

International Law in the New Age of Globalization

International Law in the New Age of Globalization

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The conference was organized by the Japanese Society of International Law and the Editors would like to thank the officers of the Japanese Society, including the staff of the Conference Secretariat and the organising committee for the conference, as well as the Steering Committee, comprising members of each society: Yuji Iwasawa, Gen Kikkawa, Naoya Okuwaki, Shigeki Sakamoto, Norio Tanaka, Masaharu Yanagihara, Elizabeth Andersen, David Caron, Kent Anderson, Craig Forcece, Joanna Harrington, Armand de Mestral, Yukari Takamura, Akiho Shibata, Shotaro Hamamoto, Dai Tamada, Machiko Kanetake, Tomoko Yamashita, Shiho Sugiki and Yoko Onishi. The conference was supported by the Egusa Foundation for International Cooperation in the Social Sciences.

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PERMISSIONS

A number of the papers presented at the Third Four Societies Conference have been published in different versions in other journals. We are grateful to the editors of the journals involved for permission to include this previously published material in this collection: Karen N Scott, 'International Environmental Governance: Managing Fragmentation through Institutional Connection' (2011) 12(1) *Melbourne Journal of International Law* 177–216; Michael J Kelly, 'Grafting the Command Responsibility Doctrine onto Corporate Criminal Liability for Atrocities' (2010) 24 *Emory International Law Review* 671, and Charles-Emmanuel Côté, 'Looking for Legitimate Claims: Scope of NAFTA Chapter 11 and Limitation of Responsibility of Host States' (2011) 12(3) *Journal of World Investment and Trade* 321.

PREFACE

NISUKE ANDO*

This book represents the outcome of the Four Societies Conference held in Awaji in Japan in late August 2010. It brings together a series of innovative and timely essays commissioned to address the challenges that globalization poses to the international legal order. The essays were written and presented by selected early career scholars from the American Society of International Law, the Australian and New Zealand Society of International Law, the Canadian Council on International Law, and the Japanese Society of International Law. At the conference, I had the pleasure of delivering some introductory remarks in which I sought to reflect upon some aspects to be taken into consideration when dealing with the complex theme of globalization and international law.

As a point of departure I consulted some of the standard dictionaries of international law with a view to finding a definition of the term 'globalization'. In 2001, a number of French-speaking scholars published the *Dictionnaire de Droit International Public*.¹ Three years later, in 2004, the Max Planck Institute of Comparative Public Law and International Law in Germany combined into four volumes its previous work on *Encyclopedia of Public International Law*.² Then, in 2005, the Japanese Society of International Law published a *Dictionary of the Law of International Relations*.³ None of these leading dictionaries contained an article or entry for the term 'globalization'.

However, the electronic version of the most recent Max Planck *Encyclopedia of Public International Law* defines globalization as 'a multi-faceted process of expansion of human activities to the entire globe and assorted cognitive frames of reference'.⁴ This is a rather broad definition. Yet, it suffices for the purposes of this collection which aims to identify some of the key implications of globalization in terms of actors,

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¹ *Dictionnaire de Droit International Public* (Bruylant, 2001).

² *Encyclopedia of Public International Law* (Oxford University Press, 2004).

³ *Kokusai Kankei Ho Jiten* (Sanseido, 2nd ed 2005).

⁴ Frédéric Mégret, 'Globalisation', *Encyclopedia of Public International Law* <www.mpepil.com> (February 2009).

community regulations, human rights and humanitarian law, and environmental protection.

If we adopt this very general definition, we can say that throughout history we have witnessed many phenomena that might be regarded as globalization in one form or another. For example, in the sixteenth century, the developments of the Reformation and Counter-Reformation were linked with the great age of European navigation and discovery. These phenomena indicated an expansion of certain human activities, first from one part of Europe to another, then from Europe to the other parts of the world. In this context, it must be noted that legal scholars at the time elaborated on such concepts as *terra nullius* and the right to trade. Francisco de Vitoria, for instance, wrote on the Spanish conquest of Central and South America and concluded that the Spanish invasion was justified on the grounds that, contrary to natural law rules, the Native Americans had unlawfully attempted to exclude Spanish traders from their kingdoms. Vitoria also confessed, however, that his 'blood froze in his veins' at the thought of the terrible atrocities committed by the Spanish in the process.⁵

On the European continent the struggle between Catholic and Protestant princes, the Thirty Years War, ended in 1648 with the conclusion of the Peace of Westphalia. The peace treaty marked the end of the feudalistic social order of the Middle Ages in that the political power of princes would prevail over religious authority. State sovereignty thus became a cornerstone of international relations and remains a fundamental principle of modern international law. A similar development took place with regard to the historical quest for the control of the seas. In 1493, Spain and Portugal persuaded Pope Alexander VI to issue a decree dividing the global seas between the two, with a meridian line drawn in the middle of the Atlantic Ocean, a division varied a year later in the Treaty of Tordesillas between these two powers. The Netherlands, and later England, both new sea-faring nations, protested against this duopoly and claimed free use of the ocean space. Eventually, State practice accepted that this space should be divided into territorial seas and high seas, the former under exclusive control or jurisdiction of coastal States, the latter for free use of all States. Here again modern international law adapted itself to human activities on a global scale, producing rules such as freedom of the

⁵ Francisco de Vitoria, 'On the American Indians', in Anthony Pagden and Jeremy Lawrence (eds), *Political Writings* (Cambridge University Press, 1991) 231.

high seas and universal jurisdiction over piracy as acts *hostis humani generis*.

The developing laws of war provide yet another example of modern international law responding to the technological innovation of weapons and new means of injuring combatants. Having witnessed the cruelty of the Thirty Years War, Hugo Grotius wrote his famous treatise *De Jure Belli ac Pacis* (On the Law of War and Peace) and attempted to provide a general ethical basis on which conflicts might be restrained. Two centuries later, US President Abraham Lincoln, facing the realities of the Civil War, ordered Colonel Lieber to prepare a code on the conduct of war. A general concern for the regulation of hostilities also led to the two Hague Peace Conferences of 1899 and 1907, where many treaties concerning the topic were adopted and subsequently applied in World War I. In 1949, taking into account the experiences of World War II, the four Geneva Conventions for the Protection of War Victims were adopted, and in 1977 they were supplemented by the two Additional Protocols to reflect subsequent practices. The international community has succeeded in adopting a treaty to prohibit the manufacturing, stockpiling and use of biological weapons as well as a similar treaty on chemical weapons. However, no such treaty has yet been adopted with respect to nuclear weapons.

In the field of economic and social issues, the Industrial Revolution, which started in eighteenth-century England and subsequently spread to the European continent, brought about the large-scale production of various consumer goods together with development of different means of transportation, thus prompting a rapid growth of cross-border trade and communication. This required the reduction or abolition of old tariff barriers as well as the creation of new universal rules for the exchange of people and commodities. Similarly, international co-operation on mail and postal services, cross-border railways and other categories of land transport led to the establishment of international administrative unions in the latter half of the nineteenth century. International economic and social cooperation further developed in the League of Nations era, which led to the establishment of various specialized agencies under the auspices of the United Nations. In 1944, the Allied powers concluded the so-called Bretton Woods Agreement which created the World Bank and the International Monetary Fund for the coordination of post-World War II international monetary and financial activities and in order to avoid a repeat of the failure of monetary and financial systems during the inter-war period. Furthermore, in 1947, States adopted the General Agreement on Tariffs and Trade to promote international trade.

As described above, international law has always responded to various forms of globalization and, in this sense, globalization is not an entirely new phenomenon to international law. However, as in the past, the current phase of globalization has its own specific characteristics of which I like to briefly pay attention to the following three: the development of information technology (IT); the decreasing factual importance of national borders; and the role of the sovereign State.

In this day and age, due to the evolution of information technology, anyone possessing a personal computer, mobile phone or similar device can share information almost simultaneously. This, in turn, has the potential to affect one's ideas as well as behaviours across borders in an unprecedented way. In spite of the numerous benefits of these possibilities, one should not forget that there are many who do not have access to these means of obtaining information and who thus do not benefit from it. Indeed, both poverty and repressive political systems continue to impede access to information in many parts of the world.

Those, however, who are in the privileged position of being able to benefit from the digital age, may potentially contribute to reducing or redefining traditional national barriers. Of course, each individual's pattern of feeling and acts are very much the product of his/her environments, social and natural, or of his/her education, widely defined. Therefore, his/her reaction to the same information may differ. On the other hand, there may be common patterns of feeling and thinking which are universally recognized and which lead to individuals in different parts of the world reacting to the same information in the same or similar manner. In any event, there is no denying the fact that one and the same information simultaneously shared is likely to reduce the importance of national borders. This may also explain the ever-increasing flow of cross-border migration of workers.

Nevertheless, so long as we have not established a world government, sovereign States continue to regulate and govern most aspects of our daily lives. But they do so with varying degrees of legal and political accountability and transparency. The European Union, for instance, has emphasized that the essence of good governance comprises of the rule of law, democracy and human rights. Few sovereign States would deny the importance of good governance, but the number of sovereign States which adhere to the above-mentioned principles of good governance is still comparatively small. Although the impact of IT development, as referred to briefly above, is gradually increasing, many States continue to curtail the free flow of information which is integral to ensuring good governance.

I have tried to clarify that globalization widely defined is not a new phenomenon for international law. Rather, international law has always been responding to globalization, in many cases effectively, and there is no reason why current international law cannot be developed and shaped to respond adequately to the current challenges of globalization. One of these challenges lies in making accessible the benefits of globalization to the greatest number of people. International law plays a decisive role in this regard. And I am pleased to note that in one way or the other, all the contributions in this collection offer fresh and intriguing insights on how this inclusiveness can be achieved under an international rule of law.

INTRODUCTION

ANDREW BYRNES, MIKA HAYASHI AND CHRISTOPHER MICHAELSEN

That we live in an increasingly globalized world is clear, as is the fact that previous times have also seen similar periods of globalization. While the existence of the phenomenon in the modern world is irrefutable, the forms it takes are multifarious, its meanings contested,¹ and its impacts both beneficial and burdensome. For some, ever-increasing globalization and connectedness is seen as a largely undiluted good to be promoted and underpinned by law, while for others it is a phenomenon that brings homogenization, alters the role and capacity of States,² undermines the democratic institutions of the nation-State,³ and destroys local cultures.

There are many definitions or descriptions of 'globalization'. Political scientists Martin Griffiths and Terry O'Callaghan have described it as 'a term that refers to the acceleration and intensification of mechanisms, processes, and activities that are allegedly promoting global interdependence and perhaps ultimately, global political and economic integration. It (...) involves the *detrterritorialisation* of social, political, economic, and cultural life.'⁴ Stephan Hobe has referred to globalization as 'an increase of transnational actors with political negotiation power, global threats, challenges beyond the capacity of states to regulate, and far-reaching changes in societal and political integration.'⁵ Similarly, Manfred Steger has suggested that globalization signifies 'a social condition characterized by the existence of global economic, political, cultural, and environmental

¹ See, eg, Tun Myint, 'Globalization and the Institutional Dynamics of Global Environmental Governance' (2011) 18 *Indiana Journal of Legal Studies* 395.

² See, eg, Saskia Sassen, 'The State and Economic Globalization: Any Implications for International Law?' (2000) 1 *Chicago Journal of International Law* 109, 110; Armin von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law' (2004) 15(5) *European Journal of International Law* 885, 892; David P Fidler, 'The Globalization of Public Health: Emerging Infectious Diseases and International Relations' (1997) 5 *Indiana Journal of Global Legal Studies* 11, 14.

³ See Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 3 *European Journal of International Law* 435.

⁴ Martin Griffiths and Terry O'Callaghan, *International Relations: The Key Concepts* (Routledge, 2002) 126–127 (emphasis added).

⁵ Stephan Hobe, 'The Era of Globalization as a Challenge to International Law' (2002) 40 *Duquesne Law Review* 655, 656.

interconnections and lows that make many of the currently existing borders and boundaries irrelevant.’⁶

In the literature on globalization and international law, it is common to refer to earlier historical periods, where there was an expansion of European power and influence to all corners of the world during the ‘great age’ of European exploration and the colonization and settlement that followed, with religious, political and economic influence being extended to many corners of the world.⁷ International law played its role in that process, in particular in providing justification and legitimacy for the exercise of power by Europeans over non-Europeans, and by Christian over non-Christians, and also supplying a legal basis for the allocation of dominion over other parts of the globe among the continental European powers. The period also saw the struggle to establish basic rules of international law (such as the freedom of the high seas) that served the interests of the expansionist European powers or reflected contests over their competing interests, and the development of common bodies of law (such as the *lex mercatoria*) that facilitated the international flow of trade.⁸

The standard narrative sees another major era of globalization in the period following the Thirty Years War in Europe, a conflict which ‘deflected European attentions from colonial expansion and globalization for much of the seventeenth century’ and which concluded in the Peace of Westphalia, a political settlement commonly identified as the foundation of the modern State-based international legal system.⁹ From this time until the late nineteenth and early twentieth century, in particular during the period of colonial imperialism in the nineteenth century, international law justified, facilitated and at times also provided resistance to forms of globalization (which was manifested in political domination, increasing trade, and the movement of peoples), sometimes simultaneously. The two world wars of the first half of the twentieth century – in particular World War I – are sometimes seen as the collapse of globalization, but they are also viewed as interruptions in the continuing expansion of globalizing trends or indeed major globalized events themselves. However one views these – as disjunctive or continuous – there is little doubt that since

⁶ Manfred B Steger, *Globalization – A Very Short Introduction* (Oxford University Press, 2003) 7.

⁷ See, eg, David J Bederman, *Globalization and International Law* (Palgrave Macmillan, 2008).

⁸ See Nisuke Ando, ‘Preface’, in this volume.

⁹ Bederman, above n 7, 21.

World War II the process of globalization has intensified and expanded, driven on by the expansion of international trade and transport, the internationalization of production, and more recently the explosion in new information and communications technology that renders the limits of time and space redundant in many respects.

Yet the current period of globalization, sometimes dated to after World War II, sometimes to later events such as the end of the Cold War, is seen involving something different from that of previous eras. Armin von Bogdandy, for example, has noted that the 'common ground among the different understandings of globalization is the observation of a massive global increase of interaction between the same spheres of different nations, especially since the beginning of the 1990s.'¹⁰ The extent of economic integration, the volume of international trade, the institutional and regulatory structures set up to facilitate ever increasing integration and interaction – and above all the influence of new communications technology – are seen by many as involving new challenges and opportunities by changing the way in which we can and do interact, and the abilities of national States and international institutions to respond.¹¹

The point of departure for all the chapters in this volume was a recognition that classical international law remained insufficiently equipped to deal with, either practically or/and theoretically, certain new phenomena in an increasingly globalizing world. Recognizing the need for innovative steps or remedies, the essays aim to identify such issues with reference to classic international law, and explore the feasibility of fresh solutions.

Part I of the book contains four essays each addressing the question of how existing international legal tools to regulate and adjudicate community interests and conflicts can be adapted, both conceptually and in practice, to the enlarged scope and changed nature of international law in the new era of globalization. In Chapter 1, Christopher Michaelsen examines the Security Council's emerging practice of adopting sanctions targeting private individuals. As Michaelsen explains, this practice raises a number of important legal questions which stem mainly from the fact that international organisations developed as elements of the inter-State system of international law to regulate the relations between States and to organize their cooperation. Therefore, conceptually these organisations were not held to regulate and sanction the behaviour of private individuals, at least

¹⁰ von Bogdandy, above n 2, 888.

¹¹ See, eg, Frank J Garcia, 'Globalization and the Theory of International Law' (2005) 11 *International Legal Theory* 9, 13.

not directly. As the Security Council's practice has significant implications for due process rights of targeted individuals, Michaelsen argues that it is all the more important to clearly determine the constitutional basis for, and the limits to the Council's measures.

In Chapter 2, Anna Spain examines how certain effects of globalization present limits for the classical international legal tool of adjudication as a means for settling disputes in order to promote international peace and security. She argues that these developments demand adapting the traditional international legal system to embrace non-judicial methods of dispute resolution, such as mediation and conciliation, and the institutions that provide them. Spain's chapter provides a framework for doing so in an integrated manner that strengthens the capacity of the overall dispute settlement system. Chapter 3, in contrast, focuses on an established mechanism of international dispute settlement. Yoshiyuki Lee-Iwamoto focuses on the challenges facing the International Court of Justice (ICJ) as it evolves to address unforeseen developments, such as the appearance of community interests, while maintaining the format of bilateral proceedings presented before the Court. Lee-Iwamoto suggests that the ICJ has used existing procedural devices for the enforcement of community interests, but that it can do so only within the scope of its judicial function. His chapter explores the possibilities and the limitations of the ICJ to protect community interests through provisional measures, and argues that the necessary requirements for provisional measures tend to focus on the bilateral rights-obligations relations between parties.

Mika Hayashi, in Chapter 4, takes up explosive remnants of war as yet another example where a bifurcated/bilateral approach does not satisfactorily respond to a contemporary challenge of fundamental significance. Hayashi accepts that apportioning the responsibility for clearance of explosive remnants of war to the affected State and the user State may be a logical consequence of a bilateral approach, and observes that this approach is taken in various instruments. She notes, however, that there are also multilateral treaties that appear to be truly collective in their approach. Hayashi's chapter explores in particular how one of these treaties, the Ottawa Convention on Landmines, regulates and realizes the community interests in clearance of explosive remnants of war.

In Part II of the book, the focus shifts to the challenge of coordinating dialogues and governance strategies within and between international legal systems and institutions. Philippa Webb's analysis in Chapter 5 focuses on responses to globalization by the interpretive community of international law. By focusing on the issue of legality of the use of force in

international law, she examines decisions of multiple international courts and tribunals, including the International Court of Justice. Webb observes that there is a mixture of fragmentation and integration apparent in judicial practice. She argues for contextualized decisions based on increased dialogue among adjudicatory bodies, which would not only improve the coherence of the law on the use of force, but would also strengthen the legitimacy of the whole international judicial system.

In Chapter 6, Sarah McCosker analyzes the interaction between international humanitarian law and human rights law by critically examining the interpretive toolbox available to international lawyers to respond to challenges of interaction of the two subsystems in practice. Recognizing the limits of traditional consolidation of rules by codification, McCosker borrows the concept of 'interoperability' from communications and information technology to make a case for more coordinated application of international humanitarian law and human rights law. She argues there is more work to be done to clarify aspects of the relationship between the two systems of law, and to translate the dense body of academic discussion about their relationship into guidance that can be more easily used in practice by the key stakeholders and decision-makers in situations of armed conflict.

Ljiljana Biuković, in Chapter 7, examines cases of interaction of international trade and human rights standards by looking at two cases of regional economic integration in Latin America and Asia. Discussing theoretical contributions to defining normative parameters for international trade and human rights rules, she utilizes the concept of coordinated compliance to argue that in order to achieve the efficient level of coordination and compliance with the two sets of international rules it is necessary to develop not only international but also national normative and structural contexts capable of managing coordinated interpretation, application and enforcement of international trade and human rights standards.

In Chapter 8, Karen Scott examines the institutional linkages between multilateral environmental agreements (MEAs) and their institutions as a means of managing the positive and negative consequences of fragmentation. Similarly to the studies of Webb, McCosker and Biuković, she focuses on the institutional linkages between agreements – in this case MEAs – and argues that the development and strengthening of these linkages have the potential to improve both environmental governance and environmental protection. In contrast to the previous chapters in Part II, Scott emphasizes the benefits that may result from both globalization and fragmentation within the field of environmental protection.

In Part III, the focus shifts from systems and institutions to some of the actors playing a key role in the process of globalization. In Chapter 9, Robin Hansen surveys the global economic role of multinational enterprises (MNEs), and notes that these entities remain a striking omission from mainstream international law's recognized cast of legal persons. Discussing the reasons for the lack of recognition for the international legal personality of MNEs thus far, she explores the possible effects of future recognition of MNE legal personality. Hansen addresses globalization's impact on the legitimacy, subjects and scope of international law, in several ways. First, she argues that potential recognition of MNEs as international legal persons has ramifications for the legitimacy of international law, suggesting that – if recognized – MNEs ought to be regarded as actors subservient to States and as persons without the power to create or enforce international law. Second, she notes that the recognition of international legal personhood is a politically-driven process. Hansen finally touches upon the topic of the appropriate scope of international law by suggesting that MNE personality may be a first step towards additional substantive and procedural international law rules concerning MNEs, including those relating to MNE obligations and to home State responsibility vis-à-vis MNE conduct. She argues that MNE personality may be a prerequisite for improved State coordination, within the international law context, of regulatory and adjudicatory jurisdiction over MNEs.

In Chapter 10, Dwight Newman explores the development of new legal norms affecting the centrality of States in international law. He examines in particular the development of norms requiring sovereign States to undertake certain actions to engage in consultation with indigenous communities that had previously been denied membership in the community of States both at the Westphalian moment and in subsequent development of international law. Newman argues that the change in these legal norms has come about partly as a result of successful advocacy by a globalized coalition of indigenous communities and that the resulting processes have potentially reflected certain changes in legitimate modes of international law formation in the context of globalization. At the same time, he asks whether some of these changes paradoxically mark a reinvigoration of the State-centred system, in ways lurking below the surface developments.

Anastasia Telesetsky reminds us in Chapter 11 that transnational corporations (TNCs) have become the most influential socio-economic force within the phenomenon of globalization. She notes that the revenues of TNCs at times exceed the gross national product for States, and that they

also increasingly engage in global governance activities. Furthermore, daily decisions that lead to conditions of environmental degradation and pollution are often made by non-State actors rather than State actors. Telesetsky proposes the re-examination of the dynamic between State actors and non-State actors in order to create regulatory frameworks that better contribute to increasing legitimacy and accountability. She argues that co-regulation presents one possibility for achieving collaborative governance between State and non-State actors, particularly with a view to negotiating binding environmental covenants. However, in order to create a more effective institutional framework for co-regulation, State actors must offer a formal role to non-State actors in intergovernmental negotiations rather than giving the, less influential role as observers.

In Chapter 12, Michael Kelly addresses the issue of the criminal liability of corporations under international law, noting that international law has not yet expanded to include corporations as objects of international criminal responsibility. He argues that there is a persuasive case for moving in this direction, talking as his example the case of the crime of genocide. In Chapter 13, Yoshihisa Hayakawa explores yet another dimension of the increasing role of corporations and their impact on the development of international law. In particular, he focuses on the emergence of investment treaty arbitration and examines the limits that this represents on the sovereign rights of the State. Arguing that investment treaty arbitration is necessary, Hayakawa describes how it enables corporations to affect the classic order of international law and can be utilised to create a new order of international law.

Finally, Part IV contains two topical chapters dealing with the exposure of State sovereignty to private actors and the need to preserve the regulatory powers of States. In Chapter 14, Tomonori Mizushima looks at the internal pressure of private actors on sovereignty when a State conducts extraterritorial activities. His chapter on Japan's new Sovereign Immunity Act traces the origin of this legislation and explores its legal consequences on foreign States' liability before Japanese courts, as well as its alignment with contemporary international practice. Mizushima addresses the issue of changing rules on State immunity in the new era of globalization, focusing more on an increase in the extraterritorial activities of State actors than an increase in trans-boundary activities by non-State actors. However, because non-State actors are the other parties in State immunity cases, this also raises the question of the role of non-State actors in international law. In Chapter 15, Charles-Emmanuel Côté focuses on the external pressure private actors put on State sovereignty when they make investment

claims against a State before arbitral tribunals. In particular, Côté examines the tension between legitimate protection of foreign investors and preservation of sovereignty by exploring the use of the scope of investment treaties to limit host State responsibility.

The essays in this volume underline the many different ways in which the processes of globalization have had an impact on international law. In some cases, international law has been a promoter and embodiment of the values and processes of globalization, and provided the normative support for its progression. In other cases it has formed part of the basis of resistance to globalization and its less benign impacts on people around the world. Whatever the forms and impact of globalization, there is a role for international law – but it is a role that is evolving in response to the many challenges to the traditional concepts and structures posed by the new era of globalization in which we live.

PART 1

ADAPTING CLASSICAL INTERNATIONAL LEGAL TOOLS
TO REGULATE AND ADJUDICATE COMMUNITY INTERESTS
AND CONFLICTS IN THE ERA OF GLOBALIZATION

CHAPTER ONE

THE COMPETENCE OF THE SECURITY COUNCIL UNDER THE UN CHARTER TO ADOPT SANCTIONS TARGETING PRIVATE INDIVIDUALS

CHRISTOPHER MICHAELSEN*

I. INTRODUCTION

The new era of globalization has seen a dramatic increase in activity by international governmental organizations. Such organizations are now regularly active in the administration and regulation of matters that once used to be the exclusive domain of States. Whether it is major environmental and economic challenges or key questions of law and security, there is virtually no issue of global importance that is not subject to some form of international governance. The shift of governance tasks and functions from States to international – or supranational organizations has been accompanied by an equally dramatic increase in activity by non-State actors. As other contributors to this book point out, non-State actors now play a key role in world governance in different fields and have become essential instruments within the international system. What both (interrelated) developments have in common is that they present major challenges to the international legal system and traditional structures of international governance. In particular, these developments raise the question whether the classic international legal tools to regulate conflict remain adequate in the age of globalization.

This chapter focuses on the imposition of sanctions as a tool to regulate the behaviour of private individuals considered to be a threat to international peace and security. Sanctions are a classical instrument available to the Security Council under Chapter VII of the UN Charter to prevent and regulate conflict through the use of measures falling short of the use of force. While the Cold War largely prevented the Council from making full use of these powers for the first four decades of its existence, the Council has initiated over twenty-five sanction regimes in the last two decades. Throughout the 1990s, however, it became apparent that there were severe

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disadvantages to comprehensive sanction regimes imposed on States as a whole. Comprehensive sanctions often had devastating effects on the innocent population without effecting any change of policy by the regime in power. In response, a process was started to develop a more targeted system of sanctions, also called 'smart' sanctions. In contrast to comprehensive economic sanctions, targeted sanctions were not imposed on States or entire populations, but on specifically identified individuals and other entities. These individuals were generally political and military leaders and individuals closely associated with the targeted government or 'traditional' non-State actors like insurgents, rebel movements or civil war factions.

In the post 9/11 era, there has been a further shift in the use of sanctions with the adoption and modification of the 1267 sanctions regime, which requires UN Member States to freeze the assets of, prevent the entry into or transit through their territories by, and prevent the direct or indirect supply, sale and transfer of arms and military equipment to any individual or entity associated with Al-Qaida, Osama bin Laden and/or the Taliban as designated by the 1267 Committee, a sub-committee of the Security Council.¹ What sets this sanction regime apart from others, however, is the fact that it goes beyond earlier sanctions regimes which targeted rebel groups or political elites. The 1267 regime was the first sanctions regime that targeted entities and private individuals who did not necessarily have any links to States, governments or even 'traditional' non-State actors like rebel groups or civil war factions. In its current form of operation, the regime effectively amounts to a system of executive proscription of individuals by the Council.²

The Council's emerging practice of adopting sanctions targeting individuals raises a number of important legal questions. These stem mainly

¹ SC Res 1267, UN SCOR, 4051st mtg, UN Doc S/RES/1267 (15 October 1999) ('Resolution 1267'); for a detailed analysis of the 1267 regime, see, eg, Christopher Michaelson, 'The Security Council's Al Qaeda and Taliban Sanctions Regime: Increasing Liability or "Essential Tool" for the UN's Counter-Terrorism Efforts?' (2010) 33 *Studies in Conflict & Terrorism* 448. The 1267 regime goes beyond the scope of other counter-terrorism resolutions like Resolution 1373 (SC Res 1373, UN SCOR, 4385th mtg UN Doc S/RES/1373 (28 September 2001)) which require Member States to legislate but which leave the details of implementation to each individual State; see, eg, Andrea Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States' (2006) 4 *Journal of Int'l Criminal Justice* 1044.

² On 17 June 2011, the Security Council adopted Resolutions 1988 (SC Res 1988, UN SCOR, 6557th mtg, UN Doc S/RES/1988 (17 June 2011) ('Resolution 1988')) and 1989 (SC Res 1989, UN SCOR, 6557th mtg, UN Doc S/RES/1989 (17 June 2011) ('Resolution 1988')) and decided to split the Al-Qaida and Taliban sanctions regime. Resolution 1989 stipulates that the sanctions list maintained by the Security Council Committee established pursuant to

from the fact that international organizations developed as elements of the inter-State system of international law to regulate the relations between States and to organize their cooperation. Therefore, conceptually they were not held to address individuals, at least not directly. Yet it is precisely individuals who have been the target of recent Council sanctions. What is more, while individualized sanctions such as asset freezing and travel bans are preventive by design, they are punitive in impact. As such they raise serious concerns in relation to fundamental human rights of targeted individuals including the right to property, the right to judicial review, the right to procedural fairness, the right to a hearing and the right to an effective remedy.³

The central aim of this chapter is to critically examine the Council's emerging practice of adopting sanctions against private individuals. For the purposes of this chapter the term 'private individuals' refers to those individuals who are not State representatives and who generally lack an explicit association with traditionally recognized and structured non-State entities. The chapter will explore, in particular, the question of whether, and to what extent, the UN Charter provides authority for the Council to adopt such measures. In this context, it will also seek to identify the content and scope of the limits to the Council's Chapter VII powers. The analysis is based on the assertion that the clear determination of those limits is becoming increasingly important in light of the developing 'individualization' of Security Council measures.

II. SECURITY COUNCIL COMPETENCE UNDER THE CHARTER TO ADOPT SANCTIONS TARGETING INDIVIDUALS

A. *The Security Council and Its Powers Under Chapter VII of the UN Charter*

As the principal organ of the United Nations charged with the maintenance of international peace and security, the Security Council enjoys greater powers than any other international body in history. Its powers are

Resolution 1267 will be known as the 'Al-Qaida Sanctions List' and include only names of those individuals, groups, undertakings and entities associated with Al-Qaida.

³ For an in-depth legal analysis of these rights as they are engaged by the 1267/1989 Listing and De-Listing Procedure, see Larissa van den Herik and Nico Schrijver, 'Human Rights Concerns in Current Targeted Sanctions Regimes from the Perspective of International and European Law' in Thomas Biersteker and Sue Eckert (eds), *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (Watson Institute for International Studies, 2006) 9–23.

far-reaching and allow for the adoption of a wide range of enforcement measures including the resort to, or authorization of the use of force. Security Council measures are binding on all UN Member States if the Council so decides. Because of its prominent and powerful role in international law and relations, the Council has often been described as an 'executive of the international community' or as an 'international government'.⁴ Writing in 1950, the American statesman John Foster Dulles—who participated in the San Francisco conference and helped draft the preamble of the UN Charter—even claimed that 'the Security Council is not a body that merely enforces agreed law; it is a law unto itself.'⁵

While the powers of the Security Council are extensive, their *legal* authority stems from the UN Charter. Likewise, Member States are *legally* obliged to implement Council decisions. However, legal obligations suppose legal accountability. As Vera Gowlland-Debbas has pointed out, it is 'by virtue of an operation of law, not of fact, that the Member States agree to carry out the Council's decisions and to subject their international agreements to the overriding effects of the Charter.'⁶ In this context, the principle of legality also requires that Security Council measures have a clear legal basis in the Charter as the constituent instrument of the UN. This was highlighted by Judge ad hoc Sir Robert Jennings in the *Lockerbie Case (Preliminary Objections)*. Dissenting from the rest of the Court's conclusions concerning jurisdiction and admissibility, he held that:

The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and the authority of the law, and at the same time, claim to be above the law.⁷

The Security Council, as any other organ of an international organization, thus enjoys powers only insofar as they are conferred on it by, or implied

⁴ Jochen A Frowein and Nico Krisch, 'Introduction to Chapter VII' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2nd ed, 2002) vol 1, 702, citing Hans Morgenthau and PM Dupuy respectively.

⁵ John Foster Dulles, *War or Peace* (Macmillan, 1950) 194.

⁶ Vera Gowlland-Debbas, 'Introduction, UN Sanctions and International Law: An Overview' in Vera Gowlland-Debbas (ed), *UN Sanctions and International Law* (Kluwer, 2001) 13.

