the duties of ASEAN Member States as parties to the ASEAN, the Charter of the United Nations, and as active members in the community of nations. Universalism in this case, therefore, might even be seen as a phenomenon long overdue.

B. ASEAN’s Legal Personality as an International Organization Subject to International Law

From an initial membership of five Southeast Asian states (Indonesia, Malaysia, the Philippines, Singapore, and Thailand) in 1967, ASEAN has expanded its current membership to ten 10, including Brunei Darussalam, Vietnam, Laos, Myanmar, and Cambodia. The primary constitutive legal instruments of ASEAN are the 1976 Treaty of Amity and Cooperation (TAC) in Southeast Asia¹⁴ and the 1967 ASEAN (Bangkok) Declaration.¹⁵ Under the terms of the TAC and the Bangkok Declaration, ASEAN, prior to its new Charter, was simply an “association for regional cooperation.”¹⁶

Covenant on Civil and Political Rights), “second generation” rights (economic and social rights such as in the International Covenant on Economic, Social, and Cultural Rights), and “third generation” rights (post-war “collective” rights such as the right to environmentally sustainable economic development, peace, security, etc.), see *Eric A. Engle, Universal Human Rights: A Generational History, Annual Survey of International & Comparative Law* 12 (2006), 219-268, 254-266.

¹⁴ Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976 (*supra* note 5).

¹⁵ ASEAN Declaration, 8 August 1976, Bangkok, Thailand. Full text found at: <http://www.aseansec.org/1212.htm> (last visited 23 January 2009).

¹⁶ *Id.*: “1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations; 2. To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter; 3. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields; 4. To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres; 5. To collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the

In furtherance of the cooperative aims previously mentioned, the TAC strictly enjoins ASEAN Member States to observe the fundamental principles of mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of the respective Member States; freedom from external interference, subversion or coercion; renunciation of the threat or use of force; and peaceful settlement of disputes.¹⁷ At the time of its creation, ASEAN's international legal personality was "relative" or "subjective",¹⁸ being attributable to the express recognition of its Member States under the framework of the TAC and the Bangkok Declaration.

In 1994, ASEAN established the ASEAN Regional Forum (ARF), which facilitates cooperation on political and security matters through confidence building, "preventive diplomacy," and constructive dialogue with ASEAN political partners.¹⁹ (Participants to the ARF include Australia, Brunei Darussalam, Cambodia, Canada, China, the European Union, India, Indonesia, Japan, the Democratic Republic of Korea, the Republic of Korea (ROK), the Lao PDR, Malaysia, Mongolia, Myanmar, New Zealand, Pakistan, Papua New Guinea, the Philippines, the Russian Federation, Singapore, Thailand, the United States, and Viet Nam.) Issues foremost on the ARF's agenda are nuclear non-proliferation,²⁰ counter-terrorism, territorial disputes,²¹ and transnational crime.²²

improvement of their transportation and communications facilities and the raising of the living standards of their peoples; 6. To promote South-East Asian studies; 7. To maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves."

¹⁷ Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976 (*supra* note 4).

¹⁸ *Oriol Casanovas*, *Unity and Pluralism in Public International Law* (2001), 124-125.

¹⁹ See ARF overview at <http://www.aseanregionalforum.org/AboutUs/tabid/57/Default.aspx> (last visited 23 January 2009).

²⁰ See *Zone of Peace, Freedom, and Neutrality Declaration*, Kuala Lumpur, 27 November 1971. Full text at: <http://www.aseansec.org/1215.htm> (last visited 23 January 2009); *Treaty on the Southeast Asia Nuclear Weapon-Free Zone*, Bangkok, Thailand, 15 December 1995. Full text at: <http://www.aseansec.org/2082.htm> (last visited 23 January 2009).

²¹ See *Declaration on the Conduct of Parties in the South China Sea*, Phnom Penh, Cambodia, 4 November 2002 at: <http://www.aseansec.org/13163.htm> (last visited 09 January 2009).

²² See overview of ARF history and developments at <http://www.aseansec.org/92.htm> (last visited 23 January 2007).

Consistent with the “ASEAN Vision 2020,” (which articulates Member States’ long-term objectives for ASEAN)²³ regional cooperation is facilitated through three “communities”: the ASEAN Security Community, the ASEAN Economic Community (which provides the venue for cooperation and dialogue in relation to the ASEAN Free Trade Area),²⁴ and the ASEAN Socio-Cultural Community.

Pursuant to the fundamental principles of the TAC, decisions are made by ASEAN Member States through the consensus of all its members. ASEAN’s “silences” and “omissions” in recognition and enforcement of international human rights norms on civil and political rights have been attributed to the difficulty of achieving a consensus, and ASEAN’s strong emphasis on the fundamental principles of sovereignty and non-interference.²⁵

The ASEAN Charter departs from ASEAN’s present voluntary model of international personality by expressly conferring upon ASEAN a “legal personality” as an “intergovernmental organization,”²⁶ and enjoying functional immunities and privileges “necessary for the fulfilment of [the] purposes”²⁷ of the organization. The hortatory provisions in the Preamble of the ASEAN Charter widen ASEAN’s orientation from political-economic cooperation towards “adherence to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms.”²⁸ The contemplated new “purposes” of ASEAN reflects this wider orientation:

²³ Full text at: <http://www.aseansec.org/1814.htm> (last visited 23 January 2009).

²⁴ See Hanoi Plan of Action, Hanoi, Vietnam, 15 December 1988. Full text at: <http://www.aseansec.org/687.htm> (last visited 23 January 2009); Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, Singapore, 28 January 1992. Full text at: <http://www.aseansec.org/1164.htm> (last visited 23 January 2009); Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation, Thailand, 15 December 1995. Full text at: <http://www.aseansec.org/2083.htm> (last visited 23 January 2009).

²⁵ *Li-ann Thio*. Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before I Sleep, *Yale Human Rights & Development Law Journal*, 2 (1999), 1-86, 6, 7, 49-57.

²⁶ ASEAN Charter, Chapter II (Legal Personality), Article 3.

²⁷ ASEAN Charter, Chapter VI, Article 17. Chapter VI, Article 19(2) also provides that “the conditions of immunities and privileges of the Permanent Representatives and officials on ASEAN duties shall be governed by the 1961 Vienna Convention on Diplomatic Relations or in accordance with the national law of the ASEAN State concerned”.

²⁸ Preamble to the ASEAN Charter, Seventh Clause.

- “1. To maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region;
2. To enhance regional resilience by promoting greater political, security, economic, and socio-cultural cooperation;
3. To preserve Southeast Asia as a Nuclear Weapon-free Zone and free of all other weapons of mass destruction;
4. To ensure that the peoples and Member States of ASEAN live in peace with the world at large in a just, democratic, and harmonious environment;
5. To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is a free flow of goods, services and investment; facilitated movement of business, persons, professionals, talents and labour; and freer flow of capital;
6. To alleviate poverty and narrow the development gap within ASEAN through mutual assistance and cooperation;
7. To strengthen democracy, enhance good governance and the rule of law, **and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN;**
8. To respond effectively, in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes, and trans-boundary challenges; [...]” (Emphasis supplied).

Thus, while the ASEAN Charter affirms the fundamental principles in the TAC, the Bangkok Declaration and other treaties, declarations, agreements, and international instruments annexed to the Charter, the ASEAN Charter introduces a novel clause by making “respect for fundamental freedoms, the promotion and protection of human rights, and

the promotion of social justice”,²⁹ and “adherence to the rule of law, good governance, the principles of democracy and constitutional government”³⁰ key principles to govern the conduct of ASEAN and its Member States. In relation to these broader purposes and principles of conduct, Member States are expressly obligated to “take all necessary measures to effectively comply with all obligations, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership.”³¹

Most importantly, the ASEAN Charter appears to dilute the consensus requirement in decision-making. While the Charter categorically states that “[a]s a basic principle, decision-making in ASEAN shall be based on consultation and consensus,”³² the failure to achieve a consensus will vest the ASEAN Summit with the authority to “decide how a specific decision can be made.”³³ Under the Charter, the ASEAN Summit (composed of the Heads of State or Government of the ASEAN Member States) is the “supreme policy-making body of ASEAN,”³⁴ and is accordingly vested with the following general powers to:

“b) deliberate, provide policy guidance and **take decisions on key issues pertaining to the realization of the objectives of ASEAN**, important matters of interest to Member States and all issues referred to it by the ASEAN Coordinating Council, the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies;

c) instruct the relevant Ministers in each of the Councils concerned to hold *ad hoc* inter-Ministerial meetings, and address important issues concerning ASEAN that cut across the Community Councils. Rules of procedure for such meetings shall be adopted by the ASEAN Coordinating Council;

d) address emergency situations affecting ASEAN **by taking appropriate actions**;

²⁹ ASEAN Charter, Chapter I, Article 2 (Principles), Section 2(i).

³⁰ ASEAN Charter, Chapter I, Article 2 (Principles), Section 2(h).

³¹ ASEAN Charter, Chapter III (Membership), Article 5(2).

³² ASEAN Charter, Chapter VII (Decision-Making), Article 20(1).

³³ ASEAN Charter, Chapter VII, Article 20(2).

³⁴ ASEAN Charter, Chapter IV (Organs), Article 7, Section 2(a).

e) decide on matters referred to it under Chapter VII and VIII”
(Emphasis supplied).

The language of the ASEAN Charter also appears to vest the ASEAN Summit with the authority to decide in cases where “[a]ny Member State [is] affected by non-compliance with the findings, recommendations, or decisions resulting from an ASEAN dispute settlement mechanism.”³⁵

It would appear, therefore, that the new ASEAN contemplated in the ASEAN Charter bears an “objective” legal personality, since the organization’s existence arises from the satisfaction of international legal requirements for “organization”: 1) the possession of the organization’s own “distinct will” apart from that of its members, evidenced by the organization’s power to take binding decisions upon the entire membership through the vote of a mere majority of its members; 2) the presence of organs bearing special tasks, defining the position of members in relation to the Organization; and 3) the granting of legal capacity, privileges, and immunities to the Organization in the territory of each of its Member States.³⁶

ASEAN’s acquisition of an objective legal personality under the ASEAN Charter (in addition to its “relative” or “subjective” legal personality conferred by its membership under the present framework of the TAC and the Bangkok Declaration) has implications for its responsibility as an international organization, and for the residuary responsibility of its Member States, to third parties. If ASEAN under the ASEAN Charter were to be viewed as a “distinct legal entity from its Member States,” it would be difficult to attribute responsibility *per se* to its Member States for acts ascribed to or authored by ASEAN. However, if Member States’ residuary responsibility to third parties is to be affirmed even under the new ASEAN, the process will likely take the shape of either: 1) “**secondary Member State responsibility**”, where the third party must first present its claim to ASEAN, and recourse to the Member States would be had only if ASEAN is in default in providing an adequate remedy; or 2) “**indirect responsibility**”, where Member States are deemed *a priori* responsible to the organization to meet its obligations towards third parties.³⁷ As will be discussed later in Part IV, ASEAN’s revised international legal personality

³⁵ ASEAN Charter, Chapter VIII (Settlement of Disputes), Article 27(2).

³⁶ Jan Klabbers, An Introduction to International Institutional Law (2002), 54-57; see also *Reparation of Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, 178-179 and 185.

³⁷ Klabbers, 311-312 (*supra* note 36).

under the ASEAN Charter generates corresponding international legal obligations and responsibilities of ASEAN and its Member States, especially in the recognition, enforcement, and protection of core human rights norms. Parts II and III will first respond to the issue of whether, in themselves, the “right to culture” and “right to development” are still satisfactory normative exceptions to advance the developing universalism of core human rights norms in ASEAN.

C. Ideological and Teleological Weaknesses of the “Right to Culture” as an Exception to “Universalizing” Core Human Rights Norms

The “right to culture” has been invoked as a competing right that qualifies, if not exempts, observance of core human rights norms on civil and political rights (by extension, *jus cogens* prohibitions against torture, slavery, crimes against humanity, war crimes, genocide, and egregious human rights violations).³⁸ The reference to culture is normatively relativist,³⁹ and presumptively argues that these “core” human rights norms can be wholly “localized” in their interpretation and enforcement.

ASEAN has refrained from codifying core human rights norms (or the first-generation civil and political rights) in its constitutive instruments, the TAC and the Bangkok Declaration. Its declarations, treaties, and protocols across its forty-year history have likewise denied any express codification of these norms. Instead, ASEAN has focused much of its efforts towards codification and enforcement of “second-generation” human rights norms on economic and social rights throughout the region.

This lack of codification of “first generation” rights fuelled the “Asian values” debate in the 1990s, led by some Southeast Asian heads of state who decried “Western imperialism” through “Western imposition of rights” deemed antithetical to “Asian values”. The “cultural” exception was cast along three premises - that rights are “culture specific;” that in Asia, “the

³⁸ Richard A. Schweder, *Customs Control: Some Anthropological Reflections on Human Rights Crusades*, *Virginia Journal of Social Policy & the Law* 14 (2006) 1, 1-38, 7-8, 11-13.

³⁹ Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates About “Values in Asia”*, *Indiana International & Comparative Law Review* 14 (2003) 1, 1-86, 9-14.

community takes precedence over individuals;” and that rights are “subordinate to national sovereignty.”⁴⁰

Considering the plethora of literature on the “Asian values” polemic, the refutations to the foregoing premises have been multidimensional. Philosophical approaches tend to argue in favour of the “transcendental” nature of certain values enshrined in human rights, and that a cross-cultural critique would yield the conclusion that these “values” are commonly found across moral systems throughout the world.⁴¹ Cultural anthropological approaches on the other hand point to the defects of transforming the “descriptive” construct of culture (what a given culture’s values supposedly are) into a “prescriptive” call for localization of value judgments (or what conduct a culture demands or prohibits).⁴² Historical approaches contend that the provenance of human rights norms is not the post-World War II “Western” intellectual thought and political architecture, but, in reality, are the more ancient Asian civilizations which have been neglected and under-researched in scholarly literature.⁴³ These diverse approaches have spawned their own quantitative and qualitative investigations and findings on the nature and history of “Asian” cultures and their value systems.

The interdisciplinary approaches provoked some robust scholarly debate on their claims to validity, and invited counter-refutations and rejoinders – the tedium of which generated exasperation for some scholars

⁴⁰ *W. Theodore de Bary*, *Asian Values and Human Rights* (1998), 6.

⁴¹ *Paul H. Brietzke*, *Globalization, Nationalism, and Human Rights*, *Florida Journal of International Law* 17 (2005) 3, 633-691, 660-663, 671-675; *William Joseph Wagner*, *Universal Human Rights, the United Nations, and the Telos of Human Dignity*, *Ave Maria Law Review* 3 (2005) 1, 197-226, 205-214.

⁴² *Elvin Hatch*, *Culture and Morality: The Relativity of Values in Anthropology* (1983), excerpt reproduced in: *Henry Steiner & Philip Alston*, *International Human Rights in Context: Law, Morals, Ethics*, 2nd ed. (2000), 369; “[...] The relativists make the error of deriving an ‘ought’ statement from an ‘is’ statement. To say that values vary from culture to culture is to describe (accurately or not) an empirical state of affairs in the real world, whereas the call for tolerance is a value judgment of what ought to be, and it is logically impossible to derive the one from the other. The fact of moral diversity no more compels our approval of other ways of life than the existence of cancer compels us to value ill-health.”

⁴³ *Surya P Subedi*, *Are the Principles of Human Rights ‘Western’ Ideas? An Analysis of the Claim of the ‘Asian’ Concept of Human Rights from the Perspectives of Hinduism*, *California Western International Law Journal* 30 (1999) 1, 45-69, 48-57; *Raimundo Pannikar*, *Is the Notion of Human Rights A Western Concept?*, excerpt reproduced in *Steiner & Alston*, 383-389 (*supra* note 42).

on the seeming futility of the universalism-cultural relativism debate.⁴⁴ For the purpose of ascertaining the viability of the “right to culture” exception as a normative standard to be applied to the “new” ASEAN envisioned under the ASEAN Charter, however, these interdisciplinary approaches, while immensely valuable, appear unnecessarily inductive, rather than deductive. The “right to culture” exception should be tested from the standpoint of international law and the enforcement of “core” human rights norms (civil and political rights under the International Covenant on Civil and Political Rights, as well as the *jus cogens* prohibitions on torture, slavery, war crimes, crimes against humanity, genocide, and other similarly egregious human rights violations) **which are deemed non-derogable**.⁴⁵ Taken against the primacy of these norms in the body of international law, it is submitted that the inherent weakness of the “right to culture” as a normative standard lies in its ideological imprecision and teleological incoherence.

I. Ideological Imprecision

“Culture” is an amorphous and unwieldy construct of moving parameters. It has been defined as referring to a set of normative principles, values, practices and ideas unique to or identifiable with a group,⁴⁶ which is difficult to disaggregate, being a “series of processes that construct, reconstruct, and dismantle cultural materials in response to identifiable determinants”.⁴⁷ Paradoxically, while the “right to culture” is itself affirmed as a fundamental human right,⁴⁸ its very indeterminacy is the cause of its disutility as a normative standard against core non-derogable human rights norms.

⁴⁴ See f. ex. *Michel Rosenfeld*, Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities”, *Columbia Human Rights Law Review* 30 (1999), 249-284.

⁴⁵ *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, I.C.J. Reports (2004), paras. 105-109; *Barcelona Traction Case*, I.C.J. Reports (1966), 32, para. 33; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), I.C.J. Reports (1996), para. 257.

⁴⁶ *Fernand Braudel*, *A History of Civilisation* (1995), 3-36.

⁴⁷ *Adam Kuper*, *Culture: The Anthropologists’ Account* (1999), excerpt reproduced in: *Steiner & Alston*, 376-381 (*supra* note 42).

⁴⁸ International Covenant on Economic, Social, and Cultural Rights, Arts. 1(1), 15(1), G.A. res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16), at 49, UN Doc. A/6316 (1966), 993 U.N.T.S., entered into force 3 January 1976; Universal Declaration of Human Rights, Article 27, UNGA A/Res 217, 10 December 1948.

It is for this reason that critics of “cultural” exceptionalism to human rights enforcement, particularly in Asia, refer to the obvious heterogeneity of cultures and sub-cultures throughout the region, reducing “Asian” values to straw arguments.⁴⁹ The diversity of Asian value systems and religio-philosophical schools of intellectual thought ultimately makes it difficult to carve a distinguishable normative exception.⁵⁰ The porous nature of the “right to culture” has been criticized as providing ostensibly “legal” justifications for authoritarian regimes refusing to comply with international human rights law.

However, defenders of “cultural” exceptionalism insist that there is no disagreement with the “solid core” of international human rights law, specifically the “core” and non-derogable human rights norms. A statement attributed to a former Minister of Foreign Affairs of Singapore downplays the existence of the controversy thus: “Diversity cannot justify gross violations of human rights. Murder is murder whether perpetrated in America, Asia or Africa. No one claims torture as part of their cultural heritage,” but that “the hard core of rights that is truly universal is perhaps smaller than we sometimes like to pretend.”⁵¹

The attempt to depict the “right to culture” as a “non-exception” to core non-derogable human rights norms fails upon scrutiny of the historical genesis of the prohibitive norms themselves. Violations of these norms, before (or even after) their express codification, have been loosely justified in the name of “culture.” Slavery, for example, prior to being outlawed by the international legal order, was treated for years as a cultural practice by many states.⁵² “Honour” killings, which patently violate the fundamental right to life, is justified under a “cultural” ethic that permits men to vindicate their sense of filial or familial honour through the killing of

⁴⁹ *Amartya Sen*, Human Rights and Asian Values, *The New Republic*, 33-40 (14 July 1997), excerpt reproduced in: *Henkin*, 113-115 (*supra* note 8); See especially for the situation in China: *Amy J. McMaster*, Human Rights at the Crossroads: When East Meets West, *Vermont Law Review* 29 (2004) 2, 109-146, 134-145.

⁵⁰ For the argument on the interpretive fit between an individual’s cultural values and conduct, see *Chaim Perelman*, Can the Rights of Man Be Founded?, in: *Alan S. Rosenbaum* (ed.), *The Philosophy of Human Rights: International Approaches* (1980), 45-51.

⁵¹ *Klabbers*, 16 (*supra* note 36).

⁵² See *Vernon Palmer*, The Customs of Slavery: The War Without Arms, *American Journal of Legal History* 48 (2006) 2, 177-218, 177-178.

adulterous (or suspected unfaithful) wives and female family members.⁵³ Genocide has been described as having “cultural” dimensions, even justified by the Nazi regime as a defensive act to preserve the purity of Aryan culture.⁵⁴ Clearly, the potency of “culture” as a claimed exception to “core” human rights norms cannot be swept under the rug by appeals to rhetoric that “torture is not part of one’s cultural heritage.” The “right to culture” is still actively invoked as a legal exception against observance and full enforcement of core non-derogable human rights norms.

It is for this reason that the ideological imprecision of the “right to culture” militates against its value as a normative standard asserted against the “core” human rights norms from which states (both by customary and conventional international law) cannot derogate. These non-derogable *jus cogens* prohibitions against genocide, torture, slavery, crimes against humanity, war crimes, and egregious violations of human rights (generally giving rise to obligations *erga omnes*) form part of **general** international law⁵⁵ and should not be easily circumvented under a highly malleable and ambiguous standard such as “culture.” To do otherwise would sanction violence to the highest tier of importance and protection accorded to these norms, as described in the famous dictum from the *Barcelona Traction* case:

“[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State... By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”⁵⁶ (Emphasis supplied)

⁵³ Rebecca Adams, Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence, *New York International Law Review* 20 (2007) 57-130, 78-79.

⁵⁴ David Nersessian, Rethinking Cultural Genocide under International Law, *Human Rights Dialogue*, 2 (2005) 12, can be found at: http://www.cceia.org/resources/publications/dialogue/2_12/section_1/5139.html (last visited 09 January 2009).

⁵⁵ Robert Jennings & Arthur Watts (eds), *Oppenheim’s International Law* (1992), 978-1030; Antonio Cassese, *International Law*, 2nd ed. (2005), 198-212.

⁵⁶ *Barcelona Traction Case*, I.C.J. Reports (1970) 3, para. 33.

For the overriding reason that core human rights norms are non-derogable and binding on all states as “norms accepted and recognized by the international community of states as a whole,” and “which can be modified **only** by a subsequent norm of general international law having the same character,”⁵⁷ the “right to culture” (with its inherent ideological imprecision) cannot be the basis for an exception. The “right to culture” has not been shown to be a norm of general international law “having the same character” as “core” human rights norms.⁵⁸ The “right to culture,” cannot operate as a normative “exception” as would modify the obligatory character of “core” and non-derogable human rights norms.

II. Teleological Incoherence

Upholding the “right to culture” as an exception to core non-derogable human rights norms would also thwart the purpose and design underlying both sets of rights.

International human rights law, as it developed after the Second World War, drew currency from theoretical conceptions of the “good” for an individual, and by extension, the social order, as well as concepts of “right conduct” and justice.⁵⁹ The protection of “human rights” is inimitably tied up with these theoretical conceptions of the “good.” What is the common theoretical conception of the “good” envisioned as the object of protection from state incursion and/or third party interference in the case of both “core” non-derogable human rights norms and the “right to culture?”

⁵⁷ Vienna Convention on the Law of Treaties, Article 53.

⁵⁸ Admittedly, this assessment falls prey to the critique of normative relativity, cautioned against for its weakening of international law as a “normative order” and as a “factor of social organization”; see *Prosper Weil*, Towards Relative Normativity in International Law? in: *Martti Koskenniemi*, Sources of International Law: Library of Essays in International Law (2000). However, it may also be considered that this evaluation of the normative quality of non-derogable international legal norms as opposed to “ordinary” norms simply exemplifies rules for state recognition (not equivalent to persuasion) of the argument; see *David Kennedy*, Theses About International Law Discourse, also in: *Koskenniemi*, 81-119.

⁵⁹ For the historical development of international human rights law, see *Hersch Lauterpacht*, International Law and Human Rights (1968), 3-72; see also *Patrick Lee*, Soul, Body and Personhood, *American Journal of Jurisprudence* 49 (2004), 87-125, 116-125; *Immanuel Kant*, Foundations of Metaphysics of Morals (1959), 49-54, reproduced in: *Henkin*, 38-41 (*supra* note 7); *Jeremy Bentham*, An Introduction to the Principles of Morals and Legislation (1789), Chapter 1, reproduced in: *Henkin*, 52-54 (*supra* note 7).

It is submitted that it is the protection of the individual’s “personhood” that predicates an individual’s conception of the “good life.”⁶⁰ While itself a “term of legal art,” an individual’s “personhood” is inextricably comprised of aspects such as bodily integrity, autonomy, the capacity to assert rationality, judgment⁶¹ and the inherent dignity of the human person.⁶² Thus, the core non-derogable human rights norms (*jus cogens* prohibitions against torture, slavery, genocide, crimes against humanity, war crimes, and egregious violations of civil and political rights codified in the International Covenant on Civil and Political Rights or ICCPR) are in themselves articulations of value for aspects of personhood such as bodily integrity, autonomy, the capacity to assert rationality and judgment and the inherent dignity of the human person. On the other hand, the right to culture as a human rights norm is also vital to an individual’s “personhood,” as it critically relates to the individual’s development of identity, personality, and beliefs in a wider sphere of group association and interaction.⁶³

Since both culture and the core non-derogable human rights norms appear to be reflections of the same fundamental value of “personhood,” why then would the assertion of one norm be inimical to the other? Otherwise stated, why would the international legal order privilege these core human rights as “non-derogable,” (being of supreme importance as would amount to the level of an obligation *erga omnes* or an obligation owed to all States) over the right to culture?

It is submitted that the privileging of core non-derogable human rights norms draws from the immediacy, inextricability, and/or proximity of these norms to the individual’s human dignity and “personhood.”⁶⁴ Torture, genocide, slavery and various forms of crimes against humanity and war

⁶⁰ For the comprehensive discussion of the totality of “personhood” under the international legal order, see *Louis B. Sohn*, *The New International Law: Protection of the Rights of Individuals Rather than States*, *American University Law Review* 32 (1982) 1, 1-64.

⁶¹ See *Harvard Law Review Association*, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction* (Note), *Harvard Law Review* 114 (2001) 6, 1745-1768, 1759-1768.

⁶² *Oscar Schachter*, *Human Dignity as a Normative Concept*, *American Journal of International Law*, 77 (1983) 4, 848-854, 854.

⁶³ *Steiner & Alston*, 372-381 (*supra* note 42).

⁶⁴ *Id.*, It has also been argued that *jus cogens* or non-derogable peremptory norms emerged from inspirational analogies from national legal systems’ own normative hierarchies. *Theodor Meron*, *On a Hierarchy of International Human Rights*, *American Journal of International Law*, 80 (1986) 1, 1-21, 3, 13-21.

crimes directly threaten the individual's bodily integrity and subordinate his inherent dignity as a human person. Similarly, the basic civil and political rights of freedom of thought, religion, association, opinion, speech, and guarantees of substantive and procedural due process are critical to preserving the individual's autonomy and independent assertion of rationality and judgment.⁶⁵ The deprivation of these key aspects of "personhood," through the violation of the "core" non-derogable human rights norms, trenches upon the legal interest of all States precisely because this wholly subverts the human conception of the "good" – or the protection and development of the individual's "personhood."

The individual's right to culture, on the other hand, does not approximate the same degree of immediacy to the individual's "personhood" as that manifest from the core non-derogable human rights norms. The observance of core non-derogable human rights norms enables the individual's multidirectional access to culture, but the converse situation does not necessarily hold true. "Cultural" participation, devoid of guarantees of autonomy, bodily integrity, and rational judgment, would degenerate into meaningless and enforced interactions to "induce" identity, "design" personality, and "condition" belief. An individual who enjoys freedom of thought and expression, for example, can verily interact with others and thereby shape the environment in which culture materializes and develops. On the other hand, if that individual's basic autonomy and capacity for rational judgment is capsulated by the arbitrariness of state interference expressed through use of force, the individual's overall ability to develop his "personhood" is compromised under an imposed fiction of "cultural" participation. "Core" human rights norms, therefore, are intrinsic to the individual's capacity to avail of his right to culture, but it is not always so the other way around.

⁶⁵ See *Khaled Abou El Fadl*, *The Unique and International and the Imperative of Discourse*, *Chicago Journal of International Law* 8 (2007), 43-58, 43-44; *Rosalyn Higgins*, *Problems and Process: International Law and How We Use It* (1995), 96. "[...] I believe profoundly in the universality of the human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter, to be able to speak freely; to practice their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. I believe there is nothing in these aspirations that is dependent upon culture, or religion, or stage of development. They are as keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment."

The right to “culture” therefore cannot be validly asserted as a normative exception to “core” non-derogable human rights norms. To do so courts teleological incoherence, and needlessly risks the purpose and design of the theoretical conception of the “good” (individual “personhood”) as expressed in these norms. The subordination of “culture” claims to “core” human rights norms is recognized in the provisions of the UNESCO Universal Declaration on Cultural Diversity:

“Article 4. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

Article 5. Cultural rights are an integral part of human rights, which are universal, indivisible, and interdependent...and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.”⁶⁶

Apart from the use of interdisciplinary approaches, therefore, it is submitted that the viability of the “right to culture” as a normative exception should also be weighed against the ideological and teleological basis of the “core” non-derogable human rights norms. Rather than fall into the trap of pitting cultural anthropological and scientific claims (universalist or particularist), focus should be redirected towards the binding scope and obligatory nature of these “core” human rights norms as part of general international law. Since the “right to culture” suffers from the vice of ideological imprecision and teleological incoherence, it can be more plausibly argued that “culture” cannot operate as an exception given the peremptory status of these “core” human rights norms.

⁶⁶ UNESCO Universal Declaration on Cultural Diversity, Articles 2, 4, and 5; See also International Covenant on Economic, Social, and Cultural Rights, Article 15(1); Universal Declaration on Human Rights; Principle 13 of the 1994 Draft Principles of Human Rights.

D. Empirical and Causal Weaknesses of the “Right to Development” as an Exception to “Universalizing” Core Human Rights Norms

North-South discourse featured the “right to development”⁶⁷ as another exception to the universality of human rights. The argument contextualizes Western insistence on universality against the postcolonialism of international law as a whole,⁶⁸ and stresses that the call for full enforcement and universality of human rights is yet another mode of Western imperialism to arrest the development of Southern states, particularly on the platforms of democracy and rule of law.⁶⁹ The “development” exception is also justified as a “fundamental right,” the “precondition of liberty, progress, justice and creativity,” the “alpha and omega of rights,” flowing and carrying the same importance as the right to self-determination.⁷⁰ Critical responses to the “development” exception, therefore, tended to focus on the abstract and expansive content of the right; the dearth of international recognition for this right; and its precarious (even nonexistent) conventional and customary foundations under international law.⁷¹

ASEAN’s forty-year record marks strong recognition, codification, and enforcement of economic and social rights as extensions flowing from the right to development. The tradeoff between “universalizing” core human rights norms (or explicit recognition, codification, and enforcement of such first-generation civil and political rights and corresponding *jus cogens* prohibitions) has been justified under the rubric of state sovereignty and

⁶⁷ See Vienna Declaration and Programme of Action, 5, U.N. Doc. A/CONF.157/23. Full text at: <http://www.ohchr.org/english/law/vienna.htm> (last visited 23 August 2007).

⁶⁸ See *Sundhya Pahuja*, The Postcoloniality of International Law, *Harvard International Law Journal*, 46 (2005), 459-469, 467-468; which seeks the reestablishment of human rights that are wary of universality because “it is necessary to explore the relationship between the concept of universality itself and the byzantine reinforcements of colonial power and knowledge, not to mention its relationship to Christianity.” The author stresses that the search for foundations of the normative content of universality is itself a “search for authority”, the narrative of which has the effect of being “authoritative and authorizing”.

⁶⁹ *Randall Peerenboom*, Human Rights and Rule of Law: What’s the Relationship?, *Georgetown Journal of International Law*, 36 (2005), 809-854, 817-818.

⁷⁰ *Steiner & Alston*, 1321-1322 (*supra* note 42).

⁷¹ *Jack Donnelly*, In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development, *California Western International Law Journal*, 15 (1985), 473-509, 482-509.

non-interference with the developmental policies of ASEAN Member States. Some ASEAN Member States still retain national or internal security legislation (the validity of which is challenged under core human rights norms) in their statute books, notwithstanding their disuse in the past decades.⁷²

Similar to the previous section’s analysis of the “right to culture” exception, the value of the “right to development” as a normative standard must be weighed against the binding scope and obligatory nature of “core” non-derogable human rights norms. However, apart from the oft-cited responses of a lack of conceptual clarity and legal support for the “right to development” as a competing, “equal” right to the “core” non-derogable human rights norms, it is further submitted that the additional weaknesses of the “right to development” lie in its empirical uncertainty and causal nebulosity.

I. Empirical Uncertainty

The logic of the “development” exception has a Maslow-like appeal.⁷³ “Development” responds to the individual’s most basic needs, whereas “core” non-derogable human rights norms appear more remote from the individual’s physical viability as a human being. “Core” non-derogable human rights norms are frequently couched in “negative” terms or prohibitions, in contrast to “development” which connotes “affirmative” rights (second-generation economic and social rights, and third-generation collective or welfare rights). For empiricists, the tangibility of “development” should prove infinitely more satisfactory as a value to be protected by the international legal order, rather than the intangibility of constructs such as the right to life, freedom of association and opinion, speech, thought, religion, among others.

This very same initial appeal, however, ultimately undercuts the utility of “development” as a value that should have precedence in international legal protection. What degree or extent of development is “sufficient” before civil and political rights can be recognized and enforced? If it is asserted that states are the sole arbiters of their developmental models and policies, then necessarily, states therefore possess the sole discretion on the recognition and enforcement of “core” human rights norms. This line of

⁷² Such as the respective Internal Security Acts of Malaysia and Singapore.

⁷³ Maslow’s hierarchy of needs theory is set out in his 1943 paper entitled “A Theory of Human Motivation”. Summary at: https://www.ahpweb.org/articles/theory_human_motivation.html (last visited 23 January 2009).

reasoning is in complete accord with the proposition that international law bears legitimacy only because states act (and sanction conduct) in pursuit of their self-interest.⁷⁴ However, while it has been observed that “states in the ordinary yet important run of their affairs generally observe international law,”⁷⁵ compliance as the “only” test for validity of international law has long been outmoded. Norms of international law arise from their breach as much as from their observance.⁷⁶ “Soft law” has also emerged and is also a subject of international compliance, under their fundamental importance as generating “expectations about the future behavior and attitudes of international actors, providing a measure of stability within the evolving system while still maintaining some flexibility.”⁷⁷ The legitimacy of international law (particularly international human rights law) cannot thus be reduced to the measure of subjective and arbitrary state implementation.

Further compounding the indeterminacy of the right to “development” is the proliferation of diverse economic development models and growth theories. From the broad spectrum of neo-Keynesian state interventionism and neoclassical *laissez-faire* economics, economists themselves dispute the determinants of growth, and the extent of state incursion, corporatism, and/or necessary interference with the individual’s basic civil and political freedoms in order to bolster growth rates and reduce income inequalities. The disparity in the models for public governance, state authority, and individual freedoms was further highlighted in the literature explaining the implosion of many Asian economies during the 1997 Asian financial crisis.

Among relatively recent development theories is the categorization of the individual’s basic civil and political rights as an **endogenous** determinant of development. In “Development as Freedom,”⁷⁸ Nobel Prize-winning economist Amartya Sen conceptualizes “development” as “capabilities,” or substantive human freedoms. Civil and political freedoms are deemed constitutive of development, since a liberal democracy is both a means and an end in itself. Civil and political rights are pivotal to “conceptualizing” economic needs, enabling individuals to have constructive inputs in shaping values and norms. From this perspective, the supposed “tradeoff” between development and “core” non-derogable human rights norms is at best, illusory.

⁷⁴ Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (2005), 23-26.

⁷⁵ Stephen M. Schwebel, *Justice in International Law* (1994), 598-607.

⁷⁶ *North Sea Continental Shelf Cases*, I.C.J. Reports (1969), 1-260.

⁷⁷ Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000), 23.

⁷⁸ Amartya Sen, *Development as Freedom* (2000), 54-86.

Regardless of the growth and development theory subscribed to by a state, there is weak rational value in the “right to development” as a normative exception to “core” non-derogable human rights norms. As discussed in Part II, the *telos* of “core” non-derogable human rights norms is the defence of the individual’s “personhood.” It is due to states’ general agreement in the conception of this “good” that these norms have attained the status of *jus cogens* (and where the correspondence applies, obligations *erga omnes*). The empirical uncertainty of “development” substantiates the threat of statist arbitrariness and coercion upon the conception of the “good,” or the individual’s “personhood.” If Sen’s definition of “development” holds, then “core” human rights norms should not be seen as an obstacle, but as necessary instruments to advance states’ conception of the “good,” or the individual’s “personhood.”

II. Causal Nebulousness

An argument privileging “development” to the exclusion of “core” human rights norms implies that the recognition and enforcement of these norms impedes development. This is not an easy causality to draw or prove. Citing the scarcity (and conflicting results) of quantitative and qualitative studies on the negative proportionality between recognition and enforcement of human rights norms and economic development, scholars advocate “rule of law” as a substitute analytical focus.⁷⁹ It is difficult to assign variables for empirically measuring already indeterminate concepts such as “development,” “degree of recognition of “core” human rights norms,” and “level of enforcement” of such norms, without falling prey to the criticism of partiality.⁸⁰

The nebulousness does not end there. More critically, recent literature considers a **reverse causal relationship** between development and human rights enforcement. Instead of human rights enforcement impeding economic development, the proposition advanced is that the violation of human rights is a causal determinant of poverty.⁸¹ “Core” human rights norms are deemed to **form part of human capital**,⁸² and are thus

⁷⁹ Charter of the United Nations, Chapter I, Article 1(3) (*supra* note 11).

⁸⁰ See *Sally Engle Merry*, *Anthropology and Activism: Researching Human Rights Across Porous Boundaries*, *Political & Legal Anthropology Review*, 28 (2005) 2, 240-258, 245-246.

⁸¹ *Alfredo Sfeir-Younis*, *The Violation of Human Rights as a Determinant of Poverty*, *International Social Science Journal*, 56 (2004) 180, 321-325.

⁸² See *Elhanan Helpman*, *The Mystery of Economic Growth* (2004), 111-142.

inextricably linked to the processes of wealth creation, poverty alleviation, and developmental effectiveness:

“[...]those whose human rights are violated, or have no possibilities to realize them (i.e. **whose human rights are denied even if not deliberately violated**), are severely handicapped in the whole process of capital accumulation. Absence of respect for human rights means social exclusion, loss of individual and social identity, and marginalization. This, in turn, means little or no access to productive assets. Lack of capital both constitutes poverty and entrenches it. Available capital, conversely, is a crucial means of getting out of poverty.

[...]

In recent decades, much focus has been placed on poor people and their ability to accumulate capital – physical (e.g. infrastructure), financial (e.g. credit), and human (e.g. education). Much less attention has been paid to how the poor accumulate other forms of capital, in particular natural, institutional, and cultural capital. The focus here is on institutional capital, which includes a number of components (e.g. organizational arrangements, the role of different actors, incentive structures and instruments, participation, empowerment, governance), and the objective is to emphasize the importance of the normative and rule-making aspects of development. The key claim is indeed that rule-making must become an intervening and endogenous variable in the design and implementation of poverty alleviation programs rather than a residual to the manipulation of other forms of capital.

[...]

Human rights are a form of capital endowment that the poor need to accumulate, within the context of all the forms of capital listed above, in order to escape poverty. This perspective offers a common framework to assess how violations of human rights – which limit directly the ability of poor people to accumulate “human rights capital” as well as indirectly limiting their access to other forms of capital – become a major determinant of entrenched poverty.”

Thus, if the causality between enforcement of “core” human rights norms and development is nebulous at best, and even supportive of abuse at

worst, there is no value in privileging the “right to development,” exception as a normative standard asserted against core non-derogable human rights norms.

As has been shown, there are additional objections (based on empirical uncertainty and causal nebulosity) to permitting the use of the “right to development” as an exception to core human rights norms. The universality of these core human rights norms is based on states’ theoretical conception of the “good” – which is the promotion and protection of the individual’s “personhood.” “Development,” while itself a value, requires greater precision and proximity to the individual’s “personhood” than the core non-derogable human rights norms.

E. The “Push and Pull” Effect of ASEAN’s “Internal” and “External” Spheres, and the “Equilibrium”-Imperative of Universalism of Core Human Rights Norms

Given the inherent weaknesses of the “culture” and “development” exceptions as normative standards against “core” human rights norms, there is no reason why the “new” ASEAN and its Member States under the ASEAN Charter should relapse into these timeworn justifications. More so, developments within and outside of ASEAN in its forty year history reflect an “internal” push and “external” pull towards universalizing these “core” human rights norms through recognition, codification, and enforcement in the Southeast Asian region.

I. The “Internal-Push”

ASEAN’s “internal” sphere, forty years from its inception, demonstrates that the *opinio juris* of its Member States is towards recognition and observance of these “core” human rights norms. The majority, if not all of its Member States, have, in recent years, either signed, ratified, or acceded to the fundamental treaties and conventions codifying the “core” human rights norms on civil and political rights and the *jus cogens* prohibitions against torture, crimes against humanity, slavery, genocide, racial discrimination, and other egregious human rights

violations.⁸³ Vietnam, Cambodia, Laos, and the Philippines, have already ratified the Apartheid Convention. All ASEAN Member States have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Cambodia, Indonesia, Laos, the Philippines, Thailand, and Vietnam have all ratified the Convention on the Elimination of Racial Discrimination (CERD). Cambodia, Laos, Malaysia, Myanmar, the Philippines, Singapore, and Vietnam have likewise ratified the Genocide Convention. The ICCPR has been ratified by Indonesia, Laos, the Philippines, Thailand, and Vietnam. In the last decade, the Torture Convention has been ratified by Indonesia, and the Philippines. Alongside these developments, it may be noted that ASEAN's most significant regional dialogue partners, China and India, have likewise ratified these international instruments. Clearly, even states most vocal about relying on the "culture" and "development" justifications, such as China and India, have by and large, evinced similar recognition of these "core" human rights norms. These acts of state recognition lend force to the obligatory character of these norms.

Notably, all ASEAN Member States are also parties to the UN Charter, which mandates human rights protection and promotion as one of its fundamental purposes. Consistent with ASEAN Member States' obligations under the UN Charter, ASEAN's own declarations and communiqués⁸⁴ among Member States likewise manifest the growing *opinio juris* in favour of "universalizing" "core" human rights norms through recognition and enforcement. Thus, both from the individual perspectives of Member States and the institutional perspective of ASEAN, the record of the last forty years shows a convergence towards recognition and enforcement of "core" human rights norms. The formal inclusion of the

⁸³ See <http://www.unhcr.org> (last visited 18 August 2008) for the status of ASEAN Member States' signatures, ratifications and accessions to the "core" human rights treaties on civil and political rights.

⁸⁴ Joint Communique of the 26th ASEAN Ministerial Meeting, Singapore, 23-24 July 1993; Joint Communique of the 31st ASEAN Ministerial Meeting, Manila, 24-25 July 1998; Joint Communique of the 32nd ASEAN Ministerial Meeting, Singapore, 23-24 July 1999; Joint Communique of the 33^d ASEAN Ministerial Meeting, Bangkok, 24-25 July 2000; Joint Communique of the 34th ASEAN Ministerial Meeting, Hanoi, 23-24 July 2001; Joint Communique of the 35th ASEAN Ministerial Meeting, Bandar Seri Begawan, 29-30 July 2002; Joint Communique of the 36th ASEAN Ministerial Meeting, Phnom Penh, 16-17 June 2003; Joint Communique of the 37th ASEAN Ministerial Meeting, Jakarta, 29 June – 2 July 2004; Hanoi Plan of Action; ASEAN Vision 2020; ASEAN Plan of Action to Combat Transnational Crime.

recognition and protection of these norms in the language of the ASEAN Charter crystallizes the “internal push” towards universalizing these norms in the Southeast Asian region.

II. The “External Pull”

At the same time, ASEAN’s forty-year history cannot be read in isolation from developments in the international sphere. New customary norms of international law have also emerged through the development of more international enforcement mechanisms for human rights protection from *ad hoc* offices, international organizations, fact-finding, and other permutations of negotiated mediation,⁸⁵ to the stricter form of prosecutions in the various international criminal tribunals (seen in the jurisprudence of Nuremberg and the International Military Tribunals, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and now the International Criminal Court), violations of “core” human rights norms on civil and political rights and the *jus cogens* prohibitions on torture, crimes against humanity, war crimes, genocide, slavery, racial discrimination, and other egregious violations of international human rights and humanitarian law. There is considerable support for the view that states have the international legal obligation to reject impunity for egregious violations of “core” human rights norms, as stated, for example, in UN Security Council Resolution 1674, which “reaffirms that ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians affected by armed conflict and to prevent future such abuses...” and “emphasizes in this context the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law...” as well as “calls on States...to take appropriate legislative, judicial and administrative measures to implement their obligations under instruments [of international humanitarian, human rights and refugee law].”⁸⁶

The customary rejection of impunity finds expression in various state duties. These include, among others: 1) the duty to prosecute persons

⁸⁵ Dinah Shelton, *Remedies in International Human Rights Law* (2000), 137-182.

⁸⁶ UN Security Council Resolution 1674 (2006), S/RES/1674 (2006); 2005 World Summit Outcome, 24 October 2005, paras. 119-126 at: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (last visited 26 September 2008).

committing serious international crimes and crimes against humanity;⁸⁷ 2) the duty to ensure that there is no “denial of justice” to persons residing or sojourning in state territory, due to “bad faith, the wilful neglect of duty, or an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency”;⁸⁸ and 3) the duty to protect the fundamental human right of all persons to an effective remedy.⁸⁹

The customary norm rejecting impunity should therefore be read into the legal parameters of state conduct for ASEAN and its Member States. This is the “external pull” that now draws ASEAN and its Member States towards universalizing core human rights norms through the recognition and enforcement of these norms in the Southeast Asian region.

Considering the “internal push” and the “external pull” effects of spheres affecting ASEAN and its Member States, therefore, the explicit inclusion in the ASEAN Charter of human rights protection as among the fundamental purposes of ASEAN (and forty years after the “neutral” language of the Treaty of Amity and Cooperation and the Bangkok Declaration) expresses the convergence towards the “equilibrium-imperative” of universalizing “core” human rights norms. This is in itself a laudable departure from ASEAN’s silence in the last forty years, and reflects a political-ideological maturity and the mobilizing potential of ASEAN’s role as an international organization.

The inevitable convergence of ASEAN towards “universalizing” core human rights norms through their recognition, codification, and enforcement should not be inhibited by back-peddalling towards “cultural” and “developmental” exceptionalism. As previously shown, appeals to the “right to culture” and the “right to development” should be made cautiously (if at all), in view of their inherent weaknesses as normative standards.

⁸⁷ *Diane F. Orentlicher*, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, *Yale Law Journal* 100 (1991) 8, 2537-2615, 2593-2594.

⁸⁸ *Jan Paulsson*, *Denial of Justice in International Law* (2006), 68-69.

⁸⁹ Article 8 of the Universal Declaration of Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights; Article 6 of the Convention on the Elimination of Racial Discrimination; Article 2(c) of the Convention on the Elimination of All Forms of Discrimination Against Women; Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment; Article 16 of the Convention on the Rights of the Child; Article 11(3) of the American Convention on Human Rights; Article 8 of the European Convention on Human Rights; Article 5 of the African Charter on Human and Peoples Rights; Articles 16(4) and 16(5) of the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO No. 69, 27 June 1989, 28 I.L.M. 1382.

Taken against the emergence of customary international law rejecting impunity, the “right to culture” and the “right to development” should be subject to strict judicial scrutiny standards (even an outright presumption against validity) before they are asserted to justify state derogations from “core” human rights norms.⁹⁰

The “new” status of ASEAN as an international organization thus raises various questions on its separate responsibility as an international organization and the derivative responsibilities of its Member States. Considering that the ASEAN Charter mandates human rights protection and observance as one of ASEAN’s fundamental organizational purposes and vests the ASEAN Summit with the authority to make binding decisions on its members, it is submitted that ASEAN as a distinct international organization should bear the duty of observing core human rights norms and ensuring compliance by its Member States. While the new ASEAN does not assume the full form and structural complex of the European Union, ASEAN can nonetheless retain an analogous “margin of appreciation” in the recognition and enforcement of these norms within the framework of the new ASEAN Charter. Under the doctrine of margin of appreciation in the jurisprudence of the European Court of Human Rights, there is a realistic “judicial “self-restraint” in recognition of the obligation to respect, “within certain bounds, the cultural and ideological variety, and also the legal variety characteristic of Europe.”⁹¹ ASEAN’s enduring principle of mutual respect for diversity among its Member States could be preserved, notwithstanding ASEAN’s new international obligations of rejecting impunity through ensuring recognition and enforcement of “core” human rights norms. The test for the governing institutions of ASEAN (specifically, the highest level of governance under the ASEAN Summit) is how and in what manner it will undertake this balancing test within the

⁹⁰ Which is not to say that the competing rights to culture and development should not figure in the discourse on human rights protection and observance by Southeast Asian governments. What I have tried to show, however, is that the traditional supremacist justifications for reliance on these rights are now timeworn in view of the strong international rejection of impunity for serious human rights violations. Conceivably, Southeast Asian states’ own practices, declarations, and express international obligations over the last forty years have themselves contributed to the development of the norm rejecting impunity. If militant or repressive Southeast Asian governments would seek exception from the observance of core international human rights norms under the new ASEAN Charter, they are now impelled by their ASEAN membership obligations to provide more rigorous theoretical and analytical foundations to justify non-compliance.

⁹¹ *Steiner & Alston*, 854-856, (*supra* note 42).

framework of institutional competences and membership obligations under the ASEAN Charter.

F. Conclusion

While ever mindful of diversity, ASEAN's new status and organizational purpose is ultimately, a choice to transcend the limitations of "culture" and "development" exceptionalism in favour of affirming states' theoretical conception of the "good" – the protection and enhancement of individual "personhood." It is a choice over forty years in the making, and is highly significant due to the region's deliberate move from loose and informal ties under developmental cooperation towards a more binding formal structure oriented towards international legal compliance.

In a region densely marked with diversity and resistance to express codification of civil and political rights, it is a significant development that the ASEAN Member States committed themselves to "promote and protect human rights and fundamental freedoms," "uphold the United Nations Charter and international law, including humanitarian law," and adhere "to the rule of law, good governance, the principles of democracy and constitutional government."⁹² These undertakings are not mere hortatory platitudes, but indeed constitute binding international obligations upon ASEAN Member States.⁹³ Even more telling is the fact that a region with Member States emerging from (or still under) authoritarian or militaristic regimes has purposely expanded Member States' international obligations by expressly committing to "take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of

⁹² ASEAN Charter, Articles 1(7) and 2(i),(j), and (h).

⁹³ These norms satisfy the five necessary and sufficient conditions for the process-driven establishment of obligatory norms: 1) formulation and designation of a requirement as to behaviour in contingent circumstances; 2) an indication that that designation has been made by persons recognized as having the competence (authority/legitimate role) to perform that function and in accordance with procedures accepted as proper for that purpose; 3) an indication of the capacity and willingness of those concerned to make the designated requirement effective in fact; 4) the transmittal of the requirement to those to whom it is addressed (the target audience); and 5) the creation in the target audience of responses (both psychological and operational) which indicate that the designated requirement is regarded as authoritative and as likely to be complied with in the future to some substantial degree. See: *Oscar Schachter, Towards a Theory of International Obligation*", in *Koskenniemi*, 9-31 (*supra* note 59).

membership.”⁹⁴ The ASEAN Charter marks a decidedly universalist topography visible from Southeast Asia’s widened political space for public international discourse. Given ASEAN Member States’ near half-century experience in consensus based decision making, their willingness to modify this mode of decision making (by permitting the ASEAN Summit to “decide on how a decision should be made” in the event of failure to reach a consensus) is reason enough for some optimism on the possibility of approximating procedural (through a rational consensus), as well as contextual universalism.⁹⁵

It would also appear that ASEAN’s evolution from cooperation to integration augurs well for the realization of a genuine Habermasian rational consensus on democratic commitments. Notably, ASEAN’s forty year history of (informal) developmental cooperation itself paved the way for the arduous process of diplomatic and informal negotiations among ASEAN Member States (fuelled by initiatives among counterpart domestic representatives, interest groups and organizations within ASEAN Member States) – which led to the ASEAN Member States’ collective decision to abide by, and participate in, democratic international lawmaking under the ASEAN Charter.⁹⁶ The widespread involvement of diplomats, scholars, lawyers, bureaucrats, interest groups and community organizations in the creation of the integrated ASEAN is itself a triumph for liberal internationalism in the region.⁹⁷

Certainly, however, optimism toward structural progress must be tempered with realistic concerns. Among various regional polities throughout the world, it cannot be said that Southeast Asia is the model of international human rights observance and compliance.⁹⁸ Critics have

⁹⁴ ASEAN Charter, Chapter III, Article 5(2).

⁹⁵ See *Alessandro Ferrara*, Universalisms: Procedural, Contextualist, and Prudential, in: *David Rasmussen* (ed.). *Universalism v. Communitarianism: Contemporary Debates in Ethics* (1995), 11-38.

⁹⁶ Considering the relative history of other international organizations, ASEAN’s emergence as a formally integrated regional organization after forty years speaks volumes about a shared history of “bureaucratic sclerosis” with other international organizations; *Jose E. Alvarez*, *International Organizations: Then and Now*, *American Journal of International Law* 100 (2006) 2, 324-347, 346.

⁹⁷ See *Anne Marie Slaughter*, *A Liberal Theory of International Law*, *American Society of International Law Proceedings* 94 (2000) 240-248, 242-246.

⁹⁸ For a synthesized report on Southeast Asian human rights developments, including, among others, extrajudicial killings and enforced disappearances in the Philippines, infringement of suffrage and electoral rights in Malaysia and Cambodia, suppression of press freedoms and the right to expression in Myanmar, see http://www.hrw.org/doc?t=southeast_asia (last visited 31 August 2008).

assailed the ASEAN Charter for failing to concretely provide for a human rights tribunals or bodies. The ASEAN Charter only provides for an executory provision where, “[i]n conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body,” leaving the terms of reference for such a body to be determined in a forthcoming ASEAN Foreign Ministers Meeting to be convened after the entry into force of the ASEAN Charter.⁹⁹ There is much left to be done, articulated and resolved, in light of the shared and unique experience of religio-political heterogeneity in Southeast Asia.

At the very least, for the ASEAN region and its constituents, the scholarly debate has finally moved on from the parochialism of “Asian values versus Western imperialism.” A newly integrated, officially institutionalized, and rules based ASEAN, with the specific international obligations assumed by its Member States, consciously evinces a universalist design in its Charter framework. Given the internal and external spheres of ASEAN politics, we can hardly expect otherwise. The new ASEAN Charter should be viewed as the tangible culmination of its individual Member States’ practice and *opinio juris* on universal norms, a move to political-economic integration that demonstrates universalist consciousness of human dignity, and a growing openness to the architecture of global citizenship¹⁰⁰ in international human rights law.

⁹⁹ ASEAN Charter, Chapter IV (Organs), Articles 14(1) and 14(2).

¹⁰⁰ See for an analysis of the international development of common legal principles *Sabino Cassese*, *The Globalization of Law*, *New York University Journal of International Law and Politics* 37 (2005) 4, 973-993.

The European Synarchy: New Discourses on Sovereignty

Dimitris N. Chrysochoou*

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Preface

Half a century since its inception as a community of western European democracies, limited in scope and competences, the European Union (EU) is taken to denote a composite polity that combines unity and multiplicity while having the capacity to produce publicly binding decisions and allocate values in European society. It is thus possible to capture the endemic systemic complexity of the regional process through the lens of new theoretical perspectives with a view to developing a series of novel understandings of EU governance in the early twenty-first century. So far, the EU polity refers to a system of institutionalized shared rule among multiple state and non-state actors, characterized by the dispersal of political authority among various levels and the transcendence of hierarchical forms of power distribution. Thus different notions of democracy, legitimacy and representation produce novel accounts of post-national politics. Accordingly, a new democratic concept for the EU project should entail a balanced mix of social and political forces that share in the emerging sovereignty of the larger unit. Within the latter, public authority should not reside within a single decision-making centre, but rather should be diffused among different governance levels and forms of social, political and cultural contention that can combine territorial and substantive public issues.

At the same time, recent changes in the workings of the EU polity have not affected its nature as an essentially statecentric project, preserving a balance between state sovereignty and a relatively moderate yet discernible deepening of integration by means of producing a system of political co-determination; in other words, a new form of *synarchy* between states and *demoi* – an ensemble *sui generis* of highly interdependent systems – is created, its structural and functional interaction resulting in a multilogical system of entwined sovereignties.¹ Yet, the EU polity still remains a treaty-constituted body politic and not the unilateral act of a single and undifferentiated *demos*. Moreover, it does not derive its political authority from its citizens directly and has not – as yet – resulted in a complete fusion among different levels of public authority. Also, its constituent parts, in the form of historically constituted nation-states, are free to dissociate themselves from the larger unit. Finally, its emerging yet nebulous and even controversial constitutional identity rests heavily on the domestic orders of states, although the EU already projects a profound

¹ Dimitris N. Chrysochoou, *Theorizing European Integration*, 2nd ed. (2009).

intertwining of democracies regarding the joint exercise of fundamental powers. Arguably, all of the above is crucial to understanding the changing conventions regarding state sovereignty that may now be interpreted as the right to be involved in the joint exercise of competences with other states.

Linked to the question of sovereignty is that of democracy, which currently points to a negative side-effect of European integration: the growing dissonance between the requisites of democratic rule and the actual conditions on which the political management of EU affairs is largely based. The crucial distinction here concerns an institutional and a socio-psychological perspective. Whereas the former focuses on power-sharing and on institutional reform as a solution to the actual or perceived problems of democracy in the EU, the latter is concerned with questions of European identity and the formation of a composite European *demos* that is nonetheless distinct as a collectivity. As the current debate raises fundamental questions about the future form of the EU as a polity of highly interrelated states and *demoi* – a *synarchy* of entwined sovereignties – recent reforms, including the Lisbon Treaty², whose ratification is still pending, failed to enhance the democratic properties of the general system, leaving the EU to resemble a system of democracies more than a democratic system in its own right.

In a period when transnational pressures are challenging both intrastate and interstate relations, it may no longer be enough to confine democracy within state boundaries to deal effectively with the implications of new forms of polity. This raises new questions such as how to hold transnational decision-makers to account to citizens who belong to different national political systems. Such questions reflect substantive concerns that have grown as the regional process has evolved from an interstate diplomatic forum to a fully-fledged polity. This development, otherwise known as a “normative turn” in EU studies, has led to scholarly interest in the idea that the EU might one day transform itself into a democratic political system. While there is some measure of agreement that the EU is not democratic, there is no consensus on how it might become so. Indeed, there are two different understandings of what the EU’s democratic deficit comprises. The first focuses on institutional properties, arguing that the problem of democracy in the EU is tied to the flawed interinstitutional interactions that characterize the functioning of a non-state polity like the

² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, OJ 2007/C 306/01.

EU. In this context, proposals for further reform speak of the EU's "institutional imbalance" and of the need to enhance the public accountability as well as the representative nature of EU policy-makers and decision-takers. The second focuses on sociopsychological factors and makes the case for a new sense of European "demos-hood". It argues that the EU's present democratic pathology occurs because of the absence of a European *demos*. As a consequence, this second perspective is more interested in collective civic identity and the extent to which there is "a feeling of community" amongst Europeans. Acknowledging that the absence of a European *demos* – assuming that a legal or economic *demos* already exists – is a barrier to a democratic Europe, proposals for further reform tend to suggest paths to transnational *demos*-formation based on a common European civicness³. These notions of plural citizenship give rise to the idea of a "Republic of Europeans", to which we now turn.

A. A Republic of Europeans

Linking the question of the EU polity with different democratic perspectives helps us confront some of the central puzzles of integration theory today. One such example that merits our attention is neo-republican theory, in that new normative understandings of shared democratic rule have sought to nurture a paradigm of social and political organization for the EU, defined as a mixed and composite polity. In its basic conception, a *res publica* aims at three primary objectives which, taken together, capture the imagination of a virtue-centred life: justice through the rule of law; the common good through a mixed and balanced constitution; and liberty through the norms of active citizenship. More than 2500 years since the founding of the Roman Republic, an anniversary that passed largely unnoticed by present-day Europeans, the above features still constitute the *raison d'être* of an idealized notion of *res publica*, marking their impact in the interminable search for "the good polity".⁴

Reviving a republican tradition constitutes a complicated enterprise, for it involves clusters of internally coherent arguments, values, and employments of concepts that facilitate reflection on present political arrangements.⁵ As Lavdas⁶ notes, liberty and civic participation have been

³ Dimitris N. Chrysschoou, *Democracy in the European Union* (1998).

⁴ John J. Schwarzmantel, *Citizenship and Identity: Towards A New Republic* (2003).

⁵ Quentin Skinner, *Liberty before Liberalism* (1998), 101-120.

interpreted and combined in a number of ways, yet the challenge for today's republican scholarship is to develop a pluralist rather than a populist republicanism in which tolerance would be guaranteed in diverse societies. This revival of republican thinking reflects a wider concern with the construction of a socially legitimized ordering founded on the notion of "balanced government" and "undominated" (or quality) choice. But it is not the latter that causes liberty, as liberty is constituted by the legal institutions of the polity – the republican state.⁷ As Brugger⁸ explains, "whereas the liberal sees liberty as essentially pre-social, the republican sees liberty as constituted by the law which transforms customs and creates citizens". Thus, participation should not be taken as a democratic end in itself, but rather as a means of ensuring a dispensation of non-domination by others (or non-arbitrary rule). In short, the rule of law, opposition of arbitrariness and the republican constitution are constitutive of civic freedom.

The notion of "balanced government" is also central to republicanism. It is forged in two related ways: negatively, by associating the constitution of "a proper institutional balance" with the prevention of tyranny; and positively, by ensuring a deliberative mode of civic rule whereby "the differing 'constituencies' which made up civil society would be encouraged to treat their preferences not simply as givens, but rather as choices which were open to debate and alteration"⁹. Liberty was expected to be best preserved under a mixed form of polity through certain constitutional guarantees, with no single branch of government being privileged over the others. Here, republicanism strikes a balance between civic participation and the attainment of the public good by allowing for "a stable form of political ordering for a society within which there are different interests or constituencies".¹⁰ A republican form of European governance refers, first and foremost, to the range of normative qualities embodying the construction of an extended civic space where citizens share among themselves a sense of a "sphere of spheres" (an element of civic virtue that is a valuable resource for the polity) and a regard for good governance (a training ground for civic learning) at the same time as taking part in different public spheres. A republican account of liberty and mixed

⁶ *Kostas A. Lavdas*, *Republican Europe and Multicultural Citizenship*, *Politics*, 21 (2001), 1-10.

⁷ *Philip Pettit*, *Republicanism: A Theory of Freedom and Government* (1997), 106-109.

⁸ *Bill Brugger*, *Republicanism Theory in political thought: virtuous or virtual?* (1999), 7.

⁹ *Paul P. Craig*, *Democracy and Rule-making within the EC: An Empirical and Normative Assessment*, *European Law Journal*, 3 (1997), 105, 114.

¹⁰ *Id.* 116.

government can thus contribute in a constructive manner to the problems of constructing a European polity. In particular, with reference to the ongoing debate on the incorporation of the Charter of Fundamental Rights into the formal Treaty framework, it has been shown that the discussion is pregnant with frustrated potentialities, indicating the need for a more extensive, if thin, institutional public space through which to expand civic competence and transform citizens into a European *demos*.¹¹

Given the absence of an engaging European *demos*, republicanism emanates as a means of disentangling “the issue of participation in an emerging polity from the cultural and emotional dimensions of citizenship as pre-existing affinity and a confirmation of belonging”.¹² The point is that “some elements of the real and symbolic *res publica* may sustain a degree of political motivation *vis-à-vis* the EU and its relevance for peoples’ lives while also allowing for other and more intense forms of motivation and involvement at other levels of participation”.¹³ But given the lack of organic unity among the member *demoi*, the republican challenge is one of institutionalizing respect for difference and group rights, whilst sustaining “a shared sense of the public good”.¹⁴ This is more likely to emerge through Pettit’s third concept of freedom as “non-domination”, as it combines “the recognition of the significance of the pluralism of cultural possibilities for meaningful choice and a framework based on a minimal set of shared political values”.¹⁵ To the extent that the EU cannot motivate extensive public engagement through emotions and sentiments of community, the making of a European *demos* calls for another approach. The question is how to disentangle the issue of civic participation from its cultural and emotional dimensions, which are based on pre-existing affinities and confirmations of belonging. From a different angle, Eriksen¹⁶ prompts us to “decouple citizenship and nationhood” from the prism of the discourse-theoretical concept of deliberative democracy and to view the constitution

¹¹ Kostas A. Lavdas & Dimitris N. Chrysoschoou, Public spheres and civic competence in the European polity: a case of liberal republicanism?, in: Iseult Honohan and Jeremy Jennings (eds), *Republicanism in Theory and Practice* (2006).

¹² Lavdas, 4 (*supra* note 6).

¹³ *Id.* 5.

¹⁴ Richard Bellamy, *Liberalism and Pluralism: Towards a politics of compromise* (1999), 190.

¹⁵ Lavdas, 6 (*supra* note 6).

¹⁶ Erik Oddvar Eriksen, Deliberative Supranationalism in the EU, in: Erik Oddvar Eriksen and John Erik Fossum (eds), *Democracy in the European Union* (2000), 51.

as “a system for accommodating difference”.¹⁷ As most aspects of active citizenship can be reduced to “emotional citizenship” or the expression of rational and deliberative capacities, the question is how to strengthen the latter in a context where the weakness of the former presents opportunities and constraints; one expects various asymmetries to emerge between polities with different state traditions, constitutional cultures and patterns of multicultural or monocultural legitimations of authority.¹⁸

This civic conception of Europe contributes to the making of a large-scale political order steered by an active community of citizens belonging to different nations but sharing a genuine interest in their common future. Here, the emphasis is not on the crystallization of liberal-democratic norms in Europe’s emerging political constitution, but rather on the search for an inclusive civic space, and the belief that democratic reform is not really the cause, but rather the consequence of popular aspirations to democratic rule: a desire to participate in a socially legitimized polity. From this perspective a Republic of Europeans requires deliberative decisions to promote certain public goods whose relevance extends far beyond the politics of democratic election; a republican polity should not be seen as representing just any kind of union set up “for narrowly instrumental purposes”, but rather as a civic association based on virtue-centred practices to serve the common good, where freedom comes first. By pointing to a mixed sovereignty regime – a *synarchy* of highly interrelated polities – new republican theorizing aptly makes the point that the polity currently emerging in Europe rests on a primarily political rather than judicial constitution, and that the notion of republican citizenship could foster a shared sense of civiness among the constituent publics. In this sense as well, new republican thinking seems to be better equipped to offer a plausible answer to the question as to whether the present-day European formation can be seen as “a community united in a common argument about the meaning, extent and scope of liberty”.¹⁹

B. Theorizing Integration

It seems fair to suggest that, after six decades of uninterrupted theorizing, the study of this uniquely observed political formation in the history of international organization has reached a high *plateau*. This is not

¹⁷ *Lavdas*, 5 (*supra* note 6).