⁷ *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Preliminary Objections)* [1998] ICJ Rep 9 (Judge Jennings).

in, the UN Charter. This means that any discretionary power of the Security Council must be derived from specific authorizations under the Charter and cannot be presumed.⁸ The Charter provides for the Security Council's enforcement powers in Chapter VII which entrusts the Council with responsibility for taking measures to maintain or restore international peace and security. As far as non-military measures are concerned, Articles 39 and 41 of the Charter are particularly relevant. Article 39 provides that:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

The Charter does not define 'threat to the peace', 'breach of the peace', or 'act of aggression', as the drafters aimed to give the Security Council maximum flexibility in determining when it was necessary to respond to a particular situation.⁹ At the same time, most observers would have predicted that a 'breach of the peace' would represent a serious conflict between States, whereas as an 'act of aggression' would describe military intervention by one State against another. The express incorporation of 'threat to the peace' demonstrates, however, that Article 39 can come into play long before an armed conflict breaks out. Indeed, in practice the Council has almost exclusively used determinations of a 'threat to the peace' to invoke its Chapter VII powers, including non-military measures such as sanctions.¹⁰

Once the Council has determined the existence of a threat to the peace, breach of the peace, or act of aggression, it has the power to authorize both military and non-military measures in order to give effect to its decisions. The power to adopt measures not involving the use of force flows from Article 41 of the Charter which was designed to be read in conjunction with Article 39.¹¹ It provides that:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of

⁸ Frowein and Krisch, above n 4, 710.

⁹ Ibid 717–28.

¹⁰ Jeremy M Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, 2007) 81–105.

¹¹ Hans Kelsen, 'Collective Security and Collective Self-Defense under the Charter of the United Nations' (1948) 42 *American Journal of International Law* 744.

rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

In spite of the fact that Article 41 was drafted broadly in order to encompass a wide range of non-military measures, explicit invocations of Article 41 are rare. As far as the application of sanctions is concerned, the Council has referred to Article 41 only sporadically, for instance, in connection with the sanctions regimes against Southern Rhodesia, North Korea, and Iran.¹² In most cases, the Council has simply noted that it was acting under Chapter VII before applying, modifying or terminating sanctions.¹³ Irrespective of any express reference to Article 41, however, all Member States are under a legal obligation to implement measures taken by the Council under Chapter VII of the Charter. This obligation flows from Articles 25 and 103 of the Charter. Article 25 obliges Member States to comply with Chapter VII resolutions while Article 103 clarifies that obligations under the Charter—including binding obligations under Article 25—prevail over ‘any other international agreement’ unless obligations contained therein constitute general principles of international law.

B. Article 41 of the Charter as the Legal Basis for Sanctions Targeting Individuals

Article 41 lists several examples of non-military measures, including the ‘interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication’ and the ‘severance of diplomatic relations’. It does not specifically mention sanctions. This gives rise to the question as to whether Article 41 can serve as the legal basis for Security Council sanctions in general, and as the basis for sanctions targeting individuals in particular. The text and history of Article 41 suggest that the enumeration of non-military measures is not exhaustive.¹⁴ Indeed, in practice the Council has employed a wide range of non-military measures including arms embargos, trade restrictions, travel bans and the freezing of assets.¹⁵ The Council has also taken atypical measures such as the

¹² Resolution 1267 and subsequent resolutions do not contain any specific reference to Article 41.

¹³ Farrall, above n 10, 105.

¹⁴ Frowein and Krisch, above n 4, 740.

¹⁵ For an overview of the different measures applied, see, eg, David Cortright and George A López (eds), *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Lynne Rienner, 2000) 205–7.

establishment of interim administrations of territories¹⁶ and the creation of international criminal tribunals.¹⁷

When adopting arms embargos, trade restrictions, travel bans and assets freezes against Member States, de-facto regimes or non-State factions in armed conflict, the Security Council has rarely discussed the legal basis for these measures in any detail. Indeed, it appears that these measures have generally been considered to be covered by Article 41. Furthermore, there is little evidence of Member States raising concerns in relation to Security Council competence in this regard. However, in cases where the Council has resorted to atypical measures, the determination of the exact legal basis in the Charter has somewhat been more controversial. In particular, the creation of the International Criminal Tribunals for the former Yugoslavia ('ICTY') and for Rwanda ('ICTR') led to some debate on whether, and to what extent, the Charter provided sufficient authority for the Council to take action. It is helpful for the purposes of this chapter to revisit this debate briefly as it sheds some light on the scope of Article 41 as well as on the question of whether it provides a legal basis for atypical measures directed at individuals.

In the Council meeting at which Resolution 827 (1993) was adopted, a majority of States considered the establishment of the ICTY consistent with Chapter VII of the Charter. Representatives of a number of Council Members stressed the unprecedented nature of this initiative, and explained that their support for it was based on a number of factors including 'the very special circumstances pertaining in the former Yugoslavia,' that it was 'an exceptional step needed to deal with exceptional circumstances,' and that the Council was not establishing norms of international law or seeking to legislate.¹⁸ Other Council Members, while acknowledging legal concerns, noted that 'this is a limited and precise action with the

¹⁶ See, eg, Matthias Ruffert, 'The Administration of Kosovo and East-Timor by the International Community' (2001) 50 *International & Comparative Law Quarterly* 613; Carsten Stahn, 'International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead' (2001) 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 107.

¹⁷ James C O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 97 *American Journal of International Law* 639; Karl Zemanek, 'Is the Security Council the Sole Judge of its Own Legality?' in Emile Yakpo and Tahar Boumedra (eds), *Liber Amicorum—Mohammed Bedjaoui* (Kluwer, 1999) 629.

¹⁸ See the statement of the representative from the United Kingdom: UN SCOR, 3217th mtg, UN Doc S/PV.3217 (25 May 1993) 18.

clear objective of restoring peace, which is perfectly in keeping with the competence of the Council'.¹⁹

In supporting the establishment of the ICTY, the majority of Council Members echoed the Secretary-General's position. He argued that setting up the tribunal under the authority of the Security Council was commensurate with the restoration or maintenance of international peace and security provided that the tribunal was given a limited mandate in terms of geography and timeframe.²⁰ The Secretary-General's conclusion was based on two factors: First, that the Council did indeed have the authority under Chapter VII, as it was acting in response to a particular situation constituting a threat to international peace and security, and the measure was aimed at restoring the peace by ending the threat.²¹ Second, by assigning the tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Council would not be creating or purporting to 'legislate' that law.²² Rather, the tribunal would have the task of applying existing international humanitarian law. The tribunal was empowered to apply only those provisions of international humanitarian law that were clearly part of customary international law.

Although the vote for Resolution 827 (1993) was unanimous, two Council Members made it clear that establishing a tribunal by means of a Security Council resolution was not their preferred approach. China argued that to avoid abuse of Chapter VII powers, a tribunal to prosecute serious violations of international humanitarian law should be established using the traditional international law-making method, namely, the negotiation and adoption of a treaty.²³ Brazil agreed, stating that it would have preferred the initiative to establish a criminal tribunal to have been brought to the attention of the General Assembly.²⁴ Negotiating a multi-lateral treaty in a more representative body such as the General Assembly, Brazil pointed out, would have been the most appropriate method for establishing a tribunal.²⁵ Moreover, at the time when the Security Council was considering whether to establish the tribunal, various Member States echoed this sentiment.²⁶

¹⁹ Ibid 22.

²⁰ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, UN SCOR, 48th Sess, 3217th mtg, UN Doc S/25704 (1993) para 28.

²¹ Ibid para 57.

²² Ibid para 27.

²³ UN Doc S/PV.3217, 33.

²⁴ Ibid 36.

²⁵ Ibid.

²⁶ Ibid.

A year later, similar concerns were raised by the same two States at the Council meeting establishing the ICTR in Resolution 955 (1994). Brazil was 'not convinced' that the competence to establish and/or to exercise an international criminal jurisdiction was among the constitutional powers of the Security Council.²⁷ Pointing out that the option of resorting to a resolution of the Security Council was not the 'most appropriate method for such a purpose', Brazil noted that:

the authority of the Security Council is not self constituted. It originates from the delegation of powers conferred upon it by the whole membership of the Organization under Article 24(1) of the Charter. For that very reason, the Council's powers and responsibilities under the Charter should be strictly construed, and cannot be created, recreated or reinterpreted by decisions of the Council itself ... Therefore, the invocation of Chapter VII of the Charter for the purpose of establishing an international tribunal goes, in our view, beyond the competence of the Council as clearly defined in the Charter. We voted in favour of the creation of the Tribunal on the former Yugoslavia because of the exceptionally serious circumstances of the situation.²⁸

China expressed similar reservations. Abstaining in the vote on Resolution 955 (1994), it stated that:

At present people still have doubts and worries about the way in which an international tribunal is established by a Security Council resolution under Chapter VII of the United Nations Charter, and careful studies are still being carried out. In principle, China is not in favour of invoking at will Chapter VII of the Charter to establish an international tribunal through the adoption of a Security Council resolution ... It was for the purpose of upholding justice and bringing to justice as soon as possible those who are responsible for crimes that seriously violate international humanitarian law that China was originally prepared to give positive consideration to the Security Council draft resolution and the draft statute on the establishment of the International Tribunal for Rwanda.²⁹

In light of the concerns it is unsurprising that some defendants before the ICTY sought to challenge the constitutionality of the tribunal itself. This issue received significant attention in the *Tadić* case, in particular before the Appeals Chamber. In this case, the defence contended, inter alia, that the establishment of the Tribunal was invalid under the Charter of the United Nations and that it was not duly established by law. In particular,

²⁷ UN SCOR, 3453rd mtg, UN Doc S/PV.3453 (8 November 1994) 9.

²⁸ *Ibid.*

²⁹ *Ibid.* 11.

the appellant argued that ‘the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII’ and that this was ‘witnessed by the fact that it figures nowhere in the provisions of that Chapter, and more particularly in Articles 41 and 42 which detail these measures’.³⁰ Furthermore, it submitted that the examples mentioned in Article 41 ‘focus upon economic and political measures and do not in any way suggest judicial measures’.³¹

The Appeals Chamber rejected this argument. Acknowledging that the discretion of the Security Council under Chapter VII of the Charter was ‘not unfettered’, the Chamber held that ‘the Security Council has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace’.³² According to the Tribunal, Articles 41 and 42 of the Charter ‘leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter’.³³ The Tribunal went on to hold that the argument made by the defence did ‘not stand by its own language’.³⁴ In particular, it was ‘evident’ that the measures set out in Article 41 were merely illustrative examples which obviously do not exclude other measures. All the Article required was ‘that they do not involve the use of force’.³⁵ As a consequence, the Tribunal concluded that the establishment of the ICTY fell ‘squarely within the powers of the Security Council under Article 41’.³⁶

So what conclusions can be drawn from the Security Council debates on the establishment of the ICTY and ICTR, as well as from the Appeal Chamber’s decision in the *Tadić* case? And, furthermore, what are the implications of these debates and findings for the emerging practice of the Council to adopt sanctions targeting individuals, particularly those that do not necessarily have any links to structured non-State entities?

Both the Security Council debates and the Appeal Chamber’s judgment confirm that the Council enjoys a wide margin of discretion when taking

³⁰ *Prosecutor v Duško Tadić, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Court for the Former Yugoslavia, Appeals Chamber, Case No IT-94-I-AR72, 2 October 1995) [32] (*‘Tadić’*).

³¹ *Ibid* [34].

³² *Ibid* [29], [32].

³³ *Ibid* [31].

³⁴ *Ibid* [35].

³⁵ *Ibid*.

³⁶ *Ibid* [36].

action under Article 41 of the Charter.³⁷ Yet, this discretion is not unlimited. In particular as far as atypical measures are concerned, the scope of Article 41 as a basis of Security Council action appears to be somewhat narrower. The establishment of the Tribunals for the former Yugoslavia and for Rwanda under Article 41 was considered an extraordinary measure and much of the political support for it stemmed from the 'exceptionally serious circumstances of the situation'. A key factor for the perceived or accepted legality of the tribunals under the Charter was their limited mandate in terms of geography, timeframe and applicable law.³⁸ In other words, the existence of detailed points of reference and temporal and geographical limits were crucial elements that made atypical Council measures acceptable. One may thus draw the conclusion that the more subsidiary or atypical Security Council measures under Article 41 are, and the further away from the action taken in the exercise of the Council's primary responsibility to maintain or restore international peace and security, the stronger grows the case for the application of international legal principles and restrictions.³⁹ This also means that in the case of atypical Council measures any express or implied limits to Security Council measures under Article 41 need to be strictly construed and applied more rigorously.

What, then, are the implications of applying this rationale to the Council's competence to adopt sanctions targeting private individuals? It is clear that sanctions targeting private individuals are atypical measures which were neither originally contemplated nor appear to be in line with the basic premise of Article 41, namely that of coercing a State into compliance with demands made by the Security Council to counter a threat or breach of the peace, or act of aggression. Sanctions targeting private individuals fit uneasily into the regular understanding of Article 41 as a dichotomy exists between the demand that sanctions seek to enforce, and the addressee of the demand itself. Sanctions under Article 41 traditionally seek to coerce a State into action or restraint while individualized

³⁷ This view is generally shared by scholars: see, eg, David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter* (Kluwer, 2001) 190.

³⁸ See generally Faiza Patel King, 'Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers under Chapter VII of the Charter' (1996) 10 *Emory International Law Review* 509.

³⁹ See also Malcolm N Shaw, 'The Security Council and the International Court of Justice: Judicial Drift and Judicial Function' in AS Muller, David Raic and Johanna Thuranzky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (Martinus Nijhoff, 1997) 234–6.

sanctions aim at preventing individuals from providing financial or other assistance to a group of relatively unidentified non-State entities. This practice is problematic as obligations are created for entities whose international legal personality is in doubt. On the other hand, it is important to recognize that targeted individuals are not formally addressed by the Security Council resolutions (with the exception of Osama bin Laden in the case of the 1267 regime). While specific individuals are identified by the Council or a subsidiary body like the 1267/Al Qaeda Committee, individuals are generally subjected to enforcement measures through the intermediary of State action.

Although there are good reasons to argue that sanctions targeting private individuals exceed the competence of the Council under Article 41, the ICTY and ICTR experiences suggest that the Council's wide discretionary powers under Chapter VII can extend to atypical measures. However, questions about the Council's competence were not raised at its meeting which led to the adoption of the 1267 sanctions regime. Malaysia reiterated its 'serious concern about the effects and impact of the sanctions on the people of Afghanistan'.⁴⁰ China did not 'approve of the frequent use of sanctions' and endorsed the views expressed by the representative of Malaysia.⁴¹ It stated that sanctions only exacerbated the suffering and hardships of the Afghan people. It also expressed the view that 'sanctions can be used only as a means of last resort and must be well targeted'.⁴²

The lack of debate on Security Council competence may be explained by the fact that the 1267 regime originally targeted the Taliban only. At the time of the adoption of Resolution 1267 (1999) the Taliban controlled certain territory *de facto* although they were not recognized as the legitimate government of Afghanistan. As Frowein and Krisch have pointed out, however, entities like the Taliban have for a long time been regarded as being subject to international legal obligations and as enjoying a certain legal personality.⁴³ As a consequence, the adoption of sanctions against the Taliban was not problematic *per se*. However, even when the 1267 regime was extended in early 2002 to apply to individuals and entities associated with the Taliban and Al Qaeda, none of the Council members raised any questions on competence. While this may appear surprising in light of the debates surrounding the establishment of the ICTY and ICTR,

⁴⁰ UN SCOR, 54th sess, 4051st mtg, UN Doc S/PV.4051 (15 October 1999) 4.

⁴¹ *Ibid* 5.

⁴² *Ibid*.

⁴³ Frowein and Krisch, above n 4, 716.

the lack of debate may be explained by the Council's general preoccupation with 'counter-terrorism' in the aftermath of the 9/11 attacks. Surely this was not the time to question the competence of the Council in these matters in the first place. As a consequence, few inferences can be drawn from the Security Council meetings establishing and expanding the 1267 regime.

IV. LIMITS TO ENFORCEMENT MEASURES UNDER ARTICLE 41 OF THE UN CHARTER

A. *Limits to the Chapter VII Powers of the Security Council*

The Council's powers under Chapter VII are subject to few express limitations. But this does not mean that its powers are unlimited. As the Appeals Chamber held in *Tadić*, 'neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)'.⁴⁴ If one accepts that Article 41 of the Charter provides a legal basis for Security Council measures targeting private individuals, it is nonetheless necessary to consider the limits to these measures. Indeed, the identification of limits to the exercise of Article 41 powers becomes all the more important in light of the fact that Article 41 does not provide any express authorization for the Council to adopt atypical measures such as individualized sanctions. Furthermore, as has been argued previously, the more atypical Security Council measures under Article 41 are, the stronger the case for a strict application of the limits.

The limits to the enforcement measures under Article 41 can generally be divided into those that are expressly or implicitly contained in the Charter and those that originate from outside the Charter regime.⁴⁵ As far as Charter-based limits are concerned, Article 24(2) is of particular relevance. It imposes the main constraint on Council activity, stating that the

⁴⁴ *Tadić* (International Criminal Court for the Former Yugoslavia, Appeals Chamber, Case No IT-94-I-AR72, 2 October 1995) [28].

⁴⁵ Georg Nolte, 'The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections' in Michael Byers (ed), *The Role of Law in International Politics* (Oxford University Press, 2000) 315; Susan Lamb, 'Legal Limits to UN Security Council Powers' in Guy S Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press, 1999) 361; TD Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (1995) 26 *Netherlands Yearbook of International Law* 33.

Council must act in accordance with the ‘principles and purposes of the United Nations’ which are listed in Articles 1 and 2 of the Charter. As far as extra-Charter principles are concerned, peremptory norms of international law—*jus cogens*—may set certain limits to the exercise of Chapter VII powers.⁴⁶ The nature and scope of these limits will now be the subject of closer analysis. In particular, the following discussion examines whether, and to what extent, the limits apply to the Security Council’s emerging practice of adopting sanctions targeting private individuals.

B. *Limits to Security Council Sanctions Targeting Private Individuals*

1. *Promoting Respect for Human Rights*

The Charter requires the United Nations to ‘promot[e] and encourag[e] respect for human rights’ (Article 1 (3)), and to ‘assist’ Member States ‘in the realization of human rights’ (Article 13 (1b)).⁴⁷ Both formulations are considerably vague. Nonetheless, as Erika de Wet has noted, the broad language does not prevent one from identifying the core content of the human rights norms in question which can be drawn from the rights guaranteed in the International Bill of Rights, ie, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (‘ICCPR’) and the *International Covenant on Economic, Social and Cultural Rights* (‘ICESCR’).⁴⁸ It is generally accepted that these instruments represent an elaboration upon the Charter’s original vision of human rights and thus constitute the human rights that the UN has to promote.⁴⁹ However, whether, and to what extent the duty to promote human rights also includes an obligation on the part of the organs of the United Nations to respect these rights when discharging the functions entrusted to them under the Charter, is contentious.⁵⁰

⁴⁶ Frowein and Krisch, above n 4, 711.

⁴⁷ Article 55 (c) of the Charter also requires the United Nations to promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’.

⁴⁸ Erika de Wet, ‘The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View’ in Erika de Wet and Andre Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia, 2003) 13.

⁴⁹ Ibid.

⁵⁰ See, eg, Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians* (Cambridge University Press, 2011); Antonios Tzanakopoulos, ‘Collective Security and Human Rights’ in Erika de Wet and Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press, 2012) 42.

It is clear that the United Nations, as an international organization, is not a party to any of the universal or regional treaties and conventions for the protection of human rights and fundamental freedoms. Accordingly, none of the UN organs—including the Security Council—are directly bound by these instruments. The treaties and conventions were drafted only with a view to the performance of States, not of other subjects of international law. It also does not follow from the fact alone that UN Member States, or even an overwhelming majority of Member States, have ratified certain human rights instruments that a corresponding obligation of the Organization has come into existence. Indeed, as Niels Blokker has noted, the rights and duties of intergovernmental organizations, as autonomous subjects of international law, on the one hand, and of their Member States, on the other hand, must be distinguished.⁵¹ This distinction is also mandated by Article 103 of the Charter which makes clear that States' obligations under the Charter prevail over conflicting treaty obligations.

Some authors thus argue that one should not read too much into the formula of combining Articles 24(2) and 1(3) of the Charter, or see them in isolation from more specific provisions in the rest of the Charter.⁵² Accordingly, they point out that given that the primary purpose of the UN is to maintain international peace and security, the Security Council is not subject to human rights constraints when exercising its powers under Chapter VII. Indeed, such constraints would considerably limit the Council's options under Chapter VII. Other scholars, on the other hand, strongly disagree with this view.⁵³ They argue that when the United Nations—as the major promoter of human rights in the international arena—takes enforcement action, it can be legitimately held to show respect for human rights in an exemplary fashion.⁵⁴ It is rather obvious that the drafters of the Charter did not expect the United Nations to exercise power or authority over individual persons in a way that their rights and freedoms would be directly affected. Accordingly, they did not find it

⁵¹ Niels Blokker, 'International Organizations and Their Members' (2004) 1 *International Organizations Law Review* 152ff.

⁵² See, eg, Anthony Aust, 'The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioners's View' in de Wet and Nollkaemper, above n 48, 32.

⁵³ Bardo Fassbender, *Targeted Sanctions and Due Process* (Humboldt-Universität, 2006); August Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 *Global Governance* 131.

⁵⁴ August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *American Journal of International Law* 869.

necessary to make human rights directly binding on the Organization, and to define such binding rules in the Charter.⁵⁵

Furthermore, as Bardo Fassbender has pointed out, the Charter is a 'living instrument'.⁵⁶ Fassbender invokes an argument first made by JL Brierly, who, shortly after the San Francisco Conference in 1945, wrote about the Charter that 'constitutions always have to be interpreted and applied, and in the process they are overlaid with precedents and conventions which change them after a time into something very different from what anyone, with only the original text before him, could possibly have foreseen'.⁵⁷ Following the adoption of the Charter, human rights, which at the international level in 1945 were moral postulates and political principles, have become legal obligations of States under international treaties and customary international law. Since the adoption of the Charter, a firmly recognized body of international human rights law has emerged, not least in part due to the incessant work of the organs of the United Nations, the General Assembly in particular. Fassbender thus concludes that the references in the Charter to human rights have developed into rules embodying direct human rights obligations binding on the organs of the United Nations, including the Security Council.⁵⁸

Henry Schermers, Niels Blokker and August Reinisch have advocated an even more progressive argument to suggest that the United Nations—including the Security Council—may be bound by international human rights law. They suggest that international organizations should be bound by the obligations of its Member States when they transfer powers to the organization.⁵⁹ Reinisch refers to this process as 'functional treaty succession' and points to the EC's functional succession to the General Agreement on Tariffs and Trade obligations of its Member States before formally becoming a contracting party to the World Trade Organization after the Uruguay Round.⁶⁰ He notes that in a similar vein the UN could be bound 'transitively' by international human rights standards as a result and to the extent that its members are bound.⁶¹ At the same time he acknowledges

⁵⁵ Ibid.

⁵⁶ Fassbender, above n 53, 25.

⁵⁷ JL Brierly, 'The Covenant and the Charter' (1946) 23 *British Year Book of International Law* 83.

⁵⁸ Fassbender, above n 53, 26.

⁵⁹ Reinisch, above n 53, 137–138; Henry G Schermers and Niels M Blokker, *International Institutional Law* (Martinus Nijhoff, 1995) 983.

⁶⁰ Reinisch, above n 53, 137–138, 141–143.

⁶¹ Ibid.

that this legal construction is perhaps more *de lege ferenda* than well-established law.⁶²

Both the 'living instrument' and the 'functional treaty succession' arguments demonstrate that there are strong grounds for suggesting that a contemporary interpretation of Articles 24(2) and 1(3) of the Charter requires the United Nations and its organs to respect international human rights standards when exercising their powers. In the context of the Security Council's emerging practice of adopting sanctions targeting individuals, however, there is a further, related, argument to be made. It has been asserted above that a modern interpretation of Article 41 of the Charter may allow for the Security Council to adopt atypical measures such as sanctions targeting individuals. However, if one accepts that this extension of Council competence is permissible even though such atypical measures were not originally contemplated or are not in line with the basic premise of Article 41, then one cannot, at the same time, exonerate the Council from respecting fundamental human rights standards which also represent an evolution of the Charter. For logical reasons one cannot invoke the living instrument argument to extend the Council's competence under Article 41 on the one hand, and reject a similar method of interpretation when determining the content and scope of Articles 24(2) and 1(3) on the other.

It is thus submitted here that the human rights constraints contained in Articles 24(2) and 1(3) of the Charter do limit the Security Council's powers to adopt sanctions targeting private individuals. However, the general determination that international human rights law provides certain limits says little about how the various rights and freedoms bind the Council in particular. After all, not all human rights are absolute and many rights permit limitations or derogation in times of war and other emergency. Sanctions targeting individuals generally engage the right to property as well as several fair trial rights. As none of these rights appear absolute, it becomes necessary to determine whether, and to what extent these rights

⁶² Reinisch, above n 54, 879. Article 61 (1) of the ILC draft articles on the responsibility of international organizations may become relevant in this regard. It provides that a 'State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.' International Law Commission, *Draft Articles on the Responsibility of International Organizations adopted by the International Law Commission at its sixty-third session*, UN GAOR, 66th sess, Supp No 10, UN Doc A/66/10 (2011) [87].

constrain the Council's enforcement measures. This issue will be taken up in the context of the discussion of customary law and *jus cogens* limits (see section below).

2. *The Need to Act in Conformity with the Principles of Justice and International Law*

Another Charter-based limit can be found in Articles 24(2) and 1(1). Article 1(1) mandates the United Nations 'to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and *in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace' (emphasis added). There is disagreement on whether all measures by UN organs need to be in conformity with the principles of justice and international law. In particular, it is controversial whether the Security Council is subject to this limitation when adopting enforcement measures under Chapter VII, or whether it only applies to dispute settlement measures under Chapter VI of the Charter.

Applying a literal and systematic method of interpretation, some commentators point out that the Charter does not include any express provision requiring the Security Council to respect international law.⁶³ Furthermore, they argue that a close reading of Article 1(1) reveals that this limitation only applies to the Council's activity under Chapter VI, that is, when it exercises its dispute settlement powers.⁶⁴ Therefore they conclude that the measures the Council seeks to impose to address threats to peace and security need not be consistent with existing international law.⁶⁵ This argument finds some support in the *travaux préparatoires* of the Charter. During the deliberations of the San Francisco conference, it was suggested that the formulations of the purpose enshrined in Article 1(1) be amended so as to read, 'to maintain international peace and security in conformity

⁶³ Anna M Vradenburgh, 'The Chapter VII Powers of the United Nations Charter: Do They "Trump" Human Rights Law?' (1991) 14 *Loyola LA International & Comparative Law Review* 175, 177, 180, 182; Gabriel H Oosthuizen, 'Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law' (1999) 12 *Leiden Journal of International Law* 549.

⁶⁴ See, eg, Eric Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?' (2005) 28 *Fordham International Law Journal* 556.

⁶⁵ *Ibid.*

with the principles of justice and international law'.⁶⁶ This motion, however, was rejected on the grounds that it might unduly limit the functions and powers of the Council. The view was expressed that it was important that the Council should have the power to bring about an end to hostilities without considering whether one side could legally have recourse to armed force.⁶⁷

On the other hand, one may argue that the rejection of this suggested amendment was possibly more aimed at allowing the Security Council to maintain or restore international peace and security irrespective of the legal position of parties to a conflict rather than generally freeing the Council from the restraints of international law. Indeed, as Erika de Wet has pointed out, a comprehensive analysis of the *travaux préparatoires* suggests that the drafters of the Charter did not intend the Security Council to be free of legal constraints.⁶⁸ The committee which rejected the inclusion of the 'justice and international law' formula in the first sentence of Article 1(1) explicitly noted that that this was not to free the Security Council completely from respecting international law when exercising its powers under the Charter.⁶⁹ De Wet thus argues that an analysis of the *travaux préparatoires* does not serve as a justification for the conclusion that the Security Council can deviate from international law in an unrestricted fashion when maintaining international peace and security.⁷⁰ August Reinisch reaches a similar conclusion.⁷¹ He refers to the Charter's Preamble, which proclaims that one of the major goals of the United Nations is to 'establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.' Reinisch argues that an organization that violates international law would certainly fail to establish such conditions.⁷²

There are further grounds to suggest that Articles 24(2) and 1(1) may limit the Security Council when adopting sanctions targeting individuals. While individualized sanctions are normally adopted under Chapter VII of the Charter—the 1267 sanctions regime is a case in point—such measures are atypical and qualitatively different from traditional enforcement

⁶⁶ Rüdiger Wolfrum, 'Article 1' in Simma et al, *The Charter of the United Nations: A Commentary*, above n 4, 43.

⁶⁷ Ibid.

⁶⁸ de Wet, above n 48, 8–9.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Reinisch, above n 54, 857.

⁷² Ibid.

measures. Limiting measures targeting private individuals, for instance, would not affect the functions of the collective security system in the same way as restricting traditional, State-centric, Chapter VII enforcement measures to maintain international peace and security would. One may also argue that atypical Chapter VII measures such as individualized sanctions rather resemble dispute settlement measures under Chapter VII. As a consequence, the 'justice and international law' formula in the first sentence of Article 1(1) may well be applicable to the Council's practice of sanctioning private individuals. But what are the implications of such a finding? In particular, how do the principles of justice and international law restrain Council action in practice? And what is the content and scope of this formula in the first place?

It is generally accepted that the words 'justice and international law' in Article 1(1) and in the Preamble refer to treaties, customary law and general principles of law as enshrined in Article 38 of the ICJ Statute.⁷³ At first this would suggest that treaty-based human rights norms may possibly limit the actions of organs of the United Nations. However, as noted above, the United Nations is not party to any human rights instrument and therefore its organs not bound by such norms. Erika de Wet has sought to construct human rights-based limits to the Chapter VII powers of the Security Council by invoking general principles of law.⁷⁴ In particular, she has examined the obligations of the United Nations to act in good faith—as contained in Article 2(2) of the Charter—and the closely related concept of equitable (promissory) estoppel.

Acknowledging that the concept of equitable estoppel mainly applies to inter-State relations, de Wet argues that it is nonetheless a general principle of law and can thus also be used to bind organs of international organizations.⁷⁵ In the context of the United Nations this requires an objective assessment of whether its organs have acted in accordance with the meaning and spirit of good faith. De Wet argues that on the basis of the good faith principle, organs of the United Nations, including the Security Council, are estopped from behaviour that violates the rights referred to in the Charter provisions outlining the UN's purposes and principles.⁷⁶ The fact that the international bill of human rights was drawn up under

⁷³ Wolfrum, above n 66, 43.

⁷⁴ de Wet, 'The Role of Human Rights in Limiting the Enforcement Power of the Security Council', above n 48, 10–14.

⁷⁵ Ibid 12.

⁷⁶ Ibid 13.

the auspices of the United Nations created the expectation that the organs of the organization itself would respect the core content of the norms that it is propagating. This, in turn, obliges the UN Member States, when acting in the context of an organ of the UN, to fulfil legally relevant expectations that are raised by their conduct with regard to human rights standards accepted in the framework of the organization.⁷⁷

De Wet's construction is very attractive as it seems to establish a direct link between UN Member States accepting obligations under the ICCPR and ICESCR on the one hand and acting in accordance with those obligations when participating in UN organs on the other. The advantage of linking the standards of the international bill of human rights with the institutional decision-making process is that it prescribes the potential human rights limits to Security Council action with more certainty than the rather vague formulation in Articles 24(1) and 1(3) of the Charter. Yet de Wet's proposition is ultimately problematic. First, it is unclear how it relates to Article 103 of the Charter which explicitly provides that Charter obligations prevail over obligations under any other international agreement. It appears that de Wet's estoppel approach is difficult to reconcile with the very rationale of Article 103 of the Charter as it effectively seeks to construe conventional human rights limits for UN organs through the 'back door'. Furthermore, some members of the Security Council have not ratified instruments such as the ICCPR, in particular China among the P5. It is difficult to see how these members would nonetheless be bound by the standards contained in those instruments when they are acting on behalf of the organization. The approach of limiting the Security Council's powers through the concept of equitable estoppel is thus somewhat unsatisfactory.

3. *The Principle of Proportionality*

It is generally accepted that the Security Council's powers may be limited by the proportionality principle. This principle constitutes a general principle of law and, as such, could fall under the category of 'principles of justice and international law' as referred to in Article 1(1) of the Charter. However, commentators have also recognized proportionality as an implied Charter principle which finds application to Chapter VII measures.⁷⁸ As a consequence, they see no need to invoke general principles of

⁷⁷ Ibid 14.

⁷⁸ Frowein and Krisch, above n 4, 711; Nicolas Angelet, 'International Law Limits to the Security Council' in Gowlland-Debbas, above n 6, 71–82.

law to justify the applicability of the proportionality principle as it already forms part of the positive law of the Charter.⁷⁹

So how, then, does the proportionality principle apply to the Council's action in practice? Authors commonly agree that Chapter VII measures must be appropriate and necessary for the achievement of its stated purposes—that is generally, the removal of the threat to peace and security—and must not disproportionately affect other interests. Frederic Kirgis, for instance, has described this standard as the 'principle of avoiding excessive disproportionality'.⁸⁰ Most authors also agree that the Security Council enjoys a wide margin of appreciation in determining whether Chapter VII measures are proportionate to the aims pursued. Yet this margin of appreciation is not unlimited. Some authors have qualified the Council's broad Chapter VII powers by stating that the Council can only adopt peace-enforcing measures rather than law-making, law-enforcing, or law-determining measures.⁸¹ Furthermore, they argue that the more the Council acquires a constitutional function, the more the principle of proportionality ought to gain currency as a general limitation of UN actions.⁸² These qualifications are consistent with the widely-held view that the Security Council serves as the global police in the UN structure, with the General Assembly mandated to recommend longer-term prescriptions for generally addressing international peace and security.⁸³

Sanctions targeting private individuals are atypical Chapter VII measures of a quasi-legislative nature combined with quasi law-enforcement characteristics. By adopting such measures the Council arguably acquires a constitutional function which, in turn, requires the application of a stricter proportionality test. The case for stricter proportionality is further strengthened by the fact that sanctions targeting individuals can lack geographical and temporal limits. In the case of the 1267 regime, for instance, sanctions were adopted to target individuals and entities associated with the Taliban, Osama bin Laden or Al-Qaida wherever they were, without the necessity of any geographical nexus to Afghanistan and without any temporal limits. This stands in stark contrast to the approach taken by the

⁷⁹ Frowein and Krisch, above n 4, 711.

⁸⁰ Frederic L Kirgis, 'The Security Council's First Fifty Years' (1995) 89 *American Journal of International Law* 517.

⁸¹ Gaetano Arrangio-Ruiz, 'On the Security Council's "Law-Making"' (2000) 83 *Rivista di Diritto Internazionale* 609, 723.

⁸² *Ibid.*

⁸³ Martti Koskenniemi, 'The Police in the Temple – Order, Justice and the U.N.: A Dialectical View' (1995) 6 *European Journal of International Law* 325.

Council when establishing the ICTY and the ICTR. In these instances it was precisely the limited mandate in terms of geography, timeframe and applicable law that secured support of critical UN Member States and contributed significantly to the legal acceptability and legitimacy of the tribunals.

However, even if one accepts that the lack of geographical and temporal limits does not make individualized sanctions disproportionate per se, one needs to consider how such measures affect other key interests. Sanctions like the freezing of assets and travel bans have significant implications for fundamental human rights of targeted individuals. In particular, they engage the right to property and several due process rights. It is suggested here that the principle of proportionality will require the Council to establish adequate mechanisms allowing for the review of individual cases.⁸⁴ The case for such review becomes stronger the longer sanctions remain in place. In the absence of any meaningful mechanism that allows targeted individuals to challenge the measures directed against them it is difficult to see how sanctions can constitute proportional Chapter VII measures.

4. *Customary International Law and Jus Cogens*

The question of whether, and to what extent, organs of international organizations—including the Security Council—are bound by customary international law is highly contentious. Some commentators claim that it is ‘generally recognized’ that international organizations must comply with international customary law, including the customary law of human rights.⁸⁵ They argue that the assumption that the UN Member States could have succeeded in collectively opting out of customary law by creating an international organization that would no longer be bound by what restricted its founding members ‘appears rather unconvincing’.⁸⁶ On the other hand, there are those authors who argue that the Security Council may disregard customary international law when maintaining

⁸⁴ For a discussion of possible review mechanisms see, eg, Christopher Michaelsen, ‘The Security Council’s Practice of Blacklisting Alleged Terrorists and Associates: Rule of Law Concerns and Prospects for Reform’ (2010) 8 *New Zealand Journal of Public and International Law* 81.

⁸⁵ Michael Bothe, ‘Security Council’s Targeted Sanctions against Presumed Terrorists’ (2008) 6 *Journal of International Criminal Justice* 543; Schermers and Blokker, above n 59, 824.

⁸⁶ Reinisch, ‘Securing the Accountability of International Organizations’, above n 53, 136.

international peace and security.⁸⁷ Eric Rosand, for instance, considers it 'widely accepted' that Charter obligations prevail over conflicting obligations under customary international law.⁸⁸ Similarly, José Alvarez argues that despite the fact that Article 103 of the Charter fails to mention customary law explicitly, the Security Council nonetheless has the authority to supersede both customary and treaty law since both sources of obligation have comparable status in Article 38 of the ICJ Statute.⁸⁹

In spite of the diverging views on the applicability of 'normal' customary international law, there seems to be broad agreement among scholars that the Security Council may not adopt measures that would violate customary rules that amount to *jus cogens*.⁹⁰ The main rationale for this assertion is based on the principles of treaty law according to which a treaty is null and void if it is concluded in conflict with a peremptory norm of international law.⁹¹ As the Charter is a treaty, it seems logical to subject it to this rule. Indeed, the Court of First Instance ('CFI') (EU) applied this principle in the cases of *Kadi*⁹² and *Yusuf and Al Barakaat*.⁹³ In these cases, the Court noted that the (indirect) exercise of judicial review of Security Council resolutions was possible in cases of alleged violations of fundamental rights guaranteed by peremptory norms of international law since these rules had a higher status, were non-derogable, and binding on all subjects of international law including UN organs.⁹⁴

In order to determine possible *jus cogens* limits to the Security Council's powers to sanction private individuals it becomes essential to explore whether any rights engaged by the Council's measures can be considered

⁸⁷ Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart, 2004) 186; Frowein and Krisch, above n 4, 711.

⁸⁸ Rosand, above n 65.

⁸⁹ José Alvarez, 'The Security Council's War on Terrorism: Problems and Policy Options' in de Wet and Nollkaemper, above n 48, 132–33.

⁹⁰ See, eg, Dapo Akande, 'The International Court of Justice and the Security Council: is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 *International and Comparative Law Quarterly* 323; Frowein and Krisch, above n 4, 711; King, 'Sensible Scrutiny', above n 38, 562; Nigel D White, 'To Review or Not to Review? The Lockerbie Cases before the World Court' (1999) 12 *Leiden Journal of International Law* 401.

⁹¹ This principle was codified in Article 53 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

⁹² *Kadi v Council of the European Union and Commission of the European Communities* (T-315/01) [2005] ECR II-3649 ('*Kadi*').

⁹³ *Yusuf and Al Barakaat v Council of the European Union and Commission of the European Communities* (T-306/01) [2005] ECR II-3533 ('*Yusuf*').

⁹⁴ *Yusuf* (T-306/01) [2005] ECR II-3533, [277]; *Kadi* (T-315/01) [2005] ECR II-3649, [226].

peremptory norms of international law. In particular, it will be necessary to examine whether the rights most commonly engaged by targeted sanctions—*inter alia* the right to property, the right to a fair hearing and the right to an effective remedy—have *jus cogens* status. This is a very tricky task as there is considerable disagreement among commentators with respect to which human rights must be recognized as *jus cogens*.⁹⁵ A common view suggests that those human rights which are identified as non-derogable for the purposes of Article 4(2) of the ICCPR possess *jus cogens* status.⁹⁶ Yet, none of the rights engaged by targeted sanctions seem to fall under this category. In particular, Article 4(2) does not include the procedural fair trial rights contained in Article 14 of the ICCPR. Moreover, the ICCPR does not explicitly recognize the individual right to property at all.

Some commentators nonetheless claim that there is increasing support for the proposition that the core elements of the right to a fair hearing in Article 14(1) are to be considered as non-derogable, and further, that this right by now constitutes ‘an element of *jus cogens*’, at least in the context of criminal proceedings.⁹⁷ However, this view is problematic for a number of reasons. First, it is unclear whether Security Council sanctions targeting individuals can constitute criminal proceedings in the terms of Article 14(1). In *Sayadi and Vinck*, the Human Rights Committee held that that in spite of its punitive nature, the 1267 sanctions regime did *not* concern a ‘criminal charge’ in the meaning of Article 14(1).⁹⁸ Second, there is little evidence to suggest that the right to a fair hearing has indeed become a norm of *jus cogens*. As a consequence, as Anthony Aust has noted, there is no reason why the Security Council could not, in effect, derogate from derogable rights such as Article 14(1) if the circumstances require it.⁹⁹ He argues that if States Parties to the ICCPR can do so if there is a public

⁹⁵ Alvarez, above n 89, 133; Andrea Bianchi, ‘Human Rights and the Magic of *Jus Cogens*’ (2008) 19 *European Journal of International Law* 491; Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles’ (1988–1989) 12 *Australian Yearbook of International Law* 82; Anthony D’Amato, ‘It’s a Bird, It’s a Plane, It’s *Jus Cogens*!’ (1999) 6 *Connecticut Journal of International Law* 1; Richard B Lillich, ‘The Growing Importance of Customary International Human Rights Law’ (1995–1996) 25 *Georgia Journal of International & Comparative Law* 1.

⁹⁶ See, eg, Human Rights Committee, *General Comment No 29: States of Emergency*, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) para 11.

⁹⁷ de Wet, ‘The Role of Human Rights in Limiting the Enforcement Power of the Security Council’, above n 48, 17, 22.

⁹⁸ Human Rights Committee, *Views: Communication No. 1472/2006*, 91st sess, UN Doc CCPR/C/94/D/1472/2006 (29 December 2008) 25 [10.11] (*Sayadi and Vinck v Belgium*).

⁹⁹ Aust, above n 52, 34–5.

emergency threatening the life of the nation, then so too, the Security Council should be able to do so if it has determined that there is a threat to international peace and security.

In its review in *Kadi and Yusuf and Al Barakaat* of the implementation of the 1267 regime within the European Union, the Court of First Instance of the European Communities also undertook an analysis of the possible *jus cogens* nature of the rights engaged by targeted sanctions. As far as the right to a fair hearing and the right to an effective remedy were concerned, the Court held that even though there was no other judicial remedy available to the applicants, 'any such lacuna in judicial protection [was] not in itself contrary to *jus cogens*' as the limitation was justified by the nature and the objective of Security Council decisions.¹⁰⁰ In relation to the right to property, the Court found that it may be regarded as protected by *jus cogens* when arbitrary deprivations are involved.¹⁰¹ In relation to the case at hand, however, the Court concluded that 'it is clear that the applicants have not been arbitrarily deprived of that right'.¹⁰² The Court's application of the *jus cogens* test received considerable criticism for being vague.¹⁰³ In contrast, the European Court of Justice, in its appeal decision in *Kadi and Al Barakaat*, did not follow the Court of First Instance and refrained from undertaking a *jus cogens* analysis.¹⁰⁴ Similarly, the Human Rights Committee, in *Sayadi and Vinck*, did not consider the possibility of the 1267 sanctions regime violating *jus cogens* in any detail, although Sir Nigel Rodley hinted at this option in his individual concurring opinion.¹⁰⁵

An extensive analysis of the *jus cogens* character of human rights engaged by targeted sanctions is beyond the scope of this chapter. The purpose of this brief exposé was rather to demonstrate that invoking *jus cogens* as a means of construing human rights limits to Security Council

¹⁰⁰ *Yusuf* (T-306/01) [2005] ECR II-3533, [270], [340]–[341].

¹⁰¹ *Ibid* [293].

¹⁰² *Ibid* [294].

¹⁰³ See, eg, Michael Wood, 'The UN Security Council and International Law: The Security Council's Powers and Their Limits' (lecture delivered at Hersch Lauterpacht Memorial Lectures, Cambridge, 8 November 2006) <http://www.lcil.cam.ac.uk/Media/lectures/pdf/2006_hersch_lecture_2.pdf>; Gabriele Porretto, 'The European Union, Counter-Terrorism Sanctions against Individuals and Human Rights Protection' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (Australian National University Electronic Press, 2008) 252–8; van den Herik and Schrijver, above n 3, 19.

¹⁰⁴ *Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities* (C-402/05 P; C-415/05 P) [2008] ECR I-0000 ('*Kadi and Al Barakaat*'). For detailed analysis see, eg, Christopher Michaelson, 'Kadi and Al Barakaat v Council of the EU – The Incompatibility of the UN Security Council's 1267 Sanctions Regime with European Due Process Guarantees' (2009) 10 *Melbourne Journal of International Law* 329.

¹⁰⁵ *Sayadi and Vinck v Belgium*, 37 (Committee member Sir Nigel Rodley).

enforcement action is both controversial and fraught with difficulties. Indeed, it appears premature to afford rights such as right to property, the right to a fair hearing and the right to an effective remedy the status of *jus cogens*. The uncertainties surrounding the *jus cogens* character of these rights have perhaps contributed to the fact that neither the European Court of Justice nor the Human Rights Committee examined the issue when reviewing individual cases challenging the implementation of the 1267 regime. More generally, it remains unclear how exactly *jus cogens* norms would limit the Security Council in practice. As Christian Tomuschat has noted, violations of *jus cogens* by the Security Council largely 'belong to the imaginary sphere of academic hypothesis rather than political reality'.¹⁰⁶

V. CONCLUSION

The shift of governance functions from States to international organizations and the rise of non-State actors as key players in the international system have presented the Security Council with significant challenges. One of these challenges concerns the question of whether, and to what extent classic international legal tools available to the Council under the Charter remain adequate in the era of globalization. This chapter has focused on the classic instrument of sanctions and its adaptation to target private individuals considered to be a threat to international peace and security. The Council continues to consider such individualized sanctions as an important mechanism under the Charter and, furthermore, as a 'significant tool in combating terrorist activity'.¹⁰⁷ Yet the practice raises concerns in relation to its constitutionality. It is unclear whether the Charter provides a legal basis for the Council's adapted use of sanctions. What is clear is that such sanctions are atypical measures in the sense that they were not originally contemplated by the drafters of the Charter. Moreover, they are atypical as they effectively address individuals without international legal personality. The experience of the ICTY and the ICTR as well as the lack of debate in the Council meeting establishing the 1267 sanctions regime may serve as indicators that the powers under Article 41 of the Charter indeed extend to adopting sanctions targeting private individuals.

¹⁰⁶ Christian Tomuschat 'Die Europäische Union und ihre völkerrechtliche Bindung' (2007) 34 *Europäische Grundrechte Zeitschrift* 10 [author's trans].

¹⁰⁷ See, eg, SC Res 1904, UN SCOR, 64th sess, 6247th mtg, UN Doc S/RES/1904 (17 December 2009) 2.

At the same time, given that such sanctions constitute atypical measures, the strict application of limits to the Council's Chapter VII becomes mandatory.

The Charter as well as general international law provides for various limits to the Council's enforcement powers. One limit of particular relevance is contained in Articles 24(2) and 1(3) of the Charter which require the United Nations to promote and encourage respect for human rights. There are strong arguments to suggest that this principle also constrains the Council's powers to sanction private individuals. Similarly, the principle of proportionality, a limit which is not explicitly mentioned in the Charter, will arguably require the Council to establish adequate mechanisms allowing for the independent review of individual cases. *Jus cogens*, too, may bind the Council in its exercise of Chapter VII powers, at least in theory. However, the rather general determination that human rights law and *jus cogens* provide certain limits says little about how the various rights and freedoms, including peremptory norms of international law, constrain the Council in practice. After all, not all human rights are absolute and many rights permit limitations or derogation in times of war and other emergency. What is more, it is far from clear which human rights amount to *jus cogens*. More research needs to be done in this regard.

It thus appears premature to pass judgment on the legality of the Council's emerging practice of adopting sanctions targeting private individuals. Any endeavour to reach conclusions on the issue with any degree of certainty is hampered by the fact that the primacy of Security Council resolutions over other norms of international law means that there is very limited scope for judicial review. The example of the 1267 sanctions regime is a case in point. Neither the Human Rights Committee nor the European Court of Justice undertook a formal review of the legality of the relevant Security Council resolutions. In fact, the latter Court made it explicitly clear, that the 'judgment given by the Community courts deciding that a Community measure intended to give effect to a resolution of the Security Council is contrary to a higher rule of law in the Community legal order would *not* entail any challenge to the primacy of that resolution in international law'.¹⁰⁸ Yet, even in the absence of formal findings on the legality of the use of individualized sanctions, one may well consider their legitimacy. It is in this respect that the discussion about the limits to the

¹⁰⁸ *Kadi and Al Barakaat* (C-402/05 P; C-415/05 P) [2008] ECR I-0000, [327] (emphasis added).

Council's powers as discussed in this chapter gains increasing prominence. If Member States perceive the Council to be acting *ultra vires*, or in violation of international human rights law, they will eventually refrain from implementing the respective measures nationally. Such a development will not only erode the authority of the Security Council, it will also have serious implications for the future of the entire system of collective security itself.

CHAPTER TWO

INTERNATIONAL DISPUTE RESOLUTION IN AN ERA OF GLOBALIZATION

ANNA SPAIN*

I. INTRODUCTION

Globalization has influenced the function of international law and with it the mechanisms used to resolve international conflicts and disputes. International armed conflicts have shifted from being primarily inter-State to becoming predominantly intra-State. Collective global problems are driving the development of collaborative problem-solving approaches. New actors and an increasingly interconnected international community are demanding increased participation in adjudicatory forums, challenging the wisdom of State-centric approaches. International courts and tribunals are proliferating, deepening expertise while creating uncertainty. These changes are symptomatic of a more global and interconnected world. In adapting to these changing demands and conditions, old practices evolve and new ones emerge.

Within this context, this chapter examines the purpose and practice of international dispute resolution ('IDR'). It considers how changes brought about by globalization present both challenges and opportunities for IDR. Moreover, this chapter takes a systemic view of IDR that accounts for the full range of legal and diplomatic methods and acknowledges their applicability to international legal disputes as well as armed conflicts. This broad view allows for understanding IDR as a system. Furthermore, while recognising that dispute settlement and conflict resolution are distinct, it reflects the understanding that they are joined by the common normative purpose of promoting global peace and security.

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II. UNDERSTANDING INTERNATIONAL DISPUTE RESOLUTION

The practice of addressing international disputes has emerged out of the history of international law itself. The creation of mechanisms for the pacific resolution of disputes was necessarily linked to the development of law that sought to promote peace. Roman law, for example, introduced the concept of *humanitas* or ‘the human tendency as an ethical commandment [to engage in] benevolent consideration for others.’¹ During the Eighty Years War and the Thirty Years War that disrupted Europe in the Middle Ages, Hugo Grotius sought to broaden the concept of *humanitas* through the development of *jus ad bellum* and *jus in bello* to support the need for laws that could bind nations and encourage more humane behaviour among peoples and between States.² During the Hague Peace Conferences of 1899 and 1907, 28 States met in order to strengthen the collective capacity to promote peace and prevent war.³ To do so, they adopted the *Convention for the Pacific Settlement of International Disputes* to ‘insure the pacific settlement of international differences’⁴ and established the Permanent Court of Arbitration (‘PCA’).⁵ After World War I the Covenant for the League of Nations established the Permanent Court of International Justice (‘PCIJ’), which operated from 1922 to 1946, as the first permanent international tribunal with general jurisdiction. It delivered opinions in 29 cases and 27 advisory opinions during this period.⁶ After

¹ Adolf Berger, ‘Encyclopedic Dictionary of Roman Law’ (1953) 43 *Transactions of the American Philosophical Society* 333.

² Hersch Lauterpacht, ‘The Grotian Tradition in International Law’ (1946) 23 *British Yearbook of International Law* 1; Hugo Grotius, *On the Law of War and Peace* (AC Campbell trans, 1814) [trans of *De Jure Belli ac Pacis* (first published 1625)].

³ James Brown Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907* (Oxford University Press, 1918).

⁴ *Convention for the Pacific Settlement of International Disputes*, opened for signature July 29 1899, 32 Stat 1779, (entered into force 4 September 1900) art 1; see Philippe Sands, ‘Introduction’ in Ruth Mackenzie et al, *The Manual on International Courts and Tribunals* (Butterworths, 2nd ed, 2010) ix: ‘The 1899 Convention marked a turning point in favour of international adjudication before standing bodies’.

⁵ See Daniel Terris et al, *The International Judge* (Brandeis University Press, 2007) 2–3 (describing the creation of the PCA and the structure of the PCA); Mackenzie, above n 4, 102 (describing the PCA as ‘the first global institution for adjudication of international disputes’).

⁶ International Court of Justice, *Publications of the Permanent Court of International Justice*, <<http://www.icj-cij.org/pcij/index.php?p1=9>>; see also Terris et al, above n 4, 1–4, for a historical account of the development of international arbitration after the US Civil War, at the 1899 Hague Peace Conference and at the Permanent Court of Arbitration as well as the evolution of international adjudication at the PCIJ and the ICJ before and after World War II.

World War II the United Nations ('UN') Charter established the International Court of Justice ('ICJ') as its principal judicial organ⁷ 'whose function is to decide in accordance with international law such disputes as are submitted to it.'⁸ This brief historical narrative serves to illustrate that the development of IDR and means for promoting peace through international law are interconnected.

Today, the UN Charter provides the framework for understanding the modern IDR regime. The fundamental purpose of dispute resolution is linked to the purpose of the United Nations 'to maintain international peace and security.'⁹ The UN Charter prohibits the threat or use of force unless it is authorized by the UN Security Council or necessary for self-defence.¹⁰ In addition, Article 2(3) requires Members to settle disputes peacefully, and Article 33 provides the list of available methods for doing so.¹¹ These IDR methods have traditionally been grouped by type (diplomatic, legal, political), aim (prevention, management, resolution), and enforcement status (binding or nonbinding).¹² They include negotiation, defined as direct communication between disputing parties for the purpose of reaching agreements that will settle or resolve a dispute, as well as legal methods of judicial settlement and arbitration (referred to collectively as adjudication).¹³ There are several diplomatic or non-legal third-party processes. Mediation is where an impartial third-party facilitates a process for effective communication of issues and interests with the aim of fostering problem solving between the disputing parties.¹⁴ Conciliation

⁷ *Charter of the United Nations* arts 92–96.

⁸ *Statute of the International Court of Justice* art 38.

⁹ *Charter of the United Nations* art 1.

¹⁰ *Ibid* arts 2(4), 40, 51.

¹¹ *Ibid* arts 2(3), 33(1)–(2): '[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

¹² See, eg, JG Merrills, *International Dispute Settlement* (Cambridge University Press, 2005).

¹³ See Jacob Bercovitch and Richard Jackson, *Conflict Resolution in the 21st Century* (University of Michigan Press, 2010) 19–31 (discussing the basic principles and frameworks for international negotiation), 47–48 (discussing international arbitration and judicial settlement in binding third parties to a proposed resolution); Merrills, above n 12, 1–2 (discussing negotiation in international disputes), 91, 127 (discussing arbitration in international disputes).

¹⁴ See Bercovitch and Jackson, above n 13, 32–46 (defining and discussing mediation as a method of international dispute resolution); see also Merrills, above n 12, 28–44 (discussing the use and structure of mediation in international disputes).

is a process where a third-party, typically in the form of a commission or panel, provides an impartial examination of the dispute and suggests settlement terms.¹⁵ Fact-finding and inquiry, often combined, offer tools for establishing the facts of a dispute in order to provide a foundation for additional IDR methods.¹⁶ In addition to these three methods, other approaches include facilitation, good offices, truth and reconciliation and peacebuilding.¹⁷ The methods for engaging in the pacific resolution of international disputes are intended for both legal disputes as well as for those that arise from armed conflict. These methods, along with the institutions that support their use, constitute the IDR regime that provides States, and increasingly non-State actors, with 'decision-making procedures'.¹⁸

This chapter applies the following definitions. Armed conflict is understood as ongoing discord between two or more entities characterized as violent or armed and resulting in death and/or casualties. Conflict occurs in the interstate, intrastate and non-State contexts, all of which can become a threat to international peace and security. International dispute refers to legal disputes that can be resolved on the basis of international law. Settlement implies that the parties to the dispute accept the adjudicatory authority's outcome that decides the dispute, often in favour of one side or another, based upon the application of the facts to the law.¹⁹ Resolution implies that the parties have not only settled the legal matter, but that they have also resolved the underlying tensions giving rise to the dispute in the first place.²⁰ The resolution of international conflicts and international disputes can be interconnected. For example, in the *Hostages* case, the ICJ was instrumental in resolving legal disputes that could have escalated into armed conflict.²¹ In *Nicaragua*, the Court addressed legal

¹⁵ See Merrills, above n 12, 64 (discussing the method and history of the process of conciliation).

¹⁶ Ibid 45–46 (noting the use of inquiry in resolving a disputed issue of fact).

¹⁷ See Bercovitch and Jackson, above n 13, for definitions and examples of these and additional IDR methods.

¹⁸ See Stephen D Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36 *International Organization* 185, 185 (offering a comprehensive discussion of international regimes and the influence that changes in structure, norms, and decision-making can have on them).

¹⁹ John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* (Oxford University Press, 1999) 1–2.

²⁰ Ibid.

²¹ *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, 3 ('*Hostages*').

disputes that arose from armed conflict.²² Beyond preventing conflict, the IDR system also provides the international community with a regime for enhancing cooperation and solving collective problems.

III. CHANGES

Globalization is changing the world order, and with it, international law. As relationships between nations and individuals become more intertwined and new technologies transform global politics and economies, the ways that societies operate have also changed. This section considers how such developments are influencing international disputes and international conflict. First, the nature, scope and impact of international conflict have changed. Armed conflict that poses a major threat to international peace used to occur primarily between nations. Today, these events increasingly occur in the intrastate or non-State context. A second development has been the emergence of global collective problems, such as climate change, that threaten peace and security. A third change is the rise of a new international community of engaged non-State actors that demand increased access to, and involvement in IDR. Fourth, the diversity and availability of dispute resolution venues has diversified and proliferated offering both promise as well as problems, such as uncertainty and fragmentation. Fifth, the paradigm of peace promotion has shifted from managing and settling disputes to resolving them and promoting societal reconciliation. These five categories of change present challenges for the IDR regime and offer new opportunities for enhancing its capacity in an era of globalization.

A. *From Inter-State to Intra-State Conflict*

Prior to WWII, most wars occurred between States, driving the need for an international legal system capable of providing interstate dispute resolution. Today's wars are different. They are taking place within a State as civil, regional, internal and inter-communal conflicts.²³ Empirical studies

²² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction) [1984] ICJ Rep 392.

²³ Meredith Reid Sarkees and Frank Whelon Wayman, *Resort to War* (CQ Press, 2010) 64–70.

show that since World War II interstate wars have declined while intrastate and non-State wars have increased. A 2010 study by the Correlates of War ('COW') Project identified 655 wars between 1816 and 2007 and found that intrastate wars have outpaced interstate ones since 1945.²⁴ The University of Maryland's 2010 Peace and Conflict Report found a similar trend and reported that by early 2008, there were 26 active armed conflicts in the world and all were classified as intrastate, occurring between a government and one or more internal groups.²⁵ A third study of 121 conflicts between 1989 and 2005 confirmed the same finding and noted that all 31 ongoing conflicts in 2005 were intrastate, with six of them becoming internationalized (indicating the presence of a second State's armed forces).²⁶

Intrastate wars are different in their nature as well as in their context. As the events of the Arab Spring demonstrate, they often arise from the political failure of the State. They do not result in definitive victories where one side surrenders to another. The line between civilians and combatants blurs as violence breaks out in neighborhoods, among families and between friends. The authority and legitimacy of warring factions is difficult to ascertain. Thus, the traditional understanding of international conflict as a war that occurs between nations, such as World War II, has been expanded to embrace the understanding that even internal wars, such as the conflicts in Syria, the Sudan and the Democratic Republic of Congo, can threaten international peace and security. This may occur due to a spillover effect, regional proliferation, the threat or use of nuclear, biological or chemical weapons or the finding of international war crimes.²⁷ This shift in the nature of war calls for better understanding about the relationship between international law, IDR and peace promotion.²⁸

²⁴ Ibid 337–341.

²⁵ See J Joseph Hewitt, 'Trends in Global Conflict, 1946–2007' in J Joseph Hewitt, Jonathan Wilkenfeld and Ted Robert Gurr (eds), *Peace and Conflict 2010* (Paradigm Publishers, 2010) 27–32.

²⁶ Lotta Harbom, Stina Högladh and Peter Wallensteen, 'Armed Conflict and Peace Agreements' (2006) 43 *Journal of Peace Research* 617, 618, table 2.

²⁷ Jacob Bercovitch and Judith Fretter, *Regional Guide to International Conflict and Management from 1945–2003* (Congressional Quarterly Press, 2004) 7–8.

²⁸ See, eg, Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era* (Stanford University Press, 1998); Helen Durham and Timothy McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Martinus Nijhoff Publishers, 1999); Carsten Stahn and JK Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (TMC Asser Press, 2008).

B. *Collective Disputes and Interconnected Issues*

Just as armed conflict has shifted from the interstate to the intrastate context, the nature of international disputes is also changing. Globalization has enhanced the scope and speed of the connection of actors in the global community. Today's large-scale harms capable of threatening global peace and security arrive in many forms. Beyond traditional war, threats can occur through global economic crises, climate change, terrorism, health pandemics and so forth. International disputes arising from such interconnected issues have proven difficult to address through traditional judicial means because they often involve extralegal concerns and non-State actors.²⁹ Many of today's international disputes, understood to be 'specific disagreement[s] concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another,'³⁰ are complex. They involve international organizations, corporations, NGOs and individuals in addition to States and are occurring at the intersections of public, private, cross-border and transnational arenas.

Efforts to resolve these disputes through traditional forms of adjudication have become increasingly ineffective because resolution requires the broader participation of the international community. As former ICJ Judge Christopher Weeramantry has stated, '[w]hen we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to progress beyond weighing the rights and obligations of the parties within a closed compartment of individual State self-interests, unrelated to the global concerns of humanity as a whole.'³¹ One nation cannot solve collective problems. Neither can States alone. Thus, the nature of many international disputes today requires the IDR system to provide the international community with a venue for collective problem solving. It also necessitates dispute resolution options for cases where legal rights have yet to be established or remain unclear.

²⁹ See Anna Spain, 'Beyond Adjudication: Resolving International Resource Disputes in an Era of Climate Change' (2011) 30 *Stanford Environmental Law Journal* 343.

³⁰ Merrills, above n 12, 1.

³¹ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, [88] (Judge Weeramantry).

C. *New Actors: Individuals and the International Community*

In the new era of globalization, every individual seeks to have a voice.³² Although States have been the dominant actors within international law, individuals today are demanding increased participation. States have the international legal capacity to enter into treaties but non-State actors are playing an increasingly powerful role in shaping the treaty-making process. For example, during the 15th session of the Conference of the Parties to the *UN Framework Convention on Climate Change* in Copenhagen in 2009, individuals and civil society groups far outnumbered State delegates, using their numbers to make up for the power their non-State delegate status lacked.³³

IDR embraced participation by individuals early in its history. For example, under the International Prize Court proposed to be established by the 1907 *Hague Convention XII*, individuals would have been able to lodge appeals against the decisions of national prize courts, although States could forbid nationals from using this option (ultimately the Convention never entered into force).³⁴ Individuals enjoyed standing to bring claims before the Central American Court of Justice (1907–1918) against foreign States without consent of their home country.³⁵ Individuals have brought claims against foreign States for war damages and mass claims before tribunals such as the Anglo-German Mixed Arbitral Tribunal in 1924.³⁶ Despite these early developments, individuals still have limited rights and access to international adjudication.³⁷

Beyond individuals, the new international community also includes collectives of stakeholders joined by similar norms, interests and identities.

³² See Thomas Franck, *The Empowered Self* (Oxford University Press, 1999) 1 ('nationalism is in retreat ... individualism has emerged, at the end of the twentieth century, as an increasingly preferred alternative to self-definition imposed by nationalism, genetic and territorial imperatives').

³³ José Alvarez, 'The New Treaty Makers' (2002) 25 *Boston College International & Comparative Law Review* 213; Anna Spain, 'Who's Going to Copenhagen? The Rise of Civil Society in International Treaty Making' (2009) 13 *ASIL Insights*.

³⁴ *Convention (XII) relative to the Creation of an International Prize Court*, opened for signature 18 October 1907, 2 *AJIL* 174 (not yet in force) art 4.