¹⁸ *Id.*

¹⁹ *Michael Ignatieff*, Republicanism, Ethnicity and Nationalism, in: *Catriona McKinnon and Iain Hampsher-Monk* (eds), *The Demands of Citizenship* (2000), 265.

to say, however, that EU scholarship should start looking for new integrative experiments of a comparable potential; the idea is that the challenges facing the future of democracy in a non-state polity like the EU that advances post-statist forms of rule should not take place in a theoretical vacuum, but should strive towards a balancing act between explanation and understanding or between “first” and “second order theorizing”. Legitimately though, one asks whether Puchala’s²⁰ cynical prophecy that the study of the EU will amount to “a rather long but not very prominent footnote in the intellectual history of twentieth century social science” will prove as accurate as the author would have us believe.

A first response from a normative standpoint is that theory matters, for familiarity with it helps test our analytical tools and appreciate their relevance in real-life situations, leading “to unique insights which are valid starting points for the purpose of comparison and evaluation”.²¹ This view is shared by the likes of Church²², in that “awareness of theory is a necessary ground-clearing measure”; Rosamond²³, in that “theorizing intellectualizes perceptions”; Groom²⁴, in his notion of theory as “an intellectual mapping exercise which tells us where we are now, from where we have come and to where we might go”; and Unger²⁵, in arguing that theorizing links “the order of ideas” (as conceptual entities) with “the order of events” (as actual occurrences). The aim is to transcend purely descriptive approaches and tackle fundamental (post-)ontological issues facing a historically unprecedented polity, which remains subject to diverse interpretation. This, in turn, requires “structured ways of understanding changing patterns of interaction”²⁶, free from the fragmented boundaries of microanalysis. In other words, it is necessary to project a macroscopic view of the relationship between democracy and integration based on systematic conceptual

²⁰ Donald J. Puchala, *The Integration Theorists and the Study of International Relations*, in: Charles W. Kegley & Eugene R. Wittkopf (eds), *The Global Agenda: Issues and Perspectives* (1984), 198.

²¹ Paul Taylor, *International Co-operation Today: the European and the Universal Patterns* (1971), i.

²² Clive H. Church, *European Integration Theory in the 1990s*, European Dossier Series, 33 (1996), 8.

²³ Ben Rosamond, *Theories of European Integration* (2000), 5.

²⁴ A.J.R. Groom, *The Setting in World Society*, in: A.J.R. Groom & Paul Taylor (eds), *Frameworks for International Cooperation* (1990), 3.

²⁵ Roberto M. Unger, *Knowledge and Politics* (1975), 13.

²⁶ Church, 8 (*supra* note 22).

explanation. Church²⁷ notes: “We need to be aware of the conceptions we use since they determine our perception of things”. Or, as Hamlyn²⁸ asserts, “one cannot get at reality except from within some system of concepts”.

This methodological pathway provides greater access to reality or offers the basis from which “a hierarchy of realities” might emerge.²⁹ The hypothesis here is that a continuum of accessible knowledge domains might bridge the distance from the study of specialized issue-areas to the understanding of collective political conduct and the exercise of specific institutional choices. Important links will thus be established between knowledge acquisition and knowledge evaluation. Integration theory may thus be seen as the systematic study of links between wholes and parts or between universals (totalities) and particulars (substructures). But there exists variation in the way scholars ascribe different meanings to concepts whose examination is crucial for furthering our understanding of complex social and political phenomena. Also, there are those who are interested in the larger picture (the hierarchy); others who aim at capturing part of the overall image (a particular reality); others who focus on the relationship of different realities; and others who focus on the art of theorizing itself. As Rosamond³⁰ notes: “Theories are necessary if we are to produce ordered observations of social phenomena”. In Stoker’s³¹ words: “theories are of value precisely because they structure all observations”.

The validity of the above arguments is further justified when identifying the common values of distinct polities and the emergence of new ones; when shedding light on the union between an interactive society of states and new sources of democratic legitimacy; and when assessing the allegedly *sui generis* nature of a polity based on interlocking and overlapping authority structures. But theory also helps to assess the changing conditions of sovereignty and its implications for states: sovereignty has not been surrendered to a statist regional “centre”; rather, the delegation of competences to common institutions is determined by the capacity of states to control the depth and range of the regional process, hence the need to place sovereignty within a context that accounts for the consensus-seeking norms embodied in joint decisions, which in turn affect

²⁷ *Id.*

²⁸ David W. Hamlyn, *Metaphysics* (1995), 31.

²⁹ *Taylor*, 149 (*supra* note 21).

³⁰ *Rosamund*, 4 (*supra* note 23).

³¹ Gerry Stoker, Introduction, in: David Marsh & Gerry Stoker (eds), *Theory and Method in Political Science* (1995), 17; quoted in: *Rosamund*, 4 (*supra* note 23).

state behavior in ways that promote synergy and even co-constitution, not conflict and contestation. These norms do not promote the retreat of the European nation state, nor do they enhance its capacities at the expense of an overarching federal authority. A symbiotic relationship has thus emerged, where the growth of central competences is not seen as a direct challenge to sovereign statehood and its assorted notions of polity-building. As Taylor³² put it: “Any assertion of the former was likely, in the pattern of the historical evolution of the latter, to be accompanied by its countervailing development”.

A major scholarly challenge for EU theorists is to assess an ever-expanding corpus of literature that often defies the categories of conventional thinking about polity-building, identity-holding and *demos*-formation. This assessment must be carried out while trying to make sense of the future of the European state system; the viability of democracy both within and across boundaries; novel forms of plural citizenship and multiple loyalty-holding; complex processes of “meta-rule-making” in a non-state polity; formal and informal interactions between the functional scope, territorial scale and integrative level of the regional process; and the institutionalization of new avenues of political communication across a plurality of national *demos*. “And yet”, Pentland³³ notes, “we need not be routed by the apparent diversity and chaos of the field”. In this light, whatever lessons are to be drawn from the current state of play regarding integration in the early 2000s both as a project and a process, this essay argues that the ordering of relations among the subunits amounts to a politics of co-determination and co-constitution. The question to raise here is whether the EU strikes a balance between becoming the main locus of political decision-making for a plurality of national *demos* and becoming the dominant focus of citizen identification within an extended European civic space.

It takes no specialist in international theory to reach the conclusion that, more than any other regional formation, the present-day EU has installed a cooperative ethos in both the political and administrative workings of the constituent units, amounting to a complex learning process of peaceful social change combined with a remarkable degree of systemic political stability. Elements of this enduring capacity for governance offer the intellectual and cognitive capital needed to capture the dynamics of

³² Paul Taylor, *The European Union in the 1990s* (1996), 97.

³³ Charles Pentland, *International Theory and European Integration* (1973), 189.

change “from a diplomatic to a domestic arena”, “from policy to polity” and, perhaps, “from democracies to democracy”. Although no shortage of available theory exists that might be used to guide EU scholarship, the field is embroiled in theoretical controversy compounded by conceptual complexity and a propensity to adopt a logic of methodological individualism. In some interpretations, the EU political system is called complex not because it is seen as a polity mix of multiple state and non-state actors and institutions but because it defies any easy notions as to how it is organized in relation to other polities, hence the question as to whether the existing theories of integration are in a position to reconcile two apparently contradictory principles: preserving segmental autonomy within a multilevel regional order. In this regard, the challenge for integration scholarship is to capture the dynamics of two complementary objectives: strengthening the viability of separate state orders (as opposed to idealized notions of the Westphalian sovereignty regime) through the institutionalization of joint sovereignty, that is through novel forms of *synarchy* that can transcend state sovereignty without subsuming their parts under a federally inspired political authority.

The problem associated with the ambitious task to organize sovereignty relations along the lines of a *synarchy* of democratic polities, rests in the differing treatment of such “general concepts” as sovereignty and integration, democracy and diplomacy, policy and polity, order and fragmentation and, crucially, unity and diversity. The question arises as to which of the many interpretations these concepts invite should be utilized to deepen our understanding of the EU polity, all the more so given its capacity for institutional self-renewal, which is of importance when employing different lines of theoretical inquiry. Whatever the mixture of evidence and the method embedded in existing models of integration, whether their emphasis is on conflict or equilibrium, and irrespective of their preference for the familiar (concrete) or the unique (unidentified) in prescribing a more or less democratic end point, it is fair to suggest that their systematic examination becomes a prime theoretical requisite for crossing a qualitative research threshold. Many discourses on EU polity-building lead “to an unhelpful focus on the formal characteristics of the actors at the expense of the processes which characterize, and flow from, their interactions, making the latter entirely dependent on the former”³⁴

³⁴ Ann P. Branch & Jacob C. Øhgaard, Trapped in the supranational-intergovernmental dichotomy: a response to Stone Sweet and Sandholtz, *Journal of European Public Policy*, 6 (1999), 123-124.

Also, competing approaches tend to disagree on background conditions and process variables, the need for more or less integration, the impact of informal structures on integrative policy outcomes, and the feasibility or even desirability of ascribing a political *telos* to an otherwise common enterprise. In the past, this "battle" of theories has often led to zero-sum notions of EU politics coupled with unjustified confidence regarding how the system "actually" works and what it is developing into. The "elephant" though, to recall Puchala's³⁵ colorful metaphor, is not easy to manipulate in theoretical terms; it often turns into a "chameleon", adjusting itself to the very requirements of the day. Thus, not only is it possible that integration theorists are aware of a limited picture of an elusive political animal with nebulous democratic characteristics, the creature itself may also change so rapidly and even profoundly as to render its study an exercise that is ultimately misleading.

While the EU remains, in large measure, an unresolved social-scientific puzzle, it nonetheless represents a novel form of regionalism that, more than any other form of deep regionalism "has displayed the potential to alter the relative congruence between territory, identity and function which characterized the nation state".³⁶ These defining properties of contemporary sovereign statehood are subjected to change: territories are gradually but steadily embedded within wider socio-political spaces, if not constitutional orders; identity displays the potential of multiple loyalties and affiliations; while traditional statist functions are influenced by a dramatic increase in the levels of interdependence and internationalization.³⁷ It follows that "the EU is more than an expression of modified interstate politics: it is the focus for processes that bring together new varieties of identity and need".³⁸ These issues are compounded by the fact that, although the EU is taken as something more than the aggregate of its parts, sovereignty as ultimate responsibility has not moved toward a new regional "centre", thus becoming a systemic property of the whole. The EU is not an international organization proper, nor is it becoming an ordinary state with a monopoly (or a delegated panoply) of law-making/enforcing powers.

³⁵ *Donald J. Puchala*, Of Blind Men, Elephants and International Integration, *Journal of Common Market Studies*, 10 (1972), 267-284.

³⁶ *Brigid Laffan*, The European Union: a distinctive model of internationalization, *Journal of European Public Policy*, 5 (1998), 235, 238.

³⁷ *Brigid Laffan, Rory O'Donnell & Michael Smith*, *Europe's Experimental Union: Rethinking Integration* (1999), 39.

³⁸ *Id.*

Equally puzzling is its legal nature; for some, it still rests on a system of international treaty-based rules, while others prefer the conceptual analogy of a metaconstitutional system driven by procedural innovation and political aspirations akin, but not identical, to statist forms of order-building.

All that we know with a certain degree of confidence is that the EU's final vocation – presuming there will be one – is yet to become discernible in political and institutional terms. Even taking into account the series of neologisms invented over the last few decades to capture its elusive political and legal ontology, to simply argue that the present-day EU is yet another political formation *sui generis*, which should thus be examined only through the lens of new conceptual paradigms, runs the risk of complying with undisciplined formulations. Yet, there is the danger of perpetuating its present stance in the gray area of "normal interstate" and "normal intrastate relations" as the two extreme poles of a continuum on which polities are conventionally located.³⁹ Herein lies a major scholarly challenge: to focus on the study of more likely intermediate institutional outcomes whose format may differ from "the forms of political domination that we are used to dealing with".⁴⁰ The aim is to conceptualize "the transient results of an ongoing process, rather than the [imagined] definitive product of a [presumed] stable equilibrium"⁴¹ for what is more likely to emerge will differ markedly both from the constitutional properties attributed to a federal state and the type of policy competences delegated to an international organization. As to the question of what kind of terminology we can employ to arrive at a more realistic image of the EU, a plausible answer is that real-life events outstrip theories: "as language precedes grammar, so politics precedes political theory".⁴² Wessels⁴³ aptly makes this point, linking the EU's conceptual conundrum with Tocqueville's view of the early United States: "[T]he human mind invents things more easily than words; that is why many improper terms and inadequate expressions gain currency [...]. Hence a form of government has been found which is neither

³⁹ Murray Forsyth, *Unions of States, The Theory and Practice of Confederation* (1981), 6.

⁴⁰ Philippe C. Schmitter, *Examining the Present Euro-Polity with the Help of Past Theories*, in: Gary Marks, Fritz W. Scharpf & Philippe C. Schmitter (eds), *Governance in the European Union* (1996), 14.

⁴¹ *Id.* 6.

⁴² Walter Hallstein, *United Europe: Challenge and Opportunity* (1962), 25-29, quoted in: Pentland, 106 (*supra* note 23).

⁴³ Wolfgang Wessels, *An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes*, *Journal of Common Market Studies*, 35 (1997), 267, 292.

precisely national nor federal; [...] and the new word to express this new thing does not yet exist.”

C. The Concept of Synarchy

The term “*synarchy*” offers the possibility to think about the constitution of a novel form of polity that is called upon to reconcile the quest for segmental autonomy (and diversity) with a sense of political unity for the whole. The theory chimes well with the idea of extending the sharing of authority into new areas of collective symbiosis, but does not imply a process of regional state-building towards an integrated and self-regulated polity, superimposed over the pre-existing ones. This qualification is fully in line with Tsatsos’⁴⁴ account of the EU as a “*sympolity*”, as well as with Kontogiorgis’⁴⁵ view of the EU as a system that “does not invalidate the capacity of the member-states to operate, at the same time, as independent political entities”. The analogy of the *sympolity* implies a sense of moral order in relation to an understanding of the EU as a community of values, even though the absence of a common European public culture prevents the EU from becoming an “ecumenical commonwealth”.⁴⁶ It also suggests “a transition from statecentrism to an ecumenical order and relates to the feasibility of developing a polysemous ‘polityhood’ – taken as a totality, contrary to the imperfect conception of a statecentric form of polityhood – with pre-representative referents, where politics occurs as a right, not as a freedom and, naturally, not as a good”.⁴⁷ Central to this is the extent to which a democentric view of integration can bring about the transcendence of statecentrism and the construction of a post-sovereign or even a post-statist condition at the level of the general system.

The analysis of Kontogiorgis favors a kind of *sympolity* that can be extended to the widest possible level, resulting in a post-statecentric and civic-minded “*cosmopolis*”. This is indicative of the conceptual synergies that normative theory allows in a post-statist direction. The synarchical model advocates a system of political co-determination for composite,

⁴⁴ *Dimitris Th. Tsatsos*, *The European Sympolity: Innovations in Democratic Thinking* (2008).

⁴⁵ *Georgios Kontogiorgis*, Preface, in: Jean-Louis Quermonne (ed.), *The Political System of the European Union* (2005), 10.

⁴⁶ *Id.*

⁴⁷ *Georgios Kontogiorgis*, *Citizen and Polis: Concept and Typology of ‘Polityhood’* (in Greek) (2003), 108.

mixed and polycentric forms of union based on the idea that the partners to it co-constitute, as co-sovereigns, the larger polity; the critical element is not an attempt at building organic links between *synarchy*, as a post-sovereign union, and the composite *demos*, as a self-regulated polity, but the ability of the general system to perform functions that favor the sharing of sovereignty. *Synarchy*, as a post-statecentric quality and, hence, as a transcendent projection of authority away from the classical doctrine of sovereignty, does not invalidate the constituent sovereignties, nor does it threaten their legitimizing role in relation to the democratic quality of the national political spheres. Similarly, it does not threaten the civic culture of the segments with a view to creating a single locus of political authority. Rather, it refers to a participative form of governance that does not presuppose the end of the nation-state or its ability to guide the future of its *demos*. It advances a commonly shared perception of the member polities as discrete yet constituent units. It does not replace or substitute the member sovereignties, but recomposes them politically and legally: politically, by extending the scope and level of collective symbiosis; legally, through a commonly formulated law. It thus refers to an organized “multiplicity of autonomies” and not to an “autonomous multiplicity”.

The term “*synarchy*” derives from the Greek verb *συνάρχω* and is defined as “co-governance by two governors”. It suggests a form of collective governance, which accords with the post-statist reality of the EU order, and links the praxis of co-determination with the idea of organized co-sovereignty. In the discussion about the modern transmutations of sovereignty, *synarchy* sketches out a transition from the classical example of interstate relations to a post-statist system of shared rule, operating within the structural logic of “co-governance”: the joint exercise of sovereign competences at multiple territorial and functional areas and at multiple levels of social and political organization. This view is in harmony with Aalbert’s⁴⁸ recent account of the future of state sovereignty in Europe’s emerging multilevel ordering in that, however resilient the concept proves to be “despite its alleged empirical decline”⁴⁹ – signifying, in classical Westphalian terms, “an international ‘living-apart-together’ of states”⁵⁰ – the EU has shifted the locus of control away from the exclusive domain of states, influencing the status of sovereign statehood in terms of “actual

⁴⁸ *Tanja E. Aalbert, The Future of Sovereignty in Multilevel Governance Europe – A Constructivist Reading, Journal of Common Market Studies, 42 (2004), 23-46.*

⁴⁹ *Id.* 23.

⁵⁰ *Id.* 24.

authority”⁵¹ (in relation to the empirical realities of EU politics and governance), rather than of formal competences:

To date, national state sovereignty has not disappeared to make way for a European sovereign state ... Yet, with the advance of institutional features way beyond the original design, and the development of a huge and extensive body of shared norms and commonly accepted rules and decision-making procedures, the EU is more than just a regime. It is at the very least a ‘saturated regime’, founded on the core institution of the ‘embedded *aquis communautaire*’.⁵²

Turning to the concept of *synarchy*, it should be stressed that synarchical Europe does not form a new type of *stato* beyond (or for that matter to the detriment of) the nation-state and capable of transcending the historical reality of nation-building. It does not point to the emergence of a new sovereignty as in the process of creating a federal state, nor does it sweep away the constituent *demoi* in the trajectory of imposed homogenization, thus building a new legal and political subject devoted to a new hierarchy. On the contrary, a synarchical configuration rests on the ascent of a cooperative culture among the subunits, being developed within a densely institutionalized framework of shared competences and mutually reinforcing perceptions about the organization of collective life. This allows the member collectivities to acknowledge the idea of “co-sovereignty” – the latter being exercised through consensual practices of shared rule that produce mutually acceptable political compromises. “Co-sovereignty” is the basic principle around which a new form of unity is being built: a cooperative culture that is the expression of not only an advanced institutional partnership but also a sense of political co-ownership, allowing for the development of a non-territorially defined political space. What is being carried out within a system of synarchical rule is the search for higher levels of symbiosis and co-determination among the co-sovereigns.

This notion of *synarchy* differs from the utopian approach developed by the French philosopher Saint-Yves, putting forward the creation of a world government guided by a single central institution: a “synarchical

⁵¹ *Id.* 31.

⁵² *Id.* 32.

federation of states". This is an elite-driven process of exercising public power through "closed" groups of illuminated people, who are inspired by the need to establish a new social ordering on the basis of their intellectual and, as it was often claimed, spiritual supremacy. Saint-Yves' model of *synarchy* was directed against the threatening phenomenon of anarchy – i.e., the absence of governing rules – in the early 1870s. It professed an opaque governing structure, where a dominant intellectual leadership controls the operations of society on the basis of its members' abilities. In this elitist scheme, social relations, and, consequently, social institutions and roles, fall under the intellectual guardianship of a hierarchical group of initiates: a kind of aristocratic oligarchy influencing public governance. Although this sociopolitical outline was developed during the latter half of the 19th century, a time when new and challenging ideas to the intellectual *status quo* were flourishing, it transcended the logic of a political movement, referring instead to an elaborate design for the evolution of humanity through "social norms" that favor a leadership-centred view of social governance. *Synarchy*, however, is not restricted to this interpretation but acquires various connotations like the one recorded by the English clergyman Stackhouse in 1737 in his two-volume work *New History of the Holy Bible from the Beginning of the World to the Establishment of Christianity*, which defines *synarchy* as a form of "co-sovereignty".

It is precisely this version that presents a challenge to the future of international theory in relation to the study of emerging categories of post-statist forms of politics. The EU, taken as a post-statist synarchical formation, resembles the concept of *respublica symbioticum*, developed by Althusius in his *Politica Methodice Digesta*, which is pre-sovereign as it precedes the Westphalian arrangement but post-sovereign as to the extended (and institutionalized) sharing of political authority. According to Hueglin⁵³, the complex form presented by Althusius is a "confederal commonwealth" – a *consociatio consociatorum* – composed of autonomous subgroups operating through mutual recognition and agreement within a legally-constituted order. The relation between synarchical co-sovereignty and Althusius' political theory becomes apparent at two levels; first, in the emphasis placed on structures of sovereignty-sharing between politically-linked communities –through a "double contract" among the participating

⁵³ Thomas O. Hueglin, *Modern Concepts for Late Modern Worlds: Althusius on Community and Federalism* (1999), 5.

polities and among them and their populations⁵⁴ – referring to the concept of *communicatio* (sharing), which was advanced at that time; second, in the Althusian design of a commonwealth, whereby the various interactions that take place among the segments, as well as between them and the common institutions, result in a multilevel system of shared rule that guarantees the actors' access to multiple arenas of governance. Hueglin⁵⁵ aptly summarizes the relevance of the two models to the EU:

For Althusius, the ownership of sovereignty is shared by the narrower and wider political communities constituting the universal commonwealth. It is, in other words, a kind of co-sovereignty shared among partially autonomous collectivities consenting to its exercise on their behalf and within the general confines of this consent requirement. The only modern political system coming somewhat close to this notion of confederal sovereignty may be the European Union, the supranational powers of which ultimately rest on negotiated agreement [...].

Today, one could perceive the constitution of the European *synarchy* as an expression of political co-determination with a post-statist analogy, paving new paths in debating the transmutations of sovereign statehood to a form of organized co-sovereignty. To the extent that the idea of co-determination offers an instrumental approach to understanding the nature of “co-governance” in the EU political system, *synarchy* indicates a wider frame which preserves a dynamic equilibrium between the collectivity and the segments. In this light, the changing conditions of sovereignty can now be interpreted as the right of states to be involved in the process of co-exercising a set of common competences and to claim an active role in the representation of their interests in the general system while retaining ultimate authority in critical decision-taking. As Taylor⁵⁶ notes with reference to the EU in the 1990s:

Something remarkable had happened: sovereignty was now a condition, even a form, of participation in the larger entity. What

⁵⁴ *Id.* 4.

⁵⁵ *Id.*

⁵⁶ Paul Taylor, *International Organization in the Age of Globalization* (2003), 47.

was stressed in the role taken on by being sovereign was the right to be involved, to participate in the mechanisms of international society and to represent there the interests of the state. It was even possible to imagine states which were sovereign but which normally exercised no exclusive competences.

Keeping in mind that every discussion on sovereignty should take into account the actual conditions of a given historical moment, the point made by Taylor on the transmutations of sovereignty at the beginning of the 21st century is that, as in the classical doctrine of sovereignty, a higher normative order was said to exist – a superior authority which Bodin referred to as „divine order”– that legitimized the terms of sovereignty in the secular power structures of the day, so states are recognized as sovereign not on the basis of what they can actually do on their own, but on the basis of their ability to participate in the mechanisms of the international community and to abide by the demands of a higher value system: a set of principles, rules and norms that constitute the international culture of the community of states⁵⁷. This critical factor relates to the idea of a “political society of states”, whereby states can now be taken as ”citizens” of a world community.⁵⁸ Only to the extent that a state *qua* citizen fulfils its international obligations and abides by the rules of international legality is it possible to be considered as sovereign: as a full and equal member of a politically organized and rule-governed society of states – even of a ”cosmopolitan moral community”– to which the state is accountable for its actions. Hence there is a new participatory quality in contemporary sovereignty relations, confirming the capacity of international institutions to produce binding rules, manage complex interdependencies, offer institutionalized forms of co-determination, and take authoritative decisions with immediate consequences for the behavior of states.

A typical expression of this dialectical quality is the EU, in that it transcends any pre-existing category of interstate organization, projecting the image of a composite polity. The latter, by offering a *polyarchival* form of co-governance, consolidates the ability of the parts to safeguard their autonomy without negating the ability of the general system to reach higher levels of collective symbiosis: ”it came to seem persuasive that the survival

⁵⁷ *Id.* 27, 28, 53.

⁵⁸ *Id.* 53.

and development of the state as completely compatible with the strengthening of the common arrangements”.⁵⁹ As Taylor⁶⁰ explains: “Integration involved the adjustment of national sovereignty to new circumstances, but not its abandonment”. Central institutions, and the European legal system, had been strengthened without weakening the states”. Although sovereignty is still being created by the subsystems, the latter are also constituted by the general system to which they belong; their sovereignty becomes an expression of their participation in the working arrangements of the collectivity, whose operations may well exceed the state framework, but whose governance requires the consent of states: “The EU’s arrangements were a unique way of managing a system of sovereign states, the like of which had not been seen before [...]. Membership in the European project had always been sought in order to restore the nation states of Europe [...]. It was necessary to understand this to see that further integration need not lead to the creation of an overweening superstate”.⁶¹ In Taylor’s summary of the discussion, the sovereignty of the parts can be seen as a reflection of the constitutive role of the collectivity as well as an acknowledgement of the need of the member publics for self-determination.⁶² As a *synarchy* of co-sovereigns, the EU directs the transmutations of sovereignty towards complex but politically viable systems of co-determination, thus advancing a philosophy of collective governing that reconciles the political tradition of Europe – as the cradle of state sovereignty– with its transcendence. This dialectical relationship between the whole and the parts rests on a common learning process, which in turn depends heavily on mutual trust, “in which”, as Wallace notes, “ideas as well as interests shape the search for consensus”.⁶³

These dynamic properties make the present-day EU the most advanced application of the principle of “consonance”; the institutional components of the general system do not exist independently of the member units, nor do they operate, as equal parties to the regional *synarchy*, independently of the institutional arrangements of the whole.⁶⁴ The

⁵⁹ Paul Taylor, *The End of European Integration: Anti-europeanism examined* (2008), 103.

⁶⁰ *Id.* 7.

⁶¹ *Id.*

⁶² Taylor, 52 (*supra* note 56).

⁶³ William Wallace, *Collective Governance*, in: Helen Wallace & William Wallace (eds), *Policy-Making in the European Union*, 4th ed. (2000), 523.

⁶⁴ Taylor, 213 (*supra* note 56).

sovereignty of states thus makes the latter follow a set of systemic and behavioral norms that they themselves have established and have applied to a considerable range of policy domains within a collective governance system, courtesy of their sovereign statehood. In a word, the sovereignty of states has taken on new shapes and has come to serve more and increasingly complex functions that were once at the core of domestic politics. Thus emerges a post-Westphalian understanding of the EU order as an exercise in organized *synarchy*.

D. Constitutional Regression

In a high-stakes public campaign, the French and Dutch publics rejected, in May and June 2005 respectively, the Constitutional Treaty, previously approved by EU Heads of State and Government on 29 October 2004 in Rome. Such major blows to the ratification process threw the EU into a profound political crisis. Interestingly though, the Constitutional Treaty, which was meant to be replaced by a Reform Treaty after the decision of the Brussels European Council in June 2007, was viewed by many as a relatively modest step toward the full constitutionalization of the formal Treaty framework. Most analysts have asserted that the constitutional project would contribute to a more functional and balanced form of decision-making in an enlarged EU of 27, coupled with a strengthening of the EU's institutional capacity to act in a more coherent and coordinated manner in its external relations, mainly through a European Foreign Affairs Minister - a provision that did not make it to the Lisbon Accords.

Much to their detriment, there were predominantly nationally-driven causes for rejecting the Constitutional Treaty that, taken together, produced an ideologically incoherent voting block against ratification. This is not to imply that greater democracy in the EU can only be an outcome of integration, as the respective publics exercised their equally democratic right to oppose the coming into force of a major treaty reform, to which they had little democratic input, as it was ultimately determined by Europe's political leaders. Were the Treaty to have been ratified by all its signatories, the fact would remain that the EU would have still rested more on an international treaty or, at best, a quasi-constitutional system of checks and balances designed to organize political authority in a non-state polity than on a Constitution "proper". Yet, by virtue of its integrative and symbolic nature, the Constitutional Treaty aimed at a new constitutional ordering, albeit of a (much) less federalist kind as compared with a formal

constitutional settlement. At this point, the following questions are in order: Did the innovative Convention on the Future of Europe act as a “constituent assembly”? Has the outcome of deliberating on the Constitutional Treaty been legitimized by European public opinion? Would the envisaged “Constitution” take the whole system further down the road to federalization? Arguably, the answer to these questions is closer to a “no”, mainly for three reasons. First, the whole drafting process was characterized by the lack of a European constituent power; let us recall that the Convention was composed of appointed delegates, albeit drawn from a wider socio-political spectrum than has previously been the case. Second, the outcome of the Convention was liable to amendments by an Intergovernmental Conference (IGC), which retained the right of states to a final say over the end product through classical forms of interstate bargaining; a good case in point is the final voting arrangement, where qualified majority voting (QMV) requires the support of 55% of (at least 15) participating states and 65% of the population. Third, following the argument about the lack of a genuine European constituent power, the reform process failed to produce a kind of European *Grundgesetz* that derives its social and, by extension, democratic legitimacy directly from a European *demos*.

Given the above, the general assessment may be that the agonizing search for a new constitutional ordering in Europe comes in direct contrast to the democratic means available for creating it. Statecentrism seems to have been the order of the day, as was the case with previous treaty reforms when it came to bestowing the EU with “basic law” provisions. Nor does the integrative nature of a Constitutional Treaty suffice to transform a constellation of democracies into a democratic polity. The Constitutional Treaty would have to be based as much on the domestic orders of states as on a new kind of ordering for the EU to retain its character as a mixed and balanced association of states and *demoi*. At best, the outcome of constitutionalizing the Treaties can follow the logic of constitutional engineering – as opposed to formal constitution-making – which has been part and parcel of the EU’s *acquis conferencielle*. It thus emerges that EU constitutionalism follows the path of sovereign-conscious states wishing to bring about a moderate re-ordering of the existing Treaties, which may well lead to a new and perhaps more viable and democratic constitutional equilibrium. But this should not be taken as a substantive transformation of the EU’s constitutional order.

The Constitutional Treaty was not meant to endow the EU with a new base of sovereignty able to transcend the sovereignty of its parts, contrary to

early federalist predictions during the (early) drafting stage. Instead, Art. 5 para.1 of the Treaty states: “The Union shall respect the national identities of its Member States, inherent in the fundamental structures, political or constitutional [...]. It shall respect their essential State functions, including those of ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security”. This provision epitomizes the dynamic, yet unstable, interplay between coordinated interdependencies and diffused political authority, suggesting that the political evolution of the EU is not part of a linear process toward a discernible federal end. Rather, it is about the preservation of those state qualities that allow the member units to survive as distinct polities whilst engaging themselves in a polity-building exercise that transforms their traditional patterns of interaction. Although this allows for the transformation of a community of states into the most advanced scheme of voluntary regional integration the world has ever witnessed, it should not carry with it the assumption of the end of the European nation-state.

The EU has not therefore taken us “beyond the nation-state” and toward a post-national state of play. Whether or not its logic of power-sharing can be explained through a theory of institutional delegation based on the principle of conferral, the most compelling evidence for the lack of a European sovereignty *per se* is that EU citizens are still taken as “sovereign” only within their national context. Thus the set of constitutional arrangements advanced by the Constitutional Treaty were confronted with the same old challenge: the level of support the EU would enjoy by the public and the means through which its institutions would open up new participatory opportunities for citizens. In this regard, effective governance for managing an integrated political order based on output-legitimacy is a poor substitute to the democratic norms of governance in relation to a *demos*. What is needed is a deliberative and civic-minded process of union as a platform from which a European constituent power can emerge. Title IV of the Constitutional Treaty on “The Democratic Life of the Union” enlists a set of principles to guide the EU, such as democratic equality, representative democracy and participatory democracy. The latter is an interesting addition in that the central institutions should “give citizens and representative associations the opportunity to make known and publicly exchange their views on all areas of Union action”. An “open, transparent and regular dialogue” is envisaged between the EU, representative associations and civil society, coupled with a citizens’ initiative inviting the Commission “to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of

implementing the Constitution". These provisions, however, do not amount to a constitutional democratic order, although a shift in emphasis has taken place from the more traditional forms of representation, expressed mainly through parliamentary channels of political deliberation and contestation, to a framework of politics allowing for greater and more active public engagement in EU affairs.

At a time when the EU retains its character as a *via media* between different forms of polity, governance and representation, the initial prospects for a smooth and uncontroversial ratification of the Constitutional Treaty raised the expectations of endowing a fragmented European *demos* with a common civic identity that would nurture a sense of "*demos-hood*". Such aspirations did not in the end prove realistic enough. Instead, the nebulous and rather unceremonious outcome of Europe's constitutional project revealed that the exclusion of citizens from the drafting stages of the process, namely the absence of a participatory method of EU constitution-making, has been at the expense of elevating their status to a system-steering agency. The whole enterprise has thus acted against the interests of better equipping citizens to become the decisive agents of civic change and further enhance their horizontal integration within a nascent pluralist order composed of entangled arenas for action. Anything less would perpetuate a predominantly elitist operation that is detrimental to legitimate forms of polity. It would also deprive the EU from acquiring a distinct political subject whose civic identity exists independent of national public spheres but whose politics extends to both EU and national civic arenas, signalling a shift in the basis of legitimation to a European *demos*. Even the new dialectic between sovereignty and integration, carrying the implication of an explicit right to political co-determination, failed to produce a credible commitment to democratizing the EU. As in previous treaty reforms, the outcome of the process, far from representing a *cause célèbre* for a democratic Europe, amounted to a cautiously negotiated deal of "partial offsets" to key democratic problems facing the future of the EU. What these reforms failed to produce was not only a common democratic vision *per se* but a belief that such a vision remains without reach, at least in the foreseeable future. This is further justified by perceiving the outcome of treaty reforms as a product of a predominantly utilitarian calculus among the divergent preferences and expectations of the dominant national political elites.