³⁵ *Convention for the Establishment of a Central American Court of Justice*, 2 *AJIL Sup* 231 (entered into force 20 December 1907) art II.

³⁶ Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society* (Cambridge University Press, 2004) 48.

³⁷ Rüdiger Wolfrum, 'Solidarity amongst States: An Emerging Structural Principle of International Law' (2009) 49 *Indian Journal of International Law* 1 (discussing the vulnerability of the individual within international law).

People now unify across borders and boundaries over common causes and events that threaten the global community as a whole. The concept of collectivity and its place in international law is not new. James Crawford described it as having a 'responsibility to the international community as a whole.'³⁸ Supported by a guiding principle of solidarity, the concept has origins in Christian and natural law.³⁹ From universal norms to shared obligations, the principle of collectivity acknowledges that for certain matters and in certain instances international law ought to prioritize collective rights, interests and needs. The establishment of the International Criminal Court and efforts to protect global environmental resources are two powerful examples of areas where collectivity is a guiding principle.

Collectivity should be a fundamental guiding principle of IDR because effective dispute resolution requires the participation of key stakeholders, regardless of their international legal personality or status. The inclusion of such stakeholders recognizes the importance of subsidiarity, or resolving disputes at the level at which they occur.⁴⁰ In the *Gabčíkovo-Nagymaros Project* case, Judge Weeramantry emphasized the importance of subsidiarity in referring to local customary law and negotiation practices on traditional water management in Bali as guidance for the case.⁴¹ Yet inclusion of individuals and other non-State stakeholders can cause tension between the aims of IDR and those of international law when the priorities of the State clash with those of the public.⁴² This is evident where international

³⁸ James Crawford, 'Responsibility to the International Community as a Whole' in *International Law as an Open System* (Cameron May, 2002) 341.

³⁹ For a historical and definitional background on the concept of solidarity in international law see Wolfrum, above n 37, 8.

⁴⁰ Anne Marie Slaughter, *A New World Order* (Princeton University Press, 2004) 30 (defining subsidiarity as 'a principle of locating governance at the lowest possible level—that closest to the individuals and groups affected by the rules and decisions adopted and enforced'); Jerome Priscoli and Aaron T Wolf, *Managing and Transforming Water Conflicts* (Cambridge University Press, 2009) 3, 95, 106 (discussing the need to keep problem-solving local for effective management of water disputes); For an example of treaty language on subsidiarity, see the *Treaty of European Union*, opened for signature 7 February 1992, OJ C 191 (entered into force 1 November 1993) ('*Treaty of Maastricht*') (establishing the foundations of the European Union, 1985 *European Charter of Local Government, European Community Treaty Protocol* 30).

⁴¹ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)*[1997] ICJ Rep 7 (Judge Weeramantry) [88]–[119]; see also Eyal Benvenisti, 'Asian Traditions and Contemporary International Law on the Management of Natural Resources' (2008) 7 *Chinese Journal of International Law* 273, 277.

⁴² See Teruo Komori, 'Changing Character of International Law' in Teruo Komori and Karel Wellens (eds), *Public Interest Rules of International Law* (Ashgate, 2009) 1 (discussing how general international rules were not created to protect general interests

law limits powerful States in protection of collective interests and cases where the international legal system protects States.⁴³

These changes pose important questions about IDR. What are the rights of people to resolve their own disputes and where are the limits? What recourse do individuals and their representative organizations have for resolving international disputes? Should individuals be granted standing before the ICJ and other adjudicative bodies? Should jurisdiction be expanded in this manner? For example, in the *Arrest Warrant* case, ICJ Judge ad hoc Van den Wyngaert criticized the court for ignoring the statements of NGOs offering the opinion of civil society and noting that opinion's importance in the formation of international customary law today.⁴⁴ Questions such as these, about the rights and obligations of individuals with regard to international dispute resolution, shape the discourse on how IDR should evolve and whom international law should serve.

D. Proliferation and Uncertainty

As international law has grown over the past few decades, so too have the methods for resolving international disputes. This growth has been documented in the following ways. First, international courts and tribunals have proliferated.⁴⁵ Second, the creation of treaty-based forums that

and why this is changing with regard to international environmental protection, humanitarian law, law of the sea and space, and other areas).

⁴³ See José Alvarez, 'Contemporary International Law: Empire of Law or Law of Empire' (2009) 24 *American University International Law Review* 811 (describing the shift in international law from a system based on the co-existence of nations to one of a new empire defined as a collective order that moves beyond statehood); Marie-Claire Cordonier Segger, 'The Role of International Forums in the Advancement of Sustainable Development' (Fall 2009) 10 *Sustainable Development Law & Policy* 1 (discussing the collective nature of international law in sustainable development); cf Philippe Sands, *Lawless World* (Viking Adult, 2005); Pierre-Marie Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi' (2005) 16 *European Journal of International Law* 131 (arguing that national interests trump longer term international objectives because powerful nations maneuver against majority aims).

⁴⁴ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, [154]–[55] (Judge Van den Wyngaert).

⁴⁵ See Mackenzie et al, above n 4, xi–xiii (describing the proliferation of international adjudicatory bodies as evidence of the growing trend toward third-party adjudication of international disputes); Cesare PR Romano, 'The Proliferation of International Judicial Bodies: The Piece of the Puzzle' (2000) 31 *New York University Journal of International Law and Politics* 709; Andrea K Schneider, 'Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution' (2009) 41 *New York University Journal of International Law and Politics* 789, 793 (citing evidence for the growing caseload in courts that hear human rights cases

provide for dispute resolution has also become more pervasive.⁴⁶ Furthermore, the practice of dispute resolution within treaty regimes has become so preponderant that some States have argued that it is unnecessary to include a specific requirement in a treaty on the grounds that the international legal requirement to seek peaceful settlement of disputes is of such an obvious nature that it does not need to be restated.⁴⁷ Third, there has been a trend toward compulsory jurisdiction and binding decision-making in international adjudicatory forums.⁴⁸ The normalization of adjudication suggests that disputes 'are more likely than ever to be resolved through a trial or adjudicatory method.'⁴⁹

Proliferation has generated increased specialization in IDR. Adjudicatory forums increasingly seek to address specific types of disputes, usually defined by subject matter. Other than the ICJ, which provides judicial settlement and the PCA, which provides arbitration, conciliation, and fact-finding,⁵⁰ most international courts and tribunals have limited

and economic disputes); Andrea Schneider, 'Not Quite a World Without Trials: Why International Dispute Resolution Is Increasingly Judicialized' (2006) *Journal of Dispute Resolution* 119 (discussing the increase in the use of trials to resolve international legal disputes).

⁴⁶ See Mackenzie et al, above n 4, 431–52 (noting the development of quasi-judicial procedures at UN Treaty Bodies for addressing alleged violations of human rights, eg, the Committee on the Elimination of Racial Discrimination, the Committee against Torture and the Committee on the Elimination of Discrimination against Women).

⁴⁷ Dominique Alheritiere, 'Settlement of Public International Disputes on Shared Resources: Elements of a Comparative Study of International Instruments' (1985) 25 *Natural Resources Journal* 701, 705 (noting several nations' objections to the inclusion of a provision urging the pacific settlement of disputes in the United Nations Environmental Programme's draft principles on resource dispute settlement, on the grounds that the repetition of such an 'obvious and ... accepted' premise of international law would only serve to weaken it).

⁴⁸ Cesare PR Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent' (2007) 39 *New York University Journal of International Law and Politics* 791, 792–95 (discussing the shift toward compelling disputants to consent to the jurisdiction of an international adjudicative body); see also Schneider, above n 45 (discussing the increase in the use of trials to resolve international legal disputes).

⁴⁹ Schneider, above n 45, 793; see Georges Abi-Saab, 'The Normalization of International Adjudication: Convergence and Divergences' (2010) 43 *New York University Journal of International Law and Politics* 1, 9–10; Robert Y Jennings, 'The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers' in Laurence Boisson de Chazournes et al (eds) 9 *American Society of International Law Bulletin* 2, 3 (American Society of International Law Publications, 1995).

⁵⁰ See Permanent Court of Arbitration, *Optional Conciliation Rules*, <http://www.pca-cpa.org/showfile.asp?fil_id=197> ('PCA Optional Conciliation Rules'); Permanent Court of Arbitration, *Optional Rules for Fact-finding Commissions of Inquiry*, <<http://www.pca-cpa.org/upload/files/INQENG.pdf>> (establishing optional rules of fact-finding which parties

jurisdiction based on subject matter or treaty status. The International Tribunal for the Law of the Sea ('ITLOS'), established by the 1982 *United Nations Convention on the Law of the Sea* ('UNCLOS'), handles disputes over marine resources and maritime boundaries.⁵¹ The World Trade Organization's Dispute Settlement Understanding ('WTO DSU') provides WTO members with dispute settlement, supervising consultations between disputing parties, adopting Appellate Body panel reports, and supervising implementation of awards⁵² as well as offering disputing parties the option of engaging in direct consultations,⁵³ or third-party intervention procedures of good offices, conciliation, and mediation.⁵⁴ The International Centre for the Settlement of Investment Disputes ('ICSID') provides arbitration and conciliation for investment disputes between 'a Contracting State and a national of another Contracting State,' such as individuals and companies.⁵⁵ Arbitration occurs through a tribunal, while conciliation occurs through a commission that is convened through the agreement of the disputing parties and in accordance with ICSID provisions.⁵⁶

may adopt at their discretion); *Convention for the Pacific Settlement of International Disputes* arts 9, 15 (providing that the PCA may provide fact-finding to assist the Commission of Inquiry and that the PCA 'shall place its offices and staff at the disposal of the Contracting Powers for the use of the Commission of Inquiry').

⁵¹ See *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 284 (reaffirming the principle of pacific settlement of disputes); art 284 (describing procedures for conciliation by a State Party).

⁵² Mackenzie et al, above n 4, 73 (outlining the general responsibilities of the WTO DSU). See also World Trade Organization, *Dispute Settlement* <http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm>.

⁵³ See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1869 UNTS 401 (entered into force 1 January 1995) annex 2, art 4 ('DSU') (outlining the rules and procedures for initiation of a consultation).

⁵⁴ Ibid art 5 (outlining the rules and procedures for good offices, conciliation, and mediation).

⁵⁵ See *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1996) arts 25(1)–(2), (outlining the scope of the ICSID's jurisdiction). The Additional Facility Rules also allow cases involving parties not contracted to the Convention or cases involving non-investment issues: International Centre for the Settlement of Investment Disputes, *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*, art 2 <http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf> (providing for additional parties ICSID will offer jurisdiction over).

⁵⁶ See Nassib G Ziadé, 'ICSID Conciliation' (1996) 13(2) *News from ICSID* 3, 5–6 (describing ICSID conciliation as having similar procedures as arbitration from the initiation stage through the constitution of the Commission, after which the proceedings differ because

One concern is that the proliferation of international courts and the 'judicialization' of international disputes have led to a multiplicity of dispute resolution options that are uncoordinated. In the adjudication realm, a system where multiple courts may exert jurisdiction over the same subjects and/or issues presents concerns about fragmentation, legitimacy and authority.⁵⁷ Inconsistent findings by different judicial bodies create multiple sources of international law that can lead to fragmentation of international legal jurisprudence.⁵⁸ For example, the decision of the International Criminal Tribunal for the former Yugoslavia in *Tadić* was interpreted by some to be a departure from the earlier standard of effective control used by the ICJ in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*.⁵⁹ Another concern arose when the

the process is non-adversarial in character and the Conciliation Commission has no power to impose a decision on the parties, but serves 'to clarify the issues in dispute ... and to endeavor to bring about agreement between them upon mutually acceptable terms' under Article 34(1) of the ICSID Convention).

⁵⁷ See Tim Stephens, 'Multiple International Courts and the Fragmentation of International Environmental Law' (2006) 25 *Australian Yearbook of International Law* 227; Y Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003); Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 *Australian Yearbook of International Law* 191; Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press, 2009) 326–31 (detailing the lack of uniformity in the application of international environmental law caused by the proliferation of ruling bodies); Pierre-Marie Dupuy, 'The Unity of Application of International Law at the Global Level and the Responsibility of Judges' (2007) 1 *European Journal of Legal Studies* 1 (proposing an institutional hierarchy and uniform judicial application of law as solutions to the lack of unity in the enforcement of international law); Rosalyn Higgins, 'The ICJ, The ECJ, and the Integrity of International Law' (2003) 52 *International and Comparative Law Quarterly* 1 (detailing the detrimental effects on coherent human rights protection in Europe stemming from the disparate rulings of different tribunals); Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 *European Journal of International Law* 265 (exploring the challenges posed by the proliferation of international tribunals and courts); cf Martti Koskeniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1 (viewing international law not as a true legal system in the national sense, and thus not subject to the same concerns about fragmentation); Martti Koskeniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553 (suggesting that worries over the fragmentation of international law may be exaggerated).

⁵⁸ Rosalyn Higgins, above n 57, 18 (noting, but disagreeing with, other findings of conflicting international jurisprudence in relation to the European Court of Human Rights judgment in *Loizidou v Turkey* [1995] 10 Eur Court HR 99, [65]–[89] where the Strasbourg Court and the ICJ differed on a question regarding treaty reservations); International Tribunal of the Sea cases *Southern Bluefin Tuna Case (Australia v Japan) (Provisional Measures)* (1999) 38 ILM 1624 and *Southern Bluefin Tuna Case (Australia v Japan) (Jurisdiction and Admissibility)* (2000) 39 ILM 1359, where one arbitral tribunal revoked earlier provisional measures granted by another tribunal ('*Southern Bluefin Tuna Cases*').

⁵⁹ Higgins, above n 57, 19.

judgment of the European Court of Human Rights ('ECHR') in *Loizidou v Turkey* adopted legal reasoning that contrasted with the ICJ's decisions regarding State reservations to treaties.⁶⁰ The International Law Commission considered the impact of diversification and fragmentation on international law in its 2006 report and noted its concerns about the lack of coherence, consistency and legitimacy of international law.⁶¹ These concerns are multiplied when considering the full range of IDR methods, driving the need for the international legal system to find a way to structurally coordinate practices and institutions in order to prevent fragmentation.

The relationship between evolution, proliferation, diversity and uncertainty in IDR is dynamic and therefore difficult to capture at any given moment. However, it is important to recognize that the fluidity and flexibility of IDR is a great asset to international law. The ability for IDR practices continually to adapt to changing circumstances enhances its effectiveness. The issue is how to address the concerns without stifling the benefits. This requires determining to what extent the lack of coordination among IDR bodies undermines the authority or legitimacy of international law. It also requires establishing common principles that confirm a normative structure.⁶²

E. *The Shifting Paradigm of Peace*

A fifth change in an era of globalization has been the shift in the normative paradigm for promoting peace. For much of the 20th century, armed

⁶⁰ *Loizidou v Turkey* [1995] 10 Eur Court HR 99, [65]–[89]; See also *Southern Bluefin Tuna Case* (1999) 38 ILM 1624 and *Southern Bluefin Tuna Case* (2000) 39 ILM 1359.

⁶¹ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) (report of the study group detailing the complications arising from the increasing diversity of international law tribunals); see also, Stephens, above n 57, 304–42 (looking at the fragmentary effects of multiple international courts on international environmental law); Jonathan I Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Recueil des Cours* 115 (exploring the fragmentary effects of a high number of tribunals on international law); Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 *Michigan Journal of International Law* 849 (detailing the upside and downside of procedural and institutional fragmentation in international law).

⁶² See Vicuña, above n 36, 6; Christian Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?' (2007) 40 *New York University Journal of International Law & Policy* 259, 271 (proposing an institutional hierarchy as a possible solution to the problem of fragmentation in international law).

conflicts were mainly interstate and were based on territorial disputes or were proxy wars between superpowers.⁶³ States focused on conflict management in order to preserve geopolitical balance in an era of superpowers and proxy wars.⁶⁴ Conflict was addressed through a management approach where States tried to stabilize situations to mitigate loss of life while still pursuing their geopolitical aims. In this paradigm, peace was the absence of violence. Since the end of the Cold War, wars have shifted to the intrastate context and are marked by identity disputes and ethnic conflict.⁶⁵ Violence occurs in cycles with no clear beginning or end. The ends of intrastate wars rarely result in clear victors, and the likelihood of recurrence events is high. For example, 48% of all conflicts between 1990 and 2007 occurred in States where a conflict had ended no more than five years previously.⁶⁶

This has brought about a new conceptualization of peace. Peace is marked not just by the absence of violence and armed conflict but by the positive progression toward resolution, rebuilding and reconciliation among those affected by war.⁶⁷ In his 2003 speech, UN Secretary-General Kofi Annan announced that 'a decisive moment' had arrived and that 'the aspiration set out in the [UN] Charter to provide collective security' is a shared responsibility.⁶⁸

The shifting paradigm of peace has influenced IDR as well. For most of the 20th century, IDR methods emphasized settling legal disputes between States. Now IDR methods are shifting from State-centric, power-based approaches to interest-based approaches that promote resolution between

⁶³ Bercovitch and Jackson, above n 13, 1–16.

⁶⁴ Louis Kriesberg, 'Applications and Misapplication of Conflict Resolution Ideas to International Conflicts' in John A Vasquez et al (eds), *Beyond Confrontation: Learning Conflict Resolution in the Post-Cold War Era* (University of Michigan Press, 1998) 211–38.

⁶⁵ Bercovitch and Jackson, above n 13, 8–14.

⁶⁶ Hewitt, Wilkenfeld, and Gurr (eds), above n 23, 31 (identifying the surge of recurring conflicts in Sri Lanka, Azerbaijan, India, Chad, Iran and two in Myanmar); see also Lawrence Wocher, 'Preventing Violent Conflict: Assessing Progress, Meeting Challenges' (2009) 231 *United States Institute of Peace Special Report* 5, n 21 (presenting the UCDP Conflict Termination Dataset).

⁶⁷ The disorganization of existing IDR efforts has been criticized as reducing the effectiveness of the international community's peace-building capacity. See Charles Call and Elizabeth Cousens, 'Ending Wars and Building Peace: International Responses to War-Torn Societies' (2008) 9 *International Studies Perspective* 1, 10–15.

⁶⁸ *Note by the Secretary-General: A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change to the Secretary-General*, UN GAOR, 59th Sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004) 1.

non-State actors.⁶⁹ In the last twenty years, the dominance of State-driven IDR has given way to the rise of intergovernmental and regional organizations. Regional and local groups have the ability to act as first-responders and often add value due to their cultural intelligence of local contexts.⁷⁰ It has also promoted democratization of IDR and the inclusion of civil society participation and non-State governance. The United Nations, for instance, has provided non-State entities increased access to international lawmaking.⁷¹ This paradigm shift has developed a vision of IDR that promotes non-State actor participation, considers a broad scope of issues, appreciates a variety of IDR methods and seeks to enhance capacity to resolve disputes in a variety of international contexts.⁷²

This paradigm shift has introduced new actors, new processes and new goals. First, intrastate conflict occurs between individuals and communities that must become non-State participants in any peacebuilding process. Plans for US-Taliban peace talks serve as an example.⁷³ Second, the new paradigm for conflict resolution recognizes the importance of multi-dimensional approaches, such as mediation, collaborative governance, truth and reconciliation commissions and community-based healing among others.⁷⁴ The aim is to achieve security through a mix of conflict resolution practices that build a positive peace.⁷⁵ Third, there has been increased creativity in applying multiple methods of IDR.⁷⁶

⁶⁹ Bercovitch and Jackson, above n 13, 1–16, (arguing that new methods of IDR are more effective and comprehensive because they seek to resolve underlying issues rather than merely settle the dispute and cease violence).

⁷⁰ Derrick V Frazier and William J Dixon, 'Third-Party Intermediaries and Negotiated Settlements, 1946–2000' (2006) 32 *International Interactions* 385, 390 (outlining two factors that probably contribute to the increased prominence of regional organizations in dispute resolution).

⁷¹ See José Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005) 154–56 (discussing the ways in which the UN has provided increased access to non-state entities).

⁷² See Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, 2009) 262, 313–333 (discussing these principles in the context of global participatory democracy); see also Rafael Domingo, *The New Global Law* (Cambridge University Press, 2010) 181–185 (making the case for the need to democratise decision-making in global law).

⁷³ See eg, Alissa Rubin, 'Former Taliban Officials Say U.S. Talks Started,' *New York Times* (New York), 29 January 2012, A9.

⁷⁴ Peters, above n 72, 69.

⁷⁵ See National Research Council, *International Conflict Resolution After the Cold War* (National Academy Press, 2000).

⁷⁶ See Anna Spain, 'Integration Matters: Rethinking the Architecture of the International Dispute Resolution System' (2010) 32 *University of Pennsylvania Journal of International Law* 1.

For example, in its recent decision in the *Abyei Arbitration*, the PCA called for the parties to develop a ‘survey team to demarcate the Abyei Area as delimited by this Award’ and that ‘the Tribunal hopes that the spirit of reconciliation and cooperation visible throughout these proceedings, particularly during the oral pleadings last April, will continue to animate the Parties on this matter.’⁷⁷

IV. CHALLENGES

Given these five areas of change—the nature of international conflict, interconnected issues and collective disputes, new actors, proliferation of IDR and a paradigm shift—this section considers whether the traditional international legal tools for addressing disputes are sufficient or, if not, how they might adapt to a globalized world. Four challenges that constrain the practice of IDR are considered. The first two challenges are posed by the traditional international legal principles of sovereignty and Statehood.⁷⁸ A third challenge emerges from these two—the limitations of adjudication in an era of globalization. Finally, this section considers the role of non-judicial methods such as mediation and how to enhance their use in the international legal system.

A. *The Doctrine of State Sovereignty*

The doctrine of State sovereignty is a principle upon which the international legal system was founded. The origins of the concept emerged out of the Peace of Westphalia, which sought to provide peace by establishing a new form of legal authority that afforded States exclusive control over their domains (eg, people and territory).⁷⁹ The classic view of Westphalian

⁷⁷ *Abyei (Government of Sudan v Sudan People's Liberation Movement/Army)* 48 ILM 1258, [769] (*'Abyei'*); *The Roadmap for Return of IDPs and Implementation of Abyei Protocol*, Khartoum (8 June 2008) arts 1–3.

⁷⁸ For further discourse on statehood and sovereignty see James Crawford, ‘Negotiating Global Security Threats in a World of Nation States: Issues and Problems of Sovereignty’ in *International Law as an Open System*, above n 38, 95–121.

⁷⁹ See Derek Croxton, ‘The Peace of Westphalia of 1648 and the Origins of Sovereignty’ (1999) 21 *International History Review* 569, 570 (explaining that the treaty did not establish interstate recognition of sovereign equality but served to ‘convince people that states ought to have exclusive territorial authority’); see also John G Ruggie, ‘Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis’ (1983) 35 *World Politics*

sovereignty established the principle of non-intervention that 'no state has the right to intervene in the internal or external affairs of another.'⁸⁰ As Sir Hersch Lauterpacht asserted in 1933, 'any inquiry of a general character in the field of international law finds itself at the very start confronted with the doctrine of sovereignty.'⁸¹

Sovereignty challenges IDR in the following ways. First, as the PCIJ established in *Eastern Carelia*, 'no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.'⁸² As States have created the rules, practices and institutions for engaging in IDR, they have built in doctrines that protect their sovereignty. The doctrine of justiciability, which provides a way to limit the scope of judicial review for international courts, is one example.⁸³ Former US Secretary of State Dean Acheson relied on this doctrine in arguing after the Cuban Missile Crisis that there are certain political-legal situations that are so vital to States that the ICJ should not interfere.⁸⁴ If sovereignty is interpreted in a

275 (stating that sovereignty 'signifies a form of legitimation'); David Held, 'The Changing Structure of International Law: Sovereignty Transformed?' in David Held and Anthony McGrew (eds) *The Global Transformations Reader: An Introduction to the Globalization Debate* (Polity Press, 2nd ed, 2003) 162, 162–64 (describing the 'classic regime of sovereignty' that arose in the seventeenth century).

⁸⁰ *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 8; see also Emerich de Vattel, *The Law of Nations; or Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns* (Joseph Chitty trans, T & JW Johnson & Co Law Booksellers, 1883) 155 [trans of: *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (first published 1758)] ('To interfere in the government of another, in whatever way indeed that may be done is opposed to the natural liberty of nations, by virtue of which one is altogether independent of the will of other nations in its action'); *The Serious Crisis in Panama in its International Context*, OAS Res 1, Meeting of Consultation of Ministers of Foreign Affairs, 21st mtg OAS Doc. 8/89 rev. 2 (17 May 1989) (adopting similar language).

⁸¹ Hersch Lauterpacht, *Function of Law in the International Community* (Clarendon Press, 1933) 2.

⁸² *Status of Eastern Carelia (Advisory Opinion)* [1923] PCIJ (ser B) No 5, 27; see also *Mavrommantis Palestine Concessions (Greece v Britain)* [1924] PCIJ (ser A) No 2, 16; *Factory at Chorzów (Germany v Poland) (Jurisdiction)* [1927] PCIJ (ser A) No 9, 32.

⁸³ See, eg, *Military and Paramilitary Activities in Nicaragua (Nicaragua v United States of America) (Judgment)* [1986] ICJ Rep 14, 212 (Judge Oda) (discussing how the *travaux préparatoires* of the ICJ Statute and applicable State practice suggest that, in accepting the ICJ Statute, States did not intent to submit themselves to judicial settlement over political disputes).

⁸⁴ Dean Acheson, *Proceedings of the ASIL* (1963) 13–14; see also Eugene Rostow, 'Dispute Involving the Inherent Right of Self-Defence' (1987) 81 *American Journal of International Law* 264.

manner that allows States the option of not participating in any form of IDR it frustrates the fundamental purpose for the creation of IDR, to ensure pacific resolution of disputes in order to prevent the recourse to war.

A second challenge occurs when a nation's sovereign right to territorial integrity is the cause of an international legal dispute. This challenge occurs in environmental disputes. Early on, *Trail Smelter* established the rule that States enjoy permanent sovereignty.⁸⁵ States may use their own natural resources as they wish, as long as they do not cause serious harm to another nation.⁸⁶ However, this guidance is not helpful for addressing disputes, like those arising from climate change, the origins of which are not confined within territorial boundaries or which are subject to any one nation's legal jurisdiction.

As people and nations become increasingly interconnected, disputes involving collective interests are more common. Addressing these disputes through the IDR system demands a new relationship with sovereignty, which itself is evolving. For example, the development of the Responsibility to Protect Doctrine has established an emerging norm that State sovereignty is a limited right, not an absolute one.⁸⁷ Actions taken by the UN Security Council in Libya and, more recently, in Syria support this view.⁸⁸ As globalization shapes new understandings of sovereignty, its relationship to IDR must also evolve. The challenge is to figure out what this means for IDR.

⁸⁵ *Trail Smelter (United States v Canada)* (1941) 3 UN Reports of International Arbitral Awards 1905 (weighing Canada's right to smelt ore in its territory against the U.S. right to harvest apples and not be subject to damaging smoke from Canada).

⁸⁶ See Franz X Perrez, 'The Relationship between "Permanent Sovereignty" and the Obligation not to Cause Transboundary Environmental Damage' (1996) 26 *Environmental Law* 1187, 1198 (noting the 'obligation of all states to protect within their territory the rights of other states, especially the right to national integrity and inviolability during peace and war'); Austen L Parrish, 'Sovereignty's Continuing Importance' in Bratspies & Miller (eds), *Transboundary Harm in International Law* (Cambridge University Press, 2006) 181–194.

⁸⁷ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, December 2001) (establishing R2P as an emerging norm in international law); 2005 *World Summit Outcome*, GA Res 60/1, UN GAOR, 60th sess, UN Doc A/RES/60/L.1 (16 September 2005) (establishing widespread State support for the principle of R2P); SC Res 1674, UN SCOR, 5430th mtg, UN Doc S/RES/1674 (28th April 2006) para 4; UN Secretary-General, *Implementing the Responsibility to Protect*, UN GAOR, 63rd sess, Agenda Items 44 and 107, UN Doc A/63/677 (12 January 2009) 8–9.

⁸⁸ See SC Res 1973, UN SCOR, 6498th mtg, UN Doc S/RES/1973 (17 March 2011) (authorising member States to 'take all necessary measures'); SC Res 2043, UN SCOR, 6756th mtg, UN Doc S/RES/2043 (21 April 2012) (establishing a UN Military Supervision Unit in Syria with 300 unarmed military observers).

B. *State-Centricity in IDR*

Closely related to the issues presented by sovereignty are those that arise due to the State-centric nature of the IDR system. Historically, IDR practices and institutions, such as the PCA, PCIJ and ICJ, have been established by States. Thus, their interests are negotiated into the rules and structure of these forums. International law granted supreme legal status to States, designating them as the primary subjects of international law.⁸⁹ Non-State actors were commonly treated as the objects of a State based on territorial or other forms of control. These actors had no standing under international law to contest a State's action or territory and thus often resorted to violent means to establish 'effective control' over the area of territory if they wanted to make a case for international recognition.⁹⁰ This State-centric focus made sense at that time because the purpose of establishing pacific dispute resolution was to prevent war between nations.

The challenge today is that a State-centric international legal system limits the capacity of IDR. Effective IDR requires the inclusion of all relevant stakeholders, including non-State actors, in the process. Yet many forums either do not provide for this or strictly limit the type and role of non-State actor participation. Despite these formal rules, IDR is becoming increasingly porous as new actors pierce through the old veil. Non-State actors are behaving more and more like subjects, not objects, of international law. Corporations and individuals are pursuing international dispute resolution independent of their governing State. NGOs are influencing the development of norms. This opening up of the system results in more actors and wider participation. However, without formal recognition and organization under the international legal regime, it also contributes to lack of clarity and confusion about the extent of State power and governance and the rights and responsibilities of everyone else.

The time has come to re-examine the place of States in the IDR system.⁹¹ What are the dangers of increasing non-State actor participation in and power over IDR processes? Where do States need to maintain supreme authority and why? For States that represent the collective will of their

⁸⁹ Martti Koskenniemi, 'The Place of Law in Collective Security' (1996) 17 *Michigan Journal of International Law* 255.

⁹⁰ David Held, 'The Changing Structure of International Law: Sovereignty Transformed?' in David Held and Anthony McGrew (eds), above n 79, 162, 163.

⁹¹ See Vicuña, above n 36, 1–9; Edith Brown Weiss, 'The New International Legal System' in Nandasiri Jasentuliyana (ed), *Perspectives on International Law* (Martinus Nijhoff Publishers, 1995) 63–82.

subjects, should IDR seek to preserve democratic values even if they are inconsistent with effective IDR practices? Will increasing the role (and power) of individuals and other non-State actors threaten States and, ultimately, the international legal system? These questions open a discourse about IDR that globalization demands.

C. *The Limits of Adjudication*

As an essential component of the international legal system, adjudication has been used to settle interstate disputes about territory, State responsibility, trade, investment, and more recently, the environment and human rights.⁹² States use adjudication because it offers certainty of process and a binding outcome that enjoys the promise of compliance under international law. International courts assist States in developing a common understanding of facts and law that promotes dispute resolution by clarifying substantive rules of law.

However, adjudication has its limits.⁹³ States are reluctant to submit important matters to a third-party decision-making authority.⁹⁴ For example, in the *Indus River Treaty* case, both India and Pakistan chose not to utilize arbitration and opted to engage in facilitation by the Permanent Indus Commission instead.⁹⁵ In the Mekong River Dispute between Thailand and Laos, the parties rejected adjudication as a dispute resolution option in the *Mekong Agreement* stating that disputes that are 'not first resolved by the Mekong River Committee are to be referred to the

⁹² Hersch Lauterpacht, above n 81, 2–4.

⁹³ Richard B Bilder, 'Some Limitations of Adjudication as an International Dispute Settlement Technique' (1982) 23 *Virginia Journal of International Law* 1, 4 (explaining the potential inability of a legal judgment to address underlying primary, often unrelated, issues which prompted the legal matter); JG Merrills, 'The Role and Limits of International Adjudication' in William E Butler (ed), *International Law and the International System* (Martinus Nijhoff Publishers, 1987); R P Anand, *Studies in International Adjudication* (Vikas Publications, 1969); G Shinkaretskaya, 'The Present and Future Role of International Adjudication as a Means for Peacefully Settling Disputes' (1989) 29 *Indian Journal of International Law* 87, 88 (suggesting that international judicial mechanisms are not effective in avoiding armed conflict).

⁹⁴ Patricia Wouters, *Universal and Regional Approaches to Resolving International Water Disputes* in International Bureau of the Permanent Court of Arbitration (ed), *Resolution of International Water Disputes* (Kluwer International, 2000) 346. See also Kenyuan Zou, 'Transnational Cooperation for Managing the Control of Environmental Disputes in East Asia' (2004) 16 *Journal of Environmental Law* 341, 359.

⁹⁵ Mary Miner et al, 'Water Sharing Between India and Pakistan: a Critical Evaluation of the Indus Water Treaty' (2009) 34 *Water International* 204, 207.

governments for negotiation, possible mediation or eventual settlement according to principles of international law.⁹⁶ In the Amur River Dispute between China and Russia, the parties decided against adjudication and chose to resolve the problem through a joint field-mapping exercise of the disputed area in which they agreed to divide the islands in half.⁹⁷

A court may issue an opinion that fails to resolve key issues in the case.⁹⁸ For example, despite the ICJ's decision in *Gabčíkovo-Nagymaros Project* regarding Slovakia and Hungary's dispute over a project to build barrages in the Danube River,⁹⁹ the matter remains unresolved.¹⁰⁰ The Court did not address the future conduct of the parties with regard to operating the existing dam or building additional ones. Slovakia and Hungary have been unable to reach an agreement on the central issues (such as the amount of water to be released into the riverbed and plans for the Nagymaros dam).¹⁰¹ In *Nuclear Tests* and other cases, the ICJ was heavily criticized for leaving the question of legality of nuclear testing, a politicised matter, undecided, and for failing to identify legal principles upon which environmental protection could be based.¹⁰²

⁹⁶ Wouters, above n 94, 137; see also Zou, above n 94, 346 (interpreting the dispute settlement mechanisms provided for under the Mekong Agreement Articles 34 and 35 as negotiation, consultation, mediation and involvement of the Mekong River Committee).

⁹⁷ Rongxing Guo, *Territorial Disputes and Resources Management: A Global Handbook Preface* (Nova Science Publishers, 2007) 45–47, 50–51.

⁹⁸ See Richard Bilder, 'International Dispute Settlement and the Role of International Adjudication' (1987) 1 *Emory Journal of International Dispute Resolution* 131, 151–61; Christine Gray and Benedict Kingsbury, 'Developments in Dispute Settlement: Interstate Arbitration since 1945' (1993) *British Year Book of International Law* 97, 105 ('Arbitral tribunals ... do not seem prepared openly to avow that they will indulge in non-legal decision-making. The question how far tribunals in fact use compromise in resolving the disputes presented to them').

⁹⁹ *Gabčíkovo-Nagymaros* [1997] ICJ Rep 7.

¹⁰⁰ See Salman MA Salman, 'Good Offices and Mediation and International Water Disputes' in the International Bureau of the Permanent Court of Arbitration, *Resolution of International Water Disputes*, above n 94, 155, 162 (describing why *Hungary/Slovakia* remains unresolved).

¹⁰¹ Marcel Szabo, 'Gabčíkovo-Nagymaros Dispute' (2009) 39 *Environmental Policy & Law* 97.

¹⁰² *Nuclear Tests Case (New Zealand v France)* [1974] ICJ Rep 457 (declining to rule upon the illegality of atmospheric nuclear weapon testing); *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 (discouraging the threat or use of nuclear weapons but not reaching whether such use may be legal in certain circumstances under international law); *Certain Phosphate Lands in Nauru (Nauru v Australia) (Judgment)* [1992] ICJ Rep 240 (avoiding ruling upon the substantive legal issues before the court); see also *Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's 1974 Judgment in the Nuclear Tests Case (New Zealand v France) (Provisional Measures)* [1995] ICJ Rep 288 (declining New Zealand's request to institute a special derivative procedure based on the Court's 1974 judgment on the ground that the situation

There are additional limitations. The nature of the adjudication process does not allow for multi-lateral involvement.¹⁰³ States 'have little incentive to resort to international adjudication as a way of clarifying or developing general rules.'¹⁰⁴ There are insufficient proactive measures to prevent harms from occurring and remedies that cannot compensate for the true value of the loss. Most adjudicatory forums exclude non-State actors.¹⁰⁵ Many view international courts as a place for Westernised justice, and concerns about the lack of diversity of judges and court bias persist.¹⁰⁶ Finally, there are capacity limitations. The ICJ, for example, lacks the capacity to consider all potential disputes over which it could assume jurisdiction. From 1946 to 1996, the ICJ assumed jurisdiction over 75 contentious cases and issued 39 judgments on the merits; it also delivered 22 advisory opinions.¹⁰⁷ Since 1996, the cases submitted to the ICJ have increased in number, scope and complexity. As of 31 December 2012, there were ten contentious cases pending before the ICJ.¹⁰⁸

These critiques of adjudication highlight its central limitations. The adjudication model is holding firm to the foundations of international law's past, while other processes are evolving and changing in response to the needs of the present and of the future. If international law is to assist in the promotion of global peace and security in this new era, the practice of adjudication must evolve to meet these challenges.

D. *Enhancing Mediation*

A fourth challenge facing IDR is the need to enhance capacity for resolving through mediation not just of international conflicts but of

considered in 1974 had related solely to atmospheric nuclear tests and not to underground tests, the matter in contention in the 1995 proceedings).

¹⁰³ See eg, Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2009) 252–53 (arguing that judicial proceedings and arbitration tend not to cater to the multi-lateral character in the context of certain environmental issues).

¹⁰⁴ Bilder, 'Some Limitations of Adjudication as an International Dispute Settlement Technique', above n 93, 2, 5.

¹⁰⁵ See Higgins, above n 57, 12 (describing both the importance of nonstate entities in today's global arena and the lack of legal jurisdiction over these entities).

¹⁰⁶ See Michelle Burgis, *Boundaries of Discourse in the International Court of Justice* (Brill, 2009) 36–37, 52.

¹⁰⁷ See 'Introduction' (1996–1997) 51 *International Court of Justice Yearbook* 1, 3 (providing a general overview of statistics about the ICJ's caseload).

¹⁰⁸ See International Court of Justice, *Pending Cases* <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1>>.

other international disputes as well. Mediation can assist parties in resolving disputes in ways that offer promise in an era of globalization. It promotes subsidiarity, inclusion of non-State stakeholders, consideration of extralegal issues, flexibility and the ability to work independent of constrictive legal frameworks. Furthermore, States have demonstrated a preference for nonbinding guidelines and flexible procedures over binding legal instruments.¹⁰⁹ Adjudication is less effective than non-legal, collaborative methods of IDR (mediation, negotiation) for resolving international environmental disputes because States are reluctant to submit their sovereignty and control to a court or tribunal and because the issues are technically complex and politically sensitive.¹¹⁰

There is some institutional support for mediation for international conflicts. Historically, the UN Secretary-General has offered good offices to States on the brink of, or engaged in, war. In addition, the UN Department of Political Affairs houses the UN Mediation Support Unit, a centre that provides educational and operational support for mediation.¹¹¹ In 2008, a five-person Mediation Support Standby Team was developed to allow for the deployment of mediators to conflict areas on short notice to lend expertise in areas including power sharing, constitution formation, security, human rights and justice.¹¹²

International institutional support for mediation of international disputes remains lacking. There is no standing body equivalent to the ICJ to provide mediation services to States for international disputes. Although the PCA and ICSID provide conciliation, they do not offer mediation. Second, the use of mediation in the international context remains

¹⁰⁹ John F Murphy, *The Evolving Dimensions of International Law: Hard Choices for the World Community* (Cambridge University Press, 2010) 3–4 (discussing the Helsinki Final Act and the Basel Accord as examples of soft law).

¹¹⁰ Bilder, 'Some Limitations of Adjudication as an International Dispute Settlement Technique', above n 93, 3–5, 9–10; Richard Bilder, 'The Settlement of Disputes in the Field of the International Law of the Environment' (1975) 144 *Recueil des Cours* 145.

¹¹¹ United Nations Department of Public Information, 'United Nations Announces New "On-Call" Mediation Team to Advise Peace Envoys in Field' (Press Release, PA/1, 5 March 2008) (announcing the formation of a new Standby Team of Mediation Experts in an effort to build up capacity for preventive diplomacy).

¹¹² See Norway: Mission to the UN, *UN: Norway Supported "On Call" Mediation Team is a Valuable Resource* (2 September 2009) <www.norway-un.org/News/News-2009/110609_MSU> (Team members serve one-year terms and were first deployed to Kenya in March 2008 during the post-election conflict).

ad-hoc.¹¹³ Third, mediation lacks formal enforcement mechanisms under international law, so compliance is voluntary or coerced through political pressure and other means. Mediation lacks the institutional power and support associated with adjudicatory forums that have a place in the international legal regime. Furthermore, there are no universally accepted procedural rules governing the use and practice of mediation. Private mediation providers such as the American Arbitration Association, Judicial Arbitration and Mediation Services ('JAMS') Inc and, most recently, the International Mediation Institute, have developed processes for certifying mediators in the practice of international mediation.¹¹⁴ But, to date, there is no venue for determining standards or qualifying international mediators that is generally accepted by the international community or recognized under international law.

Addressing this challenge requires creative thinking about how, in the absence of precedent, to achieve this aim. Should there be a centralized, standing mediation body for international disputes akin to what the ICJ provides for judicial settlement? Or should existing IDR forums—the WTO, ICSID, PCA, etc—add mediation to the methods that they provide? How will mediation, an interest-based process, fit into the existing international legal framework? These and many other questions will need to be addressed in order to meet this challenge.

V. OPPORTUNITIES

With the changes and challenges facing IDR in an era of globalization, there are also emerging opportunities for enhancing and improving global capacity for IDR. This section considers two possibilities.

A. *Integrating IDR*

The complexity of international disputes has driven new IDR approaches. This development can be understood as the integration of IDR, which

¹¹³ Christine Chinkin, 'Alternative Dispute Resolution Under International Law' in Malcolm Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart Publishing, 1998) 124.

¹¹⁴ See, eg, International Mediation Institute, *How to Become IMI Certified*, <www.imimmediation.org/how-to-become-imi-certified>.

occurs when two or more methods are applied to the same dispute sequentially or when aspects of different methods are integrated into a single process.¹¹⁵ Although judicial settlement and arbitration have different institutional and procedural structures from mediation, conciliation, and facilitation, the combination of rights based and interests based processes offer important contributions that should be recognized.¹¹⁶

Integrated approaches can maximise stakeholder participation by incorporating traditionally excluded parties (non-State actors) into the process. Interest-based methods provide venues for resolution when the law remains uncertain and cannot serve this function.¹¹⁷ International judicial forums are not well suited to resolve multiparty complex disputes. But mediation lacks a powerful and authoritative framework for compelling participation and enforcing agreed-upon resolutions. The answer is not to privilege one process over another, but rather to integrate them into a mutually reinforcing approach. In the ICJ *Frontier Dispute* case, the governments of Mali and Burkina Faso reached a cease-fire and worked to resolve their underlying disputes through judicial settlement by the ICJ and mediation that involved local stakeholders.¹¹⁸ Integrated approaches enjoy the flexibility to consider a broad range of extralegal issues deemed inappropriate for a court.¹¹⁹ Thus, combining subcomponents of

¹¹⁵ Spain, above n 76; see also Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Hart Publishing, 2009).

¹¹⁶ See Christine Chinkin, 'Alternative Dispute Resolution Under International Law' above n 113 (describing the benefits of integrating non-binding dispute resolution methods (eg, conciliation) into environmental treaty compliance regimes); Mari Koyano, 'Effective Implementation of International Environmental Agreements: Learning Lessons from the Danube Delta Conflict' in Teruo Komori and Karel Wellens (eds), *Public Interest Rules of International Law: Towards Effective Implementation* (Ashgate, 2009) 259, 285–88 (using a case study of the Danube Delta Conflict to illustrate how environmental conflict management and implementation of agreements apply the combination of dispute resolution methods, specifically fact-finding and facilitation).

¹¹⁷ See Nilaratna Xuto, 'Thailand: Conciliating a Dispute on Tuna Exports to the EC' in Peter Gallagher et al (eds), *Managing the Challenges of WTO Participation: 45 Case Studies* (Cambridge University Press, 2005); see also DSU, 1869 UNTS 401 art 24(2) (requiring that at the request of a least-developed country, the Director-General or Chairman of the DSB offer good offices, conciliation, and mediation before a request for a panel where an appropriate solution has not resulted during the course of consultations).

¹¹⁸ *Frontier Dispute (Burkina Faso v Mali) (Judgment)* [1986] ICJ 554.

¹¹⁹ John S Dryzek and Susan Hunter, 'Environmental Mediation for International Problems' (1987) 31 *International Studies Quarterly* 87 (explaining why mediation is an effective method for dealing with decentralized aspects of the global legal and political order).

different IDR processes can result in new and more effective ways to resolve disputes.¹²⁰

For example, in the *Malaysia-Singapore* case, the International Tribunal for the Law of the Sea ('ITLOS') integrated fact-finding and facilitation into its judicial approach by calling for 'the establishment of a group of independent experts to study the land reclamation issues' and make recommendations.¹²¹ In the *Pedra Branca* dispute between Malaysia and Singapore, both countries engaged in negotiations prior to and after referring the case to adjudication before the ICJ.¹²² Approaches such as these are reforming the current judicial network¹²³ and allowing for increased coordination between international legal institutions and international political ones.¹²⁴ If adjudication may lead to heightened hostility between nations by making it more difficult to resume talks if a party refuses to accept a final judicial decision, then interest-based methods offer alternative approaches.¹²⁵ In the *Thailand-Philippines* dispute over tuna exports, for example, the parties preferred consultations facilitated by the

¹²⁰ See, eg, Surya P Subedi, 'WTO Dispute Settlement Mechanisms as a New Technique for Settling Disputes in International Law' in Duncan French et al (eds), *International Law and Dispute Settlement* (Hart Publishing, 2010) 173 (describing the WTO DSB mechanism as a blend of diplomacy negotiation, mediation, arbitration and adjudication that is 'neither fully judicial nor completely a non-judicial mechanism').

¹²¹ Mackenzie et al, above n 4, 68.

¹²² The countries agreed to submit the dispute to the ICJ through a negotiated Special Agreement; see S Jayakumar and Tommy Koh, *Pedra Branca: The Road to the World Court* (NUS Press, 2009) 35 (detailing the negotiations leading up to the resolution by the ICJ); Tan Hsien-Li, 'Case Concerning Sovereignty Over Pedra Branca/Palau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)' (2008) 12 *Singapore Yearbook of International Law* 257 (2008) (describing the territorial dispute in detail); Coalter G Lathrop, 'International Decisions: Sovereignty Over Pedra Branca/Palau Batu Puteh, Middle Rocks and South Ledge' (2008) 102 *American Journal of International Law* 828 (examining the ICJ's treatment of the dispute and its resolution).

¹²³ Christine Chinkin, 'Increasing the Use and Appeal of the Court' in Connie Peck and Roy Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (Martinus Nijhoff Publishers, 1997) 43–56; Cesare Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue' (2009) 41 *New York University Journal of International Law and Policy* 755, 756–57 (discussing the trend over the last decade from a cluster of adjudicatory institutions into a network where courts are coordinating to avoid conflict of jurisdiction and jurisprudence).

¹²⁴ Gilbert Guillaume, 'The Future of International Judicial Institutions' (1995) 44 *International and Comparative Law Quarterly* 848.

¹²⁵ See Thomas J Dillon, 'The World Trade Organization: A New Legal Order for World Trade?' (1994) 16 *Michigan Journal of International Law* 349, 396–97 (arguing that adjudication may heighten tension between parties due to its adversarial nature and undermine the effectiveness of negotiation if it is unsuccessful).

European Union Trade Commissioner and mediation to the WTO DSB's adjudicative approach.¹²⁶

Integrated IDR also promotes a more accurate descriptive understanding of the field. All too often, States conceive of their IDR options as a binary choice between the categories of binding legal methods or consensual, non-binding diplomatic-political methods. This bifurcation of approaches occludes the capacity to see how and when multiple dispute resolution methods should be used to address legal and extralegal issues within a conflict. But the evolution of IDR practice provides an opportunity to reinforce the interconnected relationship between legal and political aspects of a dispute by designing institutions that treat both aspects in an integrated manner.¹²⁷ Redefining the conceptual understandings of IDR methods in this way may help build adaptive flexibility and mitigate ways that the IDR system is slow to adapt to practical realities.

B. *Encouraging Normative Discourse on Peace & Justice*

The changes and challenges facing IDR present an opportunity to reevaluate the normative purpose of IDR as a substructure of international law. As its history shows, IDR developed in a world where peace had to be secured between States.¹²⁸ Globalization has made today's reality more complex.

First, the evolution of IDR has blurred the lines between public and private international law, raising questions about who is responsible for peace.¹²⁹ The PCA, for example, has recognized its part in providing a peacemaking function when adjudicating disputes that are a part of ongoing armed conflicts.¹³⁰ Is this an isolated example or might there be an emerging practice that international courts and tribunals have some

¹²⁶ Xuto, above n 117, 555, 560 (detailing the agreement by the parties to submit to mediation, should the consultations fail).

¹²⁷ See Vicuña, above n 36, 85–87 (discussing the advantages of the WTO's DSB unique integrated design).

¹²⁸ Hans Kelsen, *Peace Through Law* (University of North Carolina Press, 1946); Tom Farer, 'Law and War' in Cyril Black and Richard Falk (eds), *The Future of the International Legal Order* (Princeton University Press, 1971) 15.

¹²⁹ *Charter of the United Nations* art 36(3) ('legal disputes should as a general rule be referred by the parties to the International Court of Justice').

¹³⁰ See eg, *Abyei* (2009) 48 ILM 1258 (Judge Al-Khasawneh). See also Judge Awn Shakat Al-Khasawneh at [202] (discussing the missed opportunity for promoting true peace and reconciliation of the parties and noting that '[i]nternational law and indeed law in general sometimes provide only simple recipes for complex situations where populations and tribes intermingle and where the livelihood of certain groups transcends borders').

obligation for promoting peace?¹³¹ If so, what should distinguish the responsibility of the ICJ, as an organ of the UN, from that of institutions like the WTO? And how might this normative aim threaten their adjudicatory functions?

A second query concerns the relationship between peace and justice.¹³² The peace–justice tension arises, for example, in international criminal proceedings between those who seek criminal accountability and those who are engaged in peace promotion. The question of whether to afford amnesty to promote peace at the expense of pursuing justice is a common challenge.¹³³ In Uganda, there were concerns that the ICC's indictments against the Lord Resistance Army's Joseph Kony would disrupt the possibility of peace talks.¹³⁴ Envisioning international courts and tribunals as part of the regime for global peace promotion, informs a new relationship between peace and justice. Ultimately, IDR 'embod[ies] the authentic meaning of justice: to attain peace through effective dispute resolution.'¹³⁵ Since both are essential aims of the international legal system, the relevant question is how to achieve the proper balance, which the emerging field of transitional justice (eg, Rwanda's Gacaca courts and South Africa's Truth and Reconciliation Commission) considers.¹³⁶ These and other aspects of the impact of globalization on IDR require initiating a discourse about what its normative purpose should be in today's world.

¹³¹ Anna Spain, 'Examining the International Judicial Function: International Courts as Dispute Resolvers' (2012) 34 *Loyola of Los Angeles International & Comparative Law Review* 101.

¹³² See Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006).

¹³³ See, eg, *Prosecutor v Morris Kallon, Brima Bazzy Kamara*, (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), 13 March 2004); Diane Orentlicher, 'Amicus Curiae Brief Concerning the Amnesty Provided by the Lomé Accord,' SCSL-2003-07, Submission in *Prosecutor v Morris Kallon*, (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-15-AR72(E), 13 March 2004); Ronald C Slye, 'The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law* 173.

¹³⁴ See Adam Branch, 'Uganda's Civil War and the Politics of the ICC's Intervention' (2007) 21 *Ethics & International Affairs* 179.

¹³⁵ Rafael Domingo, above n 72, 112.

¹³⁶ See Ruti G Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Law Journal* 69–94; Christine Bell, 'Transitional Justice, Inter-disciplinarity and the State of the "Field" or "Non-Field"' (2009) 3 *International Journal of Transitional Justice* 5.

VI. CONCLUSION

Globalization presents changes, challenges and opportunities for the discipline of international dispute resolution and is redefining the paradigm for global peace and security. The UN Charter has served as guidance for the role of international dispute resolution in the 20th century. But a changing world order demands transforming old tools for a new era. Now is the time to advance international dispute resolution to meet the complexities of the 21st century.

CHAPTER THREE

THE ICJ AS A GUARDIAN OF COMMUNITY INTERESTS? LEGAL LIMITATIONS ON THE USE OF PROVISIONAL MEASURES

YOSHIYUKI LEE-IWAMOTO*

I. INTRODUCTION

About twenty years ago, Bruno Simma proposed the term ‘community interests’ in order to describe ‘a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States.’¹ The concept of community interests is elusive, but many scholars appear to share its core idea: there are fundamental values which exist beyond a bilateral relationship between States.² As globalization produces the effect of lowering the threshold of sovereignty,³ it has led to an increasing awareness that some interests have a fundamental value which transcends the interests of individual sovereign States. Examples of community interests include, but are not limited to, the maintenance of international peace and security, the protection of human rights, the protection of the environment, and the management of spaces beyond national territorial jurisdiction, all of which essentially have a multilateral dimension.

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¹ See Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Recueil des Cours* 229, 233.

² See, eg, Markus Benzing, ‘Community Interests in the Procedure of International Courts and Tribunals’ (2006) 5 *Law & Practice of International Courts & Tribunals* 369, 371; Christian J Tams, ‘Individual States as Guardians of Community Interests’ in Ulrich Fastenrath et al (eds), *From Bilateralism to Community Interest* (Oxford University Press, 2011) 380.

³ See Rosalyn Higgins, ‘International Law in a Changing International System’, *Themes and Theories*, (Oxford University Press, 2009) vol 2, 906–907. Higgins points out that globalization represents the reality that we live in at a time when the walls of sovereignty are no protection against movements of capital, labor, information, and ideas.

While the existence of community interests in international law is now widely accepted, this development has not yet led to the creation of institutions for their adequate protection or enforcement. As a result, much of the discourse has focused on how community interests may be enforced through international dispute settlement.⁴ In this context, some scholars argue that the International Court of Justice ('the ICJ' or 'the Court') is becoming a true 'World Court' which functions as a forum for the maintenance of peace and the protection of human rights.⁵ There have also been calls for the ICJ to actively respond to enforce community interests. However, such a function stands in contrast to the traditional role of the ICJ which concerns settling an inter-State dispute through a strict bilateral process between two States. This traditional role focuses mainly on protecting and adjudicating individual interests and rights of States. This raises the question of whether, and to what extent, the Court can reconcile its function as adjudicator of bilateral disputes with the multilateral demands of protecting and enforcing community interests.

Focusing on the judicial protection of community interests through provisional measures indicated by the ICJ, this chapter seeks to address the above question. It is suggested that States and the Court have already used the existing procedural tools to enforce community interests. In particular, provisional measures have been used as a means of protecting community interests.⁶ This view, however, presents two problems in relation to Article 41 of the ICJ Statute ('the Statute'). The first concerns the purpose of provisional measures. Whereas Article 41 of the Statute stipulates that 'the Court shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken *to preserve the respective rights of either party*,'⁷ it is debatable whether the purpose of provisional measures is confined to the preservation of rights. Markus Benzing has pointed out, for instance, that 'provisional measures in inter-State judicial proceedings traditionally serve to

⁴ See, eg, Rüdiger Wolfrum, 'Enforcing Community Interests through International Dispute Settlement: Reality or Utopia?' in Ulrich Fastenrath et al (eds), *From Bilateralism to Community Interest* (Oxford University Press, 2011) 1133; Tams, above n 2, 379; Yoshifumi Tanaka, 'Protection of Community Interests in International Law' (2011) 15 *Max Planck Yearbook of United Nations Law* 329, 333.

⁵ See, eg, Giuliana Ziccardi Capaldo, *The Pillars of Global Law* (Ashgate, 2008) 132–133.

⁶ See, eg, Benzing, above n 2, 377–379.

⁷ *Statute of the International Court of Justice* art 41.

protect the rights of the parties to the case,' but that this strict limitation 'has been softened in recent jurisprudence.'⁸ He went on to say:

The Court has ... gradually widened this objective to include the prevention of the escalation or aggravation of the dispute ... This goal is manifestly of "public order" character in that it incorporates the community interest of international peace and security into the procedure before the Court.⁹

It is thus necessary to consider the question of whether the Court has a power to indicate provisional measures not designed to preserve the rights of the parties at issue, but aimed solely at maintaining international peace.

The second problem arises from the conditions required for the indication of provisional measures. Given that Article 41 of the Statute provides, in general terms, that provisional measures may be indicated if 'circumstances so require,' all conditions that have to be fulfilled before indicating provisional measures are part of these 'circumstances.'¹⁰ The question of whether these circumstances exist may be assessed in each case by the Court in the exercise of a broad discretion.¹¹ According to the Court's jurisprudence, the conditions have been formulated as follows: *prima facie* jurisdiction, and the risk of irreparable harm and the element of urgency. Some scholars have noted that the Court has not rigorously applied the conditions relating to 'rights' in the cases involving the maintenance of peace or the protection of human rights.¹² Pointing out that 'the procedure for the provisional measures ... would substantially set itself free and acquire a procedural autonomy,'¹³ Sakai argues that 'the Court has really introduced and substantiated some general interests or universal values for the international community into its dispute settlement process when it may accelerate the autonomy of the provisional measures procedure, maintaining a formalistic object of the preservation of the parties' rights

⁸ Benzing, above n 2, 378.

⁹ Ibid 378–379; See also Hironobu Sakai, 'New Developments of the Orders on Provisional Measures by the International Court of Justice' (2009) 52 *Japanese Yearbook of International Law* 231, 270.

¹⁰ See Karin Oellers-Frahm, 'Article 41' in Andreas Zimmermann et al (eds), *The Statute of The International Court of Justice: A Commentary* (Oxford University Press, 2006) 933.

¹¹ See Jerzy Sztucki, *Interim Measures in the Hague Court* (Kluwer, 1983) 102. Sztucki points out that the Court's discretion implies from the term of Article 41 'if it considers...' at 102; see also Shabtai Rosenne, *The Law and Practice of the International Court* (Kluwer Law International, 4th ed, 2006) 1382. Rosenne states that most of the law governing provisional measures of protection is judge-made.

¹² See, eg, Sakai, above n 9, 249–254. See also Yoshiyuki Iwamoto (Lee), 'The Protection of Human Life Through Provisional Measures Indicated by the International Court of Justice' (2002) 15 *Leiden Journal of International Law* 345, 350–364.

¹³ Sakai, above n 9, 255.

as a legal fiction.¹⁴ However, as a judicial organ, the Court's role is to clarify the rights and obligations of the parties—the rights and obligations at issue in the case—in order to settle the dispute: the conflict should, thereby, be reduced to the rights-obligations relation between parties to make it suitable for the judicial procedure, include the provisional measures procedure. Therefore, it is worthwhile to reconsider the recent trends of provisional measures in the light of preserving 'rights' of the State parties.

Against the above background, this chapter examines the recent jurisprudence on provisional measures. It is structured as follows: first, the chapter examines the question of whether non-aggravation of a dispute can be regarded as an independent basis for the indication of provisional measures. As the Court appears to elaborate the conditions relating to rights, recent cases are then analysed in light of two requirements: a linkage between the rights protected by provisional measures and the subject of proceeding on the merits (link test) and a reasonable possibility of success on the merits (plausibility test). Finally, the chapter assesses the recent trend of provisional measures and considers some implications of globalization to the international legal order.

II. PROVISIONAL MEASURES FOR THE SOLE PURPOSE OF PREVENTING THE AGGRAVATION OF THE DISPUTE?

According to Article 41(1) of the Statute, the Court has the power to indicate 'if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.' This is a very clear statement of the purpose of such measures—the preservation of rights. Indeed, the Court has repeatedly confirmed that the function of provisional measures is the preservation of the respective rights of the parties pending the decision of the Court on the merits.¹⁵ At the same time, however, the Court has used provisional measures for a

¹⁴ Ibid.

¹⁵ See, eg, *Fisheries Jurisdiction (United Kingdom v Iceland) (Provisional Measures)* [1972] ICJ Rep 12, 16 [21], 30, 34 [22] ('*Fisheries Jurisdiction*'); *Nuclear Tests Case (New Zealand v France) (Provisional Measures)* [1973] ICJ Rep 99, 103 [20], 135, 139 [21] ('*Nuclear Tests Case*'); *United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Provisional Measures)* [1979] ICJ Rep 7, 19 [36] ('*Diplomatic and Consular Staff in Tehran*'); *Military and Paramilitary Activities (Nicaragua v United States) (Provisional Measures)* [1984] ICJ Rep 169, 182 [32] ('*Military and Paramilitary Activities*'); *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia & Herzegovina v Yugoslavia) (Provisional Measures)* [1993] ICJ Rep 3, 19 [34] ('*Genocide Case*').

distinct purpose: that is, indicating measures to avoid an aggravation or extension of a dispute.¹⁶ While the existence of a power to indicate non-aggravation measures appears to be established in the Court's case law, the question remains as to whether the Court has the power to indicate provisional measures *for the sole purpose* of preventing the aggravation or extension of a dispute. Some scholars answer this question in the positive.¹⁷ If the Court has a power to indicate provisional measures regardless of the rights of the parties to the dispute in question,¹⁸ it would step into the peacekeeping function of other political organs (eg, the Security Council) of the United Nations.¹⁹ In doing so, the Court may therefore directly contribute to the protection of the community interest of international peace and security.

The Court itself considered this question in the *Aegean Sea Continental Shelf* case. In this case, the Court held that 'before this request could be entertained, the Court would have to determine whether, under Article 41 of the Statute, the Court has such *an independent power* to indicate interim measures having that object.'²⁰ However, the Court did not find it necessary to examine the issue because of the existence of the UN Security Council's recommendations and the willingness of the parties.²¹ In the *Frontier Dispute* case, the Chamber, for the first time, addressed the point which the Court had left open in the *Aegean Sea* case and found as follows:

[I]ndependently of the requests submitted by the Parties for the indication of provisional measures, the Court or, accordingly, the chamber possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers the circumstances so require.²²

¹⁶ See *Nuclear Tests Case* [1973] ICJ Rep 99, 106, 135, 142; *Diplomatic and Consular Staff in Tehran* [1979] ICJ Rep 7, 21 [47]; *Military and Paramilitary Activities* [1984] ICJ Rep 169, 187 [41]; *Genocide Case* [1993] ICJ Rep 3, 24 [52].

¹⁷ See, eg, Benzing, above n 2, 378–379.

¹⁸ See also Hugh Thirlway, 'The Law and Procedure in the International Court of Justice 1960–1989, Part Twelve' (2002) 72 *British Yearbook of International Law* 37, 106. Thirlway argues that the non-aggravation measures are by definition unrelated to the rights claimed.

¹⁹ Ibid 99. Thirlway points out that the 'preservation of rights' is a matter of justice, not of peace-keeping; neither the intensity of a dispute nor the risk that it may escalate into the use of force are taken into consideration, unless such escalation threatens to cause irreparable harm to the rights of either parties.

²⁰ *Aegean Sea Continental Shelf (Greece v Turkey) (Provisional Measures)* [1976] ICJ Rep 3, 12 [36] (emphasis added).

²¹ Ibid 14 [41].

²² *Frontier Dispute (Burkina Faso/Mali) (Provisional Measures)* [1986] ICJ Rep 3, 9 [18] (emphasis added).

The Chamber then indicated provisional measures calling on the governments of Burkina Faso and Mali to 'ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Chamber or prejudice the rights of the other Party to compliance with whatever judgment the Chamber may render in the case'.²³ In the *Land and Maritime Boundary* case concerning a dispute between Cameroon and Nigeria, the Court took a similar view, albeit using slightly different wording. It held that:

[I]ndependently of the requests for the indication of provisional measures submitted by the Parties to *preserve specific rights*, the Court pos[se]s by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require.²⁴

In the subsequent case of *Armed Activities on the Territory of the Congo*, the Court confirmed the approach taken in the *Land and Maritime Boundary* case²⁵ and held that both parties must prevent and refrain from any action which might prejudice the rights of the other party, or which might aggravate or extend the dispute before the Court.²⁶ In the case of *Certain Criminal Proceedings in France*, the Court again referred to the same formula, after finding that there was no urgency in this case.²⁷

Relying on the above dictum, some ICJ judges argued that the Court was entitled to indicate non-aggravation measures even in cases in which measures preserving the rights of the parties were not indicated.²⁸ Shabtai Rosenne took a similar view and argued that in the *Certain Criminal*

²³ Ibid 11–12 [32(1)(A)].