Such trends were also evident in the June 2007 European Council in Brussels, where a decision was taken for the setting up of a new IGC to prepare a Reform Treaty by the end of 2007 (so as to have been ratified by

2009). The new mandate culminated in the signing of the Lisbon Treaty on 12 December 2007, which was to be ratified by January 2009, a year of European Parliament (EP) elections followed by the appointment of a new Commission. At that time, no one had anticipated the negative verdict of the Irish public on 12 June 2008, which represented an equally major blow to the whole ratification process, as did the previous French and Dutch referenda on the Constitutional Treaty. Whatever the strategy to overcome the Irish "no" may be, it is fair to say that the end result of the review process, which culminated in the signing of the Lisbon Treaty on 13 December 2007, represented the long-awaited response of the EU to a prolonged crisis, which EU officials conveniently termed, if not camouflaged as, a "reflection period" The new Treaty classified the areas of actual or potential EU involvement into the following categories: exclusive competences (allowing the EU to issue directives and to conclude an international agreement when provided for in a piece of EU legislation – applied in the fields of customs union; competition policy; monetary policy for members of the euro-zone; the conservation of marine biological resources under the fisheries policy; and common commercial policy), shared competences (applied in the areas of the internal market; economic, social and territorial cohesion; agriculture; fisheries, environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; and common safety concerns in public health matters), and supporting actions (allowing the EU to carry out actions to support, coordinate or supplement state action – applied in areas relating to the improvement and protection of human health, industry, culture, tourism, education, youth sport and vocational training; civil protection; and administrative cooperation).

Other pro-integrationist elements to be "rescued" from the aborted Constitutional Treaty, such as those relating to the EU's democratic life and the abolition of the three-pillar structure, included an extension of qualified majority voting in some 40 new instances (most crucially in the area of police and judicial cooperation in criminal matters, with Britain and Ireland having secured the right to pick and choose whether to participate therein and the European Court of Justice gaining broad oversight for the first time); a single legal personality for the EU; a full-time standing President of the European Council (elected for a 2.5 year term, renewable once); a smaller Commission with fewer Commissioners than states, as of 2014 (a rotation system would apply every five years, with each country having a Commissioner for 10 of the first 15 years); a strengthening of the EP's co-legislative rights; and an enhanced role for national parliaments in their

dealings with the Commission (with reference to the application of the principle of subsidiary). But, as noted above, there was no mention of a European Foreign Affairs Minister, nor was an integrated treaty text replacing all earlier Treaties. Moreover, all references to EU symbols, including the term "constitution", were dropped (flag, anthem, motto), while the new Treaty made a legally binding reference to the Charter of Fundamental Rights, but did not include it in the formal text, as had the Constitutional Treaty – to mention but a few instances of constitutional regression.

The overall assessment to be drawn is that the Lisbon Treaty represented, much like previous reforms, a compromised structure among divergent, ambivalent and, more often than not, conflicting national preferences and interests, accommodating in the end the demands of the more skeptical actors like Britain and Poland. Too many reservations, opt-outs, references to the retention of states' prerogatives in relation to competences and reform practices, along with a considerable delay of applying the double majority system of the Constitutional Treaty (not before 2017, although as of 2014 a new version of the 1994 Ioannina Compromise will take effect), deprived the EU from consolidating its political identity and failed to signal a shift in the basis of legitimation towards more active and inclusionary virtues of belonging. Once again, instead of politicization becoming a weapon in the strategic arsenal of pro-integrationist forces, the new Treaty has exacerbated the possibilities to achieve a democratic equilibrium between the EU and "the civic", thus depriving the larger unit from consolidating its political identity while failing to transform itself from a states-led and essentially elitist operation to a genuine European public process founded on a shared sense of *demos*-hood.

E. Conclusion

It is true that for a polity that was founded and is still based on a system of international treaty-based rules, and whose incipient but fragmented *demos* still lacks effective civic competence, the transition "from democracies to democracy" and, by extension, from an aggregative to a deliberative model of governance is neither easy nor linear, let alone automatic. Yet, recent trends in EU treaty reform seem to give credit to those who argue that the general system is closer to a statecentric form of governance than to a democentric form of polity. This is far from an ideal state, as it hinders the emergence of a European *demos*. In other words, political pragmatism, if not cynicism, as the Lisbon Accords have shown,

seems to have had its day at the expense of a visionary project to re-ignite the public's interest in EU affairs. Like any other polity that aspires to become a democracy, the EU has to engage itself in a constitutive process to bring about a new framework of participatory politics by inventing and, where necessary, re-inventing, a sense of *res publica*. Hence, it is increasingly important for the EU to address issues of democracy and to ensure that its decisions are informed by a principled public discourse. This is because the EU will continue to be confronted with the reality of multiple polities and *demoi* as well as the fact that its present structure invests more in accommodationist types of reforms than in fundamental constitutional re-orderings.

Given the remarkable profusion of theories for the study of the EU as a polity in its own right, integration scholars should aim at rediscovering a sense of process to rethink the archetypal laboratory of concepts on which novel understandings of polity were allowed to draw and expand. Normative theory, drawing from the likes of new republicanism, is an appropriate point of departure with far-reaching possibilities for the study of the EU as a new type of political constellation concerned with the quality of its own governance. The EU has thus to associate itself closely with the formation of a European civic space – *i.e.*, the equivalent of a *polis* whose *politeia* reflects its essential purpose. This approach accords with the EU's nature as a *synarchy* of democratic polities, or a mixed commonwealth of states and *demoi*, as well as with the view that the creation of a new political ordering in Europe should be a condition for uniting the member publics and their respective public spheres into a polycultural and polycentric *res publica*.⁶⁵ Therefore, the phrase "many peoples, one *demos*" captures the imagination of a Republic of Europeans based on a certain notion of democratic *civitas* that stems from a rich intellectual tradition of European political thought. This is more than just a democratic wish for the shape of things to come. Although it is a less than concrete strategy for democratization, it remains a virtuous cause that could assign meaning to a vision of politics that would still be part of a great democratic tradition.

⁶⁵ Kostas A. Lavdas & Dimitris N. Chrysochoou, A Republic of Europeans: Civic Unity in Polycultural Diversity, in: Marco Mascia (ed.), Intercultural Dialogue and Citizenship: Translating Values into Actions (2007); Lavdas and Chrysochoou (*supra* note 11).

Provisional Measures in the ‘*Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination*’ (Georgia v. Russian Federation)

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A. Introduction

On 15 October 2008, the International Court of Justice indicated provisional measures under Article 41 of its Statute in the Case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*.¹ By these measures, it instructed both Russia and Georgia to refrain from specified violations of the Convention,² to do all in their power to prevent their public authorities from committing such violations, to facilitate humanitarian assistance, and to generally refrain from any action which might prejudice the rights under adjudication in the case. The Order of the Court was made by a vote of eight to seven, and gave rise to a Joint Dissenting Opinion by seven judges. Those judges expressed not only their dissent from the making of the Order, but also their disagreement with the majority's finding of even *prima facie* jurisdiction.³

The case has already raised a few interesting issues relating to the Court's jurisdiction to indicate provisional measures, and to the interpretation of CERD. These issues were all hotly contested not only between the parties, but also between the judges of the ICJ. This note will give a brief overview of the decision of the Court, and will comment on some outstanding features of the different opinions expressed.

B. The Jurisdiction of the Court

The main issue which divided the parties and the judges was whether the Court had jurisdiction to indicate provisional measures. Such

¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order of 15 October 2008 (*Georgia v. Russia*), available at <http://www.icj-cij.org/docket/files/140/14801.pdf> (last visited 10 December 2008).

² International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 195 (hereinafter CERD). On the measures indicated by the Court, see further Section D below.

³ *Georgia v. Russia* (see, *supra*, note 1), Joint Dissenting Opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, esp. para. 23 (Joint Dissenting Opinion) available at <http://www.icj-cij.org/docket/files/140/14805.pdf> (last visited 10 December 2008).

jurisdiction could only be based on Article 22 of CERD,⁴ which provides that:

“Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.”

Article 22 raises two questions: first, whether there was a dispute between the parties “with respect to the interpretation or application of the Convention,” and secondly, whether the requirement that the dispute should be “not settled by negotiation or by the procedures expressly provided for in [CERD]” had been met in the case before the Court.⁵

I. A “dispute [...] with respect to the interpretation or application of the Convention” and jurisdiction under Article 41 of the ICJ Statute

1. The Test Under Article 41 of the ICJ Statute

In order to have a power to indicate provisional measures, the Court must have *prima facie* jurisdiction.⁶ The Court does not, however, have to be entirely certain that it has (complete) jurisdiction to decide the case on its merits later; any such requirement would ask too much of the provisional measures procedure, which is designed, above all, to provide fast interim relief.⁷ In the case of *Georgia v. Russia*, the title of jurisdiction invoked by the applicant was a compromissory clause in a treaty, which establishes the

⁴ Georgia has not brought forward any other basis of jurisdiction, and it is not for the Court to search for titles of jurisdiction that have not been invoked before it: *Christian Tomuschat*, Art. 36 in: *Andreas Zimmermann et al.* (eds), *The Statute of the International Court of Justice. A Commentary* (2006), 609, mn 30.

⁵ Joint Dissenting Opinion (see, *supra*, note 3), para. 6.

⁶ *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Provisional Measures, Order of 17 August 1972, I.C.J. Reports 1972, 12-19, 16 (para. 17); see, *supra*, note 1 *Georgia v. Russia*, para. 85.

⁷ Cf. *Karin Oellers-Frahm*, Art. 41 in: *Zimmermann et al.* (note 4), 934, mn 27.

jurisdiction of the ICJ over disputes relating to the subject-matter of the treaty. The question therefore arises to what extent the Court needs to ascertain whether the respondent has indeed violated the treaty, or that the facts complained of would, if found to exist, come within the scope of the Convention.⁸

Georgia v. Russia was not the first time that the Court has had to deal with this question. In the *Kosovo* (officially: *Legality of Use of Force*) cases relating to the 1999 NATO campaign, Yugoslavia based the jurisdiction of the Court on the compromissory clause in the Genocide Convention. The Court held at the time that it should examine whether “the breaches alleged by Yugoslavia are capable of falling within the provisions of [the Genocide Convention].”⁹ That test was expressly taken from the judgment on jurisdiction in the *Oil Platforms* case.¹⁰ In that case, the Court had enquired whether the facts, as alleged by the applicant, would “fall within” the treaty in such a way as to amount to a violation, if not disproved or justified.¹¹ The NATO bombings did not, on that test, fall within the Genocide Convention, as they – fairly clearly – did not disclose the requisite intent to destroy any protected group.¹²

Against that background, the Court said in *Georgia v. Russia*:

“in the view of the Court, the Parties disagree with regard to the applicability of Articles 2 and 5 of CERD in the context of the events in South Ossetia and Abkhazia; whereas, consequently, there appears to exist a dispute between the Parties as to the interpretation and application of CERD; whereas, moreover, the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD, even if certain of these alleged acts might also be covered by other rules of international law,

⁸ See *id.* p. 935, mn 28-30, and, with respect also to the question of complete subject-matter jurisdiction in such a context, *Christian Tomuschat*, Art. 36 *id.* p. 624-625, mn. 57-60.

⁹ *Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, 124-141, 137 (para. 38) (Kosovo). The parallel cases against the other member States of NATO (except Spain and the US) were to like effect.

¹⁰ *Oil Platforms (Islamic Republic of Iran v. United States Of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, 803-821, 810 (para. 16).

¹¹ See *id.*, at 811 (para. 20); Separate Opinion of Judge Higgins, at 847, 856-857 (para. 34). See also *id.*, Separate Opinion of Judge Shahabuddeen, at 822.

¹² *Kosovo* (see, *supra*, note 9), at 138 (paras 40-41).

including humanitarian law; whereas this is sufficient at this stage to establish the existence of a dispute between the Parties capable of falling within the provisions of CERD, which is a necessary condition for the Court to have *prima facie* jurisdiction under Article 22 of CERD.”¹³

The first of these considerations is not easily understood. The dissent charges that the majority simply treats the existence of divergent views, relating to CERD, as disclosing a dispute within the meaning of Article 22.¹⁴ If so, then that is certainly a departure from the *Kosovo* precedent¹⁵, despite the invocation of the same language towards the end of the quotation, and a very permissive application of Article 22 of CERD: if the Convention does not apply even to the alleged facts of a case, it is difficult to see why a mere opinion that it does should make the case amenable to a merits review under the Convention, with the obvious result that there has been no violation. The Court, however, may not have said that it does; after all, its provisional conclusion to the first sentence is only that “there appears to exist” a dispute of the kind required. The argument might therefore be that the fact that the parties express divergent views on CERD merely *points to* the relevance of the Convention to the facts at issue. Yet that is also unpersuasive, since it is quite natural that a respondent State would defend itself against any serious charge made by the applicant, however irrelevant or outlandish it may be. The only reasonable construction appears to be that, in order to be a dispute on CERD, a state of affairs has to be a ‘dispute’ first, in the general sense of any “disagreement on a point of law or fact,”¹⁶ and then a dispute relating to CERD (on the *Kosovo* test). Whether the Court has actually said that, however, may be open to question.

The second part of the quotation, according to which “the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD”, departs from the language used in *Kosovo*, in that the test expounded there went further than to ask only whether the alleged facts

¹³ *Georgia v. Russia* (see, *supra*, note 1), para. 112.

¹⁴ *Georgia v. Russia* (see, *supra*, note 3), Joint Dissenting Opinion, para. 10.

¹⁵ The Court had also said there: “the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it” (*Kosovo* [note 9], 137 [para. 38]).

¹⁶ See on this general requirement, separating the Court’s *contentious* jurisdiction from an advisory function for States that it does not have, *Mavrommatis Palestine Concessions* (*Greece v. United Kingdom*), P.C.I.J., Series A, No. 2, 11; *East Timor* (*Portugal v. Australia*), I.C.J. Reports 1995, 90-106, 99-100 (para. 22).

appeared to be capable of violating the Convention. However, that merely restores to the Article 41 enquiry an element that *Kosovo* did not really express, namely the rule that jurisdiction need only appear *prima facie*. The earlier case involved a relatively simple legal assessment, which only had to point out that a use of force did not, without more, entail genocide. On those grounds, jurisdiction could be denied even on the relatively demanding test from *Oil Platforms*.¹⁷ But that enquiry, which would have demanded a full analysis of all legal issues in the case (other than justifications under the treaty), cannot generally be appropriate at the provisional measures stage.¹⁸ It is anything but a *prima facie* examination, and as such, may take up more of the Court's time than Article 41 applications are designed to do.¹⁹ *Kosovo* should therefore be taken to have described *what* the Court needed to examine, *i.e.* when a compromissory clause applied, but not how certain (*prima facie*) it would have to be.

Even so, the Court's treatment of this point on the facts was rather brief, amounting to little more than a mere assertion that the allegations appeared to engage CERD.²⁰ It might be noted, though, that the Court has been known to be as obscure even in a merits judgment, for example, in the *Armed Activities* case, where it found the established facts to have violated a whole list of rules.²¹

2. The Applicability of CERD

As in *Armed Activities*, the Court had, at least, some brief comments on the applicability of the provisions at issue, if not on the application of the provisions as such. The Court stated, quite briefly, that the fact that there might be issues also under international humanitarian law or the *jus ad bellum* did not mean that there were no issues under CERD.²² Moreover, it

¹⁷ The Court naturally allowed for amended pleadings at a later stage, reviewing only the facts already before it.

¹⁸ *Cf.* also *Oil Platforms* (see, *supra*, note 10), Separate Opinion of Judge Higgins, at 857 (para. 35).

¹⁹ See, *supra*, text at note 7.

²⁰ As criticised by the Joint Dissenting Opinion (*supra* note 3), para. 10. For the allegations see para. 111 of the Order.

²¹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J. Reports 2005, 168, 244 (para. 219) (*Armed Activities*).

²² See the quotation from *Georgia v. Russia* above, and generally on the application *pari passu* of human rights and humanitarian law *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, I.C.J. Reports

concerned itself with a Russian argument to the effect that CERD could not apply to actions by Russia outside its own territory. This would have made the dispute one not about CERD and ruled out provisional measures for the protection of CERD rights.²³ That submission was based on a general presumption against the extraterritorial effect of treaties derived from Article 29 of the Vienna Convention on the Law of Treaties,²⁴ and on the wording of Articles 2 and 5 of CERD.²⁵

The argument drawn from Article 29 VCLT holds some attraction, particularly because the official title of the article (“Territorial scope of treaties”) suggests that the article also covers the extraterritorial application of treaties, as opposed to just their application *throughout the territory* of every State party.²⁶ Yet the drafters of the VCLT in the International Law Commission expressly excepted the former question from the scope of the article, and its wording contains no reference to the problem.²⁷ There also does not seem to be any good reason why there *should* be a general presumption against the extraterritorial application of treaties. States are perfectly entitled to enter into obligations binding themselves, no matter *where* they will be bound by such law.²⁸ Real problems arise only if States create obligations, by treaty, that not only apply abroad, but also *to third States*;²⁹ or if a treaty makes directly effective law that its parties do not have jurisdiction to make, due to the absence of any territorial, *or personal or other proper* link. Such treaty rules would be beyond the powers of their makers, but in neither case would the problem really lie with the *extraterritorial* application, as opposed to their application *ratione personae* (to third States) or the absence of *any* title of jurisdiction. The only basis,

2004, 136-203, 177-178 (paras 105-106) (Wall Opinion); see, *supra*, note 21, *Armed Activities*, at 243 (para. 216).

²³ CR 2008/23, available at <http://www.icj-cij.org/docket/files/140/14713.pdf> (last visited 10 December 2008), at 39 (*Zimmermann*).

²⁴ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (hereinafter VCLT). Article 29 provides: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”

²⁵ CR 2008/23 (see, *supra*, note 23), at 40-42 (*Zimmermann*).

²⁶ *Contra Adolfo Maresca*, *Il diritto dei trattati* (1971), 382.

²⁷ ILC Draft Articles on the Law of Treaties, Yearbook of the International Law Commission 1966, vol. II, 213-214; *Syméon Karagiannis*, Art. 29 in: *Olivier Corten & Pierre Klein* (eds), *Les Conventions de Vienne sur le droit des traités* (2006), vol. II 1230-1231, mn. 60, 61; *Maresca* (see, *supra*, note 26), 382.

²⁸ *Cf. Tobias Thienel*, *The ECHR in Iraq*, *Journal of International Criminal Justice* 6 (2008), 115-128, 116, 125-126.

²⁹ *Cf. Karagiannis* (see, *supra*, note 27), 1232, mn. 63.

therefore, on which a presumption against extraterritorial effect could rest would not be that such effect is legally problematic, but that States are simply more likely to only want to make law for their home jurisdiction. That, however, would seem to be a matter of every treaty's own object and purpose, and not the province of any general presumption.

The Court did not pronounce explicitly on the existence of the presumption invoked by Russia, but it certainly approached the matter from another direction, holding that:

“there is *no restriction* of a general nature in CERD relating to its territorial application; whereas it further notes that, in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which are invoked by Georgia, contain a specific *territorial limitation*; and whereas the Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.”³⁰

It might even be thought that the Court has applied a presumption in *favour* of extraterritorial effect, looking only for textual evidence *against* such effect. However, the Court's brief reference to “other [...] instruments of that nature” may well point to its real, more convincing thoughts. The Court and others have previously held that other human rights treaties apply extraterritorially, on the grounds of their object and purpose.³¹ a State should not be allowed to do abroad what it cannot do at home.³² The inference from that object and purpose is that human rights treaties will bind their parties wherever they may be acting, unless some territorial limitation otherwise appears from the treaty. As CERD is an “instrument of that nature,” the same interpretive approach – a *quasi*-presumption, arising from the treaty itself, not the general law – fell to be applied to it.

On that approach, there certainly is nothing in CERD to suggest any territorial limitation. Its central provision, Article 2(1), provides, so far as is

³⁰ *Georgia v. Russia* (see, *supra*, note 1), para. 109 (emphasis added).

³¹ See, *supra*, note 22, *Wall opinion*, at 179 (para. 109).

³² *Issa and Others v. Turkey*, 41 Eur. Ct. H.R. 27 (2004) Judgment of 16 December 2004, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=707749&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (last visited 10 December 2008), para. 71.

relevant (highlighting the passages that, according to Russia, pointed to its exclusively territorial effect³³):

“States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to [...] ensure that all public authorities and public institutions, *national and local*, shall act in conformity with this obligation; [...]

(c) Each State Party shall take effective measures to review governmental, *national and local* policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, *including legislation* as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.”

The article contains a general condemnation of all racial discrimination and an undertaking to eliminate it, along with a list of means to be used “to this end.” Some of those means refer to the control and review of *national and local* authorities and policies, but those expressions would seem to relate more to the entities that will have to act than to the places where they are to do so; the article is concerned that all State entities, at all levels, should be made to comply with the Convention,³⁴ but does not say that they should only do so domestically. In any event, it is difficult to see why a description of the particular *means* to be employed, even if it is

³³ CR 2008/23 (see, *supra*, note 23), at 41 (Zimmermann).

³⁴ It thus complements the principle by which *all* State organs can engage the responsibility of the State: *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999, 9-17, 16 (para. 28); *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999, 62-91, 87 (para. 62).

somewhat limited, should be read as restricting the general obligation to “pursue *by all appropriate means*” the *end* expressed in Article 2.³⁵ Therefore, the obligations to offer protection and to promote integrationist organisations in subsections (d) and (e) – which, in any case, may apply wherever a State *is in control* – likewise do not show that CERD generally applies only territorially. Indeed, looked at in the round, CERD is not so limited.

II. A Dispute “not settled by negotiation or by the procedures [of CERD]”

The Court further held that Article 22 of CERD did not import any requirement that negotiations or the procedures of CERD should have been exhausted before the dispute is taken to the ICJ; the structure of the article, the Court held, was different from that of other instruments that do provide for the prior exhaustion of such means of dispute settlement.³⁶ This is a surprising conclusion. It is true that an obligation to first exhaust negotiations or other specified mechanisms could have – and has elsewhere – been expressed more clearly, but the Court’s interpretation, in effect, turns the clause into a simple condition that the dispute should not already have been settled. That condition goes without saying,³⁷ and the clause is therefore left without any real meaning.³⁸ Yet, it should not be overlooked that the rule by which every clause in a treaty should be taken to have some legal effect of its own does not apply with any particular strength to every international treaty; repetitions of trite law occur all the time. Indeed, a clause very similar to the negotiations clause in Article 22 of CERD has previously been interpreted much like Article 22 has been in *Georgia v. Russia*: it did not matter, the Court said of such a clause in the *Oil Platforms* case, which of the parties had failed to pursue negotiations, as the only

³⁵ Beyond Article 2, Articles 3, 6 and 14 of CERD refer to a State’s “jurisdiction.” That is not a *strict* territorial limitation on any view, and on the correct view refers only to the exercise of power in *fact*: see Marko Milanović, From Compromise to Principle: Clarifying the Notion of State Jurisdiction in International Human Rights Treaties, *Human Rights Law Review* 8 (2008), 411-448. Moreover, Articles 6 and (especially) 14 of CERD would seem to apply the “jurisdiction” formula to *all* rights under CERD.

³⁶ *Georgia v. Russia* (see, *supra*, note 1), para. 114.

³⁷ *Cf. supra*, note 16.

³⁸ Joint Dissenting Opinion (see, *supra*, note 3), para. 12.

condition was that the dispute “was not satisfactorily adjusted before being submitted to the Court.”³⁹

But even if Article 22 of CERD established a condition of the prior exhaustion of negotiations or CERD procedures, this would not necessarily have availed Russia. Regarding the alternative of negotiations, such a clause would require, not only that the party bringing the case to the ICJ has sought to negotiate at all, but also that it has done so concerning the application of the convention on which its case in the ICJ is based.⁴⁰ However, it would make little sense to require that the convention in question should be explicitly cited. Given that the purpose of the negotiations is to put the other State on notice that there are some grievances under the convention,⁴¹ and to allow it to perhaps change its ways, it should be sufficient if facts are complained of that quite clearly engage the convention. Such complaints need not be made by the State that later brings the case to the ICJ, but may come from third parties trying to settle the dispute.⁴² In *Georgia v. Russia* it should, therefore, be enough that Russia has been referred to acts of “ethnic cleansing” and similar actions by Georgian and international officials,⁴³ actions that on any view violate CERD.

C. The Risk of Irreparable Prejudice and the Urgency of Provisional Measures

The Court then had to decide whether to indicate provisional measures in the circumstances of the case. Article 41 of the ICJ Statute has very little to say on this, prescribing only that circumstances should require the indication of provisional measures. This presupposes, according to the

³⁹ *Oil Platforms* (see, *supra*, note 10), Merits, I.C.J. Reports 2003, 161-219, 210-211 (para. 107); see in the same sense *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Separate Opinion of Judge Sir Robert Jennings, I.C.J. Reports 1984, 533-557, 556.

⁴⁰ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002, 219-251, 247 (para. 79); *id.*, Judgment, I.C.J. Reports 2006, 6-54, 40-41 (para. 91); see, *supra*, note 3, Joint Dissenting Opinion, para. 15.

⁴¹ See *supra*, note 39, *Nicaragua*, Judgment, at 392, 428 (para. 83).

⁴² *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, I.C.J. Reports 1962, 319-348, 346; see also, *supra*, note 39 *Nicaragua*, Separate Opinion of Judge Sir Robert Jennings, at 556.

⁴³ See CR 2008/25, available at <http://www.icj-cij.org/docket/files/140/14719.pdf> (last visited 10 December 2008), at 16, 19-20 (*Crawford*).

Court's settled case-law, that "irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings."⁴⁴ Consequently, there must be a real risk of such prejudice, "such as to require, as a matter of urgency, the indication of provisional measures."⁴⁵

The Court has approached this dual requirement, of a risk of irreparable damage raising an urgent need for judicial action, by noting in a first step that the rights at issue were "of such a nature that prejudice to them could be irreparable." Violations of the right to security of person and to protection against violence (Article 5 (b) of CERD) could involve loss of life, and people displaced from their homes could be "exposed to privation, hardship, anguish and even danger to life and health."⁴⁶ That is all convincing, if obviously for different reasons: deprivations of life are by their very nature irreparable,⁴⁷ while severe violations not resulting in death may be deemed to have caused suffering that reparations will never be able to fully compensate, or to be beyond recompense on a more normative approach.

In a second step, the Court has dealt with the requirement of urgency by noting that there remain uncertainties as to the lines of authority in Georgia and that the situation is volatile and could rapidly change. The Court, therefore, concluded that the ethnic Georgians in the areas affected by the recent conflict remained vulnerable, as were the ethnic Ossetian and Abkhazian populations, and consequently that there was an imminent risk of irreparable prejudice to the rights at issue.⁴⁸ The Court apparently did not look for a very proximate or concrete risk, which might at first sight seem to conflict with its approach in *Certain Criminal Proceedings in France*, where it examined the likelihood of any violation on the facts.⁴⁹ The approach might seem to conflict even more with the approach in *Avena and Other Mexican Nationals*, where the Court indicated measures only in

⁴⁴ *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998 I.C.J. Reports 1998, 248-258, 257 (para. 35); *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, Order of 17 June 2003 I.C.J. Reports 2003, 102-112, 107 (para. 22); see, *supra*, note 1, *Georgia v. Russia*, para. 129.

⁴⁵ *Certain Criminal Proceedings in France* (See, *supra*, note 44), at 109 (para. 30).

⁴⁶ *Georgia v. Russia* (see, *supra*, note 1), para. 142.

⁴⁷ *Vienna Convention on Consular Relations* (see, *supra*, note 44), at 257 (para. 37); *LaGrand* (see, *supra*, note 34), at 15 (para. 24).

⁴⁸ *Georgia v. Russia* (see, *supra*, note 1), para. 143.

⁴⁹ *Certain Criminal Proceedings in France* (see, *supra*, note 44), at 109-111 (paras. 30-38).

respect of those death row inmates for whose execution dates had already been set, but expressly not (yet) for many others.⁵⁰ However, the Court's approach is no more than a consequence of the volatile nature of the situation; where the situation is foreseeable, as in *Avena*, it may easily be said that there is not yet a sufficiently proximate risk; but where the situation is unclear and in flux, there is a risk, though no-one knows quite how serious it is. In such circumstances, it will be better to act than to wait until a more proximate risk appears, for if violations materialise (again), a lot could happen before the Court would be able, even *proprio motu*,⁵¹ to indicate the necessary measures. Considering further that *Georgia v. Russia* is about the human rights of individual people (even if the claim is brought by a State), there can be no suggestion that there is a threshold of temporarily tolerable suffering, that some damage may have to be suffered. A suggestion along those lines might possibly hold water in a pure inter-State case, where, at the risk of having a State tolerate some slight damage before measures are taken at a later stage, the Court may not be prepared to make a protective order in the absence of any true urgency. However, human rights law is more sensitive, looking as it does at every bearer of rights *individually*: once one person has sustained irreparable damage, the proceedings will have been (partly) set at naught.

D. The Measures Indicated

The obligations imposed by the Order of the Court, for the most part, repeat the obligations already incumbent on the parties by virtue of CERD itself. This is unsurprising; where violations of the substantive law at issue would happen to cause irreparable prejudice, provisional measures under Article 41 of the ICJ Statute must forbid such violations. But the Court did not simply remind the parties of the existence of Articles 2 and 5 of CERD by brief reference to those provisions.⁵² Doing so would be no more than putting the existing rules on an additional legal basis;⁵³ this would have

⁵⁰ *Avena and Other Mexican Nationals (Mexico v. U.S.)*, Provisional Measures, Order of 5 February 2005, I.C.J. Reports 2003, 77-92, 91 (paras 55-56).

⁵¹ The Court apparently reserved the power to so act in *Avena*, in case further dates of execution might have been set: *Shabtai Rosenne*, Provisional Measures in International Law (2006), 204.

⁵² That, by contrast, is what the President of the ECtHR has done, with respect to Articles 2 and 3 ECHR: see that Court's Press Release of 12 August 2008.

⁵³ It has been suggested that the obligation under Article 41 of the ICJ Statute to comply with the Court's Order can even take priority over any conflicting treaty obligations

been rather unhelpful, as all disputes about the application of those articles would then have been transferred to the application of the Order. Instead, the Court at least clarified the territorial application of its measures in South Ossetia, Abkhazia and adjacent areas of Georgia, and also that the obligation imposed “to ensure [...] security of persons” and other rights would not require Russia to exercise more power in Georgia than it currently does,⁵⁴ but would only apply “whenever and wherever possible.”⁵⁵

It seems, however, that the Court has gone beyond the rights at issue in requiring the parties to ensure *the rights to security of person (etc.)*; the obligation in Article 5 of CERD is to guarantee the right to *equality* before the law, “notably *in the enjoyment of*” the specified rights, but CERD does not itself guarantee those rights. It is, after all, concerned with racial discrimination, not with the measure of protection afforded to all. It presupposes the existence of the specified rights, but leaves the legal enforcement of that expectation to other treaties. The Court, on the other hand, has ordered not only that there should be equality *of* protection, but protection *and* full equality in this regard (“to ensure, without distinction as to national or ethnic origin, security of persons”).

Beyond the measures taken from CERD, the Court has ordered that the parties should facilitate all relevant humanitarian assistance, and that they should “refrain from any action which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”⁵⁶ The latter is a common formula,⁵⁷ and gives expression to a general obligation incumbent on the parties to international proceedings.⁵⁸

under Articles 103 and 92 of the UN Charter: *Rosenne* (see, *supra*, note 51), 108, note 60.

⁵⁴ This concern was raised in oral argument: CR 2008/23 (see, *supra*, note 23), at 50 (*Zimmermann*).

⁵⁵ *Georgia v. Russia* (see, *supra*, note 1), para. 149 (A).

⁵⁶ *Id.*, para. 149 (B) and (C).

⁵⁷ See e.g. *Nicaragua* (*supra*, note 39), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984, 169-188, 187 (para. 41(B)(3), (4)); *Armed Activities* (note 21), Provisional Measures, ICJ Reports 2000, 111, 129 (para. 47(1)). The power to indicate such measures is additional to that to preserve the rights in dispute: see the last-cited Order, at 128 (para. 44).

⁵⁸ See *LaGrand* (*supra*, note 34), Judgment, I.C.J. Reports 2001, 466-517, 503 (para. 103).

E. Conclusion

It may be concluded that the Court had jurisdiction to indicate provisional measures. However, the decision has left some questions rather less than fully answered. Indeed, what the Court has said seems at least plausible, but for the most part the Court has not made the argument. Even so, the Order (and the case) is interesting, not just for the Court's renewed sojourn into human rights law, and into a specialised and almost universally ratified treaty at that. In particular, the Court has clarified that human rights treaties may readily be taken to govern the actions of States even beyond their territory, and that they apply also in armed conflicts. It seems unlikely that either proposition could be successfully attacked again later. The Court has not, however, decided at this stage that it has complete jurisdiction to decide the case; instead, it has been content to only say now that the acts complained of *appear to be* capable of falling within CERD. Whether those acts actually do violate the Convention, and whether they can be proved, is a matter for another day.

In practical terms, it is open to doubt whether the Order of the Court will (have to) achieve much on the ground, given that the situation may well not get worse again. It is nonetheless understandable that the Court has made provision for such a possibility.

European Court of Justice Secures Fundamental Rights from UN Security Council Resolutions

Sebastian Recker*

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A. Introduction

The European Court of Justice has annulled Council Regulation (EC) No 881/2002¹ freezing funds of Mr. Kadi and Al Barakaat based on Resolution 1267 (1999)² of the United Nations Security Council³. In so doing, the European Court of Justice has set aside the Court of First Instance's judgment⁴. The Court of First Instance held that in principle it had no jurisdiction to review the lawfulness of regulations based on Security Council resolutions. The European Court of Justice stated that acts of the Sanctions Committee under Chapter VII of the UN Charter must be reviewable if restrictions infringe general principles of Community law⁵. This decision creates a new balance of power in international law. Obligations from international agreements cannot prejudice fundamental rights as general principles of the EC Treaty.

Until this judgment, it seemed that the UN Security Council had the unconfined power to determine binding instructions to States under Chapter VII of the UN Charter without the possibility of judicial review by Member States. The conflict between the status quo demanded by the United Nations and the requirement of the European Communities in securing their general

¹ Commission Regulation No. 881/2002, O.J. L 139/9 (2002).

² SC Res. 1267, UN SCOR, 54th sess., 4051st mtg., UN Doc. S/RES/678 (15 October 1999).

³ Notes relating to the decision: *Christoph Ohler*, *Gemeinschaftsrechtlicher Rechtsschutz gegen personengerichtete Sanktionen des UN Sicherheitsrates*, *Europäische Zeitschrift für Wirtschaftsrecht – EuZW* Heft 20 (2008), 630-633; *Kirsten Schmalenbach*, *Bedingt kooperationsbereit: Der Kontrollanspruch des EuGH bei gezielten Sanktionen der Vereinten Nationen*, *Juristenzeitung – JZ* Heft 1 (2009), 35-43; *Nikolaus Graf Vitzthum*, *Les compétences législatives et juridictionnelles de la Communauté européenne dans la lutte contre le terrorisme – l'affaire "Kadi"*, *Zeitschrift für Europarechtliche Studien – ZeuS* (2008) 375-429; *Michael Riegner*, *Bulletin of international legal developments* (2008) Vol. 17, 193-196; *Maja Brkan*, *Presekani (in spet zavezani) gordijski vozeli*, *Pravna praksa* (2008), ŠT. 36, 25-27.

⁴ *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T-306/01 [2005] E.C.R. II-3533, *Common Market Law Review* 43 (2006) 537 ('*Yusuf and Al Barakaat*'); *Yassin Abdullah Kadi v. Council and Commission*, Case T-315/01 [2005] E.C.R. II-3649, *Common Market Law Review* 43 (2006) 537 ('*Kadi*').

⁵ *Al Barakaat International Foundation v. Council and Commission, Yassin Abdullah Kadi v. Council and Commission*, Joined Cases C-402/05 P and C-415/05 P (Eur.Ct.J. 3 September 2008) (not yet reported), summarized in *Weekly Proceedings of the Court of Justice* 31/08, at 1 ('*Kadi and Al Barakaat*').

principles shows the purpose and at the same time abashment of international law. Who determines the rules in international law and who is to decide when the rules have been violated? This question is contentious, because the standing of rules in international law is dependent on the consent of the parties. In this regard, European Union Member States, institutions, citizens and courts were not agreed on how to balance the competence in these cases⁶. For example, the Court of First Instance restricted the supervision of Security Council resolutions to *jus cogens*⁷. Conversely Germany⁸, the French Republic, the Kingdom of the Netherlands, the United Kingdom and the Council demanded exemption from all review arising from measures adopted by the Security Council under Chapter VII of the UN Charter⁹. In contrast, the European Court of Justice and the appellants in the given cases have seen the necessity of effective judicial review if fundamental rights are infringed¹⁰. However, how can international law work if there is no consent regarding the principle of supremacy?

Without question this judgment has decimated the basis of tribute in international law and increased the standard of the European Communities as guardians of their general principles in international law.

B. Case Development

The European Court of Justice has set aside the judgment of the Court of First Instance of the European Communities in Case T-306/01 and Case T-315/01. In these judgments the plaintiffs applied to have Council Regulation (EC) No 881/2002 declared null and void because of infringements on their Fundamental Rights. The implementation has become necessary for the EC to execute the obligations of United Nations Security Council Resolution 1267 (1999). This resolution requires Member States to freeze funds and other financial resources of individuals with ties to the Taliban in order to combat international terrorism. The Court of First Instance stated that binding Security Council resolutions are not revisable to community law¹¹. According to the judgment of the Court of First Instance

⁶ *Kadi and Al Barakaat*, paras 107-115 (ECJ).

⁷ *Yusuf and Al Barakaat*, para. 277; *Kadi*, para. 226 (CFI).

⁸ *Frank Schorkopf*, *Grundgesetz und Überstaatlichkeit* (2007), 152-156.

⁹ *Kadi and Al Barakaat*, paras 111-112, 114-115 (ECJ).

¹⁰ *Kadi and Al Barakaat*, paras 107-108, 327 (ECJ).

¹¹ *Yusuf and Al Barakaat*, paras 263-282; *Kadi*, paras 212-231 (CFI).

the supervision of Security Council resolutions is restricted to *jus cogens*, which in this case was not infringed.

I. Security Council Resolution

The Security Council is the principal organ of the United Nations with a primary responsibility for the maintenance of international peace and security as set down in Article 24 of the UN Charter. According to Article 1 (1) and (3) of the UN Charter, preservation of “*international peace and security*” throughout the world is one of the aims the United Nations and its members strive towards. However, the aims listed in Article 1 of the UN Charter are not just a political programme. Article 24 of the UN Charter grants the ability to make binding recommendations which are applied against state or non-state actors by the UN Security Council, based on Chapter VII and Article 41 of the UN Charter. Resolution 1267 (1999) established sanctions condemning acts carried out by the Taliban in Afghanistan. Since the US invasion of Afghanistan in 2001, the sanctions have also been applied to individuals and organizations located in all parts of the world. In order to suppress international terrorism, the Security Council stated in Paragraph 4(b) of Resolution 1267 (1999) that all states must freeze funds and other financial resources of individuals with ties to the Taliban. All twenty-seven European Union Member States are members of the United Nations¹². They are bound to the primacy of the obligations under the Charter of the United Nations, Article 103 UN Charter. As a consequence of this obligation, laid down in Article 25 UN Charter, according to the wording of the Charter, Member States must carry out the decisions of the Security Council. The Court of First Instance states that this obligation has antecedence to any other obligation Member States may have entered into under an international agreement¹³. However, as this obligation does not bind the Community, as it is not a Member of the United Nations, the European Community is bound by Art 307 EC by Community Law. If the European Community has assumed powers from Member States in an area referred to under the United Nations Charter, the Community must ensure that Member States fulfil their obligations. Therefore action by the European Community was necessary in order to imply this resolution into

¹² *Ministry of Foreign Affairs and Trade*, United Nations Handbook 2008/09, (2008) 11-13.

¹³ *Yusuf and Al Barakaat*, paras. 239-240; *Kadi*, paras 189-190 (CFI).

Community Law. First the Council adopted Common Position¹⁴ 2002/402/CFSP¹⁵ whereby the Council adopted the contested regulation on the basis of Articles 60 EC, 301 EC and 308 EC.

II. Judgment of the Court of First Instance

Mr. Kadi based his claim on three grounds of annulment alleging breaches of his fundamental rights¹⁶. In addition to violations of his judicial rights, his right to be heard and his right to effective judicial review, Mr. Kadi argued that there had been an infringement of his right to respect for property and of the principle of proportionality. *Al Barakaat* mentioned that the Council was not concerned with the adoption of the regulation and a breach of Article 249 EC and fundamental rights¹⁷.

1. Council's Competence and Observance of Article 249 EC

The European Union incorporates Security Council resolutions in two steps. First the Council generates a Common Position based on Article 15 EU. Then it dispenses a Regulation on Article 249 II EC based on Articles 60 EC, 301 EC and 308 EC.

It is, however, questionable if the Council was competent to adopt a measure based on Article 249 II EC. The plaintiffs mentioned that the measures were disproportionate to the pursued objective of interruption or due economic relations with third countries¹⁸. The Court of First Instance replied that Articles 60 EC and 301 EC expressly contemplate the implementation of a common foreign and security policy assigned to the European Union by Article 2 EU¹⁹. This contemplation was forced by the Maastricht Treaty, which related Community actions imposing economic sanctions and the objectives of the European Union Treaty regarding to external relations.

Article 249 II EC facilitates the order of regulations edged over general public. In the case of *Yusuf* and *Al Barakaat* the plaintiffs argued that the regulation prejudices the rights of individuals directly and

¹⁴ Council Common Position 2002/402/CFSP, O.J. L 139/4 (2002).

¹⁵ Common Foreign and Security Policy.

¹⁶ *Kadi and Al Barakaat*, para. 49 (ECJ).

¹⁷ *Kadi and Al Barakaat*, para. 50 (ECJ).

¹⁸ *Kadi and Al Barakaat*, para. 69 (ECJ).

¹⁹ *Kadi and Al Barakaat*, para. 67 (ECJ).

prescribes the imposition of individual sanctions²⁰. The Court of First Instance accomplished the regulation's general application because the regulation prohibits anyone to raise funds or economic resources for the persons named in Annex I to the regulation²¹. Although the named persons are directly and individually concerned for the purpose of Article 230 IV EC, this does not change the general nature of the prohibition.

2. Concerning Respect of Certain Fundamental Rights

As the Sanctions Committee decided under Chapter VII of the UN Charter, its resolution is binding on Member States under Article 48 of the UN Charter. Therefore, the question arises as to whether the Court of First Instance is generally competent to undertake a review of the lawfulness of the resolution. But the Court of First Instance is only able to go into the merits of the case if it is competent to undertake a review.

Scope of Review of Lawfulness

The Court of First Instance holds forth that the resolution falls within the scope of its judicial review. In this scope, determining what constitutes a threat to international peace and security is exclusively the scope of the Security Council. For this reason it exists outside the jurisdiction of Community Law²². The only exception is the inherent right to individual or collective self-defence, Article 51 UN Charter. On the one hand, such jurisdiction would be incompatible with international law, Articles 25, 48 and 103 UN Charter and also Article 27 of the Vienna Convention on the Law of Treaties. On the other hand, it would be incompatible with the norms of the EC and EU Treaty, especially Article 307 EC and the principle that it must be exercised in compliance with international law. References to infringements of fundamental rights as protected by the Community cannot affect the validity of a Security Council resolution. In principle, Security Council resolutions fall outside the ambit of the judicial review of the Court of First Instance.

Jus Cogens

According to the European Court of First Instance, the Court is empowered indirectly to prove whether the resolution is lawful according to

²⁰ *Kadi and Al Barakaat*, para. 69 (ECJ).

²¹ *Yusuf and Al Barakaat*, para. 186 (CFI); *Kadi and Al Barakaat*, para. 72 (ECJ).

²² *Yusuf and Al Barakaat*, para. 276; *Kadi*, para. 225 (CFI).

jus cogens. *Jus cogens* refers to norms of international law which have peremptory force and which are binding on all subjects of international law with no derogation except by another peremptory rule²³. *Jus cogens* is defined in Articles 53 and 64 of the Vienna Convention on the Law of Treaties. Article 53 states that a treaty provision contrary to a *jus cogens* norm is void. *Jus cogens* norms are norms which are accepted by the international community of states as a whole in a treaty or custom²⁴. The United Nations is also bound by *jus cogens* because the UN Charter itself requires the existence of mandatory principles of international law and, consequently, fundamental rights as well. Security Council resolutions are bound by fundamental peremptory provisions of *jus cogens*. However, neither Member States nor the United Nations may derogate from “intransgressible principles” of international customary law²⁵.

The alleged breach of the right to be heard must be rejected by the Court. Due to its bond to decisions of the Sanctions Committee, the Community has indeed no power to investigate the resolution. However, a person can submit his allegation to the Sanctions Committee via his national authority²⁶. The person is bound to the diplomatic protection of his state, but in conflict, he is allowed to bring an action for judicial review against any wrongful refusal by the national authority.

In the Court of First Instance’s view, the fundamental right to respect for property is not infringed upon by freezing funds. This measure has neither the purpose nor the effect of treating the listed persons in an inhuman way²⁷. Therefore, the Court has established that freezing funds is a temporary precautionary measure which does not affect the substance of the right, unlike a confiscation²⁸.

Furthermore, the Court of First Instance stated that the right to effective judicial review was not infringed upon. The plaintiff was able to bring an action for annulment before the Court under Article 230 EC. The Court reviews the lawfulness of the regulation and, indirectly, the lawfulness of the resolution in light of *jus cogens*. However, the Court is not competent to review indirectly whether the resolution is compatible with fundamental rights guaranteed by the Community legal order. Admittedly

²³ *Rebecca Wallace & Anne Holliday*, *International Law*, 1st ed. (2006), 25.

²⁴ *Rebecca Wallace & Anne Holliday*, *International Law*, 1st ed. (2006), 25-26.

²⁵ *Yusuf and Al Barakaat*, para. 282; *Kadi*, para. 231 (CFI).

²⁶ *Yusuf and Al Barakaat*, para. 317; *Kadi*, para. 270 (CFI).

²⁷ *Yusuf and Al Barakaat*, paras. 290-291; *Kadi*, paras 239-240 (CFI).

²⁸ *Yusuf and Al Barakaat*, paras. 294-302; *Kadi*, paras 243-251 (CFI).

there is no independent international court responsible for ruling individual decisions taken by the Sanctions Committee. According to the Court of First Instance this lacuna in judicial protection is not contrary to jus cogens, since it is justified by the nature of the decisions made under Chapter VII of the UN Charter “*In the circumstances of this case, the applicant’s interest in having a court hear his case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council in accordance with the Charter of the United Nations*”²⁹. Therefore, it is required to mention that there is a mechanism for re-examining the measures after 12 or 18 months.

All in all, the mechanism of applying at any time to this committee is adequate for guaranteeing the right to effective judicial review by jus cogens.

III. Judgment of the European Court of Justice

Mr. Kadi based his concern to set aside the Court of First Instance’s judgment on the lack of any legal basis for the regulation and infringement of fundamental rights by disregarding several rules of international law³⁰. Ahmed Ali Yusuf’s name was struck from the Court’s register in response to his abandonment of the appeal³¹. However, Al Barakaat also based its concern on the lack of any legal basis for the regulation and infringement of fundamental rights by disregarding Article 249 EC³².

1. Legal Basis of the Contested Regulation

Mr. Kadi denounced the fact that the Court of First Instance had taken Articles 60 EC and 301 EC as a legal basis even though these provisions were only able to provide a basis for measures against third countries, not for measures against individuals and non-State entities³³. In addition, Article 301 EC exhibits no function as a “bridge” between the EC and EU Treaties in order to achieve EU treaty ambitions. On account of the

²⁹ *Yusuf and Al Barakaat*, para. 344; *Kadi*, para. 289 (CFI).

³⁰ *Kadi and Al Barakaat*, para. 116 (ECJ).

³¹ *Kadi and Al Barakaat*, para. 119 (ECJ).

³² *Kadi and Al Barakaat*, para. 117 (ECJ).

³³ *Kadi and Al Barakaat*, para. 123 (ECJ).

fact that Article 308 EC was misinterpreted, here the Court of First Instance assimilated the objectives of the separated legal orders.

The European Court of Justice stated that the Court of First Instance was right to determine that Articles 60 EC, 301 EC and 308 EC were the correct legal basis, however, it was not right in its argumentation³⁴. Indeed, Article 301 EC functions as a “bridge” between EC and EU treaty ambitions, but neither the wording nor the structure provide any foundation for an extension to Article 308 EC³⁵. The Court of First Instance’s conclusion runs counter to the wording of Article 308 EC, which requires an acquisition to the “operation of the common market”, not including the objectives of the Common Foreign and Security Policy (CFSP). Article 308 EC is part of a system based on the principle of conferred powers. It does not include a basis for widening the scope of power beyond the general framework created by provisions of the EC Treaty. However, Article 308 EC should fill gaps where the EC Treaty shows deficiency of provisions even though the Community needs such powers to attain one of the objectives laid down by the EC Treaty³⁶. The regulation falls within the ambit of Articles 60 EC and 301 EC, while the restrictive measures are of a financial nature, in so far as the inclusion of both articles was justified by law³⁷. However, these provisions do not impose measures against individuals and non-State entities which are not linked to the governing regime of a third country, as Article 308 EC is seen by the European Court of Justice as the missing piece to be authorised in order to impose such measures³⁸. The European Court of Justice has also used the objectives of the EC treaty as a legal basis. Articles 60 EC and 301 EC are the expression of an objective, making it possible to adopt measures of a financial nature through the efficient use of a Community instrument. This objective is seen by the European Court of Justice as an objective of the Community for the purpose of Article 308 EC, while the measures exhibit a link to the operation of the common market. This interpretation is supported by Article 60(2) EC, which contends that the power of taking measures on Article 60(1) EC can only be exercised if Community measures have not been taken pursuant to Article 60(1) EC³⁹.

³⁴ *Kadi and Al Barakaat*, para. 166 (ECJ).

³⁵ *Kadi and Al Barakaat*, para. 195 (ECJ).

³⁶ *Kadi and Al Barakaat*, para. 198 (ECJ).

³⁷ *Kadi and Al Barakaat*, paras 213-214 (ECJ).

³⁸ *Kadi and Al Barakaat*, para. 216 (ECJ).

³⁹ *Kadi and Al Barakaat*, para. 228 (ECJ).

The European Court of Justice dismissed the grounds of appeal relating to the lack of legal basis as unfounded⁴⁰. Al Barakaat's ground of appeal relating to infringement of Article 249 EC was dismissed by the argumentation of the Court of First Instance⁴¹.

2. Infringement of Fundamental Rights

Mr. Kadi alleged that the Court of First Instance erred in law by supposing that it had no power to review the lawfulness of Security Council resolutions adopted by virtue of Chapter VII of the UN Charter. Similarly, the fact that the Security Council has not established an independent international court competent to rule on actions brought against individual decisions taken by the Sanctions Committee does not mean that Member States also have no power to do so⁴². In his view the re-examination procedure before the Sanctions Committee does not offer protection of fundamental rights in the way guaranteed by the ECHR. In addition, Mr. Kadi cited the *Bosphorus*⁴³ case, in which it was decided that all Community legislative measures must be subject to judicial review, even if a measure's origin is an act of international law⁴⁴. Security Council resolutions can only have legal effect if their implementation was consistent with law in force.

Competence to Review Community Measures

The European Court of Justice ensures fundamental rights according to settled case-law. In this way the European Court of Justice based this jurisdiction to constitutional traditions common to Member States and international instruments for human rights protection, like the ECHR⁴⁵. Even if Member States are bound by obligations imposed by an international agreement, these obligations are not able to prejudice constitutional principles of the EC Treaty⁴⁶. All Community acts must respect fundamental rights. Thus, respect of fundamental rights is a

⁴⁰ *Kadi and Al Barakaat*, para. 236 (ECJ).

⁴¹ *Kadi and Al Barakaat*, paras 241-247 (ECJ).

⁴² *Kadi and Al Barakaat*, para. 254 (ECJ).

⁴³ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, application No. 45036/98, judgment of the European Court of Human Rights (Grand Chamber) of 30 June 2005, (2006) 42 E.H.R.R. 1.

⁴⁴ *Kadi and Al Barakaat*, para. 255 (ECJ).

⁴⁵ *Kadi and Al Barakaat*, para. 283 (ECJ).

⁴⁶ *Kadi and Al Barakaat*, para. 285 (ECJ).

condition for the lawfulness of Community acts. The European Court of Justice must review them in the framework of the legal system established by the EC Treaty. In this case the review of lawfulness applies to Community acts, which incorporate the obligations, not the latter as such. According to the resolution, the European Court of Justice is not competent to review Security Council resolutions under Chapter VII of the UN Charter⁴⁷. The European Court of Justice has therefore set aside the Court of First Instance's argumentation. Even if the review were limited to *jus cogens*, the Court would not be competent to review the Security Council resolution⁴⁸. Article 307 EC states that national courts, and in this case Community courts, must ensure that rights under earlier agreements are honoured and correlative obligations fulfilled. But Article 307 EC is not able to permit any challenge to principles of the Community which include fundamental rights. Accordingly, the Community must have a chance to evaluate the lawfulness of Community measures according to their consistency with major principles and fundamental rights. Article 300(7) EC states that Member States and Community institutions are bound by agreements concluded under this article. The agreement of the Security Council would have primacy over acts of secondary Community law if Article 300(7) EC were applicable to the UN Charter. But even if this primacy existed, it would not extend to primary law⁴⁹. Because of this, there is no binding of the Community to the primacy if fundamental rights are infringed. Furthermore Article 300(6) EC supports the view that an international agreement cannot enter into force if an adverse opinion of the EC Treaty has been found. The European Court of Justice is competent to review community measures, even if they are based on a Security Council resolution⁵⁰.

Rights of the Defence

The right to effective judicial review is a general principle of Community law. It is taken from the constitutional traditions common to Member States and is guaranteed by Articles 6 and 13 of the ECHR. Furthermore, it is stipulated in Article 47 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice,

⁴⁷ *Kadi and Al Barakaat*, para. 287 (ECJ).

⁴⁸ *Kadi and Al Barakaat*, para. 287 (ECJ).

⁴⁹ *Kadi and Al Barakaat*, para. 308 (ECJ).

⁵⁰ *Kadi and Al Barakaat*, para. 326 (ECJ).

France⁵¹. In order to ensure the effectiveness of judicial review the individuals and organisations included in the list provided in Annex I to the resolution must be granted the possibility to have the Community institutions reassess the lawfulness of the measure in question. But the effectiveness of freezing funds and resources is not given if the concerned persons are inducted to these measures. In order to attain the objective pursued these measures must include an element of surprise. But how can this be achieved without infringement of effectiveness and the right to be heard on the one hand and fundamental rights on the other hand? Of course, the struggle against terrorism is of overriding importance for the safety and conduct of international relations. But this does not mean that measures may be exempt from all review at a subsequent point in time. Neither the Common Position 2002/402, nor the regulation planned procedures of communicating the evidence or giving a chance of hearing those persons⁵². Because they had no possibility to recheck the measures and no opportunity to state their position the appellants' rights to defence were not respected. Because the appellants were not informed of the evidence an effective legal remedy was not possible. The right to be heard is infringed if the person cannot raise a claim. No plaintiff can defend himself if he does not know what he did wrong. Since there was no possibility of effective judicial review and no opportunity for self-defence, the right to be heard and the right to effective judicial review were infringed by the Community measures⁵³.

Right to Respect for Property

Aside from the right to effective judicial review, the right to respect for property is one of the general principles of Community law, Article 1 of the First Additional Protocol to the ECHR. However, the right to respect for property is not absolute. It must be viewed in the context of its role in society⁵⁴. The European Court of Justice has to review whether the act of freezing funds is disproportional to the right to respect for property. The freezing of funds is a temporary measure which does not purport to deprive persons of their property. The European Court of Justice had to check if the measure can be justified. Accordingly, the interest of the public must be weighed against the interest of individuals. The restrictive measures

⁵¹ *Kadi and Al Barakaat*, para. 335 (ECJ).

⁵² *Kadi and Al Barakaat*, para. 345 (ECJ).

⁵³ *Kadi and Al Barakaat*, paras 352-353 (ECJ).

⁵⁴ *Kadi and Al Barakaat*, para. 360 (ECJ).

contribute to actions against the Taliban and link individuals with non-State entities. The aim of the Security Council resolution is to maintain international peace. Theoretically, infringements of property rights can be justified by this aim. But the question arises as to whether such a restriction can be justified in the given cases. The regulation included request possibilities for basic expenses and “extraordinary expense” if the Sanctions Committee expressly objects⁵⁵. But as shown, the applicants’ procedures must afford a chance of effective judicial review. The regulation was adopted by the Community without offering any guarantee of the right to be heard in a situation where property rights are significantly restricted. In combination with the restriction of the right to defence, these measures constitute an unjustified restriction of the right to respect for property. As far as the regulation concerns the appellants, it must be annulled⁵⁶.

C. Analysis of the Judgment

I. The Effect of the Judgment in International Law

On 3 September 2008, the European Court of Justice annulled the regulation. However, the Court did not want to damage the effectiveness of the restrictive measure⁵⁷. In order to maintain effectiveness on the one hand and annul the regulation on the other hand the Court decided to annul the regulation without immediate effect. This decision is uncharacteristic of the Court but comprehensible in the given case in light of the aim of the Security Council resolution. For this reason, the European Court of Justice has ordered that the effects of the regulation be maintained for a period of three months as of the date of delivery. Because of the fact that the judgment does not state if the measures against the plaintiffs were justified, immediate effect would obviate the effect of the regulation. According to Article 231 EC, the effect of the regulation has to be maintained for this period to give the Council the chance to remedy the infringements⁵⁸. This decision seems justified. Indeed, the issue of the infringements of the plaintiffs’ rights is not solved in this manner, but in contrast to the lack of effectiveness and the retrograde step of terrorism combat the decision of perpetuation appears to be fungible.

⁵⁵ *Kadi and Al Barakaat*, para. 364 (ECJ).

⁵⁶ *Kadi and Al Barakaat*, para. 372 (ECJ).

⁵⁷ *Kadi and Al Barakaat*, para. 373 (ECJ).

⁵⁸ *Kadi and Al Barakaat*, para. 375 (ECJ).

In order to comply with the judgment the Commission communicated the UN Sanctions Committee's reasons for listing Mr. Kadi and Al Barakaat. The plaintiffs were given the chance to comment on having no links to the Al-Qaida network. After consideration of the plaintiffs' comments the Commission adopted Regulation (EC) 1190/2008⁵⁹ on 28 November 2008, amending Council Regulation (EC) No 881/2002 for the 101st time. Here it considered listing them again. The Commission saw the listing as justified because of the given association with Al-Qaida. Annex I to this regulation added Al Barakaat International Foundation and Yassin Abdullah Kadi to the list of persons, groups and entities covered by the freezing of funds and economic resources again under this regulation. The regulation entered into force in due time on 3 December 2008. Although the European Court of Justice stated that fundamental rights were infringed, in the end nothing changed for the plaintiffs. First, between 3 September and 3 October the plaintiffs could not extend their fundamental rights because of the court's decision to annul the regulation without immediate effect. Second, the plaintiffs could not convincingly argue that they had no contact to Al-Qaida so that they again find themselves on the aforementioned list. From the plaintiffs' standpoint the decision could be seen as "much ado about nothing".

II. The Problem of Priorities

The primacy of United Nations Security Council resolutions under Chapter VII of the UN Charter is acknowledged by its members. Article 24 of the UN Charter grants the ability to make binding recommendations, which, according to the wording, the members must carry out, Article 25 UN Charter. According to the principles laid down in the UN Charter and the acceptance of its members and Community law, the question arises as to how an area of conflict can at all develop? As shown, the Security Council is bound by fundamental peremptory provisions of jus cogens. However, if jus cogens norms have not been infringed, the Security Council has done nothing wrong. Thus, fundamental rights have to give way to the obligation laid down in Article 25 UN Charter.

Yet, how is the conflict to be resolved if the subordinated legal order guarantees a higher standard of fundamental rights protection? According to both judgments community institutions are not competent to review the

⁵⁹ Commission Regulation No. 1190/2008, O.J.L. 322/25 (2008).

lawfulness of the Security Council resolutions. In this regard, primacy of the superior legal order is ensured.

1. Resemblance to the German (*Solange I*) “*so long as I*” Judgment

Nonetheless, the question arises as to whether the European Court of Justice was right in its position that it has the power to review the community measure. On the one hand, the European Court of Justice has to ensure the possibility to review any community act in the framework of its legal system. On the other hand, the community act simply reflects the ruling from the superior legal order, excluded from discretionary power. The possibility of review calls the primacy into question. This situation resembles the German Federal Constitutional Court’s (*Solange I*) “*so long as I*” judgment of 1974⁶⁰. The German Court stated in this decision that it has full authority to review community measures from the superior legal order, “*so long as*” there is no sufficient protection of human rights guaranteed by the superior legal order, the Community. Even though the European Court of Justice lambasted this judgment, one could presume that the Court has taken advantage of the “*Solange I*” judgment by applying double standards.

It remains questionable if these cases are comparable to each other and if the intentions of the Courts are comparable in the given cases. The European Court of Justice did not avow to take full control “as long as” there is no sufficient standard in human rights protection by the United Nations. But might not that be intended by this judgment?

2. Independent International Court Unwanted

A sufficient standard in human rights protection could be guaranteed by an international court. An administrative court could be seen as the ideal solution to this problem. Creation of a new administrative court seems desirable at first glance, but when considering the difficulties that arose while creating the United Nations Administrative Tribunal it begins to seem unrealistic⁶¹. With regard to an already existing court, the International

⁶⁰ Internationale Handelsgesellschaft GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (*Solange I*) [1974] 2 CMLR 540.

⁶¹ *Christian Tomuschat, Die Europäische Union und ihre völkerrechtliche Bindung, Vorträge und Berichte Nr. 158, Zentrum für Europäisches Wirtschaftsrecht (2007), 34.*

Court of Justice could be seen as the proper court to review Security Council resolutions. However, the UN Charter includes no specific ability for the competence to assess measures. Indeed, not only does the UN Charter include no specific ability, such ability was discussed at the “United Nations Conference on International Organization” in San Francisco in 1945, but explicitly rejected⁶². Nevertheless, today it is questionable if it cannot be interpreted by the UN Charter. The International Court of Justice itself states that it has no power to review Security Council resolutions⁶³. Others cite implicit authority under Article 96 UN Charter⁶⁴. Besides the politically motivated position of the International Court of Justice the majority of literature arrives at the conclusion that the power to review is applied in the UN Charter. If the Charter is to be recognized as “the constitution” of the international community, respect in practice is just the next step in the development of the International Court of Justice into a court with the power to review Security Council resolutions. It simply has to give up its politically motivated position towards having the power to review. One could come to the conclusion that the judgment of the European Court of Justice renews the discussion about whether the International Court of Justice could be seen as a constitutional court.

The development of the relationship between Community law and national law again comes to mind. Even though there is no international court that understands itself as an independent court with the power to review or even as constitutional court, the building blocks of such a court are invested in the UN Charter. Until now, this development is unwanted politically, however, an international (constitutional) jurisdiction was also unwanted in the European Communities. At that time the aim of the Community was to create a uniform common market. The EEC Treaty even lacked a provision dealing with priority. The starting position of establishing supremacy was worse than today on an international level. While having no formal basis in the EC Treaty, the European Court of Justice developed the

⁶² *United Nations Committee of Jurists*, Documents of the United Nations Conference on International Organization San Francisco, 1945 Volume XIV, 821-822.

⁶³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports (1971), 16, para. 89; *Bruno Simma*, The Charter of the United Nations a commentary, 2^{ed}. Vol. 2 (2002), 1187-1188.

⁶⁴ *Martin Dixon*, Textbook on International Law 6th^{ed}. (2007), 304; *Mehrdad Payandeh*, Rechtskontrolle des UN-Sicherheitsrates durch Staatliche und überstaatliche Gerichte, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 66 (2006), 41-71, 49.

priority in its jurisdiction⁶⁵. Therefore the validity of Community law cannot be reviewed by the Member States. So why does it differ between the proportion to the Member States and the international legal order? Admittedly at that time the Community included six Member States which were relatively homogenous in their cultural and economic starting position. However, after the Second World War, the states were mindful of maintaining sovereignty. Creating a common market was the aim of the Community, a political union was unwanted. In my view the starting positions are comparable, even if international law covers more members, which exhibit greater differences. The actors in international law are more open and more used to working together in international partnerships, agreements and organisations, than they were after the Second World War. Even if on the one hand actors do not want to suffer the loss of sovereignty, on the other hand they create international organisations in order to be heard and to express their concepts globally⁶⁶.

3. Independent International Court as Syllogism

The starting positions seem comparable to each other. The European Court of Justice acknowledges supremacy as a basic principle while mentioning that it has no power to review Security Council resolutions. Accordingly the court assesses the transforming act with regard to constitutional principles of Community law. However, if this standard is reached in international law the European Court of Justice has to relinquish from its viewpoint as the German Federal Constitutional Court did. Upon delivering a comparable standard, the German Federal Constitutional Court stated in its “*as long as IF*” (*Solange II*) judgment of 1987, that as long as

⁶⁵ Josephine Steiner and Lorna Woods and Christian Twigg-Flesner, *EU Law*, 9th ed. (2006), 71.

⁶⁶ International organisations like *United Nations* as well as regional organisations like *North American Free Trade Agreement (NAFTA)*, *Central American Integration System (SICA)*, *Caribbean Community (CARICOM)*, *Andean Community*, *Southern Common Market (MERCOSUR)*, *European Free Trade Association (EFTA)*, *European Union (EU)*, *Commonwealth of Independent States (CIS)*, *Arab Maghreb Union (AMU)*, *Economic Community of West African States (ECOWAS)*, *Economic Community of Central African States (ECCAS)*, *Southern African Development Community (SADC)*, *Intergovernmental Authority on Development (IGAD)*, *Cooperation Council for the Arab States of the Gulf (GCC)*, *South Asian Association for Regional Cooperation (SAARC)*, *Association of Southeast Asian Nations (ASEAN)*, *Pacific Islands Forum (PIF)*.

Community law ensures the effective protection of fundamental rights, a ruling from the European Court of Justice would not be subject to a review by the German Court⁶⁷. The German Court developed its jurisdiction in a logical and consistent manner. Thirteen years later, the demanded protection of human rights was reached in the German Court's view so that it granted superiority. Since the European Court has assessed the regulation with regard to its standard, the Court has to acquiesce if this standard is given by the superior legal order. Without mentioning the words "as long as", the judgment of the court has to be understood as an "as long as" judgment. In my view an independent international (constitutional) jurisdiction could be a syllogism if the International Court of Justice changes its politically motivated position towards reviewability. Such an acknowledgment seems to reflect and combine the different aims of the actors in international law. The Member States acknowledge the superior legal order without losing influence if the standard is not guaranteed by the superior legal order in the future. This solution for solving the problem of priorities between Germany as a Member State and the Community is not unique in international law. In the *Bosphorus* case, the ECHR stated that the protection of fundamental rights by EC law could have been regarded as equivalent to the standard of the European Convention on Human Rights. The court just advanced the *Solange II* decision. "*Such a presumption could be rebutted if, in a particular case, it was considered that the protection of Convention rights was manifestly deficient*"⁶⁸.