²⁴ *Land and Maritime Boundary (Cameroon v Nigeria) (Provisional Measures)* [1996] ICJ Rep 13, 22–23, [41] (emphasis added).

²⁵ See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Provisional Measures)* [2000] ICJ Rep 111, 128 [44] ('*Armed Activities*').

²⁶ Ibid 129 [47].

²⁷ See *Certain Criminal Proceedings (Republic of the Congo v France) (Provisional Measures)* [2003] ICJ Rep 102, 111 [39] ('*Certain Criminal Proceedings*'). However, the Court did 'not in the circumstances of the present case see any need for measures of this kind to be indicated': at 111.

²⁸ See, eg, 1971 *Montreal Convention (Libya v United Kingdom) (Provisional Measures)* [1992] ICJ Rep 3, 33, 48 [31]–[32] (Judge Bedjaoui) 72, 74–77 [9]–[12] (Judge Ranjeva) 78, 88–92 (Judge Ajibola) arguing in favour of indicating provisional measures exclusively in order to prevent the aggravation of the dispute; *Legality of Use of Force (Yugoslavia v Belgium) (Provisional Measures)* [1999] ICJ Rep 124, 205, 207–208 (Judge Shi), 209 (Judge Vereshchetin) arguing that the Court would have been entitled to indicate provisional measures, despite the lack of prima facie jurisdiction ('*Legality of the Use of Force*').

Proceedings in France case, 'the Court took the opportunity to nail down once and for all a question that had not been fully clarified in its earlier case-law case.'²⁹ He saw this as 'another indication that the Court is integrating itself into the general peace-keeping functions of the United Nations, in its capacity of a principal organ.'³⁰ However, these views, which are based on an extensive interpretation of Article 41 of the Statute, do not find support in the recent case law of the Court. Rather, in the *Pulp Mills on the River Uruguay* case, the Court seems to standardise its case law retaining a narrow view on the scope of its power to indicate provisional measures to prevent the aggravation of the dispute.

In that case, Uruguay complained that an Argentine citizen group had blockaded the bridges and roads between the two States for the purpose of forcing Uruguay to terminate construction of the pulp mills and alleged that Argentina failed to act against them. Uruguay thus requested provisional measures directing Argentina to abstain from any measure that might aggravate the dispute (the second provisional measure).³¹ Declining to indicate provisional measures, the Court observed that in all cases in which it had issued the provisional measure directing the parties not to take any actions which could aggravate or extend the dispute, other measures had also been indicated.³² In other words, the Court considered that non-aggravation measures had never been indicated separately. In this context, it is noteworthy that the *Frontier Dispute* case was not included among the cases cited by the Court.³³ In so doing, the Court clarified that in its case law, it had indicated a measure directing the parties not to aggravate the dispute *only when* specific measures to protect the rights had also been indicated.³⁴

Moreover, according to the reasoning of the Court, non-aggravation measures can be indicated *only when* the Court finds that there is a risk of irreparable prejudice to the rights of the parties to the dispute. In relation to the second provisional measures, Uruguay argued that 'an order can be made to prevent aggravation of the dispute even where the Court has

²⁹ Shabtai Rosenne, *Provisional Measures in International Law* (Oxford University Press, 2005) 214.

³⁰ *Ibid.*

³¹ See *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Provisional Measures) [2007] ICJ Rep 3, 5–7 [8]–[13], 14–16 [44]–[48] ('*Pulp Mills*').

³² *Ibid* 16 [49].

³³ *Ibid.*

³⁴ See also Daniel Müller, 'Procedural Developments at the International Court of Justice' (2007) 6 *Law & Practice of International Courts & Tribunals* 221, 228.

found that there is no threat of irreparable damage to the rights in dispute.³⁵ On this issue, the Court stated that:

[It] has not found that at present there is an imminent risk of irreparable prejudice to the rights of Uruguay in dispute before it, caused by the blockades of the bridges and roads linking the two States ... the Court therefore considers that the blockades themselves do not justify the indication of the second provisional measures requested by Uruguay, *in the absence of the conditions* for the Court to indicate the first provisional measure.³⁶

In fact, Judge Buergenthal, who accepted non-aggravation measures as a separate power, interpreted the Court's reasoning on the rejection of the second provisional measures as the lack of an irreparable prejudice to the rights in dispute.³⁷ From the viewpoint of the Court's recent jurisprudence,³⁸ however, non-aggravation of the dispute cannot be regarded as an independent basis for the indication of provisional measures.³⁹ By attaching relevance to the element of aggravation, the Court has been able to indicate measures that are not strictly needed to prevent a risk of irreparable harm, but which contribute to a greater protection of *the rights* of the parties.⁴⁰ The non-aggravation measures are merely ancillary to measures directed at preserving specific rights, and thus 'the preservation of rights' is considered as the indispensable object of provisional measures under Article 41 of the Statute. Accordingly, the author concludes that the ICJ can use provisional measures in order to protect the community interest of international peace and security only when the threats to such interest are associated with the possible aggravation of the rights to be preserved.⁴¹

³⁵ *Pulp Mills* [2007] ICJ Rep 3, 14 [45].

³⁶ *Ibid* 16 [50] (emphasis added).

³⁷ *Ibid* 24–25 [10]–[11] (Judge Buergenthal).

³⁸ In the *Certain Activities carried out by Nicaragua in the Border Area* case, the Court reaffirmed the reasoning used in the *Pulp Mills on the River Uruguay* case, according to which the non-aggravation measure is intended as a complement to the more specific measures protecting the rights which form the subject of the case before the Court on the merits: *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Provisional Measures)* (International Court of Justice, General List No 150, 8 March 2011) [63], [83] ('*Certain Activities carried out by Nicaragua*').

³⁹ See Bernhard Kempen and Zan He, 'The Practice of the International Court of Justice on Provisional Measures: The Recent Development' (2009) 69(3) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 919, 923–925.

⁴⁰ See Paolo Palchetti, 'The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute' (2008) 21 *Leiden Journal of International Law* 623, 630–637.

⁴¹ In this chapter, the author does not consider the recommendations made by the Court in the Order on provisional measures, because they are different from provisional

III. EMERGING INDIVIDUALISATION OF THE CONDITIONS RELATING TO 'RIGHTS'

The essential purpose of provisional measures under Article 41 of the Statute is the preservation of rights. However, Article 41 is silent on what rights actually require preservation. The fact that measures are *provisional* implies that they seek to protect the rights which are asserted in the proceedings, and which a party seeks to have confirmed by the Court in its eventual judgment on the merits.⁴² The Court's case law confirmed this point. In the *Fisheries Jurisdiction* cases, the Court stated that 'irreparable prejudice should not be caused to *the rights which are the subject of dispute in judicial proceedings*'.⁴³ Similarly, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, it found that 'the Court must be concerned to preserve by such measures *the rights which may subsequently be adjudged by the Court* to belong either to the Applicant or to the Respondent'.⁴⁴

It is natural that, from the substantive point of view, the party requesting provisional measures is required to specify the 'rights' to be protected by the measures. This requirement is reinforced by the fact that the Court does not examine its *prima facie* jurisdiction unless the party requesting provisional measures claims that the rights which it believes it holds fall within the Court's jurisdiction.⁴⁵

On the other hand, from the procedural point of view, it appears to be unnecessary for the party to specify the 'rights' to be protected. On this point, it is worth noting that the provision in the Rules of the Court which provided that '[t]he request shall specify ... the rights to be protected,' was deleted in 1978.⁴⁶ Oellers-Frahm points out that '[t]his amendment seems

measures in terms of their legally binding force. On this practice, see pros argument: Jean d'Aspremont, 'The Recommendations made by the International Court of Justice' (2008) 56 *International and Comparative Law Quarterly* 185; cons argument: Hugh Thirlway, 'The Recommendations made by the International Court of Justice: A Sceptical View' (2009) 58 *International and Comparative Law Quarterly* 151.

⁴² Thirlway, above n 18, 87; see also *Statut de la Cour internationale de Justice* art 41. The term in the French text, *mesures conservatoires du droit*, presents this point more clearly.

⁴³ *Fisheries Jurisdiction* [1972] ICJ Rep 12, 16 [21], 30, 34 [22] (emphasis added).

⁴⁴ *Genocide Case* [1993] ICJ Rep 3, 19 [34] (emphasis added).

⁴⁵ See *Armed Activities (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Provisional Measures)* [2002] ICJ Rep 219, 249 [88].

⁴⁶ See International Court of Justice, *Rules of the Court* (adopted 5 May 1946) art 61(1), renumbered as article 66(1) in the 1978 Rules: International Court of Justice, *Rules of the Court* (adopted 14 April 1978) art 66(1); See also International Court of Justice, *Rules of the Court* (adopted 14 April 1978) art 73(2) 'providing that the request shall specify the reasons therefor, the possible consequences if it is not granted, and the measures requested'.

to be the consequence of the fact that formalistic definitions are not always helpful and that the Court has to assess the indication of provisional measures from the point of view of the substance of the dispute as a whole.⁴⁷ In her view, the Court thus mainly bases its decision on the nature and scope of the overall conflict between the parties to the dispute before it.⁴⁸

The recent jurisprudence of the Court, however, tends to move in the opposite direction. It seems to suggest that the Court not only considers the 'rights' to be protected by the provisional measures in assessing the conditions for indicating provisional measures, but also reformulates the conditions for indicating provisional measures in light of those 'rights'. In other words, the 'rights' factor appears to play an independent role in assessing the conditions for the indication of provisional measures. This tendency shows that community interests are required to be formulated as 'individual State's rights under international law' in order to be protectable by provisional measures. Therefore, this chapter will next examine the Court's jurisprudence by focusing on the following two requirements which relate to the rights protected by provisional measures: the link test and the plausibility test.

A. Link Test: Link Between the Rights Protected by Provisional Measures and the Subject of the Proceedings on the Merits

The function of provisional measures is to safeguard the rights which are in dispute, pending the Court's decision on the merits. In this respect, the term 'rights' is unfortunate because the 'right' remains in existence even if it is infringed. Thus, what is to be preserved is the subject matter of the right, the factual use of the right which would be impossible if the subject matter were irreparably destroyed.⁴⁹ Because of the above gap, the question of a link arises: the rights to be protected by provisional measures should be linked directly to the right which the main case is destined to declare or protect.

⁴⁷ Oellers-Frahm, above n 10, 939.

⁴⁸ See also Sakai, above n 9, 248.

⁴⁹ See Hugh Thirlway, 'The Indication of Provisional Measures by the International Court of Justice' in Rudolf Bernhardt (ed), *Interim Measures Indicated by the International Court* (Springer-Verlag, 1994) 7–8; see also Oellers-Frahm, above n 10, 931.

In fact, the Court has rejected requests for the indication of provisional measures because of the lack of a link between the rights protected by requested provisional measures and the rights which constitute the subject of the proceedings on the merits. In the *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* case, Guinea-Bissau sought to have the Court declare the 1989 Arbitral Award void, non-existent or invalid, and requested provisional measures which essentially sought to preserve the status quo in maritime areas which were subject to the Arbitral Award. The Court rejected this request by stating that:

[T]he Applicant ... asks the Court to pass upon the existence and validity of the award but does not ask the Court to pass upon the respective rights of the Parties in the maritime areas in question [A]ccordingly, the alleged rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case.⁵⁰

This position was followed in the subsequent case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. In this case, the Court stated that '[it] ought not to indicate measures for protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of that jurisdiction.'⁵¹

While the link test has also been considered implicit in assessing the existence of irreparable prejudice to the rights in issue,⁵² it should be noted that the recent case law shows a tendency to formulate explicitly the requirement of a link between the rights protected by provisional measures and the subject of the proceedings on the merits. In the case of *Pulp Mills on the River Uruguay*, the Court considered whether the provisional measures requested by Uruguay (Respondent) aimed at protecting the rights which fell under the prima facie jurisdiction on the merits initiated by Argentina (Applicant). The Court formulated the link test in general terms as follows:

⁵⁰ *Arbitral Award (Guinea-Bissau v Senegal) (Provisional Measures)* [1990] ICJ Rep 64, 70 [26].

⁵¹ *Genocide Case* [1993] ICJ Rep 3, 19 [35].

⁵² See, eg, *Certain Criminal Proceedings* [2003] ICJ Rep 102, 108–109 [26]–[29]. In this case, after observing the provisional measures requested—suspension of the French proceedings—and the rights on the merits—the right to require a State to abstain from exercising universal jurisdiction in criminal matters in a manner contrary to international law and the right to respect by France for the immunities by international law—the Court found that the irreparable prejudice would not be caused to those rights as such, but the prejudice might be regarded as such as to affect irreparably the rights asserted in the Application.

[T]he link between *the alleged rights* the protection of which is the subject of the provisional measures being sought, and *the subject of the proceedings before the Court on the merits of the case* has to be examined.⁵³

And the Court found the Applicant's rights to be protected by provisional measures as follows:

[A]ny right Uruguay may have to continue the construction and to begin the commissioning of the Botnia plant in conformity with the provisions of the 1975 Statute .. effectively constitutes a claimed right in the present case, which may in principle be protected by the indication of provisional measures ... Uruguay's claimed right to have the merits of the present case resolved by the Court under Article 60 of the 1975 Statute also has a connection with the subject of the proceedings on the merits initiated by Argentina and may in principle be protected by the indication of provisional measures.⁵⁴

Consequently, the Court concluded that 'the rights which Uruguay invoked in, and seeks to protect by, its request ... have a sufficient connection with the merits of the case for the purpose of the current proceedings'.⁵⁵ This was the first case in which the Court explicitly required the link between the rights protected by the provisional measures and the subject of the proceedings before the Court on the merits. At the same time, the Court employed the 'sufficient' criterion as the degree of that link. However, there remained the question of whether the above formula had general application to other ordinary cases. This was unclear for two reasons: firstly, the 'link test' in this case was considered in the context of *prima facie* jurisdiction;⁵⁶ secondly, the authentic French text used a weaker expression: '*il échet d'examiner le lien*'.⁵⁷ Accordingly, it was not clear whether the 'link test' was an independent and necessary requirement for indicating provisional measures.

This problem was addressed in the case of *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America)*. In this case, Mexico, referring to Article 60 of the Statute, requested the Court to interpret paragraph 153(9) of the *Avena* judgment and, at the same time, asked for provisional measures to suspend the execution of the death penalty.

⁵³ *Pulp Mills* [2007] ICJ Rep 3, 10 [27] (emphasis added).

⁵⁴ *Ibid* 10–11 [29].

⁵⁵ *Ibid* 11 [30].

⁵⁶ *Ibid*.

⁵⁷ This expression can be translated into English as 'it is appropriate to examine the link'.

Rejecting the submission of the United States that the Mexican application needed to be dismissed *in limine* on the grounds of a manifest lack of jurisdiction, the Court formulated the link test in the following terms: '[A] link *must* therefore be established between *the alleged rights* the protection of which is the subject of the provisional measures being sought, and *the subject of the principal request* submitted to the Court.'⁵⁸ Confirming that the subject of the proceedings was 'the interpretation of the meaning and scope of that obligation, and hence of the rights which Mexico and its nationals have on the basis of paragraph 153(9) of the 2004 Judgment in the *Avena* case',⁵⁹ the Court found that 'the rights which Mexico seeks to protect by its request for the indication of provisional measures ... have a sufficient connection with the Request for interpretation.'⁶⁰ It should be noted that the obligatory term 'must' ('*doit*' in the French text) was used. However, the general applicability of the link test was still open to question. The merits of this case concerned the interpretation of the Judgment under Article 60 of the Statute, and, as a result, the terms of formula were different: the link between the rights protected by the provisional measures and the subject of *the principal request*.

In the subsequent case of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the Court adopted a very similar formula concerning the link test. In this case, Georgia alleged that Russia had violated its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and requested provisional measures to protect its citizens against violent acts of discrimination by Russia, in order to preserve the rights under Article 2 and 5 of CERD. The Court rejected the request but confirmed its *prima facie* jurisdiction to deal with the case to the extent that the subject matter of the dispute related to the interpretation and application of CERD.⁶¹ It formulated the link test as follows: '[A] link must therefore be established between *the alleged rights* the protection of which is the subject of the provisional measures being sought, and *the subject of the proceedings before the Court on the merits of the case*.'⁶² On this issue, Russia contended

⁵⁸ *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Provisional Measures)* [2008] ICJ Rep 311, 326–327 [58] (emphasis added) ('*Avena*').

⁵⁹ *Ibid* 328 [63].

⁶⁰ *Ibid* 328 [64] (emphasis added).

⁶¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia) (Provisional measures)* [2008] ICJ Rep 353, 388 [117].

⁶² *Ibid* 388–389 [118] (emphasis added).

that the above link was lacking because neither Article 2 nor 5 of CERD contained an obligation to prevent breaches of CERD.⁶³ While the Court reserved a decision on the issue as to whether Article 2 and 5 implied a duty to prevent racial discrimination by other actors, it found the link as follows:

[T]here is a correlation between respect for individual rights, the obligations of States parties and the right of States parties to seek compliance there-with.... [I]n the view of the Court *the rights* which Georgia invokes in, and seeks to protect by, its Request for the indication of provisional measures *have a sufficient connection with the merits of the case* it brings for the purposes of the current proceedings.⁶⁴

The above findings show that the Court formulates the link test as an independent requirement which is separate from other conditions such as *prima facie* jurisdiction and irreparable harm. In other words, it is necessary that the Court ascertain the link between the rights protected by provisional measures and the subject of the proceedings before the Court on the merits of the case.

Furthermore, according to the *Questions relating to the Obligation to Prosecute or Extradite* case, it seems that the Court has attempted to enhance the link between the provisional measures and the merits. In this case, Belgium sought to have the Court declare Senegal's obligation to prosecute Mr Hissène Habré (former President of Chad) or to extradite him to Belgium. It also requested provisional measures to keep him under control and surveillance of the Senegalese authorities. After finding that it had *prima facie* jurisdiction under Article 30 of the Convention against Torture to entertain the case, the Court formulated the link test as follows: '[A] link must therefore be established between *the provisional measures requested and the rights which are the subject of the proceedings before the Court as to the merits of the case*.'⁶⁵ This formula indicates that the Court has shifted its focus to the 'rights' on the merits, which might be a narrower concept than 'the subject of proceedings on the merits.' However, it should also be pointed out that the Court relaxed the degree of the link by stating that 'the possible departure of Mr Habré from Senegalese territory

⁶³ Ibid 391 [124]–[125].

⁶⁴ Ibid 391–392 [126] (emphasis added).

⁶⁵ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Provisional Measures)* [2009] ICJ Rep 139, 151 [56] (emphasis added) ('*Questions Relating to the Obligation to Prosecute or Extradite*').

would be likely to affect the rights which might be adjudged to belong to Belgium on the merits.⁶⁶

In the *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) case, the Court affirmed the formula adopted in the *Questions relating to the Obligation to Prosecute or Extradite* case.⁶⁷ It found the link between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought.⁶⁸

In conclusion, the link test has been settled in the case law of the ICJ as an independent condition which is separated from other conditions such as prima facie jurisdiction and irreparable harm. Indeed, the Court has assessed the degree of a link as relatively loose. At the same time, it should not be overlooked that the introduction of the link test confirms the Court's recent tendency that provisional measures must address the rights on the merits.

B. *Plausibility Test: Reasonable Possibility of Success on the Merits*

There is another condition relating to 'rights', known as prima facie case or *fumus boni juris* in other international courts and domestic legal systems.⁶⁹ This condition requires that unless it is apparent that the applicant has at least some prospect of success on the merits, it is inappropriate for the

⁶⁶ Ibid 152 [61].

⁶⁷ See *Certain Activities carried out by Nicaragua* (International Court of Justice; General List No 150, 8 March 2011) [54].

⁶⁸ With regard to the first provisional measure requested by Costa Rica, which was aimed at ensuring that Nicaragua refrained from any activity in the area comprising the entirety of Isla Portillos, the Court found that 'the continuation or resumption of the disputed activities by Nicaragua on Isla Portillos *would be likely to affect the rights of sovereignty which might be adjudged on the merits to belong to Costa Rica*': Ibid [60]. Moreover, with regard to the second provisional measure requested by Costa Rica, which concerned the suspension of Nicaragua's dredging programme in the River San Juan adjacent to the relevant area, the Court found that 'there is a risk that the rights which might be adjudged on the merits to belong to Costa Rica *would be affected* if it were established that the continuation of the Nicaraguan dredging operations on the San Juan river threatened seriously to impair navigation on the Colorado river or to cause damage to Costa Rica's territory': Ibid [61].

⁶⁹ See, eg, Francis G Jacobs, 'Interim Measures in the Law and Practice of the Court of Justice of the European Communities', in Rudolf Bernhardt (ed), *Interim Measures Indicated by the International Court* (Springer-Verlag, 1994) 48–51; Thomas Buergenthal, 'Interim Measures in the Inter-American Court of Human Rights' in *ibid*, 92; and in relation to municipal systems, Lawrence Collins, 'Provisional Measures and Protective Measures in International Litigation' (1992) 234(III) *Recueil des Cours* 19, 26–27, 224.

Court to indicate provisional measures. On this view, the strength of the applicant's case on the merits should be treated as a relevant 'circumstance' which justifies the indication of provisional measures. In the *Passage through the Great Belt* case, the Court explicitly faced the question as to whether the State requesting measures was required to substantiate the right that it claimed.⁷⁰ Although the Court did not take a clear position on this issue, Judge Shahabuddeen analysed the question in some detail in his separate opinion. He argued that the State requesting provisional measures 'is required to establish the possible existence of the rights sought to be protected.'⁷¹

The question of whether this test is a necessary condition has been controversial. For example, stating that 'it is wholly unrealistic to suppose that the apparent merits of the case have no influence on the outcome of the application for interim measures of protection,' Collins has argued that, 'counsel have sought, on applications for interim measures, to prove or disprove the possibility of the existence of the right claimed. In fact this is surely a pattern common to all legal systems.'⁷² Thirlway has pointed out that '[a]t the preliminary measures stage, as the Court has repeatedly emphasized, it is not concerned to determine whether the rights claimed do or do not exist; but some sort of *prima facie* case for their existence must be made out.'⁷³ Rosenne has also stated that '[Article 41] requires the party requesting the measures to satisfy the Court *prima facie* as to the existence of the rights claimed.'⁷⁴

On the other hand, pointing out that '[t]he law of the Court does not require that the applicant and requesting States show a "*prima facie* case" and, accordingly, as a rule they do not argue this point,' Sztucki concluded that 'the preliminary view on the merits of a dispute *can marginally* play a role in the assessment of circumstances of a case in their entirety.'⁷⁵ Merrills also stated that 'although superficially attractive, such an approach [plausibility test] would present many problems and has never been

⁷⁰ *Passage through the Great Belt (Finland v Denmark) (Provisional Measures)* [1991] ICJ Rep 12, 17 [21].

⁷¹ *Ibid* 36 (Judge Shahabuddeen) finding that Finland, the applicant, had met this test.

⁷² Collins, above n 69, 225.

⁷³ Thirlway, above n 18, 88.

⁷⁴ Rosenne, above n 11, 1410.

⁷⁵ Sztucki, above n 11, 123–124 (emphasis in original).

endorsed by the Court.⁷⁶ He argued that 'if a prima facie test were to be formally required it would probably be impossible to prevent the parties from devoting a significant amount of their argument to the merits.'⁷⁷ Certainly the complexity of the cases which are inter-State disputes will make even a prima facie examination of the well-founded character of the claims almost impossible. It will also be very difficult to respect the distinction between a mere prima facie test and a kind of interim judgment.⁷⁸

In fact, however, the plausibility test has been repeatedly affirmed by the States parties to proceedings before the Court and by some individual judges. For example, in the *Certain Criminal Proceedings in France* case, France (Respondent) argued before the Court that 'the Applicant's claims must have a minimum degree of likelihood [*un minimum de vraisemblance*], failing which not only should they be dismissed on the merits but also, at the outset, any provisional measures can only be refused.'⁷⁹ In the *Pulp Mills on the River Uruguay* case, Judge Bennouna and Judge Abraham suggested the Court adopt the plausibility test, although the majority of the Court avoided considering the issue. In particular, Judge Bennouna argued that the Court should examine the prima facie existence of the right at issue in light of the fact that the two parties engaged in a full-scale debate before the Court about the very existence of the rights claimed by Argentina.⁸⁰ Judge Abraham also argued that the Court could not prescribe provisional measures without having conducted some minimum degree of review as to the existence of the rights claimed by the applicant. He was of the view that this review needed to be limited and closely resemble the standard of *fumus boni juris* so familiar to other international court and many domestic legal systems.⁸¹ Both judges considered that, as a matter of principle, there needed to be a plausible case for the existence

⁷⁶ John Merrills, 'Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice' (1995) 44 *International and Comparative Law Quarterly* 90, 114.

⁷⁷ Ibid 116.

⁷⁸ Oellers-Frahm, above n 10, 938.

⁷⁹ 'Public sitting held on Monday 28 April 2003, at 4 p.m., at the Peace Palace, President Shi presiding' *Certain Criminal Proceedings (Republic of the Congo v France)* International Court of Justice, 28 April 2003, CR 2003/21, 25 [20].

⁸⁰ See *Pulp Mills on the River of Uruguay (Argentina v Uruguay)* (Provisional Measures) [2006] ICJ Rep 113 (Judge Bennouna) 144 [7], 145 [11]–[12].

⁸¹ Ibid (Judge Abraham) 140–141 [10]–[11].

of the rights for indicating provisional measures, although they agreed with the Court's *dispositif* in the case at issue.⁸²

The Court also touched on the plausibility test in the *Legality of Use of Force* cases (the NATO cases). In those cases, the Court took account of the plausibility of the rights in the context of prima facie jurisdiction when declining to indicate provisional measures on the basis that the special intent to commit genocide did not, at the present stage of the proceedings, appear to have existed.⁸³ According to Oellers-Frahm, 'this case lies at the borderline between the denial of interim protection for lack of substantive jurisdiction or lack of prospect of success.'⁸⁴ In the NATO cases the plausibility of rights may have been taken into consideration in the context of prima facie jurisdiction. Nevertheless, the Court has never independently applied the condition of reasonable prospect of success on the merits in provisional measures proceedings. At the same time, there seems to be some evidence to suggest that the Court is changing its position. In the case concerning the *Questions relating to the Obligation to Prosecute or Extradite*, the Court seems to have accepted the plausibility test, '[T]he power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that *the rights asserted by a party are at least plausible*.'⁸⁵

Furthermore, in the *Certain Activities carried out by Nicaragua in the Border Area* case, the Court re-adopted the above formula⁸⁶ and applied the plausibility test under a new subject heading: 'Plausible character of the rights whose protection is being sought.'⁸⁷

While the above case law shows that the Court seems to employ the plausibility test, the question remains as to what degree of plausibility of rights is required.⁸⁸ On this point, the degree of plausibility required is generally rather low, including in courts which have adopted the doctrine

⁸² Ibid (Judge Bennouna) 146 [16], (Judge Abraham) 141 [13]. Judge Bennouna voted in favour of the Order because he considered that the evidence presented to the Court was insufficient to determine prima facie whether the right claimed by Argentina existed, and he was in agreement with the rest of the Court's reasoning. Judge Abraham agreed with the Court's rejection by reason of the lack of urgency.

⁸³ *Legality of Use of Force* [1999] ICJ Rep 124, 138 [40].

⁸⁴ Oellers-Frahm, above n 10, 938.

⁸⁵ *Questions relating to the Obligation to Prosecute or Extradite* [2009] ICJ Rep 139, [57] (emphasis added).

⁸⁶ *Certain Activities Carried out by Nicaragua* (International Court of Justice; General List No 150, 8 March 2011) [53].

⁸⁷ Ibid 55–59.

⁸⁸ Ibid (Judge Koroma) [7]–[8], (Judge Sepúlveda-Amor) [12], (Judge Greenwood) [4]–[5].

of *fumus boni juris*. As Castillo de la Torre has pointed out, even in the European Court of Justice '[t]he recent tendency is to assess whether the pleas in law are not, prima facie, entirely unfounded, which is slowly turning this requirement into a *fumus non mali juris*.'⁸⁹ In fact, in the *Questions relating to the Obligation to Prosecute or Extradite* case, the ICJ found plausibility by stating that 'the rights asserted by Belgium, being grounded in a possible interpretation of the Convention against Torture, therefore appear to be plausible'.⁹⁰ In the *Certain Activities carried out by Nicaragua in the Border Area* case, the ICJ also appears to find plausibility without considering whether a strong presumption existed that the rights claimed by the Applicant were well-founded.⁹¹ Thus, the degree of plausibility is low, even though it depends on the Court's assessment in the case at issue. If so, it might be practically difficult for the Court to use the plausibility test as a reason for rejecting the request. Indeed, there is some sense in Merrills' suggestion that 'it seems reasonable to ask whether a test [plausibility test] which is so easily met is really necessary, given that governments rarely bring cases which are obviously hopeless.'⁹² However, we may recall here that, although the prima facie jurisdiction is a low threshold, the NATO cases demonstrated that even that low threshold must be reached before the Court is prepared to entertain the requests.⁹³

At this time it is too early to determine the scope of the criterion of plausibility with any degree of certainty. Nevertheless, it is important to note that the ICJ tends to require the party requesting provisional measures to present the rights formulated as a possible interpretation of international law. As a result, community interests must be construed as the rights of the party to a dispute before the Court.

IV. CONCLUSION

It cannot be denied that the ICJ tends to develop judicial protection of community interests through provisional measures.⁹⁴ This tendency could

⁸⁹ Fernando Castillo de la Torre, 'Interim Measures in Community Courts: Recent Trends' (2007) 44 *Common Market Law Review* 273, 284.

⁹⁰ *Questions relating to the Obligation to Prosecute or Extradite* [2009] ICJ Rep 139, [60] (emphasis added).

⁹¹ *Certain Activities carried out by Nicaragua* (International Court of Justice; General List No 150, 8 March 2011) [58]–[59].

⁹² Merrills, above n 76, 115.

⁹³ *Legality of Use of Force* [1999] ICJ Rep 124, 138 [41], [139], [45].

⁹⁴ According to Article 75 (1) of the Rules of Court, provisional measures may be indicated by the Court even in the absence of a request by one of both parties. If the *proprio*

be considered as evidence that suggests that the ICJ is not only stepping into the field of 'conflict resolution or management,'⁹⁵ but also leading the development of international law and the protection of the principles of the emerging 'global community.'⁹⁶ Nevertheless, the judicial protection of community interests through provisional measures can only be accepted on the condition that community interests are formulated as the specific rights of the individual States before the Court and such rights have a sufficient connection with provisional measures. According to the ICJ's recent case law, the non-aggravation measures are conceived as ancillary to measures directed at preserving specific rights. The recent case law also shows a tendency that the 'rights' factors—the link test and the plausibility test—are independently considered in the assessment of the conditions for indicating provisional measures. In this regard, it seems reasonable to suppose that by elaborating the conditions relating to the 'rights' to be protected by provisional measures, the Court attempts to strengthen the relevancy of the provisional measures to the merits. It may increase the risk that the provisional measures stage approaches the merits stage, but, at the same time, it contributes to safeguard the Court's judicial function.⁹⁷

The ICJ can play a role in the protection of community interests by indicating provisional measures within the scope of its judicial function,⁹⁸ and, therefore, it is legitimate that as a matter of judicial policy, the Court adopts a formalistic approach focusing on the bilateral rights-obligations relation between parties.⁹⁹ This approach is necessary to

motu action of the Court were taken, it would testify the Court's positive attitude toward the protection of community interests. To this day, however, the Court has never indicated provisional measures wholly of its own motion. Cf in the *LaGrand* case, the Court relied on Article 75 (1), which allows for the indication of provisional measures without oral proceedings, although a request for provisional measures had been filed: *LaGrand (Germany v United States of America) (Provisional Measures)* [1999] ICJ Reports 9,11–15 [6]–[12], [21], [26].

⁹⁵ See Rosenne, above n 29, 218–220; see also Sakai, above n 9, 277.

⁹⁶ Capaldo, above n 5, 132–133; see also Sakai, above n 9, 254.

⁹⁷ The judicial function of the Court is to state the law in order to remove uncertainty from their legal relations, and the Court itself must be a guardian of the Court's judicial integrity: see *Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Rep 15, 29, 33–34.

⁹⁸ See Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius Publications, 1986) vol 2, 548. Fitzmaurice points out that 'the Court is a "right" rather than a "peace" preserving institution'.

⁹⁹ See René-Jean Dupuy, 'Formalisme juridique et Cour internationale de Justice' in Jerzy Malarczyc (ed), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International, 1996) 401.

ensure its judicial function is maintained, in particular in light of unrealistic expectations about the Court's role in the absence of specific mechanisms for protecting and enforcing community interests.

About 20 years ago, a learned scholar stated that:

In the view of [the state of political integration of the international society] and the dismal record of States' compliance with provisional measures, it would seem advisable for the Court ... to apply judicial restraint rather than engage in a futile display of judicial valor in using its discretionary power under Article 41 of the Statute.¹⁰⁰

It seems that this situation has not changed.¹⁰¹ While the ICJ has found that orders indicating provisional measures create a legally binding obligation on the party or parties at which the measures are addressed,¹⁰² it is unclear what remedies a party to the proceeding would have in the event that the other party does not comply with the Court's Order indicating provisional measures.¹⁰³ While notice of provisional measures must be given to the UN Security Council pursuant to Article 41(2) of the Statute, an Order of provisional measures is not a 'judgment' within the meaning of Article 94(2) of the UN Charter.¹⁰⁴ In other words, although provisional measures are binding, there is no formal process by which they can be enforced.¹⁰⁵ Compliance with provisional measures primarily depends on the State parties at which the measures are addressed. Therefore, even if the ICJ indicates legally binding provisional measures aiming at protecting community interests by relaxing the conditions for indicating measures, the effect of such provisional measures might turn out to be not as effective as expected.¹⁰⁶

¹⁰⁰ Leo Gross, 'Some Observations on Provisional Measures' in Yoram Dinstein (ed), *International Law at a Time of Perplexity* (Martinus Nijhoff Publishers, 1989) 317.

¹⁰¹ See, eg, Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press, 2004) 402. Schulte points out that 'the record of compliance and efficiency of provisional measures is far from satisfactory'.

¹⁰² *LaGrand (Germany v United States of America) (Merits)* [2001] ICJ Rep 466, 501–506 [98]–[110].

¹⁰³ See Maurice Mendelson, 'State Responsibility for the Breach of Interim Protection Orders of the International Court of Justice' in Malgosia Fitzmaurice & Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing, 2004) 38–53.

¹⁰⁴ See Karin Oellers-Frahm, 'Article 94 UN Charter' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2006) 162–163.

¹⁰⁵ However, Article 94(2) does not rule out action by the SC for the enforcement of provisional measures in the exercise of other competence: see Schulte, above n 101, 62.

¹⁰⁶ See Gentian Zyberi, 'Provisional Measures of the International Court of Justice in Armed Conflict' (2010) 23 *Leiden Journal of International Law* 571, 583. Zyberi points out

The formalistic approach to provisional measures is a form of judicial restraint which might reflect a disparity between substantive law and procedural law in the international legal order. The substantive law and the procedural law are working in their never-ending interactions: as the substantive legal rules develop according to the situations in contemporary international community, the procedural legal rules have to change in harmony with them.¹⁰⁷ It seems, however, that the changes in the substantive law which stem from the emergence of community interests are not directly reflected in the procedural law as far as the ICJ jurisprudence on provisional measures is concerned. The State-centric and bilateral characters of international law are still retained, at least in their procedural dimension. This aspect of the international legal order has not changed, even in the new era of globalization.

that the usefulness of the Court's procedures hinges on the convergence of preservation of the rights at risk with the rights which form the subject of the dispute.

¹⁰⁷ Sakai, above n 9, 279.

CHAPTER FOUR

CLEARANCE OF REMNANTS OF WAR AND ITS ASSISTANCE AS COLLECTIVE RESPONSIBILITY: THE CASE OF THE OTTAWA CONVENTION (MINE BAN CONVENTION)

MIKA HAYASHI*

I. INTRODUCTION

Because of the serious risks to civilians that various kinds of explosive remnants of war¹ represent, they should receive proper attention and handling after a conflict. Under general international law, however, there is no rule as to who is responsible to act in the presence of such weapon contamination.² The question of who should accept post-conflict responsibility³ for remedying weapon contamination has for a long time focused on only two potential candidates to take action: (a) the affected State, which is responsible for the safety of the local population and which therefore ought to take action; or (b) the user State, which produced the weapon contamination in the first place by the use of these weapons and which therefore bears responsibility and must undo what it has done. The first section of this chapter identifies the limits of this bilateral vision that focused more or less exclusively on these two candidates as being

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¹ The term 'explosive remnants of war' in this chapter is used in a generic sense, except in the context of the discussion of the *Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, opened for signature 28 November 2003, 2399 UNTS 100 (entered into force 12 November 2006) ('the ERW Protocol'); see also G Blum, 'Remnants of war' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) vol VI, 95.

² This is a term used by the International Committee of the Red Cross ('the ICRC') to describe the problem treated in this chapter, although the ICRC's scope under this appellation is not limited to *explosive* remnants: ICRC, *Weapon Contamination* (ICRC, 2010).

³ The term 'post-conflict responsibility' in this chapter refers to obligations of clearance of weapon contamination and the obligation of its assistance after a conflict. It is *not* meant to imply State responsibility for internationally wrongful acts, unless otherwise specified.

responsible. While the bilateral vision is predominant in classic tools of international law that dealt with bilateral, inter-State relations, it fits poorly into the landscape of global problems whose solution will be in the interest of the entire international community in the era of globalization.

The chapter examines the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* (the 'Ottawa Convention'),⁴ a multilateral treaty that distances itself from the bilateral vision. In this Convention, the obligation of clearance of the mined areas is exclusively an obligation of the affected States,⁵ and unlike other multilateral treaties that deal with weapon contamination, there is no mention whatsoever of the role of the user States in assisting the clearance efforts of the affected States. Instead, according to the Convention, providing such assistance is an obligation of 'each State Party in a position to do so'.⁶ This marks a departure from a bilateral vision: the post-conflict responsibility is no longer shared between the affected States and the user States. Instead, at first glance, it looks as if assisting the clearance efforts of the affected States is a collective responsibility, or everyone's responsibility.

This change, however, fuelled a fear that everyone's responsibility in theory was going to end up as no one's responsibility in practice. The obligation of assistance borne by States Parties 'in a position to do so' in the Ottawa Convention meant that, according to one critique, 'the nonaffected states have an undefined and voluntary admonishment to assist if they feel they are "in a position to do so"'.⁷

Against this backdrop, this chapter undertakes an inquiry into three aspects of the Ottawa Convention's approach to the issues of weapon contamination, in this case, by anti-personnel landmines. The first is the issue of whether the Convention is indeed meant to create a *collective* responsibility to provide assistance; the chapter answers this question in the

⁴ *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, opened for signature 18 September 1997, 2056 UNTS 211 (entered into force 1 March 1999).

⁵ The Ottawa Convention refers to States Parties that have control or jurisdiction over the area in question: see, eg, arts 5(2), 7(1)(b). Under most circumstances, these States are the affected States, although in some circumstances, it is possible that the area in question is temporarily under jurisdiction or control of foreign, occupying forces. See Section III-A.

⁶ *Ottawa Convention* art 6.

⁷ Robert Eaton, 'An Indispensable Tool: The Mine Ban Treaty and Mine Action' in J Williams, SD Goose and M Wareham (eds), *Banning Landmines: Disarmament, Citizen Diplomacy and Human Security* (Rowman & Littlefield, 2008) 127–41, 134.

affirmative. The second aspect is how the operation of the Ottawa Convention circumvents the apparent weakness of the scheme—that collective responsibility is unlikely to ensure the assistance needed for the clearance. The third aspect is the implication of the absence of the user State approach for the post-conflict responsibility in the Convention. This Chapter argues that on the whole, the new strategy adopted in the Convention is more effective in solving global issues such as this than the bilateral vision.

II. POST-CONFLICT RESPONSIBILITY UNDER THE BILATERAL VISION

In the United Nations, regional forums, as well as in multilateral treaties, two approaches can be observed in the discussions about which State should be responsible in relation to the remnants of war of various kinds: the ‘user’ State approach and ‘affected’ State approach. Broadly speaking, the user State approach advocates the responsibility of the State that used certain weapons which later become hazardous remnants. The affected State approach advocates the responsibility of the State under whose jurisdiction or control such remnants are found, to clear them. This section shows the limits of a bilateral vision, which limits the obligation to act in the presence of weapon contamination to the affected State, the user State or both of these two types of States. It argues that to maintain that one or other of these States is under a *legal* obligation to act is not a productive approach to addressing the issue. Moreover, though these two approaches are not mutually exclusive, in practice, they are often presented as two opposing approaches. The effect of this opposition was to make negotiations unnecessarily confrontational. Furthermore, the bilateral vision prevented the States from considering involvement of other States not directly concerned.

A. *‘Affected’ State Approach*

The first obvious candidate to which responsibility for clearance, removal and marking of any explosive remnants of war could be assigned is the State in which these remnants are located: if a State has an area under its jurisdiction or control that is contaminated by remnants of war, it would be responsible for the clearance of these remnants after the conflict that left them. The affected State approach in this sense is confirmed, for example, in the Report of the UN Secretary General in 1998 on Assistance in

Mine Clearance.⁸ It concludes that 'the primary responsibility for taking action against the presence of landmines lies with the Government of the affected State.'⁹ The affected State approach is also the accepted approach throughout the UN agencies whose work deals with mines as well as other types of explosive remnants of war.¹⁰

From a practical viewpoint, the affected State approach makes sense. The main actions needed where there is weapon contamination are clearance, removal and marking of risks to civilians. In most circumstances, such actions are impossible to carry out without the consent and concrete cooperation of the affected State that exercises jurisdiction or control over the area in question. Therefore, attributing post-conflict responsibility to the affected State makes practical sense. From a theoretical viewpoint, an explanation frequently offered for the affected State approach is territorial sovereignty.¹¹ Post-conflict responsibility is one of the many duties of States that come with territorial sovereignty. For example, in the case of landmines, it was clearly stated by the UN Secretary General that the responsibility to clear landmines derives from a larger responsibility of any government for the safety of the people located in its territory.¹²

Although it seems, from a theoretical and practical perspective, that the affected State approach would be a sensible choice, this approach is often ineffective. Even assuming that the post-conflict clearance of a weapon-contaminated area is indeed a legal obligation for an affected State, it is not clear to whom it owes this obligation, nor is it self-evident in the case of a failure to fulfil the obligation—for example, if the affected State does nothing—which State is entitled to raise and pursue the matter. There is no obvious candidate. Moreover, even if the affected State were nominally responsible because of its sovereignty, the specific content of its

⁸ Kofi Annan, *Report of the Secretary-General on Assistance in Mine Clearance*, UN Doc A/53/496 (14 October 1998).

⁹ *Ibid* para 34.

¹⁰ See, eg, UNMAS, *Mine Action and Effective Coordination: United Nations Inter-Agency Policy* (6 June 2005) para 16; UNHCR Mine Action Operational Framework, para. 16 (30 September 2005); UNMAS, *Guide for the Application of International Mine Action Standard* (IMAS) (2nd edition, 1 January 2003) s 6.1. The affected State approach in these documents stresses the national 'ownership' of the clearance and other activities.

¹¹ See, eg, Steven A Solomon, 'The United Nations Convention on Certain Conventional Weapons of 1980: Its Recent Development and Increasing Significance' (2003) 6 *Yearbook of International Humanitarian Law* 345, 359, in the context of the ERW Protocol.

¹² Boutros Boutros-Ghali, *Report of the Secretary General on Assistance in Mine Clearance*, UN Doc A/50/408 (6 September 1995) para 55.

obligations cannot be derived from an abstract concept of territorial sovereignty. One logical consequence of territorial sovereignty is that a State should be allowed to deal with the weapon contamination when it wishes to do so.¹³ But it also means that the choice of specific methods to deal with the remnants of war is left to the discretion of each affected State. Neither practice nor theory suggests that territorial sovereignty is a source of an immediate obligation to clear remnants of war. Finally, the affected State approach expresses the obvious, and evades the real problem that affected States face: they do not have sufficient resources or information to clear the remnants and so the risk of explosion and injury persists for the local population.

B. 'User' State Approach

The second obvious candidate for post-conflict responsibility is the 'user' State, the State that produced the lingering post-conflict risks to civilians by use of such weapons or methods of warfare. For example, the study of customary international humanitarian law under the auspices of the ICRC articulates the 'principle that States laying mines are responsible for them.'¹⁴ Not surprisingly, the user State approach in practice is advocated by affected States, or by collective bodies supporting or consisting of such affected States. For example, in June 2006 the Islamic Conference of Foreign Ministers was ready to 'support[s] Lebanon in its demands for the removal of the mines left behind by the Israeli occupation, as Israel is responsible for laying and removing these mines, and for the need to hand over full mine location maps.'¹⁵ In other words, Israel, the user State, and not Lebanon, the affected State, should bear the consequences. The discussions on the report on mine clearance by the UN Secretary General show a similar pattern.¹⁶ In the discussions of this report in the General

¹³ See, eg, SC Res 1005, UN SCOR, 3555th mtg, UN Doc S/Res/1005 (17 July 1995).

¹⁴ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, (Cambridge University Press, 2005) vol 1, 285. The principle requires, according to the study, that at the end of active hostilities, parties to the conflict which have used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal.

¹⁵ *Resolution N.1/33-PAL on the Cause of Palestine, the City of Al-Quds Al-Sharif and the Arab Israeli Conflict*, Islamic Conference of Foreign Ministers, 33rd sess (19–21 June 2006) para 29.

¹⁶ Boutros Boutros-Ghali, *Report of the Secretary General on Assistance in Mine Clearance*, UN Doc A/50/408 (6 September 1995).

Assembly, Egypt explicitly criticized the affected State approach of the report and advocated the user State approach.¹⁷ Libya also emphasised the responsibility of the colonial powers that laid the mines.¹⁸ While these are obviously States that are affected by various remnants of war left by armed forces of foreign States, a number of States that are not affected in this way also supported the user State approach, voicing their preference for the responsibility for mine clearance of the States which had laid the mines.¹⁹ The user State approach was also endorsed by the UN General Assembly for other types of remnants of war not limited to landmines: The General Assembly was '[c]onvinced that the removal of remnants of war should be the responsibility of the countries that implanted them and should be carried out at their expense', and supported 'the demand of the States affected by the implantation of mines and the presence of other remnants of war on their lands for compensation for the losses incurred from the States responsible for those remnants.'²⁰

However, the user State approach observed in these examples does not seem to amount to any *legal* duty. First, it is an approach expressed only in non-binding instruments such as the resolutions of the UN General Assembly. Moreover, the voting records of the relevant resolutions show that the support for the user State approach was far from being unanimous.²¹ Furthermore, in some of the instruments, notably from conferences organized under the auspices of the African Union, the reference is explicitly to the '*moral* responsibility' of the States that laid, for example, mines.²² In these instruments, the term employed to describe the

¹⁷ UN GAOR, 53rd sess, 60th plen mtg, Agenda Item 42, UN Doc A/53/PV.60 (17 November 1998) 18–21.

¹⁸ UN GAOR, 53rd sess, 60th plen mtg, Agenda Item 42, UN Doc A/53/PV.60 (17 November 1998) 11–13.

¹⁹ See the Statement by Austria speaking on behalf of the EU and 12 other countries: UN GAOR, 53rd sess, 60th plen mtg, Agenda Item 42, UN Doc A/53/PV.60 (17 November 1998) 1–2.

²⁰ *Problem of Remnants of War*, GA Res 36/188, UN GAOR, 36th sess, UN Doc A/RES/36/188 (17 December 1981).

²¹ See also *Remnants of War*, GA Res 37/215, UN GAOR, 37th sess, UN Doc A/RES/37/215 (20 December 1982); *Remnants of War*, GA Res 38/162, UN GAOR, 38th sess, UN Doc A/RES/38/162 (19 December 1983); *Remnants of War*, GA Res 39/167, UN GAOR, 39th sess, UN Doc A/RES/39/167 (17 December 1984); *Remnants of War*, GA Res 40/197, UN GAOR, 40th sess, UN Doc A/RES/40/197 (17 December 1985).

²² OAU Council of Ministers, *Report of the Secretary General on the Issue of Anti-Personnel Mines and International Efforts to Reach a Total Ban*, OAU Resolution CM/Res 363, Doc CM/2009 (LXVI) (28–31 May 1997) para (j) ('OAU Council of Ministers Resolutions'); OAU Executive Council, *Common African Position on Landmines*, EX.CL/Dec.164(V),

content of the responsibility of the user State have always been 'should', a recommendation, instead of 'shall', a requirement. Above all, there is no uniform practice of the user States that might suggest a customary obligation for the user State to assist with clearance.

C. *Common Trends in Multilateral Treaties—Efforts to Combine the Two Approaches*

The two approaches reviewed above thus lead to no definitive solution of the post-conflict problems posed by weapon contamination. In addition to that, the opposition between the two approaches has proved to be counter-productive in the elaboration of a number of treaties that have attempted to tackle these problems. To illustrate this point, a number of Protocols to the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*²³ as well as the *Convention on Cluster Munitions*²⁴ will be examined below.

1. *CCW Protocols*

The opposition between the two approaches prevented the original Landmine Protocol²⁵ of the CCW from adopting any provision on the post-conflict responsibility. The Protocol only provides that after the cessation of active hostilities, parties to the conflict²⁶ must make an effort to

Second Continental Conference of African Experts on Anti-Personnel Landmines (17 Sept. 2004) D-12-iii; African Union, *African Common Position on Anti-Personnel Landmines*, Third Continental Conference of African Experts on Landmines (11 Sept 2009), E-13-iii (emphasis added).

²³ *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, opened for signature 10 October 1980, 1342 UNTS 137, (entered into force 2 December 1983) (the 'CCW').

²⁴ *Convention on Cluster Munitions*, opened for signature 30 May 2008, UN Doc CCM/77 (entered into force 1 August 2010).

²⁵ *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices (Protocol II)*, opened for signature 10 October 1980, 1342 UNTS 168 (entered into force 3 December 1998) ('the Landmine Protocol'). In the discussion of the Landmine Protocol and the Amended Protocol in this chapter, the shorthand 'mines' will be used instead of 'mines, booby traps and other devices.'

²⁶ The CCW employs the term 'party to the conflict,' and this obviously includes not only the High Contracting Parties, but also other types of parties to a conflict. In spite of this clear indication in the CCW, in order not to digress from the present author's argument, the present chapter will continue to focus on the user 'States.'

reach an agreement concerning the removal of mines and minefields.²⁷ This is obviously not the same as an obligation of clearance and assistance in that task. The negotiating history indicates that opposition between the affected State approach and the user State approach was one of the main areas of disagreement²⁸ and that even after two preparatory conferences there was still no agreement.²⁹ Because decisions are made in the CCW context on the basis of consensus, the result was that the Protocol is silent on the question of post-conflict responsibility for mine clearance. Many commentators were strongly critical of this silence,³⁰ and the amended Protocol eventually included a compromise between the user State approach and the affected State approach:³¹ States are responsible for the removal of mines in areas under their control,³² and when these are no longer the user States, the user States should provide assistance to the former.³³ Stakeholders such as the ICRC were delighted to see that the user State approach was finally incorporated into this amendment.³⁴

The tension between the affected State approach and the user State approach was also one of the main areas of disagreement in the negotiation of the ERW Protocol of the CCW.³⁵ Prior to the adoption of the ERW Protocol, a number of years had been spent on finding an acceptable balance between the two approaches. In particular, there were again

²⁷ *Landmine Protocol* art 9. Removing of mines becomes an obligation of user parties only in a limited case where a UN peacekeeping operations so requests: art 8(1).

²⁸ See APV Rogers, 'The Mines Protocol: Negotiating History,' in the ICRC *Symposium on Anti-Personnel Mines* (Montreux, 21–23 April 1993), reproduced in Louis Maresca & Stuart Maslen, *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1955–1999* (Cambridge University Press, 2000) 184.

²⁹ During the negotiations, Libya did make a proposal, to no avail, to include an obligation of the user State to provide assistance in clearance and deactivation of the mines it had previously laid. Philippe Bretton, 'Problèmes juridiques posés par les restes matériels de la seconde guerre mondiale de Libye' (1982) 28 *Annuaire français de droit international* 233, 243.

³⁰ Knut Dörmann, *Völkerrechtliche Probleme des Landmineneinsatzes: Weiterentwicklung des geltenden Vertragsrechts durch das geänderte Minenprotokoll vom 3. Mai 1996 zum UN-Waffenübereinkommen von 1980* (Berliner Wissenschafts-Verlag, 2002) 353–55.

³¹ *Landmine Protocol*.

³² *Ibid* art 10(2).

³³ *Ibid* art 10(3).

³⁴ See the comments of the ICRC: *Summary Record of the 2nd meeting*, Second Review Conference of the States Parties to the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, UN Doc CCW/CONF.II/SR.2 (16 January 2002) paras 36–40.

³⁵ Louis Maresca, 'A New Protocol on Explosive Remnants of War: The History and Negotiation of Protocol V to the 1980 Convention on Certain Conventional Weapons' (2004) 86 *International Review of the Red Cross* 815, 825; Solomon, above n 11, 358.

divergent views concerning the concrete scope of responsibility of the user State.³⁶ At the time of the Second Review Conference of the CCW in 2001, some States and NGOs strongly supported the user State approach for the post-conflict responsibility within the scope of the new protocol: 'It must be established that those who used munitions were responsible for clearing, or providing any assistance needed to clear unexploded ordnance ...'.³⁷ Concerning abandoned ordnance in particular, Egypt also maintained the position that '[A]ny future protocol on the subject should stipulate that the foreign States that had abandoned such ordnance were responsible for helping to dispose of it'.³⁸ So controversial was the question that at the end of the Second Review Conference, commentators refrained from making any prediction that there would be agreed approaches or rules for ERW clearance.³⁹

At the end, as the amended Landmine Protocol did, the ERW Protocol also opted for post-conflict responsibility on the basis of a combination of the two approaches.⁴⁰ In accordance with the affected State approach, each State is responsible for the clearance, removal and destruction of the ERW in the affected territory under its control.⁴¹ At the same time, if the State in control is not the user State, then in accordance with the user State approach, the user State is under an obligation to provide, *inter alia*, technical, financial, material or human resources assistance to facilitate

³⁶ Solomon, above n 11, 359. The actual or potential user States appeared to be apprehensive of the unpredictable extent of financial burden in some cases: J McClelland, 'Conventional Weapons: A Cluster of Developments' (2005) 54 *International and Comparative Law Quarterly* 755, 765.

³⁷ See the statement by a representative of the International Campaign to Ban Landmines: *Summary Record of the 3rd meeting*, Second Review Conference of the States Parties to the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, UN Doc CCW/CONF.II/SR.3 (19 December 2001) para 52; see also the statement by the same representative, and a statement by the representative of the Landmine Action, UK, paras 44, 42.

³⁸ See the statement by Egypt: *Summary Record of the 3rd meeting*, Second Review Conference of the States Parties to the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, UN Doc CCW/CONF.II/SR.3 (19 December 2001) para 35; see also *China's Position on the Explosive Remnants of War*, CCW/CONF.II/PC.3/WP.9 (27 September 2001).

³⁹ David Kaye and Steven A Solomon, 'The Second Review Conference of the 1980 Convention on Certain Conventional Weapons' (2002) 96 *American Journal of International Law* 922, 936.

⁴⁰ Solomon, above n 11, 360.

⁴¹ *ERW Protocol* art 3(1).

the undertaking by the affected State.⁴² The concrete obligation based on the affected State approach is for that State to 'mark and clear, remove or destroy' ERW in affected territories under its control.⁴³ The final text, which included the user State approach at least in part, was considered to be an important achievement again by those who supported the user State approach in the negotiation.⁴⁴

A similar compromise was reached regarding 'existing' ERW, incorporated in Article 7. The issue of responsibility in relation to ERW produced prior to the entry into the force of the Protocol, once again saw disagreement between a group of States who advocated the user State approach, and those who resisted this view. The latter group comprised mainly States which would have been under an obligation to provide assistance for the clearance of ERW from past conflicts as defined in the Protocol. The compromise reached was Article 7(2), which stipulates that those who are in a position to do so are under an obligation to provide assistance, 'as necessary and feasible.' The States which favoured the user State approach were also the States which wished to have a provision covering existing ERW, and they succeeded at least in inserting an article on existing ERW in the Protocol. From the viewpoint of the group that opposed this attempt, it succeeded in eliminating any mention of user States as the specific addressees of this obligation.

2. *Convention on Cluster Munitions*

The opposition between the two approaches was also a stumbling bloc at one point of the negotiations that led to the *Convention on Cluster Munitions*.⁴⁵ Like the previous treaties discussed, there was a familiar and sharp division over the attribution of post-conflict responsibility during these negotiations between those advocating the user State approach and

⁴² Ibid.

⁴³ Ibid art 3(2).

⁴⁴ Maresca, above n 35, 826; Louis Maresca, 'Regulating Explosive Remnants of War' (2002) 5 *Yearbook of International Humanitarian Law* 360, 373; See also a remark by the representative of the Human Rights Watch: *Summary Record of the 6th meeting*, Third Review Conference of the States Parties to the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, UN Doc CCW/CONF.III/SR.6 (17 November 2006) para 7.

⁴⁵ A comprehensive overview of this Convention is offered by Eric David, 'La convention de 2008 sur les armes à sous-munitions' (2009) 113(4) *Revue générale de droit international public* 785.

those supporting the affected State approach. This opposition was at its peak in the final stage of negotiations at the Dublin Conference in May 2008. For example, during the discussions of the draft Article 6 on international cooperation and assistance, Indonesia reiterated that '[Paragraphs in this article] should recognize the special responsibility of user States that have deployed cluster munitions, not just regarding the provision of assistance, but also the provision of information ...'⁴⁶ A number of other States and civil society representatives also supported the user State approach including the Cluster Munitions Coalition, an NGO and one of the key promoters of the Convention.

The upshot was that the user State approach was not incorporated directly in Article 6. Instead, it was given a place, *albeit* a limited one for a specific circumstance, in Article 4(4).⁴⁷ In fact, Article 6 refers to Article 4(4) to 'emphasize[s] the importance of that special responsibility user States bear for clearance.'⁴⁸ Article 4(4) concerns the remnants of cluster munitions used or abandoned before the entry into force of the treaty. The user State approach was clearly the basis for the draft article which was circulated in the Dublin Conference. It read, in its relevant part:

This paragraph shall apply in cases in which cluster munitions have been used or abandoned by one State Party prior to entry into force of this Convention for it and have become cluster munition remnants located in areas under the jurisdiction or control of another State Party at the time of entry into force of this Convention for the latter. In such cases, upon entry into force of this Convention for both States Parties, the former State Party shall provide, *inter alia*, technical, financial, material or human resources assistance to the latter State Party ... to facilitate the marking, clearance and destruction of such cluster munition remnants. Such assistance shall include information on types and quantities of the cluster munitions used, precise locations of cluster munition strikes and areas in which cluster munition remnants are known to be located.⁴⁹

⁴⁶ *Summary Record of the 2nd Session of the Committee of the Whole*, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, UN Doc CCM/CW/SR/2 (18 June 2008).

⁴⁷ See Jessica Corsi, 'Towards Peace through Legal Innovation: The Process and the Promise of the 2008 Cluster Munitions Convention' (2009) 22 *Harvard Human Rights Journal* 145, 152–153; see also Bonnie Docherty, 'Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law' (2009) 31 *Human Rights Quarterly* 934, 952–955, concerning the user State approach in Article 4(4).

⁴⁸ Gro Nystuen and Stuart Casey-Maslen, *The Convention on Cluster Munitions: A Commentary* (Oxford University Press, 2010) 399.

⁴⁹ *Draft Convention on Cluster Munitions*, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, UN Doc CCM/3 (19 May 2008) in Nystuen and Casey Maslen, *The Convention on Cluster Munitions: A Commentary*, above n 48, 653–670.

In the discussions of this draft article, Lebanon, Venezuela, Laos and the Philippines explicitly supported the user State approach in the draft. However, a number of influential States were firmly against the user State approach, and made proposals that would effectively weaken the obligation of the user State in circumstances described by the draft article. The proposed UK amendment eliminated all references to a user State.⁵⁰ Other States who disliked the user State approach in the draft (such as Germany and France) also effectively argued for the deletion of any reference to a user State.⁵¹ Italy even asked for a deletion of the entire paragraph,⁵² which was supported by Canada.⁵³

As a result, the rolling text used later in the Dublin Conference softened the obligations of user States. According to the text, user States from the past conflicts were merely 'encouraged' to provide assistance to the affected States. In the consolidated text, a modest gain was made by those who advocated the user State approach: user States in this context are 'strongly encouraged' to provide assistance to the affected State.⁵⁴

3. *Summary: Limits of the Bilateral Vision—Why the Two Approaches Do Not Suffice*

A focus on these two approaches as representing the full range of available or appropriate solutions has not brought about an effective solution to post-conflict issues of weapon contamination. Besides the theoretical

⁵⁰ *Proposal by the United Kingdom for the Amendment of Article 4*, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, UN Doc CCM/33 (19 May 2008).

⁵¹ The ERW Protocol's provision in a similar circumstance is that the user States provide assistance 'as necessary and feasible.' *ERW Protocol* art 7(20). France and Germany submitted a joint amendment proposal by which they tried to set the formulation back to a paragraph very similar to this corresponding paragraph in the ERW Protocol: *Proposal by France and Germany for the Amendment of Article 4*, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, UN Doc CCM/32 (19 May 2008); *Proposal by France and Germany for Additional Text*, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, UN Doc CCM/47 (19 May 2008).

⁵² *Proposal by Italy for the Amendment of Article 4*, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, UN Doc CCM/34 (19 May 2008).

⁵³ *Summary Record of the 2nd Session of the Committee of the Whole*, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, UN Doc CCM/CW/SR/2 (18 June 2008).

⁵⁴ *Convention on Cluster Munitions* art 4(4)(a) (emphasis added); the negotiation is described in detail in John Borrie, 'How the Cluster Munition Ban Was Won: Oslo Treaty Negotiations Conclude in Dublin' (2008) 88 *Disarmament Diplomacy*.

difficulty of confirming a *legal* obligation outside treaties, both approaches have serious shortcomings. On one hand, the affected State approach reiterates the obvious—in the absence of an external assistance, the approach does not help at all in situations where the affected States do not possess sufficient means to undertake clearance activities. On the other hand, the user State approach as an alternative or reinforcement of the affected State approach has also encountered problems of its own. In the first place, the most prominent and vocal advocates of the user States approach consist of a number of affected States which have been disappointed by lack of assistance from user States in the past, and that disappointment created the impetus to push for the user State approach. Because of this background, the tone of blame against the user States was very apparent in this approach. It is true that the user State approach does not explicitly point to the State responsibility of the user State in most of the cases examined. Nevertheless, the tone of blame against the user States is palpable whenever the issue is brought up. In some cases, while a user State proposes an action of assistance on grounds other than its own past wrong, the affected State presents it as compensation.⁵⁵ This tendency to stress the wrongfulness of the action and ensuing compensation in discussing the post-conflict responsibility made it all the more unacceptable for past or potential user States to embrace the idea of user State responsibility; in their perspective, the questioned use of landmines had been, at the time of the use, legitimate in light of relevant rules.⁵⁶

⁵⁵ See, eg, *Trattato Italia-Libia di amicizia, partenariato e cooperazione*, Italy-Libya, signed on 30 August 2008 (entered into force 2 March 2009); The overview of this bilateral treaty is presented in Natalino Ronzitti, 'The Treaty on Friendship, Partnership and Cooperation Between Italy and Libya: New Prospects for Cooperation in the Mediterranean?' (2009) 1(1) *Bulletin of Italian Politics* 125. Nowhere in the treaty is a specific reason for this contribution provided, but Libya tries to portray this obligation as compensation coming from a user State, stating that this was something that 'Italy accepted for the sake of victims mutilated by the mines placed on the Libyan territory during the Second World War': UN GAOR, 64th sess, 3rd plen mtg, UN Doc GA/10860 (23 September 2009).