III. Jus Cogens as a Basis for an Internal Structure of International Fundamental Rights

As shown jus cogens norms are norms of international law with peremptory force. They are binding on all subjects of international law with no derogation except by other peremptory rules. Theoretically, jus cogens norms could develop into an all-embracing system of protection for fundamental rights. The Vienna Convention refers disputes of jus cogens norms to binding judicial decisions by the International Court of Justice. The International Court of Justice is seen by the treaty as the organ for giving binding decisions. However, the Vienna Convention on the Law of

⁶⁷ Application of *Wünsche Handesgesellschaft (Solange II)* [1987] 3 CMLR 225.

⁶⁸ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, application No. 45036/98, judgment of the European Court of Human Rights (Grand Chamber) of 30 June 2005, (2006) 42 E.H.R.R. 1.

Treaties includes no absolute right for the International Court of Justice. The validity is limited because of Articles 65 and 66 of the Vienna Convention on the Law of Treaties. By these norms, parties to the Treaty have the right to claim the invalidity of the Treaty in case of an alleged conflict with a peremptory norm. This limitation does not fit with *jus cogens* as an all-embracing system of protection for fundamental rights.

However, this abstraction does not correspond to reality. In practice, the leading political organs in international law are the General Assembly of the United Nations and the Security Council of the United Nations. They act against violations of *jus cogens* norms. Nonetheless, these organs are political, not judicial organs, with no possibility of condemnation. Accordingly, determination and expansion of *jus cogens* norms is needed most to create sufficient protection of human rights in international law.

IV. Primary Community Law as Constitutional Law

If one compares the judgment of the Court of First Instance with the judgment of the European Court of Justice, it is evident that the European Court of Justice remained silent with regard to Article 103 UN Charter. This norm conveys conflict obligations under the UN Charter prior to other international obligations. The argument that the UN Charter is to be recognized as the constitution in international law is ultimately based on Article 103 UN Charter. So the question arises as to how the European Court of Justice could pay no attention to the norm, even though it played a major role in the Court of First Instance's judgment. Even if the Community is not a member of the UN Charter it has assumed powers from Member States in an area referred to under the UN Charter. Thus, it must ensure that Member States fulfil their obligations. But does the obligation in the given case correspond to the obligation under the UN Charter? Fundamental rights are infringed. However, fundamental rights belong to primary community law. The European Court of Justice defines the EC Treaty and therefore primary community law as the constitutional charter⁶⁹.

Regarding the constitutional charter: If primary community law is the constitutional charter, non-observance of Art. 103 EC has to be seen as the consequence. Constitutions arising from the autonomy of the Community legal system cannot be changed by international agreements, treaties or practice⁷⁰. However, can primary community law be seen as a constitutional

⁶⁹ *Kadi and Al Barakaat*, para. 281 (ECJ).

⁷⁰ *Kadi and Al Barakaat*, para. 282 (ECJ).

charter? The European Court of Justice mentioned this phrase once in its rulings⁷¹. The political answer of the Lisbon Treaty is the renunciation of anything that might suggest that the EC Treaty is a constitution. If the Court's viewpoint influences community law, the status of the United Nations is debilitated until a sufficient standard in human rights protection is guaranteed by international law.

D. Conclusion

In my view the development in international law pertaining to the standard of fundamental rights bears a resemblance to the argument between the European Union and its Member States. Similar to the German Federal Constitutional Court in 1974, the European Court of Justice manifested the priority of international law by its judgment of 2008. Even if the European Court of Justice has stated that the protection of fundamental rights is at present not comparable to the standard in the Community, the Court has taken the next step of establishing an independent international court, possibly even an international constitutional court. Since the European Court has assessed the regulation with regard to its standard, the Court has to acquiesce if this standard is given by the superior legal order. I have to admit that the viewpoint of the European Court of Justice shows only the beginning of this development, but it unavoidably leads to an independent international (constitutional) court if the United Nations wishes to be capable of acting. The only hurdle is the politically motivated position which the International Court of Justice has assumed. If the United Nations notices that it has to guarantee this standard in human rights protection to be capable of acting, its point on an independent international (constitutional) court has to change. If its position changes and this standard is guaranteed in the superior legal order the European Court of Justice has to accept the priority of international law as a superior legal order. In 1974 the German Federal Constitutional Court considered cementing its position of priority vis-à-vis the Community. History shows that the German Court initiated the process of establishing a system of protection of fundamental rights by the European Court of Justice. If the International Court of Justice starts establishing fundamental rights in international law, an independent international (constitutional) court will be the syllogism.

⁷¹ *Parti écologiste "Les Verts" v European Parliament*, Case 294/83 [1986] E.C.R. 1339, para. 23.

The Signing of the U.S.-India Agreement Concerning Peaceful Uses of Nuclear Energy

Jörn Müller*

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A. Introduction

On 10 October 2008, the US Secretary of State Condoleezza Rice and the Indian Minister of External Affairs Pranab Mukherjee signed the “Agreement for Cooperation between the Government of the United States of America and the Government of India Concerning Peaceful Uses of Nuclear Energy” (hereafter: US-India Agreement).¹

The text of the US-India Agreement had been agreed upon in summer 2007; the text was released on 3 August 2007. Preliminary assessments were mixed: Some scholars were highly critical, going so far as dubbing it a “debilitating blow to the non-proliferation regime”.² Others saw the deal more favourably, pointing to a possible strengthening of the nuclear non-proliferation regime through a better integration of India.³ However, although the terms of the US-India Agreement have been known for some time, its impact depended on several other decisions that had to be made prior to its formal entry into force. In particular, India had to negotiate a safeguards agreement with the International Atomic Agency (IAEA). In addition, the Nuclear Suppliers Group (NSG) had to approve the US-India Agreement. Moreover, domestic approval both within India and the United States had to be reached. Several early commentators correctly pointed out that there was still room for possible modifications of the Agreement.⁴ Moreover, it was entirely possible that the Agreement would be defeated altogether.⁵

¹ The agreement is available in full text at <http://www.state.gov/r/pa/prs/ps/2007/aug/90050.htm> (last visited 5 November 2008). It is also sometimes termed as “123 Agreement”, referring to section 123 of the US Atomic Energy Act of 1954, Pub. L. 109-401, 68 Stat. 919, which lays down the requirements under US domestic law for nuclear cooperation with other States.

² *Kesav Murthy Wable*, The U.S.-India Strategic Nuclear Partnership: A Debilitating Blow to the Non-Proliferation Regime, *Brooklyn Journal of International Law* 33 (2008) 719-759.

³ *Kate Heinzelman*, Towards Common Interests and Responsibilities: The U.S.-India Civil Nuclear Deal and the International Nonproliferation Regime, *Yale Journal of International Law* 33 (2008) 447-478, 449.

⁴ *Id.*, 472-478; *Oliver Meier*, The US-India Nuclear Deal: The End of Universal Non-Proliferation Efforts?, *Internationale Politik und Gesellschaft* (2006) 4, 28-43, 38-41.

⁵ *Leonard Weiss*, U.S.-India Nuclear Cooperation. Better Later than Sooner, *Nonproliferation Review* 14 (2007) 429-457, 452; *Harald Müller & Carsten Rauch*, Der Atomdeal. Die indisch-amerikanische Nuklearkooperation und ihre Auswirkung

Now that all milestones have been reached and the Agreement has been formally concluded, this note will outline its background and its contents and give a brief assessment of its compatibility with and its impact on the international nuclear non-proliferation regime. The first part of the note will give a short overview of the international non-proliferation regime relevant for the US-India Agreement. The second part will deal with the evolution of the Agreement and will give some background information on the Indian nuclear program. The third part will give a preliminary assessment of the Agreement's impact on the global non-proliferation regime.

B. The Nuclear Non-Proliferation Regime

I. The NPT and Non-Proliferation

Numerous treaties,⁶ Security Council resolutions⁷ and soft law instruments⁸ are part of the international regime against the proliferation of nuclear weapons, but the Nuclear Non-Proliferation Treaty (NPT)⁹ with its 189 States parties forms its core.¹⁰ Unlike other multi-lateral

auf das globale Nichtverbreitungsregime (2007), 23. Especially domestic approval in India turned out to be difficult, yet was finally achieved in summer 2008.

⁶ Among them are: The Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, 5 August 1963, 480 U.N.T.S. 43; the Treaty on the Limitation of Underground Nuclear Weapon Tests, 3 July 1974, 1714 U.N.T.S. 29637. In addition, there are several treaties establishing nuclear weapon free zones, such as the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, 14 February 1967, 634 U.N.T.S. 326 and the South Pacific Nuclear Free Zone Treaty, 6 August 1985, 1445 U.N.T.S. 177.

⁷ This includes the "legislative" Security Council Resolutions SC Res. 1540, UN SCOR, 4956th mtg., UN Doc. S/RES/1540 (28 April 2004) and SC Res. 1673, UN SCOR, 5429th mtg., UN Doc. S/RES/1673 (27 April 2006), dealing with the risk of proliferation of weapons of mass destruction to non-state actors. On the "legislative" function of the Security Council see: *Stefan Talmon*, *The Security Council as World Legislature*, *American Journal of International Law* 99 (2005) 175-193.

⁸ Among these soft law instruments are the Nuclear Suppliers Group, the Proliferation Security Initiative and the Zangger Committee.

⁹ Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 729 U.N.T.S. 161.

¹⁰ All UN member States (plus the Holy See) with the exception of India, Pakistan and Israel. North Korea withdrew from the NPT in 2003, although there have been some doubts as to the legality of its withdrawal. See *Heike Krieger*, *A Nuclear Test for Multilateralism - Challenges to the Non-Proliferation Treaty as a Means of Arms Control*, *German Yearbook of International Law* 49 (2006) 17-50, 26, 27 and *Andreas L. Paulus & Jörn Müller*, *Security Council Resolution 1718 on North Korea's Nuclear*

non-proliferation and disarmament conventions against the proliferation of weapons of mass destruction,¹¹ it does not universally prohibit the possession of the category of weapons it deals with. Instead, it divides the world into non-nuclear weapon States and nuclear weapon States. Only the latter are entitled to develop, produce and stockpile nuclear weapons. Non-nuclear weapon States are defined as those States that have not conducted a nuclear explosion prior to January 1, 1967 – *i.e.* all States with the exception of the United States, Russia, the United Kingdom, France and China (Art. IX para. 3 NPT). This is a closed group: other States may not join the NPT as nuclear weapon States even if they have developed nuclear weapons prior to this. Instead, they would have to disarm their nuclear weapons.¹² Since support for the NPT was initially far from universal, this exclusive definition was a means to dissuade States from first developing nuclear weapons in order to later join the NPT as a nuclear weapon State.

The distinction between nuclear weapon States and non-nuclear weapon States is reflected in the NPT's non-proliferation obligations in Art. I and II. According to Art. II NPT, the non-nuclear weapon States undertake "not to receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices." In addition, the non-nuclear weapon States may "not [...] manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices." Art. I NPT contains no such prohibition for the nuclear weapon States. However, they are obliged "not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly" and may not assist non-nuclear weapon States in developing nuclear weapons.

For verification purposes, Art. III NPT stipulates that all non-nuclear weapon States party to the NPT undertake to conclude safeguards agreements with the International Atomic Energy Agency (IAEA). They apply to all source or fissionable material in all peaceful nuclear activities within a non-nuclear weapon State party to the NPT so as to ensure that this material is not diverted to the production of nuclear weapons, for which it is

Test, American Society of International Law Insights 10 (3 November 2006), available at <http://www.asil.org/insights061103.cfm> (last visited November 2008).

¹¹ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993, 1974 U.N.T.S. 45; Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972, 1015 U.N.T.S. 163.

¹² The only State so far to do so was South Africa. For an overview, see *Joseph Cirincione & Jon Wolfsthal & Miriam Rajkumar, Deadly Arsenal: Nuclear, Biological and Chemical Threats*, 2nd ed. (2005), 407-415.

indispensable. Commonly, these safeguards are termed “comprehensive” or “full-scope safeguards.” Moreover, all States party to the NPT undertake not to provide source or special fissionable material or certain technology especially designed for the production, processing or use of such material to non-nuclear weapon States, unless safeguards apply to the material also in the importing State, even if that State is not a party to the NPT.

Due to the distinction between nuclear haves and nuclear have-nots, the NPT has been described as not being based on strict reciprocity.¹³ However, others have described its bargain as “the exchange of non-acquisition and non-dissemination pledges between and among nuclear weapons States and non-weapons States alike, to the collective security benefit of all.”¹⁴ Yet this explanation still falls short of providing reciprocity. Rather, the burden remains one-sided, since only non-nuclear weapon States have to relinquish nuclear weapons. Consequently, other elements in the NPT’s bargain are of crucial importance for restoring some form of material reciprocity, namely the pledge for nuclear disarmament and the promise not to interfere with and to cooperate in the field of civilian uses of nuclear energy.

II. The Importance of Nuclear Disarmament

The disarmament pledge is contained in Art. VI NPT:

“Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

The importance of the NPT’s nuclear disarmament component was repeatedly stressed by non-nuclear weapon States, as numerous UN General Assembly resolutions show.¹⁵ Moreover, the periodical NPT Review

¹³ See, *Krieger*, 22-24 (*supra* note 10). See also *Christopher Daase*, *Der Anfang vom Ende des nuklearen Tabus*, *Zeitschrift für internationale Beziehungen* 10 (2003) 7-41, 34.

¹⁴ *Christopher A. Ford*, *The Nonproliferation Bestiary: A Typology and Analysis of Non-Proliferation Regimes*, *New York University Journal of International Law and Politics* 39 (2007), 937-993, 962.

¹⁵ For recent examples see UN General Assembly Resolution 62/42: Nuclear disarmament, GA Res. 62/42, UN GAOR, 62nd sess., 61st plen. mtg., UN Doc.

Conferences unanimously adopted two landmark documents in 1995¹⁶ and 2000,¹⁷ which contained principles and objectives towards the aim of total nuclear disarmament. In particular, the latter document contained thirteen “practical steps for the systematic and progressive efforts to implement article VI”. Two concrete treaties are identified as indispensable intermediate steps towards nuclear disarmament: The Comprehensive Nuclear Test-Ban Treaty (CTBT)¹⁸ and a convention banning the production of fissile material for nuclear explosive devices (commonly called Fissile Material Cut-Off Treaty, or FMCT). Moreover, further steps were mentioned, *inter alia* unilateral reductions of nuclear arsenals and a diminishment of the role for nuclear weapons in national security policies.¹⁹ The NPT States parties have thus indicated how to interpret the disarmament obligation. The conclusion that Art. VI goes “beyond a mere obligation of conduct”, as the ICJ declared, is thus well-founded.²⁰

III. Other Concessions: Peaceful Cooperation and Security Guarantees

Before total nuclear disarmament can be achieved, some detrimental effects of the temporary discrimination have to be outweighed by concessions that are effective immediately. During the NPT negotiations, many non-nuclear weapon States were concerned that the nuclear weapon States would deny them the right to peaceful nuclear development and would keep advanced nuclear technology secret in order to minimize any

A/RES/62/42 (8 January 2008); UN General Assembly Resolution 62/37: Renewed determination towards the total elimination of nuclear weapons, GA Res. 62/37, UN GAOR, 62nd sess., 61st plen. mtg., UN Doc. A/RES/62/37 (10 January 2008); UN General Assembly Resolution 61/104: Comprehensive Nuclear-Test-Ban Treaty, GA Res. 61/104, UN GAOR, 61st sess., 67th plen. mtg., UN Doc. A/RES/61/104 (19 December 2006).

¹⁶ Decision 2 adopted on 11 May 1995 at the 17th plenary meeting of the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 11 May 1995, NPT/CONF.1995/32 (Part I), 9-12.

¹⁷ Final Document of the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 19 May 2000, NPT/CONF.2000/28 (Parts I and II).

¹⁸ Comprehensive Nuclear-Test-Ban Treaty, 24 September 1996, 35 I.L.M. 1439, (not yet in force).

¹⁹ See, NPT/CONF.2000/28 (Parts I and II), 14-15 (*supra* note 17).

²⁰ *Legality of the Use or Threat of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, 226-267, 264 (para. 99). See also *Krieger*, 24 (*supra* note 10).

proliferation risk and to keep a technological advance.²¹ To alleviate these concerns, Art. IV NPT was included, highlighting the “inalienable right” to “research, production and use of nuclear energy for peaceful purposes” within the limits of Art. I and II NPT. The States parties are furthermore committed to facilitating the exchange of equipment, materials and information for peaceful uses.

In particular the developing countries among the non-nuclear weapon States, saw this as an important incentive for joining the NPT. They have always insisted on active contributions by States with advanced nuclear technology. This was reflected in the final document of the 1995 NPT Review and Extension Conference and that of the 2000 NPT Review Conference, which also stated that non-nuclear weapon States party to the NPT should be given preferential treatment in activities designed to promote the peaceful uses of nuclear energy.²²

In addition, non-aligned non-nuclear weapon States feared that they would be unable to credibly deter a nuclear attack without possessing nuclear weapons. They therefore pressed for security guarantees. Nevertheless, they were not integrated in the treaty but were only issued through unilateral declarations and in a very weak form through Security Council Resolutions.²³

IV. The NPT’s Bargain at a Glance

The NPT’s web of rights and obligations is structured so as to achieve an inclusion of all interests concerned. The NPT is best described as resting on a layered form of reciprocity: While its central non-proliferation element is discriminatory, the treaty as a whole is intended to mitigate the effects of this inequality and to finally overcome nuclear weaponry. Progress in

²¹ See, for example, the statement by the representative of India to the ENDC, Final Verbatim Record of the 298th Meeting, 23 May 1967, UN Doc. ENDC/PV.298, 4-17. For a contemporary introduction to the negotiations in that respect see *Mason Willrich*, *Non-Proliferation Treaty: Framework for Nuclear Arms Control* (1969), 127-150.

²² See, NPT/CONF.1995/32 (Part I), 11 (para. 16) (*supra* note 16), and NPT/CONF.2000/28 (Parts I and II), 9 (*supra* note 17).

²³ UN Security Council Resolution 255: Question relating to Measures to Safeguard Non-nuclear-weapon States Parties to the Treaty on the Non-proliferation of Nuclear Weapons, SC Res. 255, UN SCOR, 1433th mtg., UN Doc. S/RES/255 (19 June 1968); UN Security Council Resolution 984, SC Res 984, UN SCOR, 3513th mtg., UN Doc. S/RES/984 (11 April 1995).

nuclear disarmament is thus the crucial *quid pro quo* by the nuclear weapon States for the renunciation of nuclear weapons by the other States parties.²⁴ All States parties agree that the nuclear world order provided for in the NPT is only a temporary *status quo*. The aim of the NPT is thus full material reciprocity in the field of nuclear weapons through their eventual elimination. To that end, the elements of the bargain are mutually reinforcing and depend upon their even-handed and good faith implementation in practice for their success.

V. Other Elements of the Non-Proliferation Regime

While the NPT is at the core of the non-proliferation regime, in the context of the US-India Agreement other elements have to be taken into account: Firstly, the Comprehensive Nuclear Test-Ban Treaty, which has been ratified by 146 States. 44 States listed in its Annex 2 have to ratify the Treaty before it may enter into force. Nine of these States have not yet ratified, including India and the United States.²⁵ The Treaty bans all nuclear tests and establishes an elaborate verification regime that is able to detect and localize nuclear tests worldwide.

Secondly, the envisaged Fissile Material Cut-Off Treaty has to be considered. Its goal is to ban the production of fissionable material for nuclear explosive devices. However, there has been no progress in the negotiations in the Conference on Disarmament. Reportedly, this is mainly due to the resistance of China, Pakistan and Iran – but India also notably voiced concerns in 2007.²⁶

Thirdly, the Nuclear Suppliers Group (NSG) is of particular relevance. The NSG is a voluntary association of States that export nuclear technology and material.²⁷ It has elaborated guidelines for exports of nuclear technology

²⁴ David A. Koplow, *Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?*, *Wisconsin Law Review* (1993) 301-394, 336-337, in particular note 152, quoting US President Johnson acknowledging the *quid pro quo* character.

²⁵ State as of 14 November 2008. Further updates may be obtained from the CTBTO website at <http://www.ctbto.org/the-treaty/status-of-signature-and-ratification/> (last visited 14 November 2008).

²⁶ Shannon N. Kile, *Nuclear Arms Control and Non-Proliferation*, *SIPRI Yearbook* (2008) 337-365, 362.

²⁷ Initially, seven governments participated in the NSG (Canada, West Germany, France, Japan, the USSR, the United Kingdom, and the United States). At the time of writing (November 2008), 45 States participated in the NSG. For a list see

and material for peaceful purposes in order to prevent the transfer of these items to non-safeguarded activities.²⁸ Although these guidelines are only soft-law instruments, all participating States have consistently claimed to observe them – therefore they have considerable impact. In 1992, the NSG introduced a requirement of full-scope safeguards for recipients of nuclear technology and material.²⁹ To that end, the NSG has drawn up a “trigger list”: Items on this list may only be exported to States that have agreed upon full-scope safeguards agreements with the IAEA – they thus have to fulfil the requirement set out in Art. III NPT for non-nuclear weapon States. Yet the “trigger list” does not only cover fissionable material, but also dual-use technology, *i.e.* equipment and material useful to military nuclear activities that may also be used in peaceful (nuclear and non-nuclear) activities. Since the NSG comprises all major exporters of advanced nuclear technology, not meeting its requirements amounts to being cut off from the world market in this field.

C. India and the Nuclear Non-Proliferation Regime

I. The History of India’s Nuclear Program

The significance of the US-India Agreement can only be explained in context of the special position of India in the field of nuclear non-proliferation. As a State not party to the NPT, India has criticized the Treaty for its discriminatory distinction between nuclear haves and have-nots. When the NPT entered into force on 5 March 1970, India had already acquired nuclear technology and material that was not subject to safeguards. In particular, in the late 1950s India had built a reactor (called CIRUS) with Canadian assistance that used heavy water supplied by the United States. It was capable of producing plutonium suitable for nuclear weapons and was not subject to safeguards, although India had agreed to use the technology and material received for peaceful purposes only. Nevertheless, in 1974, India successfully conducted its first nuclear test for which it used

<http://www.nuclearsuppliersgroup.org/member.htm> (last visited 12 November 2008). A detailed self-description of the NSG is contained in the IAEA Information Circular ('The Nuclear Suppliers Group: Its Origins, Role and Activities'), 10 May 2005, IAEA Doc. INFCIRC/539/Rev. 3.

²⁸ IAEA Information Circular ('Guidelines for Nuclear Transfers'), 7 November 2007, IAEA Doc. INFCIRC 254/Rev.9/Part 1.

²⁹ Annex to IAEA Information Circular ('Guidelines for Nuclear Transfers'), October 1995, IAEA Doc. INFCIRC/254/Rev.2/Part 1.

plutonium produced in the CIRUS reactor. In an attempt to evade international criticism, India labelled the test a “peaceful nuclear explosion”.³⁰

The United States responded by introducing the requirement of full-scope safeguards for recipients of nuclear technology and material into domestic law in 1978. India was not willing to accept such full-scope safeguards which would have rendered its nuclear weapons program all but impossible. Consequently, all US nuclear exports to India were cut off in 1980. Moreover, the US initiated the creation of the NSG and actively sought the participating States to also adopt the full-scope safeguards requirement. When the NSG finally adopted this requirement in 1992, India’s nuclear program was hampered to some extent due to the lack of access to the nuclear world market, especially since India was dependent on nuclear fuel imports for some of its reactors. Some relief came from Russia, which supplied fuel to India under a highly questionable interpretation of a safety exception of the NSG guidelines, and from France, which supplied fuel to India prior to its adoption of the NSG standards in 1995.³¹

Despite these problems, India was able to create an ambitious nuclear program with closely intertwined military and civilian components.³² It built reactors that did not rely on imported fuel and constructed facilities for the domestic production of nuclear fuel, while at the same time advancing its research in nuclear weapons technology. Its military nuclear program culminated in a series of nuclear tests in 1998, the first and only Indian tests since the 1974 “peaceful” nuclear explosion.³³ These tests – and those by Pakistan which followed soon after – were condemned by the UN Security Council in its Resolution 1172.³⁴ India has probably assembled several dozen nuclear warheads; current estimates put the number at approximately

³⁰ For a description of the background to the 1974 test and the legal implications, see *Gary Milhollin*, *Stopping the Indian Bomb*, *American Journal of International Law* 81 (1987), 593-609, 595-596.

³¹ *Paul K. Kerr*, *Congressional Research Service Report RL33016. U.S. Nuclear Cooperation with India: Issues for Congress* (Updated 17 October 2008), CRS-3.

³² For an overview of India’s nuclear infrastructure see *Cirincione & Wolfsthal & Rajkumar*, 233-237 (*supra* note 12).

³³ See *Weiss*, 430-431 for a description of the political developments within India that led to the tests (*supra* note 5).

³⁴ UN Security Council Resolution 1172, SC Res. 1172, UN SCOR, 3890th mtg., UN Doc. S/RES/1172 (6 June 1998).

60.³⁵ It is not known how many nuclear weapons India intends to produce – the only public statements by officials are that they want to maintain a “minimum credible nuclear deterrent”.³⁶

II. The US-India Nuclear Agreement

At the same time, India actively sought for a way out of its nuclear isolation. Success came in 2005, when India and the United States agreed on a program for civilian nuclear cooperation.³⁷ India agreed to separate the military sector of its nuclear program from the civilian sector and to place the latter under IAEA safeguards. In turn, the US would lift domestic law restrictions on nuclear trade with India, in particular by dropping the full-scope safeguards requirement and seeking an exception from the NSG guidelines. Both sides proceeded on their respective parts of the deal: India prepared a separation plan,³⁸ whilst the US Congress made the necessary domestic legal changes.³⁹ The US administration was thus free to negotiate a civilian nuclear cooperation agreement, subject to approval by Congress,⁴⁰ which eventually led to the US-India Agreement.

In essence, the Agreement permits civilian nuclear trade between India and the United States. In return, India agrees to separate its military nuclear sector from its civilian sector and put the latter under IAEA

³⁵ Robert S. Norris & Hans M. Kristensen, *India's Nuclear Forces 2007*, Bulletin of the Atomic Scientists 64 (2007), 74-78, 74; Shannon N. Kile & Vitaiy Fedchenko & Hans M. Kristensen, Appendix 8A. World nuclear forces, 2008, SIPRI Yearbook (2008), 366-398, 389.

³⁶ See, Norris & Kristensen, 74 (*supra* note 35) and Cirincione & Wolfsthal & Rajkumar, 407-415 (*supra* note 12).

³⁷ For a detailed introduction into the political background see Weiss, 429-436 (*supra* note 5).

³⁸ For a description and analysis of the Indian separation plan see Shannon Squassoni, Congressional Research Service Report RL33292. *India's Nuclear Separation Plan: Issues and Views* (Updated 22 December 2006). The text of the plan was communicated to all IAEA members by IAEA Information Circular ('Implementation of the India-United States Joint Statement of July 18, 2005: India's Separation Plan'), 25 July 2008, IAEA Doc. INFCIRC/731.

³⁹ Henry J. Hyde, *United States-India Peaceful Atomic Energy Cooperation Act of 2006*, Pub. L. No. 109-401, tit. I, 120 Stat. 2726.

⁴⁰ The final approval came on 27 September 2008 with a House vote of 110-369 and on 1 October 2008 with a Senate vote of 86-13. The “United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act”, Pub. L. 110-369 was signed into law by US President Bush on 8 October 2008, paving the way for the formal signing two days later.

safeguards. At first glance, this seems to be rather insignificant. Yet the Agreement is nonetheless remarkable for several reasons. Firstly, it enables trade in nuclear technology without India having to accept full-scope safeguards. Moreover, it enables nuclear trade with a State that is qualified as a non-nuclear weapon State under the NPT that has a full-fledged nuclear weapons program and stays outside the NPT. Although all trade is clearly limited to the civilian program and all fissionable material will be subject to safeguards as required by Art. III (2) NPT, this is nevertheless an extreme departure from previous US policy and that of the NSG. Secondly, a clear statement is missing that the US would terminate the agreement in case of a further nuclear test by India.⁴¹ Thirdly, Art. 5 (6) of the Agreement contains terms committing the US to secure a reliable supply of nuclear fuel to India and to support an Indian effort to build a strategic nuclear fuel reserve to guard against any disruption of fuel supply over the lifetime of India's reactors. Although these provisions are so broad that they constitute more of a declaration of political intent than concrete legal obligations, they are nevertheless remarkable additions to the nuclear cooperation agreements previously concluded by the United States.

III. The India-Specific Safeguards Agreement

After successful negotiations between the IAEA and India, the India-specific safeguards agreement was approved by the IAEA Board of Governors on 1 August 2008.⁴² The Agreement has not yet entered into force, as this is dependent upon a declaration by India that its statutory and/or constitutional requirements have been met (Art. 104). The Safeguards Agreement is an "umbrella agreement", *i.e.* it details the safeguards procedure, yet India unilaterally determines to which facilities it will apply. However, once the Safeguards Agreement applies to a certain facility, India may not unilaterally withdraw the site from its application.

⁴¹ *Wade Boese*, U.S.-Indian Nuclear Deal Advances, *Arms Control Today* 37 (2007), available at <http://www.armscontrol.org/epublish/1/109> (last visited 20 October 2008).

⁴² The text of the Agreement has not yet been released to the public, but some information as to its content was made public by the IAEA Director-General, see *Kerr*, CRS-24-26 (*supra* note 31). The text of the final draft agreement (IAEA Doc. GOV/2008/30), which was in all likelihood adopted without changes, has been leaked and is available on various websites, *e.g.* at http://www.isis-online.org/publications/southasia/India_IAEA_safeguards.pdf (last visited 10 November 2008). The following remarks relate to this leaked final draft.

India also entered into negotiations on an Additional Protocol, which would strengthen IAEA verification rights.

IV. The Approval by the Nuclear Suppliers Group

Moreover, the US-India Agreement necessitated a waiver of the NSG requirement of full-scope safeguards. Some States attempted to attach conditions to such a waiver, such as an automatic termination, in case of a nuclear test by India. Yet, due to intense US pressure and lobbying,⁴³ India was finally granted an unconditional waiver.⁴⁴ The only concession India had to make was to issue a unilateral statement, detailing its commitment to non-proliferation.⁴⁵ However, the NSG explicitly took note of the steps initiated by India regarding the separation plan, the conclusion of a safeguards agreement with the IAEA and its unilateral non-proliferation pledge, but did not formally tie the waiver to the implementation of these steps by India. Rather, it is within the discretion of each NSG member State to decide of its own accord what steps to take if India does not stick to its promise. Since the NSG works through consensus, revoking the waiver requires universal support within the NSG. It therefore created a full-fledged exception from its requirement for full-scope safeguards for nuclear trade with India. The only requirement is that any transfers must be for peaceful purposes and that the material transferred is subject to safeguards.

D. The Compatibility of the Agreement with the NPT: A Preliminary Assessment

I. Possible Contravention of Art. I NPT by the United States

Since India is a non-nuclear weapon State in the terminology of the NPT despite possessing nuclear weapons, the Agreement may be contrary to

⁴³ *Wade Boese*, NSG, Congress Approve Nuclear Trade with India, Arms Control Today 38 (2008), available at http://www.armscontrol.org/act/2008_10/NSGapprove (last visited 14 November 2008).

⁴⁴ For the text of the NSG approval see the IAEA Information Circular ('Statement on Civil Nuclear Cooperation with India'), 19 September 2008, IAEA Doc. INFCIRC/734.

⁴⁵ Statement by External Affairs Minister of India Shri Pranab Mukherjee on the Civil Nuclear Initiative, 5 September 2008, available at <http://www.indianembassy.org.cn/press/20080916-1.htm> (last visited 14 November 2008)

US obligations under Art. I NPT “not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices”. Critics argue that the Agreement may have the effect of assisting India in its nuclear weapons program.⁴⁶ Accordingly, the provision of fissionable material by the US to India would free its limited domestic resources for use in its nuclear weapons program, enabling it to produce nuclear weapons faster and in greater numbers.⁴⁷ Whether this is in fact true is open to some debate,⁴⁸ although clearly the ability to buy fissionable material on the world market will be advantageous for the Indian nuclear program as a whole.

Nevertheless, this does not necessarily amount to “assistance”, qualified as illegal under Art. I NPT. According to economics theory, any form of trade beneficial to India’s economy makes free resources that may be used in a nuclear weapons program.⁴⁹ Yet the NPT is clearly not intending to stifle trade. Moreover, according to Art. IV (2), one of its aims is to facilitate nuclear cooperation among the States parties. Since such cooperation is almost always potentially useful to a nuclear weapons program,⁵⁰ the question of what amounts to “assistance” is crucial. The answer may be found in Art. III, which clarifies that the transfer of source or special fissionable material and of equipment needed for the processing, production or use of special fissionable material is legal, as long as it is

⁴⁶ See, *Weiss*, 452 (*supra* note 5).

⁴⁷ The problem was already identified in 1969 by *Willrich* (*supra* note 21).

⁴⁸ *Ashley J. Tellis*, *Atoms for War? U.S.-Indian Civilian Nuclear Cooperation and India’s Nuclear Arsenal* (2006) 37, concludes that India’s resources are sufficient to both pursue a civilian and a large scale nuclear weapons program. In contrast, a study concludes that India’s current Uranium production is not sufficient for both its civilian reactors and its current nuclear weapons program, see report of *Zia Mian & Abdul H. Nayyar & Ramamurti Rajaraman & M.V. Ramana*, *Fissile Materials in South Asia: The Implications of the U.S.-India Nuclear Deal*, International Panel on Fissile Materials (IPFM), September 2006, available at http://www.fissilematerials.org/ipfm/site_down/ipfmresearchreport01.pdf (last visited 20 October 2008). Likewise, Meier and Neuneck conclude that the deal would allow India to expand its production from seven to 40-50 nuclear weapons per year, *Oliver Meier & Götz Neuneck*, *Der Atomdeal zwischen Indien und den Vereinigten Staaten: Nukleare Nichtverbreitung am Scheideweg*, *Hamburger Informationen zur Friedensforschung und Sicherheitspolitik* 37 (2006), 1-8, 5. In addition, *Zia Mian & M.V. Ramana*, *Wrong Ends, Means, and Needs: Behind the U.S. Nuclear Deal With India*, *Arms Control Today* 36 (2006) 11-17 describe numerous benefits to the Indian nuclear weapons program if India acquires access to external fuel for its civilian reactors.

⁴⁹ See, *Tellis*, 10 (*supra* note 48).

⁵⁰ See, *Willrich*, 94 (*supra* note 21).

covered by safeguards that prevent the diversion to a nuclear weapons program. These safeguards have to cover the material or equipment that is transferred. The US-India Agreement requires such limited safeguards and is thus technically not in violation of the NPT. However, the argument may be made that the whole NPT safeguards system was only designed for non-nuclear weapon States parties to the Treaty, that have to adopt full-scope safeguards and are prohibited from conducting a nuclear weapons program. Consequently, trade in fissionable material with States who are not party to the Treaty should then be limited to those that also accept full-scope safeguards. Yet although this may be desirable, there is no indication in the text of the NPT to that end.

Other critics even go so far as to argue that Pakistan may feel threatened by the Agreement and thus be induced to proliferate nuclear weapons.⁵¹ However, such a conclusion depends upon too many conditions. Therefore, to conclude that Art. I NPT takes into account even such remote possibilities seems to be far-fetched.

Nevertheless, transferring nuclear material and technology to a State that actively pursues a nuclear weapons program has its risks. Firstly, even the best safeguards agreement may not prevent technology transfers between a military and a civilian program, as long as no material, but only knowledge is transferred.⁵² Secondly, there is always the risk of direct transfers in violation of international obligations – as India did in the 1970s when it used the CIRUS reactor in its military program. While the NPT does not prohibit taking these risks, these concerns were behind the idea to adopt the full-scope safeguards requirement in the NSG. The US-India Agreement may thus set a dangerous precedent, as it will be difficult to argue that different standards have to be applied to similar agreements, for example between China and Pakistan.

In addition, in concluding nuclear cooperation agreements with India, other States may feel less inclined to impose strict conditions on the use of dual-use equipment. This points to a rather peculiar loophole in the NPT that affects the relationship between non-nuclear weapon States inside and outside of the Treaty: there is no clear obligation for a non-nuclear weapon State party to the treaty not to assist a non-nuclear weapon State not party to the treaty in a nuclear weapons program.⁵³ If no such obligation existed,

⁵¹ See, *Wable*, 730 (*supra* note 2).

⁵² *Id.*, 730-732.

⁵³ See, *Willrich*, 96 (*supra* note 21); *Mohamed I. Shaker*, *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959-1979* (1980), 268.

assistance for India's nuclear weapons program by a non-nuclear weapon State party to the NPT would not be contrary to the NPT. However, if one regards general non-proliferation as one of the NPT's central aims, such assistance would run counter to its object and purpose. This may be inferred from Art. III (2) NPT, which requires safeguards to be applied to all nuclear exports, even to a non-nuclear weapon State not party to the NPT. Nevertheless, such a conclusion is by no means invulnerable to criticism, since the safeguards system only covers certain types of equipment and only refers to the transfer for peaceful purposes.⁵⁴ Consequently, the arguments advanced by the United States⁵⁵ and the Soviet Union⁵⁶ for closing the gap have been met with some degree of scepticism.⁵⁷ The US-India nuclear deal may therefore revive the argument about this apparent loophole – certainly not a welcome side effect, given the fact that at least some legal uncertainty remains.

II. The US-India Agreement as a Gain for Non-Proliferation?

Proponents of the deal argue that it will bring India closer to the non-proliferation regime, since India commits to non-proliferation and accepts safeguards for a great number of previously unsafeguarded nuclear facilities.⁵⁸ Yet while this is certainly a gain, it has to be noted that the effect upon India's nuclear weapons program is minimal: according to the separation plan, those facilities that are of particular concern with regard to proliferation will not be safeguarded. Moreover, the separation plan is

⁵⁴ Article III (2) reads: "Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article."

⁵⁵ The US argued that in case of such assistance "the presumption would immediately arise that these acts had the purpose of developing nuclear weapons for itself, in violation of the treaty." Statement by the US Representative to the Eighteen Nation Committee on Disarmament, 27 February 1968, UN Doc. ENDC/PV.370, 28.

⁵⁶ The Soviet Union argued that since Article III (2) NPT requires safeguards to be applied to the transfer of equipment or material to any non-nuclear weapon State even if that State is not a party to the NPT, it is designed as a barrier against any assistance in a nuclear weapons program. See the Statement by the USSR Representative to the Eighteen Nation Committee on Disarmament, 27 February 1968, UN Doc. ENDC/PV.370, 20-21.

⁵⁷ See, *Willrich*, 96 (*supra* note 21).

⁵⁸ See, *Heinzelman*, 462 (*supra* note 3).

merely a unilateral declaration of intent that has not been incorporated in the Indian IAEA Safeguards Agreement. Particularly aberrant in this respect is the fact that India designated the CIRUS reactor as a military facility that will not be safeguarded – this may be seen as a belated acceptance of its misappropriation for military purposes by the United States.⁵⁹ In regard to future facilities, India will unilaterally decide if they will be safeguarded – although from then on they may not be unilaterally withdrawn from the application of the Safeguards Agreement.

However, the preamble of the Indian IAEA Safeguards Agreement contains some language that casts doubt on this perpetual application:

“An essential basis of India’s concurrence to accept Agency safeguards under an India-specific safeguards agreement (hereinafter referred to as “this Agreement”) is the conclusion of international cooperation arrangements creating the necessary conditions for India to obtain access to the international fuel market, including reliable, uninterrupted and continuous access to fuel supplies from companies in several nations, as well as support for an Indian effort to develop a strategic reserve of nuclear fuel to guard against any disruption of supply over the lifetime of India’s reactors;[...].”

Similar reference to the importance of these cooperation agreements is made in Art. 4 of the Indian IAEA Safeguards Agreement. Moreover, the preamble states that

“India may take corrective measures to ensure uninterrupted operation of its civilian nuclear reactors in the event of disruption of foreign fuel supplies;”

This seems to suggest that India may unilaterally withdraw some facilities from its application or that it may terminate the Agreement. While there is no language to that end in the operative part, the repeated reference to the importance of international cooperation agreements may be designed by India so as to facilitate a claim for a fundamental change of

⁵⁹ See, *Weiss*, 451 (*supra* note 5). However, India has stated that it will shut down the reactor by 2010.

circumstances (Art. 62 Vienna Convention on the Law of Treaties)⁶⁰ in case these cooperation agreements fail.

Moreover, the gain to the international non-proliferation regime is also questionable for another, more substantive reason: while India unilaterally stated that it will commit to international non-proliferation efforts and that it will refrain from proliferating nuclear technology, it has not accepted such comprehensive legal commitments. While the nuclear material in the facilities that India designates as civilian and subjects to IAEA safeguards may not legally be transferred to a nuclear weapons program in a third State, similar binding legal commitments do not apply India's military technology and material not subject to safeguards. India has not accepted binding obligations in relation to non-proliferation similar to these of the nuclear weapon States under the NPT.

III. The Impact on Nuclear Disarmament

The short review of the NPT structure has shown that despite its weakness, the disarmament pillar remains the cardinal *quid pro quo* for the renunciation of nuclear weapons by the non-nuclear weapon States. The commitment to this pillar is thus essential for the balance of rights and obligations in the Treaty. If a State armed with nuclear weapons remains outside these disarmament obligations, the international non-proliferation regime will be deficient, since the NPT's goal of creating security through a world free of nuclear weapons is then unattainable. The fact that States continue to possess nuclear weapons outside the NPT regime is thus a huge challenge, since they are not incorporated in the NPT's web of rights and obligations. On the contrary, the existence of nuclear weapons in States not party to the NPT may even be used as justification by the nuclear weapon States for their continued possession of nuclear weapons. An effort to incorporate India closer in the international non-proliferation system should therefore not only address questions of proliferation, but also of disarmament.

Yet the US-India Agreement does almost nothing to that end. It contains no binding disarmament commitments – not even preliminary steps, such as a pledge to ratify the CTBT. India only unilaterally declared its commitment to a “voluntary, unilateral moratorium on nuclear testing”.⁶¹ Moreover, a clear signal that the international community will not tolerate a

⁶⁰ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

⁶¹ Statement by the Indian External Affairs Minister, (*supra* note 45).

future Indian nuclear test is missing both from the NSG approval and the US-India Agreement. However, given the hostility shown by the outgoing US administration towards multilateral nuclear disarmament efforts, this does not come as a surprise.⁶² It is an ironic outcome that India, which repeatedly and eloquently criticized the weakness of the disarmament pillar of the NPT,⁶³ now does not even accept these obligations incumbent on the nuclear weapon States. The unilateral declarations that India will support a multilateral Fissile Material Cut-Off Treaty and its reference to its vision of a world free of nuclear weapons may be nice diplomatic gesture politics but do nothing in terms of true legal commitments.

In sum, the US-India Agreement, the separation plan provided by India and the IAEA Safeguards Agreement guarantee maximum flexibility for India's future nuclear policies. In particular, they accredit maximum flexibility in regard to future nuclear testing.

IV. Further Possible Repercussions

One also has to note that the path taken by the US was decidedly non-multilateral.⁶⁴ The IAEA and the NSG were only involved after the deal had been announced – and all concerns voiced there were brushed aside. Moreover, contrary to the consensus of the NPT States parties,⁶⁵ the US has chosen to accredit preferential treatment on a State not party to the NPT, thereby probably frustrating a number of developing States aspiring to use nuclear energy peacefully.

Given the fact that the Conference on Disarmament has now been blocked for years, this may have been the only way forward to a successful agreement with India – although there is reason to believe that the West, and in particular the United States, has to bear its share of the blame for the multilateral impasse. Nevertheless, the NPT's web of rights and obligations is fragile and depends upon active support by all of its parties. Now that it

⁶² See *Patricia Hewitson*, Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm, *Berkeley Journal of International Law* 21 (2003), 405-494 for an insight into the approach taken by the outgoing US administration.

⁶³ See, for example, the statement by the Indian representative, UN General Assembly, 22nd Session, First Committee, 1567th Meeting, 14 May 1968, Official Records, UN Doc. A/C.1/PV.1567, 11-17, in particular para. 119.

⁶⁴ See, *Wable*, 737 (*supra* note 2).

⁶⁵ See NPT/CONF.1995/32 (Part I), 11 (para. 16.) (*supra* note 22) and NPT/CONF.2000/28 (Parts I and II), 9.

has attained virtual universality, the question of how to incorporate the remaining nuclear holdout States is without doubt one of the most pressing challenges the nuclear non-proliferation regime faces. Consequently, any solution has to be supported not just by a few States, but by all. Yet any such multilateral solution has been considerably hampered, since India will probably see no need to make any concessions now that it has achieved full *de facto* recognition as a nuclear weapons State.

E. Conclusion

The US-India Agreement is largely a concession to India's demands. India had to accept virtually no binding legal restrictions on its nuclear policies and its nuclear weapons program while simultaneously gaining access to the global market in nuclear technology and material. It therefore signals that persistent resistance to the NPT pays off in the long run.⁶⁶ This may undermine efforts to convince nuclear threshold countries such as Iran to stay in the system. Imposing stronger safeguards on non-nuclear weapon States may be rendered more difficult.⁶⁷

Nevertheless, the more contentious terms of the US-India Agreement are stipulated in rather general language and thus depend upon their actual implementation. Its immediate legal impact thus seems to be limited. Yet while the US-India Agreement as such is not in direct contravention of any NPT provisions, it will almost certainly have negative repercussions on the NPT's bargain as a whole. While it may be true that the Agreement will not induce a non-nuclear weapon State to initiate a nuclear weapons program,⁶⁸ the extent of this damage to the system remains to be seen. It will depend to a large extent on India's future conduct. In this regard, India should constantly be reminded that it must live up to the standards it has been advocating since the 1950s, namely working towards a world free of nuclear weapons. With the conclusion of the US-India Agreement, the argument that the non-proliferation order is discriminatory towards India no longer applies.

⁶⁶ The concerns voiced by *William C. Potter* in 2005 were thus not taken into account; see *William C. Potter*, *India and the New Look of U.S. Nonproliferation Policy*, *Nonproliferation Review* 12 (2005), 343-354.

⁶⁷ See, *Weiss*, 451 (*supra* note 5).

⁶⁸ See, *Heinzelman*, 463 (*supra* note 3).

EC Liability in the Absence of Unlawfulness

- The FIAMM¹ Case -

Katrin Arend*

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¹ *Fabbrica italiana accumulatori motocarri Montecceio SPA v. Council and Commission (FIAMM)*, T-69/00, (2005) European Court Reports II-5393. See also the parallel case T-135/01 (2005) which is not published in the European Court Reports. *FIAMM*, Joined cases C-120, 121/06 P, not yet reported.

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A. In General

While the European Community has been repeatedly held liable for its non-contractual unlawful acts on the basis of Art. 288.2 EC,² the European courts have long been reluctant to find explicit wording that would establish or reject a liability regime for unlawful EC action.³ Finally in *FIAMM*, the Court of First Instance (CFI) took the decisive step of accepting such liability in principle and developed the criteria for its application.⁴ The judgement of the CFI represents a remarkable innovation in two respects. First, it makes reviewable all conduct of the Community and its institutions for the purposes of compensation and thus opens the door to a vast area of liability. Second, it is the very first indication that the EC is to pay compensation for behaviour which is deemed lawful (merely) from the European perspective. In other words, the CFI has undercut the European sovereignty shield that the European Court of Justice (ECJ) so carefully installed in order to protect the European legal order from being pierced by Public International Law. As remarkable and thought provoking this suggestion is, the door has been shut by the ECJ on its recent review of the *FIAMM* decision. In its judgement of 9 September 2008, the Court made it explicitly clear that as of now, there is no such liability of the European Community.⁵

For many, the decision comes a no surprise; for the European industries subject to WTO retaliatory measures like *FIAMM*, it does not worsen their already low standing before EC courts. Why the judgement of the ECJ must, in fact, be welcomed and preferred to that of the CFI is laid down in the following.

² Already the ECJ in *Lütticke v. Commission*, C-4/69, (1971) E.C.R. 325; *Zuckerfabrik Schöppenstedt v. Council*, C-5/71, (1971) E.C.R. 975; *HNL v. Council and Commission*, Joined C-83, 94/76, 4, 15, 40/77, (1978) E.C.R. 1209; *Mulder et al. v. Council and Commission*, Joined C-104/89, 37/90, (1992) E.C.R. I-3061; also the Court of First Instance in *African Fruit Company v. Council and Commission*, Joined T-64/01, 65/01, (2004) E.C.R. II-521.

³ See, for instance, *Compagnie d'approvisionnement v. Commission*, Joined C-9, 11/71, (1972) E.C.R. 391; *Développement SA et Clemessy v. Commission*, C-267/82, (1986) E.C.R. 1907; *Dorsch Consult v. Council*, C-237/98 P, (2000) E.C.R. I-4549 and *Förde-Reederei v. Council and Commission*, C-170/00, (2002) E.C.R. II-515.

⁴ *FIAMM*, T-69/00, (2005) E.C.R. II-5393, paras 157, 158.

⁵ *FIAMM*, Joined C-120, 121/06 P, para. 176.

B. Setting of the Case

The Italian-based producer of stationary batteries, *FIAMM*, comes to Court as just one in a long line of claimants seeking compensation for damages incurred as a result of Community conduct inconsistent with the WTO legal order.⁶ Based on Art. 288.2 EC, these actions typically tie in with breaches of WTO law or non-compliance with Panel or Appellate Body decisions as adopted by the DSB. With the *Portugal v. Council* separation of the EC and the WTO legal order in mind, they were dismissed accordingly.⁷ *FIAMM* looked at this situation from a different perspective. In this case, the claimant sought to recover damages from retaliatory measures authorised by the DSB under Art. 22.2 DSU and imposed by the US. Indeed, non-implementation of the *Bananas* decision⁸ triggered the US to request authorisation for the suspension of concessions.⁹ The request

⁶ For other examples, see *Geert A. Zonnekeyn*, EC liability for non-implementation of adopted WTO panel and Appellate Body Reports – The example of innocent exporters in the Banana case, in: *Vincent Kronenberg*, (ed.), *The EU and the International Legal Order: Discord or Harmony?*, 2001, 251-272 and *Geert A. Zonnekeyn*, EC liability for non-implementation of WTO dispute settlement decisions – are the dice cast?, *Journal of International Economic Law* 7 (2004) 2, 483-490.

⁷ *Biret*, C-94/02 P, (2003) E.C.R. I-10565, paras 55-66, where the Court held that the question of legal effects of DSB rulings is independent from that relating to the direct effect of WTO law. Nearly undoing this distinction are *Léon Van Parys*, C-377/02, (2005) E.C.R. I-1465, para. 51 and *Chiquita Brands*, T-19/01, (2005) E.C.R. II-315, paras 161-166. In these cases, the EC Courts argued that reliance on DSB rulings, similarly to reliance on WTO rules, would interfere with the scope of action available to the Community when implementing DSB decisions.

⁸ On 9 September 1997 the DSB adopted the Panel Reports as well as the Appellate Body Report following complaints by Ecuador, Guatemala, Honduras, Mexico and the USA (WT/DS27/AB/R). The DSB found the Community regime governing the import of bananas established by Council Regulation (EEC) No. 404/93 of 13 February 1993 on the Common Organisation of the Market in Bananas (Banana Market Regulation, OJ EC 1993, L 47/1) incompatible with the WTO Agreements, as it included preferential provisions benefiting bananas from ACP countries. The DSB recommended that the Community bring its regime into conformity before the expiry of a reasonable period, set for 1 January 1999. Two amendments of the Banana Market Regulation followed in 1998 (Council Regulation (EC) No. 1637/98, OJ EC 1998, L 210/28 and Commission Regulation (EC) No. 2362/98, OJ EC 1998, L 293/32).

⁹ Recourse by the United States to Article 22.2 DSU, *EC – Bananas III*, WT/DS27/43, 14 January 1999. Page three, listing the products for which an imposition of increased export duties is requested, refers to, *inter alia*, lead-acid storage batteries other than of

concerned *inter alia* the import of stationary batteries. When the suspension was authorised in April 1999,¹⁰ the US increased its import duties on stationary batteries from Italy to about 96,5% for a duration of two years.¹¹ In 2000, the case was brought to the CFI where *FIAMM* claimed damages of around €12 million. The CFI delivered its judgement in December 2005. In February 2006, it was appealed and referred to the ECJ which issued its decision on 9 September 2008.

Since *FIAMM* explicitly invoked what is now phrased “non-contractual liability in the absence of unlawfulness” as a legal ground for compensation, the Courts could not circumvent the issue this time and needed to rule on the existence of such a liability regime.¹²

C. Non-Contractual Liability for Lawful EC Acts According to the CFI

After the CFI had rejected all classical avenues of compensation by refusing to identify an “unlawful act” for which the EC could be held liable,¹³ it turned to the question of whether the EC could be held liable in the absence of unlawful conduct. With reference to *De Boer Buizen*, the Court stated that:

“Where, as in the present case, it has not been established that conduct attributed to the Community institutions is unlawful, that does not mean that undertakings which, as a category of economic operators, are required to bear a disproportionate part of the burden resulting from a restriction of access to export

a kind used for starting piston engines or as the primary source of power for electric vehicles.

¹⁰ Decision of the Arbitrators, *EC – Bananas III*, WT/DS27/ARB, 9 April 1999, para. 8.1. See Notice of the USTR of 19 April 1999 published in the Federal Register 64 Fed. Reg. 19, 209 (1999), announcing the final product list for purposes of retaliatory measures in relation to the *Bananas III* dispute. The list includes: bath preparations, handbags, wallets and similar articles, felt paper and paperboard boxes, lithographs, bed linen, batteries and coffee or tea makers.

¹¹ See *Stefan Haak*, Grundsätzliche Anerkennung der außervertraglichen Haftung der EG für rechtmäßiges Verhalten nach Art. 288 Abs. 2 EG, *Europarecht* 5 (2006), 696-705.

¹² This issue has been brought to the ECJ already in *Biret*, but it was dismissed because it was raised too late in the proceedings.

¹³ *FIAMM*, T-69/00, (2005) E.C.R. II-5393, paras 108-131.

markets can in no circumstances obtain compensation by virtue of the Community's non-contractual liability".¹⁴

The Court came to this finding through reliance on the notion of "general principles common to the laws of the Member States" as laid down in Art. 288 EC.¹⁵ The Court argued that national laws apply - "albeit to varying degrees, in specific fields and in accordance with differing rules" - to systems of non-contractual liability and "even in the absence of unlawful action by the perpetrator of the damage".¹⁶ According to the Court, the fact that Art. 288.2 EC exclusively addresses non-contractual Community liability for *unlawful* behaviour does not restrict the ambit of those general principles. Affirming the *Dorsch Consult* judgement,¹⁷ it also held that the EC, "when damage is caused not shown to be unlawful, can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution and to the unusual and special nature of the damage in question are all met."¹⁸

This is a significant shift of focus of EC liability, especially in view of the fact that the Court had easily accepted the actual conduct and causal link requirements on the merits of the case. It shows that the crucial criterion for EC non-contractual liability for lawful conduct is the "unusual and special nature" of the damage. In other words, not the unlawfulness of the EC conduct but the exceptional character of the damages triggers EC liability according to the CFI. It was exactly this last criterion where *FIAMM* could not sustain its case. With reference to its *Dorsch Consult* decision, the CFI specified when it would understand a damage to be of unusual and of special nature:

"[Damage is] first, **unusual** when it exceeds the limits of the economic risks inherent in operating in the sector concerned and,

¹⁴ *Id.*, para. 157 referring to *De Boer Buizen v. Council and Commission*, C-81/86, (1987) E.C.R. 3677, para. 17.

¹⁵ *Id.*, para. 158.

¹⁶ *Id.*, para. 159.

¹⁷ *Dorsch Consult v. Council and Commission*, C-237/98 P, (2000) E.C.R. 4549, para. 19

¹⁸ *FIAMM*, T-69/00, (2005) E.C.R. II-5393, para. 160.

second, **special** when it affects a particular circle of economic operators in a disproportionate manner by comparison with other operators.”¹⁹

More specifically, concerning economic operators producing, selling or advertising their products on the market of a WTO Member, the CFI found that the suspension of tariff concessions in relation to products from within the Community did not lead to unusual or special damage. Instead, this possibility ranks, according to the Court, among the “vicissitudes inherent in the current system of international trade” and should therefore be foreseen by each operator individually.²⁰ The fact that the retaliatory measure could be imposed in a different sector of the respective industry or in cases of cross-retaliation in a different industry altogether, did not change the Court’s perception. As a result, *FIAMM* was to foresee and bear the risk that EC conduct inconsistent with WTO rules in the agricultural industry could negatively affect its trade with stationary batteries. Similarly, in a number of WTO cases European based international traders have been left without legal remedy because the risk that, for instance, European sanitary policy will impact on trade in Gin, Gucci handbags or bicycles²¹ was considered “inherent in their export operations”.

Considering that the Court set out to establish a liability for lawful EC acts in order to open avenues of compensation for every harmful consequence of the conduct of the EC and its institutions, this is indeed a somewhat paradoxical result.

¹⁹ *Id.*, paras 202-211, emphasis added.

²⁰ *Id.*

²¹ *Cf.* Decision by the Arbitrators, *EC – Hormones*, WT/DS48/ARB, 12 July 1999, paras 72-73. Annex II lists products for the suspension of concessions as proposed by the claimant Canada. Decision by the Arbitrators, *EC – Hormones*, WT/DS26/ARB, 12 July 1999, paras 83-84. In notice by the USTR of 27 July 1999 published in the Federal Register 64 Fed. Reg. 40, 638 (1999), the United States published its intention to retaliate by additional duties imposed on pork, Roquefort cheese, onions, truffles, dried carrots, liver of goose, fruit juice, chicory, and mustard.

D. Non-Contractual Community Liability According to the ECJ

The ECJ recently overruled the jurisdiction of the CFI.²² In its judgement, the Court dealt with the existence and criteria of Community liability for *unlawful* and *lawful* EC conduct. Concerning the former, it noted that in accordance with the settled case law of the ECJ, Art. 288.2 EC means that the non-contractual liability of the Community and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions. These conditions relate to the *unlawfulness* of the conduct of which the institutions are accused, the damage as such, and the existence of a causal link between that conduct and the damage.²³ With regard to liability in the event of *lawful* EC conduct, the ECJ made it clear that as Community law currently stands, “no liability regime exists under which the Community can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts”.²⁴

I. Liability for Unlawful EC Conduct

In the consistent interpretation by the Court, unlawfulness of the conduct of which the institutions are accused is the very first condition to be satisfied for the non-contractual liability of the Community.²⁵

However in *FIAMM*, the applicants contended for the first time before the CFI that the Community institutions acted unlawfully in failing to bring the Community legislation into conformity with WTO law within the period specified by the DSB for implementation, the ECJ confirmed the judgement of first instance. Accordingly, Community courts cannot review the legality of the conduct of the Community institutions in the light of WTO rules notwithstanding the expiry of the implementation period.²⁶ For that reason,

²² *FIAMM*, joined cases C-120, 121/06 P, judgement of 9 September 2008, not yet reported.

²³ *Id.*, para 164, emphasis added.

²⁴ *Id.*, para. 176, emphasis added.

²⁵ *Id.*, para. 106, with reference to *Oleifici Mediterranei v. EEC*, 26/81, (1982) E.C.R. 3057, para. 16; *KYDEP v. Council and Commission*, C-146/91, (1994) E.C.R. I-4199, para. 19.

²⁶ *Id.*, paras 108-133.

both Courts could find no conduct by an institution of an unlawful nature. The ECJ clearly pointed out that, “where the Community courts find that there is no such act or omission by an institution of an unlawful nature, so that the first condition for non-contractual Community liability [under Art. 288.2 EC] is not satisfied, they may dismiss the application in its entirety without it being necessary for them to examine the other preconditions for such liability [...]”.²⁷

The ECJ then turned to its established jurisprudence concerning the direct applicability of international treaty law in the Community legal order. Following its review standard shown in *Kupferberg*, the Court considered that the effects of the Community’s international treaty relations within the Community may not be determined without taking into consideration the international origin of the provisions in question. In conformity with the principles of public international law, Community institutions which have power to negotiate and conclude such an agreement are free to agree with non-member States what effects the provisions of the agreement are to have in the internal legal order of the contracting parties. If that question has not been expressly dealt with in the agreement, it is the Courts’, and in particular the Court of Justice, that has the task of answering it.²⁸ In *International Fruit Company*, the very first judgement considering the ‘external’ direct effect²⁹ of international law within the Community, the Court established the principle that it falls within its jurisdiction to examine whether the provisions of an international agreement confer on individuals the right to rely on that agreement when they contest the validity of a Community measure.³⁰ In exercising its authority the Court considers, in

²⁷ *Id.*, para. 166, with reference to *KYDEP v. Council and Commission*, C-146/91, (1994) E.C.R. I-4199, paras 80 and 81.

²⁸ *Id.*, para. 108 with reference to the cases *Kupferberg*, 104/81, (1982) E.C.R. 3641, para. 17, and *Portugal v. Council*, C-149/96, (1999) E.C.R. I-8395, para. 34, as well to *Germany v. Council*, C-280/93, (1994) E.C.R. I-4973, para. 110. Concerning EC secondary legislation, the ECJ referred to *Intertanko and Others*, C-308/06, (2008) E.C.R. I-0000.

²⁹ In *Van Gend en Loos* and *Flaminio Costa v. E.N.E.L.*, the ECJ decided that EC law, as well as being supreme and not to be overridden by national orders, could also be relied upon by individuals as well as States, thus establishing the concept of ‘internal’ direct effect. See Case *Flaminio Costa v. E.N.E.L.*, 6/64, (1964) E.C.R. 585, 601 and Case *Van Gend en Loos*, 26/62, (1963) E.C.R. 3.

³⁰ *International Fruit Company and Others*, Joined C-21 to 24/72, (1972) E.C.R. 1219, para. 19 (with regard to the GATT 1947). Other more recent confirmations are *Intertanko and Others*, C-308/06, (2008) E.C.R. I-0000, para. 45; *IATA and ELFAA*, C-344/04, (2006) E.C.R. I-403, para. 39.

accordance with its case-law,³¹ “whether the nature and the broad logic of the international treaty preclude direct applicability of its provisions and, in addition, whether the content of the specific treaty provisions appear to be unconditional and sufficiently precise”.³² With particular regard to the EC - WTO relationship, *FIAMM* reaffirms the traditional view taken by the ECJ that the WTO agreements are not, in principle, among the rules against which the legality of actions adopted by the Community institutions can be measured.³³ This fits in with the *Portugal v. Council* judgement, where the Court made it clear that it would maintain its approach towards world trade law, also *post* the General Agreement on Tariffs and Trade (GATT) of 1947, pursuant to which it considers the resolution of disputes, now under the institutional framework of the WTO, still largely negotiations-based. Following this reasoning, the possibility to come to a mutually acceptable solution is not exhausted with the rendering of a WTO report or the expiry of the implementation period.³⁴

For the Court, it is consistent with such a legal perception to object to a review of the EC measure’s legality also after the expiry of that period because this enables the Community to find a solution which is acceptable to the complaining WTO Member and in conformity to the WTO rules.³⁵ Also in this specific case, the Court saw no room for a legality review without compromising the ability of the Community to reconcile its obligations, under the WTO agreements, with those in respect of the ACP States, and with the requirements inherent in the implementation of the common agricultural policy. To accept that the Community courts have the direct responsibility for ensuring that Community law complies with the

³¹ *Intertanko and Others*, C-308/06, (2008) E.C.R. I-0000, para. 45.

³² *FIAMM*, Joined C-120, 121/06 P, para. 110.

³³ *Id.*, para. 111, with reference to *OGT Fruchthandelsgesellschaft*, C-307/99, (2001) E.C.R. I-3159, paras 25-28; *Portugal v. Council*, C-149/96, (1999) E.C.R. I-8395, para. 47; *Biret*, C-94/02 P, (2003) E.C.R. I-10565, para. 52; and *Léon Van Parys*, C-377/02, (2005) E.C.R. I-1465, para. 39.

³⁴ *Id.*, paras 115-117. with reference to *Léon Van Parys*, C-377/02, (2005) E.C.R. I-1465, para. 52. *Cf. inter alia* on the subject *Jan Klabbers*, *International Law in Community Law: The Law and Politics of Direct Effect*; *Yearbook of European Law* 21 (2001-2002), 263-298; *Trevor C. Hartley*, *International Law and the Law of the European Union – A Reassessment*, *British Yearbook of International Law* 72 (2001), 1-35; *Judson O. Berkey*, *The European Court of Justice and Direct Effect for the GATT*, *European Journal of International Law* 9 (1998), 626-657; *Anne Peters*, *The Position of International Law Within the EC Legal Order*, *German Yearbook of International Law* 40 (1997), 9-77.

³⁵ *Id.*, para. 117.

WTO rules would, according to the judgement, effectively deprive the Community's legislative or executive organs of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.³⁶ That this applies, irrespective of whether a legality review was sought for the purpose of annulment proceedings or for an action for compensation³⁷ was substantiated by the Court by drawing attention to the negative consequences that compensatory actions would have on regulation in the public interest and on the regulating institution in question.³⁸

Further to this, the Court rejected the CFI's contention that a distinction should be drawn between the direct effect of the WTO rules imposing substantive obligations and the direct effect of a decision of the DSB. This is the most recent confirmation of the more specific, but equally settled case law pursuant to which individuals cannot challenge the legality of the conduct of the Community institutions in the light of DSB decisions before Community courts.³⁹ In holding that the DSB decision has no object other than to declare the (in)consistency of a WTO Member's conduct with the obligations assumed under the WTO, the ECJ claims that DSB decisions following from panel or Appellate Body reports carry no separate meaning which could oust the negotiability of the process and could therefore be relevant to the direct applicability and reliance before Community courts.⁴⁰ On that basis, the ECJ agreed with the conclusion of the CFI that even the most precise recommendation or ruling adopted by the DSB is "no more capable than those rules of conferring upon individuals a right to rely thereon before the Community courts for the purpose of having the legality of the conduct of the Community institutions reviewed".⁴¹ Like the CFI, it did not feel competent, in the circumstances of the present case, to review the legality of the Community banana regime in light of the WTO rules. Necessarily, the ECJ came to the conclusion that in *FIAMM* there was no

³⁶ *Id.*, para. 118., with reference to *Léon Van Parys*, C-377/02, (2005) E.C.R. I-1465, paras 49, 50, 53.

³⁷ To this effect, with regard to the period preceding the expiry of the reasonable period of time allowed for implementing a decision of the DSB, see *Biret*, C-94/02 P, (2003) E.C.R. I-10565, para. 62.

³⁸ *FIAMM*, Joined C-120, 121/06 P, paras 121-131. See also, in particular, *HNL*, Joined C-83, 94/76, 4, 15, 40/77, (1978) E.C.R. 1209, para. 5, and *Brasserie du pêcheur* and *Factortame*, Joined C-46, 48/93, (1996) E.C.R. I-1029, para. 45.

³⁹ *Id.*, paras 125-126.

⁴⁰ *Id.*, paras 127-128.

⁴¹ *Id.*, para. 129.

unlawful act or omission by an EC institution on which a non-contractual liability of the Community could be based.

II. Community Liability in the Absence of Unlawfulness

Later in the judgement, the ECJ specifically addressed the existence of Community liability for lawful conduct. The Court admitted that in *Dorsch Consult*, it had specified some of the conditions under which liability could be incurred *if* Community liability for a lawful act was recognised Community law.⁴² This allowed the Court to infer that it had established the basis and principles of such a regime. From this point, the Court was eventually compelled to be explicit about the existence of Community liability for lawful acts. While it did not reject the notion altogether, the Court came to the conclusion that Community law, as it currently stands, does not support liability of the Community for conduct which fails to comply with the WTO agreements.⁴³ Accordingly, *FIAMM* failed before the ECJ because Community law does not (yet) accept liability of its institutions in the absence of unlawfulness. In other words, because there was, from the Community perspective, no unlawful EC conduct and no established other principle among the Member States, there was also no liability regime under which the Community could have been held liable for conduct falling within the sphere of its legislative competence.⁴⁴

Like the CFI, the ECJ drew from Art. 288.1 EC and, more specifically, from the notion of “general principles common to the laws of the Member States”. Comparative analysis was therefore key to both Courts. Contrary to the CFI however, the ECJ found it in no way clear that there was a convergence of legal systems among the Member States upholding a principle of liability in the case of a *lawful* act or omission of the public authorities.⁴⁵ In Art. 288.2 EC the Court simply saw an “expression of the general principle familiar to the legal systems of the Member States that an *unlawful* act or omission gives rise to an obligation to make good the damage caused”.⁴⁶ This does not, according to the Court, include legislative

⁴² *Dorsch Consult v. Council and Commission*, C-237/98 P, (2000) E.C.R. 4549, para. 18. See also, in similar terms, Case *Biovilac v. EEC*, 59/83, (1984) E.C.R. 4057, para. 28.

⁴³ *FIAMM*, Joined C-120, 121/06 P, para. 176.

⁴⁴ *Id.*

⁴⁵ *Id.*, para. 175.

⁴⁶ *Id.*, para. 170 with reference to *Brasserie du pêcheur and Factortame*, Joined C-46, 48/93, (1996) E.C.R. I-1029, paras 28 and 29.

measures which involve choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.⁴⁷

E. In Conclusion

FIAMM is yet another illustration of the poor legal standing that European based international traders have when they get trapped in between the obligations which the Community assumes on the international plane and its persistent disregard resulting from a differing policy choice. In a nutshell, *FIAMM* failed before the CFI because it should have foreseen the imposition of trade sanctions on stationary batteries as a result of WTO inconsistent agricultural policy. At review, the contention did not succeed because the ECJ considered there exists no liability regime (yet) for lawful behaviour common to the laws of the Member States that could be taken up and applied by the Community as a general principle under Art. 288.2 EC. Despite the attempt of the Court of First Instance to find new ways of remedying damages of EU citizens, both Courts stood firm by their view that the legality of Community conduct in the WTO context is not reviewable and on that basis irrelevant to the Community's non-contractual liability for unlawful conduct of its institutions. Taking consistency and plausibility as the relevant benchmark, the decision of the ECJ must clearly be welcomed because it follows a long established jurisprudential reasoning and formulates objective standards of EC non-contractual liability. Indeed, from that perspective, the half-hearted approach taken by the CFI to accept liability for lawful EC conduct in principle, but to dress it in clothes that simply won't fit to any situation appears unsatisfactory (II.). Furthermore, the way in which the Court of First Instance came to acknowledge the existence of a Community principle concerning liability for lawful EC conduct deserves critical attention (I.). Finally, it is necessary to assess *FIAMM* in its broader context - that is its relation to the preceding case law on the interplay between international and European law (III.) and the more practical consequences which traders bear out of WTO-inconsistent

⁴⁷ *Id.*, paras 167, 172. See also, *inter alia*, *Compagnie d'approvisionnement, de transport et de crédit* and *Grands Moulins de Paris v. Commission*, Joined C-9, 11/71, (1972) E.C.R. 391, para. 13; *HNL*, Joined C-83, 94/76, C-4, 15, 40/77, (1978) E.C.R. 1209, para. 4; *Les Grands Moulins de Paris v. EEC*, C-50/86, (1987) E.C.R. 4833, para. 8; and *AERPO and Others v. Commission*, C-119/88, (1990) E.C.R. I-2189, para. 18.

behaviour of the EC and which supposedly prompted the CFI's most recent advance (F.).

I. Legal Basis of EC Non-Contractual Liability in the Absence of Unlawfulness

Both the ECJ and CFI located the legal basis of EC non-contractual liability in the absence of unlawfulness in Art. 288.2 EC according to which the Community is, “*in accordance with the general principles common to the laws of the Member States*, to make good any damage caused by its institutions”⁴⁸. For a long time, general principles of Community law have been identified and developed by the Community courts.⁴⁹ They belong to the body of law by means of which the Courts may account for fundamental considerations like good governance⁵⁰ and interpret the Community liability principle as such.⁵¹

In *FIAMM*, the CFI recognised Art. 288.2 EC as triggering Community liability also in the absence of unlawfulness and, based on that contention, sought to establish the Community basis for a re-distribution of costs resulting from the institutions' freedom to act in the public interest. The Court seemed to have arrived at its findings partly from a comparative analysis and partly from free evaluation. The Court held that such a liability principle existed in the Community legal system even where only some of the Member States have known it as part of their national legal systems. AG *Maduro* agreed with the CFI's interpretation and confirmed the suitability of “non-fault liability”, in particular in the WTO context.⁵² In his Opinion before the ECJ, he noted that although guidance must be sought by the “most characteristic provisions of the systems of domestic law, [the Court] must above all ensure that it adopts a solution appropriate to the needs and

⁴⁸ Emphasis added.

⁴⁹ They are relevant irrespective of whether the Community conduct in question is directly applicable in the Community legal order.

⁵⁰ *E.g.* for the principle of non-discrimination, *HNL*, Joined Cases 83, 94/76, 4, 15 and 40/77, (1978) E.C.R. 1209, paras 5, 6; for the right to property, the principles of non-discrimination, of equality, and of proportionality, *Zuckerfabrik Bedburg*, Case 281/84, (1987) E.C.R. 49; for the principles of legal certainty and legitimate expectations, *CNTA v. Commission*, Case 74/74, (1975) E.C.R. 533; for the misuse of powers, *AERPO v. Commission*, C-119/88, (1990) E.C.R. I-2189.

⁵¹ See *Laboratoires Pharmaceutiques Bergaderm and Goupil v. Commission*, C-352/98 P, (2000) E.C.R. I-5291, paras 41-43.

⁵² Opinion of Attorney General *Maduro* in *FIAMM*, C-120, 121/06 P, paras 55 to 60.

specific features of the Community legal system”⁵³. According to his understanding, even a “solution adopted by a minority may be preferred if it best meets the requirements of the Community system”⁵⁴.

Indeed, in some Member States, there is such a liability regime based on the principle of equal treatment or of the right to property.⁵⁵ However this is only true for about half of the Member States’ legal systems.⁵⁶ With no substantive comparative analysis and no indication as to *which* of the Member States apply the principle, the Court can scarcely be found to have based its conclusion on “general principles *common* to the laws of the Member States”. Why did the CFI then suddenly accept this liability principle? Equity concerns certainly played a role. The Court’s reading of Art. 288.2 EC according to which the very purpose of the provision “is to make good *every* harmful consequence, even a remote one, of conduct” of the EC and its institutions reflects this motivation.⁵⁷ However, to base such vast liability on indefinite wording by using almost free design and interpretation is simply too big of an argumentative gap to bridge. Even within the laws of the Member States in question, such liability is considered the exception. Any enquiry for such far-reaching liability should be in accordance with the wording of the Treaty. Also, the broader an obligation is made, the higher the standards on the explicitness of the statutory basis are and on the interpreting body to firmly observe it. An objective test should thus be the core of an extension of the Community liability regime. In this respect, it seems insufficient to indicate the existence of liability without actually engaging in a substantive enquiry. The more so as constructing “non-fault” liability to compensate for non-invokable faults

⁵³ *Id.*, para. 55.

⁵⁴ *Id.*

⁵⁵ For example in France, one citizen need not bear more of the burden imposed by the pursuit of general interests than another. Also, it is not far from the German “Sonderopfertheorie” as laid down in Article 839 Bürgerliches Gesetzbuch (German civil code) and Article 34 Grundgesetz (German constitution). Cf. analysis by *Stefan Haack*, Grundsätzliche Anerkennung der außervertraglichen Haftung der EG für rechtmäßiges Verhalten nach Art. 288 Abs. 2 EG, *Europarecht* 5 (2006), 696, 701.

⁵⁶ *Armin von Bogdandy*, Art. 288 EGV, in: *Eberhard Grabitz & Meinhard Hilf* (eds), *Das Recht der Europäischen Union*, loose-leaf January 2008, para. 94; *Stefan Haack*, Die außervertragliche Haftung der Europäischen Gemeinschaft für rechtmäßiges Verhalten ihrer Organe, 1995, 46-74; *Stefan Haack*, Grundsätzliche Anerkennung der außervertraglichen Haftung der EG für rechtmäßiges Verhalten nach Art. 288 Abs. 2 EG, *Europarecht* 5 (2006), 696-705; *Jan Schöder*, Rechtsschutz gegenüber rechtmäßigem Handeln der Europäischen Union, 2005.

⁵⁷ *FIAMM*, T-69/00, (2005) E.C.R. II-5393, para. 177, emphasis added.

of the Community on the international plane is not convincing. Neither the French nor the German liability regime quite fit to this constellation. The ECJ thus rightly pointed out that an extension of Community law on liability is in no way compelling. Admittedly, it appears doubtful whether the Courts will ever recognise a liability regime concerning lawful EC behaviour on the basis of such a high standard. It is, however, at least also in doubt whether to open a vast area of Community conduct to compensation claims on such weak grounds and to rectify persistent disregard of WTO obligations by a liability principle that builds on lawful behaviour.

II. Unusual and Special Damage

The short lived optimism which rose among scholars and European traders concerning a possible liability of the EC in the absence of unlawful action was somewhat limited by its particular formulation. While in *Dorsch Consult*, the ECJ addressed, albeit hypothetically, the conditions of such a liability regime, *FIAMM*, for the first time, applied them. In fact, *FIAMM* shows that, if liability of lawful EC acts was accepted, it is the unusual and special nature of the damage which serves to balance the risks between applicant and Community. In this respect, the CFI established that economic risks inherent in the operation of a business are attributable not only across different sectors of the same industry but also from one industry to another. This rather inclusive determination requires each trader to follow at all times all market, legal and political developments at all levels of interrelation and regulation, and to provide for sufficient security. It also means that compensation is generally denied to EC exporters incurring damage from WTO authorised retaliatory measures. *Kuijper* and *Bronckers* share this view and compare the situation of trade sanctions with that of other WTO advantages (extension of concessions by Most-Favoured Nation (MFN)) and disadvantages (trade barriers on the basis of *e.g.* GATT Art. XX) which traders may incur in course of their business operations. Accordingly, both consider trade sanctions as yet another indication of the reciprocal nature of the WTO.⁵⁸

On closer scrutiny however, trade sanctions and other barriers to trade are not as easily comparable in terms of their regulatory concept and structural background: First, different from trade sanctions, other barriers to trade give priority to non-trade policies such as human safety, the

⁵⁸ *Pieter-Jan Kuijper & Marco Bronckers, WTO law in the European Court of Justice, Common Market Law Review 42 (2005) 5, 1313-1355, 1339.*

environment or national security. Trade sanctions are in contrast purely trade-motivated. Their very purpose is to cause damage to innocent traders. Second, retaliatory action shall hit traders unexpectedly. If the WTO recognized that its Members may prepare for trade sanctions and thus buy out of their original obligations, not only would the enforcement mechanism be ineffective but also the integrity of the WTO rules as a whole be at risk. On the other hand, restrictive trade regulations provided for under the WTO agreements as a legitimate means of economic ruling are not authorised *ad hoc* but formulated on an abstract legal basis which seeks to make their application certain, conclusive and predictable to the trader. Finally, because MFN multiplies the bilateral concessions made to some WTO Members, the interdependencies in this area of economic regulation can no longer be dissolved for each Member individually.⁵⁹ Instead, the WTO system evolved to an objective legal order with parallel claims rather than relative rights and reciprocal duties.⁶⁰ WTO Members and institutions pursue common objectives and act in a qualified structure of regulation, law administration and enforcement.⁶¹ The world trade order follows legal rules which are considered to bring about just treatment and fair results. Authorised barriers to trade other than sanctions move within the objective order just as expressions of conflicting policies. Trade sanctions move outside this position, accepted only as temporary means necessary *to re-establish* a level playing field.

In essence, the world trade order is not as policy driven as is mandated by the ECJ and some scholars. Legal principle establishes stable ground for traders to arrange their business operations according to the framework that the WTO offers in this specific sector. If the home country violates this framework, they should anticipate economic changes. The situation is however different for traders from a different industrial sector or a different industry. Cross-retaliation oversteps the limits of adequacy; its consequences are inherently unusual to the targeted operator. Still, this form of remedial action remains essential to the WTO enforcement mechanism

⁵⁹ The Appellate Body Report in the *EC - Bananas III* case reflects this. See WT/DS/27/AB/R, paras 136-138. Also, the competitive conditions principle is an illustration of the “inextricable interwoven” claims.

⁶⁰ Similar *Ernst-Ulrich Petersmann*, Violation-Complaints and Non-Violation Complaints in Public International Trade Law, German Yearbook of International Law 34 (1991), 175, 181.

⁶¹ *Ilka Neugärtner*, Die *actio popularis* in der WTO, 2003, 88-115.

notwithstanding the minimum standards laid down in Art. 22.3 Dispute Settlement Understanding.

Whether an adequate link exists between the export of stationary batteries and the European banana market - which could explain an attribution of economic risk - is most doubtful. Doubts appear to have motivated *FIAMM* to appeal. Also AG *Maduro* suggested to the ECJ that the judgement of the CFI should be set aside based on an erroneous interpretation of the unusual and special damage criterion.⁶² Finally, the reasoning of the Court is at odds with its initial approach to extend Community liability in order to more equitably re-distribute the cost of EC breaches of international/WTO law. The ECJ needed not to address this issue because it had already rejected the existence of Community liability for lawful conduct.

III. Circumvention of the Established Case Law

In addition, it should be mentioned that the route taken by the Court of First Instance burdens the long settled case law on the separation of the EC and WTO legal order or, more specifically, on the direct effect and invocability of WTO obligations and DSB decisions. Indeed, compensating affected retaliation victims despite the non-invocability of the triggering action, means granting a relief that was until that point persistently denied to them. It is true that the recognition of liability in the absence of unlawfulness would not lead to the annulment of a Community act for breach of WTO law. Its acceptance however, although not compelling the Community institutions to comply with the WTO rules, inevitably pressures them to revise their conduct in the light of the assumed WTO obligations. While this result appears to many not quite undesirable, it is simply ignorant of the previous judicial policy. In this respect, the ECJ has found a rigid but consistent solution.

F. *FIAMM* and the Recovering of Damages From EC Non-Compliance With DSB's Rulings

If *FIAMM* at first instance seeks to give effect to the WTO rules through the back door of liability in the absence of lawfulness, if it means to overcome the non-invocability of the action by focusing on the resulting

⁶² Opinion of Attorney General *Maduro* in *FIAMM*, C-120, 121/06 P, para. 83.

damage instead, where does this leave the ECJ and its jurisprudence on the WTO-EC relationship? And are the dice cast with the latest refusal of the ECJ to accept WTO penetration into the Community⁶³ - or need the plausibility of the Court's attitude as such to be reconsidered?

From a policy point of view, the protectionist approach of the ECJ expresses its unwillingness to submit to a strong and international adjudicating body as the DSB. In terms of legal argument, it is the lack of precision and the general political nature of the WTO and its dispute settlement system which underlie the refusal to grant external direct effect.⁶⁴ More specifically with regard to DSB decisions, the Court denied them any separate meaning which could oust the negotiability of the process and, on that account, be relevant to the direct applicability and reliance upon before Community courts.⁶⁵

This position can be criticised in three respects: First, a WTO report adopted by the DSB is an absolute and precise clarification of the consistency of a Member's measure with the WTO agreements. Also, it is a binding determination of the existence of a WTO breach. Secondly, while it is true that the disputing Members shall engage in consultations before bringing the matter before a panel and that a mutually accepted solution in conformity with the WTO rules is preferred to the litigation of the matter (Arts 3.4-7, 4 Dispute Settlement Understanding), these stipulations, when viewed in the greater context of the Understanding, rather support the idea that *quasi*-judicial proceedings shall not commence until the parties have otherwise attempted to settle their dispute. The jurisprudence on cases where the measure was terminated *post* the establishment of the panel and the explicit commitment to the rule of law, transparency and consistency confirm the legal function of the WTO adjudicators. In other words, once a case is referred to the DSB, the appointed bench will render a decision based on legal principles. Thirdly, to accept the direct effect of a WTO report does not necessarily mean impairing the scope of action of the Community on the international plane. It is correct that, in accordance with Art. 3.2, sentence 3 Dispute Settlement Understanding, the recommendations and rulings of the DSB can not add to or diminish the

⁶³ As put for discussion by *Geert A. Zonnekeyn*, EC liability for non-implementation of WTO dispute settlement decisions – are the dice cast?, *Journal of International Economic Law* 7 (2004) 2, 483-490 already after the *Biret* judgement.

⁶⁴ See in particular *International Fruit Company* and *Germany v. Council*; Joined C-120, 121/06 P, *FIAMM*, paras 110-133.

⁶⁵ *Id.*, paras 127-128.

rights and obligations provided for in the agreements concerned. A determination of WTO (in)consistency does not, however, alter the rights and obligations provided in the covered agreements. A decision restates the right or obligation under the covered agreements and applies it to the measure at stake. Unless in cases of judicial activism (being the true subject of the provision), a restatement of the law does not preclude negotiations within the limits of the WTO agreements. It follows from Art. 19 Dispute Settlement Understanding that Members found in breach with their obligations are to bring their measure into conformity with WTO law. The disputants are, in principle, free to agree on whatever implementation they consider appropriate, provided they move within the framework of the WTO rules. Also because the ECJ does not seek to clear the Community from its duty to re-establish a WTO consistent situation, it is suggested to allow affected traders a certain reliance on the attested WTO breach. To safeguard sufficient freedom of the EC to negotiate the particular WTO consistent solution, such action should be limited to liability (covering the damages which occur after the declaration of inconsistency) and directly attach to the unlawfulness of the Community action. Admittedly, the suggested advance creates a major shift in understanding of the EC – WTO relationship. On the other hand, it would allow interim solutions for traders who are targets and instruments of the Members to pursue their WTO non-compliant policies and to induce compliance with the decisions adopted by the DSB.⁶⁶

The question which *FIAMM* raises is whether we want to close the gap in judicial protection and if so, on what basis. Is it better to socialise the damages incurred by the WTO inconsistent behaviour or to grant limited or even full review? *FIAMM* is also the latest peak of the growing discontent with the existing policy towards retaliation victims. However, the construction of a new liability regime for lawful EC conduct on the ground of “unlawful” (WTO-inconsistent) behaviour, which cannot be invoked before EC Courts, is quite unsatisfactory and also unnecessary, if the ECJ came to accept the rule-orientated nature of the WTO dispute settlement. It is indeed more plausible and sustainable to remedy damages on the basis of

⁶⁶ Without doubt, the WTO is no value-sharing community like the EU but its Members follow a common objective and are a community of legal principle (vielleicht besser “community based on legal principles”?). EC conduct triggering international trade disputes is usually motivated by political interests, such as the protection of health in the context of the prohibition of selling/the import ban on hormone treated beef. The WTO does account for those policies on the basis of scientific and the precautionary principle(s) and gives the Members ample room for regulation.

the unlawfulness of the EC conduct instead of granting compensation for unusual and specific damages.

Finally, from the WTO perspective, the Community liability in the absence of unlawfulness does not appear suggestive. By offsetting the negative effects of trade sanctions through installing internal balancing mechanisms, WTO Members would compromise the integrity of the WTO and the effectiveness of its enforcement system. In contrast, liability on the basis of unlawful conduct would strengthen the WTO legal order because giving individuals limited means to redress breaches of WTO law puts added pressure on the Community to reach a positive solution of the dispute more quickly.

A Quantum of Solace: Guzman on the Classical Mechanics of International Law

Book Review: Andrew Guzman, How International Law Works. A Rational Choice Theory (2008)

Matthias Goldmann*

A.

Compared to the discipline of international law, scholars of physics are blessed. While the principles of classical mechanics were theorized several centuries ago, quantum theory and the theory of relativity offer supplementary ways for describing how material objects and energy interact where classical mechanics does not provide an explanation. Thus, even in the absence of an all-comprising “world theory”, physicists have a wide array of workable theories at their service. By contrast, the “classical mechanics” of international law, *i.e.* the explanation of the most basic causal relationships between international legal norms and the behaviour of states as the main subjects of international law, are still subject to deep theoretical controversies. International legal doctrine presupposes that international law does have an impact and does not aim at questioning or further explaining this assumption. Traditional legal theories that see the essence of legal normativity in the possibility to trigger mechanisms of physical constraint often come to the conclusion that international law, in the absence of central enforcement mechanisms, is at best a primitive form of law. More recent

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enquiries into international legal theory from very different theoretical angles come to even less uplifting conclusions. Some argue that international legal norms are either entirely devoid of content because of their inherent indeterminacy and therefore prone to be captured by special interests. Others consider international law to be merely epiphenomenal because rational states would only consent to legal norms if, and as long as, they describe a behaviour they would choose anyway because it promises higher payoffs. In particular the latter critique put forward so forcefully by Jack Goldsmith and Eric Posner sent considerable shock waves through the invisible college of international lawyers. This is the background that needs to be kept in mind in order to assess the quantum of solace that Andrew Guzman's new book provides.

B.

The most important and most telling element of this book is therefore its title: "How international law works" implies first and foremost that international law actually has an impact on the behaviour of those subject to it. Guzman takes this as a starting point, as he sees enough *prima facie* evidence demonstrating the relevance of international law for state behaviour. For example, why would states, presumed to be rational actors, otherwise care so much about the legality of their actions and invest valuable resources into international lawmaking and expensive international law departments? Why would President Bush provoke a conflict with state governments when he ordered them to obey the ICJ's *Avena* judgment, if international law did not matter and if other factors can be excluded? And why would sophisticated actors like NGOs see a solution to numerous griefs of the world in the furthering of international law? Guzman concludes that the burden of proof should be on those who claim that international law does *not* work and ventures on a theory that explains how it might actually work.

He bases his theory on familiar assumptions of rationalist-institutionalist approaches to international law and relations (17). Accordingly, states are presumed to be the dominant actors on the international level and able to pursue their interests rationally. The preferences underlying these interests are relatively stable over time. Complying with international law is not a preference of itself, and the internal structure of states is deemed relatively insignificant for their behaviour on the international level.

The core of Guzman's theory consists in his elaboration of three factors which induce states' compliance with international law: reciprocity, retaliation and reputation ("the Three Rs of compliance"). The main innovative aspect of this proposal is the mechanics surrounding reputation, which Guzman sets out in great detail in the second chapter. Accordingly, reputation plays a central role in the calculation of states whether to enter into an agreement or not. Suppose that a state receives higher payoffs from cooperation in a certain situation and therefore prefers the conclusion of an international legal agreement with other states to this effect. However, there is a risk that other states might defect and sacrifice common long-term benefits for higher individual short-term benefits. In the context of national law, domestic law enforcement reduces this risk of defection. Absent such mechanisms on the international level, states will seek other ways of reducing the risk of defection and only enter into cooperative agreements where this risk appears sufficiently low. In order to appreciate the risk, states need to make estimates. This is where reputation comes in: it is a judgment about a state's past response to international legal obligations used to predict future compliance (73). Reputation is thus a capital which allows states to cooperate and enjoy better long-term collective benefits at the expense of short-term individual benefits.

In some situations, reputation works even better than reciprocity, the costless termination of a state's obligations under international law in response to a violation, or retaliation, the costly enforcement of the rule. This is particularly the case in situations resembling a multilateral iterative prisoner's dilemma where a pure public good is at stake like, *e.g.*, the protection of the environment. Reciprocity has little impact because all states, and not only the violating one, benefit from the cooperative behaviour of the non-violating states that reciprocal action terminates. Retaliation does not work very well either because of free-riding. Goldsmith and Posner therefore simply deny that international law has any impact on state behaviour in these situations. Guzman, however, sees reputation as the main factor for compliance: If a state violates the obligation, negative "reputational payoffs" will accrue automatically, and without cost. The reputational loss will diminish the capacity of the violating state to enter into other agreements, or even to renew the violated agreement provided that other states want to acquire a reputation for taking a hard edge position on non-compliance.

In conclusion, compliance induced by reputational effects have a particularly high impact where the non-reputational payoffs (*i.e.* the payoffs a state faces besides the reputational repercussions of his behaviour) of non-

cooperation are not significantly higher than those of cooperative behaviour. In such situations reputational payoffs might actually tip the scales towards cooperation. However, there are obvious limits to the effects of reputation and thus to the effectiveness of international law when the non-reputational payoffs of defection are fundamentally higher than those of compliance. This explains, *e.g.*, why international law is only of limited use for preventing war. Apart from reputation, retaliation and reciprocity, Guzman sees no other major compliance-inducing factors at work. International adjudication, for example, is considered valuable as a tool for generating and disseminating information about facts and law, but not as a tool of enforcement, since enforcement of the judgment raises the same problems as the enforcement of any other rule of international law.

C.

After setting out his basic theory and a subsequent detailed elaboration of the concept of reputation in the third chapter, in which he argues, among others, that states have multiple, sector-specific, but interlinked reputations, Guzman extends his theory to international agreements and customary international law, explaining why they exist and how they work. Some of his conclusions deserve to be discussed here in more detail.

Among the highlights of these sections is certainly Guzman's argument that states are not naturally risk averse and refrain from international legal commitments as far as possible, as realism has it. Rather, he argues that states seeking to maximize their benefit will have an interest in entering into international agreements whenever cooperative behaviour promises better long-term benefits. For the risk of entering a treaty is limited to the risk of breaking it, *i.e.* to the reputational or reciprocal, and in rare cases also to the retaliatory consequences of a violation (125).

Another remarkable point is his elaboration of the relationship between the form and substance of international agreements. Guzman argues that rational states do not have a preference for flexible rules, but for reliable commitments (137). The reliability of a commitment depends on trades between formal and substantive elements in the design of international agreements. Accordingly, states might opt for a soft law instrument where it is wholly sufficient to induce cooperation, such as in an easy to resolve coordination game where all that is needed is a focal point (*e.g.* "drive on the right side of the street"). In other cases, they might choose to enhance the effectiveness of a soft law instrument by equipping it with some monitoring mechanism that ensures the correct attribution of

reputational gains and losses which accrue as a consequence of compliance or non-compliance with the instrument. The binding character of a rule is therefore no absolute indicator for the likeliness of states to comply, but just one factor among many others (160, 217). Consequently, a binary distinction between soft law and treaties is not meaningful. The difference between soft and hard law is rather a matter of degree (143). Guzman suggests that states choose their forms of cooperation from a spectre of commitments ranging from non-legal norms to treaties (214). At this point, however, one might ask whether Guzman's theory would not have supported a much more radical approach than the already somewhat conventional spectre theory. The different formal and substantive design elements could be seen as the axes of a multidimensional pattern of instruments. Better than a linear spectre, a multidimensional pattern would explain why, for example, a soft law instrument equipped with certain compliance-inducing formal or substantive features might have a greater impact on the behaviour of states than a "binding" treaty containing mostly indeterminate provisions.

Guzman's reputational theory further leads him to a convincing argument about the scope of agreements aimed at by rational states. Previous scholarship hypothesized that rational states would seek to limit membership in an agreement the more difficult it is to enforce, because reciprocal enforcement works better in a small group of states. Considering that reputation is the main compliance inducing factor, Guzman sees no reason why states would seek to limit membership in this way. Rather, he argues that rational states will seek the inclusion of all states whose cooperation is needed to solve the problem at stake. While I am convinced by the argument that the role of reciprocity is limited, I would, however, like to add the caveat that considerations of compliance and enforcement might indeed play a role in choosing the scope of an agreement: if a limited group of states has the power to force states outside the group to comply with the rules they make, rational states have no reason to open the club to further members. Examples for this kind of hegemonic law-making abound. One might only consider the OECD's recent efforts to dry up tax havens, none of which is an OECD member. The reputational (and, possibly, retaliatory) effects of non-compliance with the rules of the OECD are too strong for non-member states to resist. Thus, the choice of membership in an agreement might be better understood as a function of both the underlying problem and considerations of compliance. This solution would also be in line with Guzman's generally successful strategy of building

theoretical models which contain more than one variable, such as his toolbox approach to form and substance.

Strictly in accordance with his reputational theory of compliance, Guzman also provides a fascinating explanation of customary international law. Accordingly, neither *opinio iuris* nor state practice is decisive for the assumption of a rule of customary international law, but the belief of *other* states (even of one other state) that the state whose behaviour is in question has a legal obligation (195). This suffices for triggering reputational consequences, independent of any more or less fictitious form of consent to the rule which traditional international law doctrine presupposes. Thus, *opinio iuris* (understood as the opinion of *other* states) is clearly the dominant element. State practice has the function of an indicator of *opinio iuris*. This approach solves many problems related to the selection of the relevant state practice, which is made by virtue of the reputational impact of the act in question.

A theory is only as good as it explains the world. The practice test therefore provides the proof of the pudding. Large-scale empirical assessments can hardly be expected, in particular in case of a theoretical model as complex as the one proposed by Guzman. However, throughout the book, Guzman provides numerous practical illustrations ranging from areas of international law as diverse as the environment, human rights and disarmament. The stunning explanations of international legal phenomena provided by these examples equip Guzman's theory with a high degree of plausibility. The theory is able to explain for a large number of diverse international legal rules how they came into existence and why they are complied with or broken. What else could one expect from a good theory?

D.

Guzman's book thus presents an impressive, theoretically sound and practically useful theory of international law. How does this theory relate to other theoretical approaches? As the book's cover image, showing four interlocking gearwheels depicting different continents, quite tellingly illustrates, Guzman's theory could indeed be said to represent for the discipline of international law what classical mechanics represent for physics: A comprehensive theory that might soon become part of the routine business of a great number of legal scholars, but whose explanatory value has known limits.

From an internal standpoint, Guzman's theory owes its attractiveness, first, to its parsimonious use of basic assumptions, which nevertheless keep

some distance to realist assumptions. Thus, while it sees states as the principal actors on the international scene, it does not suppose that their principal interest is security. The theory is therefore open-textured enough to accommodate very different concrete situations. Second, the assumptions are not used too rigidly. Rather, Guzman switches gear several times throughout the book and relaxes many of his basic assumptions, such as the stability of states' preferences over time. This leads to quite a complex theoretical engine. Although this makes the application of the theory more complex and ambiguous, it lends it more credibility.

These two factors also make Guzman's book a profound criticism of Goldsmith's and Posner's theory about the limits of international law. Guzman's smartly designed rational choice theory of international law actually helps to explain the role of law in international relations in many situations. This is so valuable compared to some bold theses about international law's irrelevance which carry little empirical support and whose basic assumptions are fragile not least because of their rigidity.

Turning now to the external perspective, those who do not believe in rational choice will be particularly pleased by Guzman's non-hegemonic attitude towards theory. Indeed, the concept of law underlying Guzman's theory is not fundamentally different from other contemporary legal theories such as discourse theory or the theory of social systems, even though they emanate from completely different, and completely irreconcilable theoretical bases. This is by virtue of Guzman's focus on reputation, which in essence means that international law is about the creation and maintenance of expectations towards the behaviour of states (and not only about constraint). Moreover, in the first chapter, in which Guzman positions his approach on the landscape of theories about international law and relations in an excellent and virtuous survey of the state of the art, Guzman shows full awareness of the limits of his theory and of the fact that what he is developing is classical mechanics rather than a "quantum theory" of international relations. Unlike Guzman, constructivism and liberal theory, which might be considered "quantum theories" of international relations, look into the inside of the billiard ball – or, to stick to the scientific metaphor – into the atomic nucleus of the state and theorize about the impact of its internal structure or the formation of its preferences. Guzman justifies his theoretical neglect for these approaches with the unavailability of workable models explaining the interactions on the domestic level that are emphasized in liberal theory, or the generation of preferences through ideas as suggested by constructivist accounts.

However, it might be asked to what extent it would have been desirable to accommodate certain elements that play key roles in constructivist and liberal theories of international law within a rational choice model of international law. For example, the astonishingly marginal attention that Guzman pays to international organizations raises some doubts. In this respect, it stands in opposition to a lot of recent research in law and social sciences that has provided ample illustration of how international organizations change international law-making and law-enforcement. Whether international organizations are considered as mere tools of their member states for the reduction of transaction costs or the use of synergies, as the rationalist-functionalist standard account has it, or whether they are presumed to get a life of their own and trigger dynamics that are different from mere intergovernmental relationships, as constructivist or liberal scholars would do, it might change the constitution, effects and management of reputation significantly. Admittedly, the latter stream of research has not developed rational models for the analysis of causal relationships (which surprises all the less as some of them, in particular constructivists, might not even have an interest in questions of causality). But that would make the challenge of developing such models ever more interesting. And even if in such a model international organizations were eventually considered as billiard balls with fixed, independent interests instead of mere tools of their members, this would probably not amount to a greater oversimplification than the billiard ball concept of states. Nevertheless, this point of criticism does not deprive Guzman's theory of its value for the study of international law, but rather hints at future fields of research.

In conclusion, Guzman's book should be in a position to rehabilitate the damaged reputation of rational choice as a way of theorizing about international law. I am convinced that many members of the "invisible college" will appreciate the quantum of solace provided by Guzman's theory, even those whose principal hope is for the solace of a quantum theory of international law.