⁵⁶ See Ove Bring, 'Review: The War Continues' (1986) 15(2) *Ambio* 72, 73. Quite distinct is the case where the user State is liable for an unlawful use of weapon or method of warfare that later produce the remnants of war. In such a case, the responsibility of the State under the general law of State responsibility is involved: See, eg, the conclusion of the Commission of Inquiry established by the Human Rights Council in the report on the aftermath of the Israeli attack on Lebanon in 2008. Upon its finding that some instances of the use of cluster munitions by the Israeli Defence Force constituted violations of the law of armed conflict, the Commission stated: 'Israel infringed its international law, international humanitarian law and human rights obligations. As a consequence, the question of its international responsibility arises.' UN Human Rights Council, *Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1*, UN GAOR, UN Doc A/HRC/3/2 (23 November 2006).

In the second place, the resulting practical problem is apparent: alienating the user States means alienating some of the most important donors to the cause. In the second place, in the treaties with a provision based on the user State approach, user States try to minimise the financial implications of the provision. They try to keep a measure of discretion in determining how such an obligation is to be performed. They also feel more comfortable being 'encouraged' to act, rather than being 'obliged' to act or being told that they 'shall' act. Against this backdrop, the user State approach adopted in treaties is couched in restricted terms, and is very unlikely to generate the maximum assistance from these States.

Finally, a more fundamental problem arising from the bilateral vision is the assumption that the search for the responsibility to deal with the problem has to end with one of the two candidates, the affected State or the user State. The bilateral vision supposes that (1) one can always identify a user State and an affected State as distinct States; (2) it is always possible to identify who the user State was; and (3) the weapon contamination does not interest any State except the user State and the affected State. These assumptions are not well-founded, as the following examples demonstrate.

Weapon contamination may be a result of a non-international armed conflict within a single State (as opposed to the first assumption that there will always be two States involved). There are also weapons often used for defensive purposes such as landmines. This means they are laid by the forces in the territory that they defend. In such a case, too, even after an international conflict, the user State and the affected State will be one and the same (as opposed to the assumption that these will be two different States). It is also possible to have an area with various types of remnants of war from various conflicts in the past. Contrary to the second assumption, it could be an impossible task to allocate the post-conflict responsibility strictly to each of the users of the remnants in such cases. The third assumption, which concerns the attitude of States rather than the facts of the conflict in question, lies at the heart of the problem of the bilateral vision. Confined by this vision, as discussed previously, States had little inclination to explore any other approach which would be different from the combination of the affected State approach and the user State approach. The Ottawa Convention, which is a product of globalization in more than one respect, discarded the bilateral vision in this context. That is precisely the reason why the Ottawa Convention regarding anti-personnel landmines will be examined in the next section.

III. COLLECTIVE RESPONSIBILITY APPROACH UNDER THE OTTAWA CONVENTION

Against the backdrop described in Section II, the Ottawa Convention regarding anti-personnel landmines stands out for its unique approach to the post-conflict responsibility of clearance and its assistance.⁵⁷ The Convention has opted for what may be called a collective responsibility approach, instead of combining the user State approach and the affected State approach. Because this is unique in comparison to all other multilateral treaties dealing with weapon contamination, Part III first describes the way in which this unique perspective is incorporated in the Convention, as well as the attitude of States Parties concerning the nature of the obligation of clearance and assistance. It will then turn to the criticisms of the collective responsibility approach embodied in the Ottawa Convention, and examine how the feared dysfunction of collective responsibility is avoided in the operation of the treaty. The significance of the absence of the user State approach is explored briefly at the end.

A. *Collective Nature of the Obligations of Clearance and its Assistance*

The user State approach was not adopted in the final text of the Convention. The Brussels Declaration in 1997 described the importance of ‘international cooperation and assistance in the area of mine clearance in affected countries.’⁵⁸ This declaration was one of the milestones in the formulation of this Convention, and it did not mention the user State approach at all.⁵⁹ The final text of the Ottawa Convention stipulates that ‘[E]ach State Party undertakes never under any circumstances to use anti-personnel mines,’

⁵⁷ What was discussed as post-conflict responsibility in the previous section is not specially characterized as ‘post-conflict’ responsibility in the Ottawa Convention, since the Convention does not make a distinction between the conflict and peace time.

⁵⁸ *Declaration for the Brussels Conference on Anti-Personnel Landmines*, Conference on Disarmament, UN Doc CD/1467 (16 July 1997) reproduced in Stuart Maslen, *Commentaries on Arms Control Treaties* (Oxford University Press, 2008) vol 1, 376–380.

⁵⁹ The user State approach was not entirely absent during the negotiation of this Convention. On the contrary, a draft proposed in 1996 by the International Campaign to Ban Landmines (hereinafter the ICBL) did contain the traditional pattern of dividing responsibility of clearance between the affected State and the user State: Maslen, *Commentaries on Arms Control Treaties*, above n 58, 398–404. At the Vienna Conference in 1997, a number of States also stressed their support for the user State approach for the clearance of mines and mined areas. These States were Australia, Brazil and Colombia: 159. Egypt also maintained its long-standing position that the States that had laid mines were responsible for such mines.

or '[t]o develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines.'⁶⁰ The States Parties also undertake 'to destroy or ensure the destruction of all anti-personnel mines.'⁶¹ It is the last obligation that covers the issues of weapon contamination, for it includes the destruction of mines in the mined area.⁶² More specifically, each State Party is responsible for 'all anti-personnel mines in mined areas under its jurisdiction or control.'⁶³ In addition, until the removal or destruction of these mines, such a State Party must identify the mined areas and keep it 'perimeter-marked, monitored and protected by fencing or other means, to ensure the effective exclusion of civilians.'⁶⁴ These obligations show that the primary approach of the Ottawa Convention concerning the clearance of mines is the affected State approach; a State Party that has mined areas under its jurisdiction or control is, in the majority of the cases, the affected State.

The unique characteristic of the Ottawa Convention in this regard, in comparison to other multilateral treaties discussed in the previous section, is that the share of responsibility attributed specifically to the user States is nowhere stipulated. Unlike Article 3(1) of the ERW Protocol and Article 10(3) of the Amended Landmine Protocol of the CCW or Article 4(4) of the *Convention on Cluster Munitions*, the user State approach is completely eliminated in this Convention. Consequently, the Ottawa Convention has been criticized by the proponents of the user State approach as having 'failed to state any legal responsibilities or commitments against the countries that emplaced mines in other countries during various wars.'⁶⁵

The omission of any obligation based on the user State approach meant that the assistance for clearance was not an obligation for past user States. The question that follows is who provides assistance. The Ottawa

⁶⁰ *Ottawa Convention* art 1(1).

⁶¹ *Ibid* art 1(2).

⁶² The obligation to clear the mined areas or render them harmless is to be fulfilled 'as soon as possible but not later than 10 years after the entry into force of this Convention for that State Party' in principle: *Ibid* art 5(1). If a State Party believes that it will be unable to destroy or ensure the destruction of all anti-personnel mines in mined areas within ten years, 'it may submit a request ... for an extension of the deadline for completing the destruction of such anti-personnel mines, for a period of up to ten years:' art 5(3).

⁶³ *Ibid* art 5(1).

⁶⁴ *Ibid* art 5(2).

⁶⁵ Position expressed by Egypt as a reservation to the *African Common Position on Anti-Personnel Landmines*: African Union, *Report on African Common Position on Anti-Personnel Landmines*, Third Continental Conference of African Experts on Landmines (11 September 2009) 6.

Convention provides that 'each State Party in a position to do so' is to provide assistance for mine clearance and related activities undertaken by the affected States.⁶⁶ Despite certain criticism to the effect that this provision does not amount to a legal obligation,⁶⁷ the *legal* nature of this responsibility cannot be seriously doubted.⁶⁸ It is expressed in the form of an article in a treaty, no matter how vague the addressee(s) of the obligation may be. The *collective* nature of this responsibility is also unequivocally accepted. This is to be seen in many of the documents that the States Parties have adopted in the framework of this Convention, above all, in the outcome documents of the two review conferences that have taken place since the entry into force of the Convention. In discussing the contributions made under Article 6, the First Review Conference in 2004 affirmed without any ambiguity that 'assistance in implementing the Convention is a *collective matter*'⁶⁹ and not a bilateral matter between the user State and the affected State. The Cartagena Action Plan adopted in the Second Review Conference five years later reaffirms in its 'preamble' that the States Parties are '*collectively responsible* for promoting compliance with the Convention.'⁷⁰ The Action Plans adopted on each of these occasions express, in several places regarding different aspects of obligations under Article 6, that the matter of ensuring compliance is '*the business of all States Parties*.'⁷¹ The documents adopted by the Review Conferences are not binding upon the States Parties. Nevertheless, they do express the understanding of the States Parties as a whole about the Convention's obligations.

⁶⁶ *Ottawa Convention* art 6(4).

⁶⁷ Alexander Kmentt, 'A Beacon of Light: The Mine Ban Treaty Since 1997' in J Williams, SD Goose and M Wareham (eds), *Banning Landmines: Disarmament, Citizen Diplomacy and Human Security* (Rowman & Littlefield, 2008) 23.

⁶⁸ See *Statement by Norway on Cooperation and Assistance*, Meeting of the Standing Committee on Mine Clearance, Mine Risk Education and Mine Action Technologies (28 May 2009).

⁶⁹ *Final Report*, First Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, UN Doc APLC/CONF/2004/5 (9 February 2005) para 92 (emphasis added).

⁷⁰ *Cartagena Action Plan 2010–2014: Ending the Suffering Caused by Anti-Personnel Mines*, UN Doc APLC/CONF/2009/9 (17 June 2010) ('Cartagena Action Plan').

⁷¹ The expression is derived from the Final Report of the Second Review Conference: *Final Report*, Second Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, UN Doc APLC/CONF/2009/9 (17 June 2010) para 45 (emphasis added). The report discusses the extension requests for the stockpile destruction by Belarus and Ukraine and the obligations of other States under Article 6; see also the discussion of victim assistance under Article 6(3) in the same report.

B. Implementation of Collective Responsibility

1. Challenges

The primary challenge of a collective responsibility approach lies not so much in the idea itself but in its operation. How does a treaty ensure that everyone's responsibility does not end up in being no one's responsibility? Concerns regarding the effectiveness of this obligation of assistance⁷² deserve more than a rhetorical assurance that the collective responsibility approach will ensure that assistance is forthcoming. Commentators have expressed concern that under Article 6, States 'can refuse to provide assistance,'⁷³ or 'the non-affected states have an undefined and voluntary admonishment to assist if they feel they are "in a position to do so".'⁷⁴ The fear that Article 6 would not generate sufficient assistance for the mine clearance required by Article 5 was shared by the States Parties and has been confirmed in a number of instances. Botswana explicitly referred to this article that obliges States Parties in a position to do so to assist the clearance, and called it a 'failure' that the Ottawa Convention did not secure funding for demining activities of the affected States.⁷⁵ The provisions were criticized as 'lack[ing] obligatory force.'⁷⁶ There have also been other examples of States experiencing difficulties in accessing assistance for clearance under the Ottawa Convention,⁷⁷ despite the obligation to provide assistance of each State Party in a position to do so, and despite the confirmation in the Second Review Conference that 'many States

⁷² Gro Nystuen, 'A New Treaty Banning Cluster Munitions: The Interplay between Disarmament Diplomacy and Humanitarian Requirements' in CM Bailliet (ed), *Security: A Multidisciplinary Normative Approach* (Martinus Nijhoff, 2009) 150; Eaton, 'An Indispensable Tool', above n 7, 134; Kmentt, above n 67, 23.

⁷³ Harry HG Post, 'Explosive Remnants of War' in A de Guttery, H Post and G Venturini (eds), *The 1998–2000 War Between Eritrea and Ethiopia* (TMC Asser Press, 2009) 500.

⁷⁴ Eaton, above n 7, 134. This article is an excellent summary of the concerns expressed by stakeholders over the clearance of mines and its assistance under Articles 5 and 6.

⁷⁵ This was a statement made during a negotiation for the Convention on Cluster Munitions but specifically about the Ottawa Convention: *Summary Record of the 2nd Session of the Committee of the Whole*, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, UN Doc CCM/CW/SR/2 (18 June 2008) 8.

⁷⁶ Ibid.

⁷⁷ *Statement by Zambia at the Special Session on International Cooperation and Assistance*, Interessional Work Program for the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (25 June 2010).

Parties in a position to do so have demonstrated that they have been fulfilling their obligation to provide assistance.⁷⁸

While the same or similar formulation of an obligation of assistance for States 'in a position to do so' had been employed in the provisions on international cooperation in some of the earlier treaties,⁷⁹ it did not raise much concern, since this collective obligation was apparently given a subsidiary place after the allocation of post-conflict responsibility to the affected State *and* the user State. In these treaties, the concern behind the inclusion of the phrase 'each High Contracting Party in a position to do so' was also not so much about how to boost the assistance but about how to keep the financial burden of each contributing State under its own control.⁸⁰ In contrast, the formulation mattered very much in the Ottawa Convention. At the very least, it was important since the Convention did not impose any obligation of assistance on any other group of States including user States. This obligation of the States 'in a position to do so' under Article 6 was the only resource for the mine actions besides the resource of the affected States themselves. From the stocktaking, it was clear that many of these affected States would require assistance for the clearance in order to meet the deadlines for clearance stipulated by the Convention. In this light, how a mildly stated obligation of each State Party 'in position to do so' can function was a question, above all, of practical importance.

2. *Supervision in the Ottawa Convention: Offering a Venue for a Continuous Reminder*

In the light of the terms that describe the obligation of assistance, if left to their own devices, States Parties in a position to provide assistance for clearance may not act. Given this concern, the Ottawa Convention has established mechanisms through which they are constantly reminded

⁷⁸ *Final Report*, Second Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, UN Doc APLC/CONF/2009/9 (17 June 2010) 170.

⁷⁹ *Landmine Protocol* art 11(3); *ERW Protocol* arts 8, 7(2).

⁸⁰ Concerning the Amended Landmine Protocol, see Dörmann 'Völkerrechtliche Probleme des Landmineneinsatzes', above n 30, 475; for the ERW Protocol, see Section II-C of this chapter; see also Thilo Marauhn, 'The Silent Threat: Explosive Remnants of War' in A Fischer-Lescano, HP Gasser, T Marauhn and N Ronzitti (eds), *Frieden in Freiheit, Peace in liberty, Paix en liberté : Festschrift für Michael Bothe zum 70. Geburtstag* (Nomos, 2008) 201–202.

of and advised about this obligation. In fact, many multilateral treaties establish some kind of mechanism to monitor or supervise the operation of the treaties: supervision or monitoring discussed in public international law 'is first and foremost designed to enhance compliance with international obligations. International supervision strengthens dialogue and compliance efforts; it sparks public opinion and the shame of the wrong-doer.'⁸¹ However, the obligations under multilateral treaties discussed in this context are mostly obligations to refrain from a prohibited action, so a logical next step to the supervision may be either 'sanctions'⁸² collectively carried out, or countermeasures individually carried out, to correct the action of the wrong-doer. For a number of reasons, this cannot provide an adequate framework for the analysis of the collective responsibility of assistance in the Ottawa Convention which appears in an article on international assistance and cooperation. The obligation in this case requires an action instead of an omission; the type of the action or the expected financial amount to assist with the mine clearance is not specified by the article; the required action is not of a type that can be compelled by sanctions or countermeasures; and the required action of assistance is meaningful only if there is proper channelling of the financial support provided. In short, supervision of collective responsibility in the Ottawa Convention is much more about inducing donor States to act in certain way than about reprimanding or coercing them.

Reflecting this specificity of the collective responsibility, the supervisory scheme in the Ottawa Convention is characterized by the combination of formal and informal arrangements. From a formal perspective, the Convention provides for regular Meetings of the States Parties and Review Conferences. International cooperation and assistance in accordance with Article 6 explicitly figures among the matters that such Meetings discuss,⁸³ and both the Meetings and Review Conferences are competent in reviewing the operation and status of the Convention in general.⁸⁴ Accordingly, they regularly call upon 'all States Parties in a position to do so to honour their commitments to fulfilling their obligations under article 6.4 of the Convention to provide assistance for mine clearance and

⁸¹ K Schmalenbach, 'International Organizations or Institutions, Supervision and Sanctions', in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) Vol VIII, 872.

⁸² Ibid.

⁸³ *Ottawa Convention* art 11(1)(c).

⁸⁴ Ibid art 11(1)(a); art 12(2)(a).

related activities.’⁸⁵ But the Meetings of the States Parties once a year⁸⁶ and Review Conferences every five years⁸⁷ alone may not suffice as a *constant* reminder for the States Parties in a position to provide assistance. Given the specificity of collective responsibility described previously, the principal goal of the supervisory scheme of the Convention is to make the choice of non-contribution difficult, not necessarily as a matter of law, but in practice. From this perspective, a reminder to all States Parties in a position to fulfil their collective obligation of assistance has to be as constant as possible, ie, regularly repeated in the supervisory scheme in order to be effective.

Therefore, the States Parties to the Convention agreed upon an additional informal structure of supervision that meets much more frequently than the formal Meetings and Conferences: Standing Committees and their ‘Intersessional Work Program.’⁸⁸ This is an informal structure that makes the supervisory scheme, as its name accurately suggests, more or less permanent by filling the intersessional gaps physically. While informal, these meetings are open meetings. As it is the case with the formal forum described above, NGOs are indispensable participants in the Intersessional Work Program.⁸⁹

Statements by governments during the meetings of the Intersessional Work Program indicate that these informal occasions function as a constant reminder to States Parties ‘in a position to do so’ of Article 6 obligation. On these informal occasions, some governments affirm explicitly how they are fulfilling the obligation of assistance under Article 6.⁹⁰

⁸⁵ See, eg, *Final Report*, Second Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, UN Doc APLC/CONF/2009/9 (17 June 2010) pt I, para 25.

⁸⁶ *Ottawa Convention* art 11(2).

⁸⁷ *Ibid* art 12(1).

⁸⁸ *Final Report*, First Meeting of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, UN Doc APLC/MSP.1/1999/1 (20 May 1999) pt I.

⁸⁹ For the positive assessment of the Intersessional Work Program by participating NGO officers, see Kathleen Lawand, ‘The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention)’ in Geir Ulfstein, Thilo Marauhn and Andreas Zimmermann (eds), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press, 2007) 333; Stephen D Goose et al, ‘Banning Landmines and Beyond,’ in Jody Williams et al (eds), *Banning Landmines: Disarmament, Citizen Diplomacy and Human Security* (Rowman & Littlefield, 2008) 6–8.

⁹⁰ See, eg, the statements by Germany and Norway: *Germany: Statement on Mine Clearance*, Standing Committee on Mine Clearance, Mine Risk Education and Mine Action

Others report apologetically that their contributions specifically under Article 6 are not what they would have liked them to be.⁹¹ The statements by the ICBL often include an appeal to States Parties about ‘a responsibility under Article 6’ to reinvigorate their financial and other support for mine action and victim assistance.⁹² The appreciation of the States Parties of the Intersessional Work Program in general is apparent in the review carried out at the request of the Second Review Conference.⁹³ Their particular appreciation of its influence over the States Parties in a position to provide assistance is confirmed by a recent addition of the Standing Committee on Assistance and Cooperation to this arrangement. The new Committee, operating since 2011, is designed ‘to serve as a forum to exchange information and views, and share ideas, on (a) ensuring adequate and predictable levels of human, technical and financial support for the implementation of the Convention on the part of both States Parties implementing the Convention and from other States Parties and other sources, and, (b) the efficient and effective use of resources.’⁹⁴

3. *Supervision in the Ottawa Convention: Persuasion through the Examination of Individual Cases*

The supervision in the Ottawa Convention also involves the examination of individual cases submitted by the States Parties. This process again illustrates how collective responsibility can be realised without recourse to a coercive measure of any kind. It shows how *both* the affected States and donor States are brought to honour the commitments they make in the course of the continuous dialogue in this supervisory scheme.

The example analysed here concerns the obligation of destruction of placed mines in mined areas.⁹⁵ A State Party must, by the end of the tenth

Technologies (28 May 2009); *Statement by Norway on Cooperation and Assistance*, Standing Committee on Mine Clearance, Mine Risk Education and Mine Action Technologies (28 May 2009).

⁹¹ See, eg, *Statement by Canada*, Standing Committee on Mine Clearance, Mine Risk Education and Mine Action Technologies (28 May 2009).

⁹² See, eg, *ICBL Statement on International Cooperation and Assistance*, Standing Committee on Mine Clearance, Mine Risk Education and Mine Action Technologies (28 May 2009).

⁹³ *Review of the Intersessional Work Programme presented by the President of the Second Review Conference on behalf of the Coordinating Committee*, Meeting of States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, UN Doc APLC/MSP.10/2010/5 (24 November 2010).

⁹⁴ *Ibid* para 7.

⁹⁵ *Ottawa Convention* art 5(1).

year, complete this obligation. If a State Party finds difficulties in complying with this ten-year deadline, it may seek a rescheduling of the deadline.⁹⁶ This extension request process involves an informal dialogue that begins many months before the extension is granted by the Meeting of the States Parties or the Review Conference. It takes place between the requesting State Party and the group mandated to analyse the extension requests. The analysing group, in its dialogue with the requesting State Party, offers advice and suggestions. In many cases, this informal process leads to an improved, revised extension requests with clearer focus of actions and clearer identification of needs for cooperation.⁹⁷ The actions and plans thus proposed by the requesting State Party are, in form, not pledges. Nevertheless, they are commitments made by the requesting State Party; fulfilment of which effectively becomes a condition for the collective decision to grant an extension. They are a product of dialogue, as opposed to something unilaterally imposed. These backgrounds to the commitments made by the requesting State Party make it difficult for that State to renege on these commitments.

A similar effect can be expected on the donor States that were collectively involved in the dialogue leading to an extension decision. In the dialogue, difficulties that the requesting State Party faces are discussed, and collectively recognised. The need for international assistance is frequently acknowledged in the process, too. For example, upon examining the extension request by Mozambique in 2008, the Meeting of the States Parties unanimously agreed to the extension of the deadline to March 2014, as requested.⁹⁸ In the course of this examination, it was confirmed by the Meeting of the States Parties that Mozambique indeed needed international assistance to complete its obligation of clearance of mined areas.⁹⁹ It was equally confirmed that the downward trend of the assistance had to be reversed if one was to expect Mozambique to complete its clearance in the renewed timeframe.¹⁰⁰ Given this collective and explicit

⁹⁶ Ibid art 5(3).

⁹⁷ See *Achieving the Aims of the Cartagena Action Plan: The Geneva Progress Report 2009–2010*, Meeting of States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, UN Doc APLC/MSP.10/2010/WP.8 (16 December 2010) para 62.

⁹⁸ Final Report of the tenth MSP, Annex II.

⁹⁹ *Analysis of the Request Submitted by Mozambique for an Extension of the Deadline for Completing the Destruction of Anti-Personnel Mines in Accordance with Article 5 of the Convention*, Meeting of States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, UN Doc APLC/MSP.9/2008/WP.10 (17 October 2008).

¹⁰⁰ Ibid.

confirmation, it will be difficult for the rest of the States Parties that are in a position to offer assistance to ignore this downward trend. Those States which do not react by increasing their assistance may also find it difficult to blame Mozambique even if it fails to keep its end of bargain by the renewed deadline of March 2014: they have not kept theirs.

C. Absence of the User State Approach—A Question that Remains Unsettled

A question that nevertheless remains to be addressed is the significance of the absence of the user State approach in a broader perspective. Despite the advances in the Convention, given the decades of efforts prior to the Ottawa Convention to allocate some kind of post-conflict responsibility concerning weapon contamination to the user States, one may feel that eliminating any reference to the user State in the context of the obligation of assistance in this Convention is a step backward.

In a way, there is no cause for alarm in the Ottawa Convention. First of all, (potential) user States are still potential donor States in a position to provide assistance under Article 6. Thus, they are in no way excluded from the obligation of assistance. Second, the elimination of the user State approach does not mean that the use of anti-personnel landmines is condoned. Quite the contrary: the most important undertaking by the States Parties in this Convention is not to use anti-personnel landmines under any circumstances.¹⁰¹ In addition, while no known case of alleged non-compliance has gone beyond the consultation and cooperation among the States Parties, the Meeting of the States Parties or the Special Meeting of the States Parties has a broad competence to deal with non-compliance (Art. 8).¹⁰² In case of alleged use, it may decide to establish a fact-finding commission. The user State within the Ottawa Convention may be exposed through this process. The user State might also receive suggestions from the Meeting of the States Parties or the Special Meeting of the States Parties concerning ‘the initiation of appropriate procedures in conformity with international law.’¹⁰³

Nevertheless, it is also true that the Convention does not provide for any substantive, as opposed to procedural, consequences of the violation

¹⁰¹ *Ottawa Convention* art 1(1)(a).

¹⁰² *Ibid* art 8.

¹⁰³ *Ibid* art 8(19).

for a user State. Nothing in Article 8 indicates a definite legal consequence of non-compliance. Without prejudice to what a Meeting or the Special Meeting of the States Parties determines in each case, the only certain consequence is a series of traditional consequences in the law of State responsibility for an unlawful act—and the law of armed conflict if the treaty violation occurs during an armed conflict.¹⁰⁴ What that offers in the context of clearance and assistance remain unsettled.¹⁰⁵

IV. CONCLUSION

The shortcomings of the bilateral vision that narrowed the endeavour to address the problem of weapon contamination to a search for the responsible State were identified in the first half of this chapter. For various reasons, neither the affected State approach nor the user State approach provided a satisfactory answer to the question of weapon contamination and the post-conflict responsibility. Above all, the bilateral vision confined the consideration of who should accept this post-conflict responsibility to a choice between these two types of States. The role and involvement of other States was never seriously explored under the narrow, bilateral vision. The global nature of the issue was not fully appreciated even in multilateral treaties that deal with the weapon contamination. Against that background, this chapter examined the Ottawa Convention on Landmines, whose wording and structure indicated a departure from the bilateral vision. Three questions were examined. The first question was whether the Convention is indeed meant to create *collective* responsibility of assistance in the clearance of anti-personnel landmines. The answer to this question was in the positive, based on the survey of mainly the outcome documents of the two Review Conferences. The second question was how the alleged weakness of such responsibility, namely that no one will act under the collective responsibility approach, is avoided in the operation of the Ottawa Convention. The answer was found in the formal and informal mechanism of supervision the States Parties have established in the course of the operation of the treaty. The third question in the Ottawa Convention was whether the elimination of the user State approach for the post-conflict responsibility in the Convention means the

¹⁰⁴ David, above n 45, 803.

¹⁰⁵ See the reference to the State responsibility in UN Human Rights Council, *Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1*, above n 56.

user States are exonerated in some way. While the answer was no, there is no provision in the Convention that specifies the consequences for the violation of the core obligation of the Convention, that is, the prohibition of the use of the anti-personnel landmines.¹⁰⁶ Thus, the law of State responsibility—and the law of armed conflict in case of the use in armed conflict—simply continues to apply. It will determine what kind of obligations a user State bears.

The key element in answering the second question was supervision. It is true that the Ottawa Convention does not specify precisely which States are under an obligation to provide assistance under its collective responsibility approach. Taken at a face value, it is not difficult to neglect this obligation of assistance, and if a majority of States Parties chose to do so, this would turn everyone's responsibility into no one's responsibility in reality. Therefore, considerable doubts and concerns have been expressed about the effectiveness of assistance to be provided pursuant to a collective responsibility under Article 6(4). In the Ottawa Convention, it has been through formal and informal mechanisms of supervision that collective responsibility has indeed been discharged collectively.

The choice of the Ottawa Convention—the collective responsibility approach and supervision to go with it—is of course not automatically the best choice in all multilateral treaties that deal with remnants of war and weapon contamination: each weapon has its own characteristics that may dictate the choice. Nevertheless, some of the findings concerning the collective responsibility approach in the Ottawa Convention may be relevant in analysing multilateral treaties with a similar structure and aspirations. In particular, while the *Convention on Cluster Munitions* retained the combination of the affected State approach and the user State approach in part,¹⁰⁷ it adopted a general article on clearance and assistance which is very similar to the one in the Ottawa Convention. Thus, mechanisms of supervision that are used in the Ottawa Convention to persuade the States Parties to contribute to the assistance of clearance may well serve as a reference in developing the operational setting of the *Convention on Cluster Munitions*.¹⁰⁸

¹⁰⁶ *Ottawa Convention* art 1.

¹⁰⁷ See *Convention on Cluster Munitions* art 4(4) described in Section II-C-2 of this chapter.

¹⁰⁸ The first and the second Meetings of the States Parties to the Convention on Cluster Munitions have in fact taken a step in this direction: see *Final Document*, First Meeting of States Parties to the Convention on Cluster Munitions, UN Doc CCM/MSP/2010/5 (30 January 2010) para 22; *Final Document*, Second Meeting of States Parties to the Convention on Cluster Munitions, UN Doc CCM/MSP/2011/5 (16 September 2011) para 27.

PART 2

COORDINATING DIALOGUES AND GOVERNANCE
STRATEGIES WITHIN AND BETWEEN INTERNATIONAL
LEGAL SYSTEMS AND INSTITUTIONS

CHAPTER FIVE

THE USE OF FORCE AND THE EMERGING INTERNATIONAL JUDICIAL SYSTEM

PHILIPPA WEBB*

I. INTRODUCTION

The law on the use of force is coming up against the realities of globalization. This area of international law, which is regulated by a legal regime that was mainly designed in the aftermath of World War II,¹ is experiencing change in two respects. Globalization has changed the *circumstances* in which force is used and exacerbated the complexity of the *structures* for decision-making on the legality of use of force.

As regards the changing *circumstances* of the use of force, the traditional paradigm of inter-State conflicts involving national armed forces clashing across borders using conventional weapons no longer reflects reality. A gap has opened up between the assumption of inter-State conflict in Articles 2(4) and 51 of the United Nations ('UN') Charter and what is happening on the ground. Most contemporary armed conflicts are not between two States.² Further, the traditional dichotomy in the Geneva Conventions between international and non-international armed conflicts does not transpose easily to situations in which non-State actors operate among States or across the borders of occupied territories.³ The line between civilians and combatants is often blurred. Asymmetry, in the sense of large disparities in strength and strategies, is a salient feature of many modern conflicts.⁴ New methods of waging war, such as

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¹ Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method' (2009) 22 *Leiden Journal of International Law* 651, 652 n 3.

² Human Security Report 2005, *War and Peace in the 21st Century* (2005).

³ Andreas Paulus and Mindia Vashakmadze, 'Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization' (2009) 91(873) *International Review of the Red Cross* 95, 100.

⁴ Herfried Münkler, 'The Wars of the 21st Century' (2003) 85(849) *International Review of the Red Cross* 7.

nuclear weapons, radar-guided missiles, and information warfare, have also changed the nature of conflict.

At the same time as the circumstances in which force is being used are changing, the *structures* for adjudicating disputes about the law on the use of force have also altered. It is a 'well-known paradox' that globalization has led to both rising uniformisation of social life around the globe and increasing specialisation through the emergence of relatively autonomous spheres of social action and structure.⁵ On the one hand, the world has become smaller and more connected, with increased supranational decision-making through regional and international organizations and via transnational networks for governance and information.⁶ On the other hand, the world has become more complex and potentially confusing because these entities do not exist in a hierarchy and often lack means of coordination.

The impact of globalization is very apparent in the realm of international dispute settlement. The last few decades have seen the International Court of Justice ('ICJ'), the only international court of general jurisdiction, joined by a number of international courts and tribunals specialised in international criminal law, the law of the sea, human rights, and trade. There are also panels of legal experts deciding cases as ad hoc arbitral tribunals or commissions.⁷ These courts make up an emerging international judicial system, but they approach cases from different perspectives and are not organised into a judicial hierarchy. A number of them have decided cases on the use of force. The ICJ is the principal judicial organ of the UN, dedicated to resolving disputes between States and providing advisory opinions to certain UN organs and agencies. The International Criminal Tribunal for Yugoslavia ('ICTY') is an ad hoc body created by Security Council Resolution to prosecute individuals for serious international crimes arising from the Balkans conflict. The International Criminal Court ('ICC') is also directed to seeking to hold individuals accountable for serious international crimes, but it is a permanent body, established outside of the UN system and with potentially global jurisdiction. Ad hoc commissions have been established to determine questions about the use of force

⁵ International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (2006) UN Doc A/CN.4/L.682, 11 ('*ILC Fragmentation Report*').

⁶ Anne-Marie Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' (2002–2003) 24 *Michigan Journal of International Law* 1041.

⁷ For the purpose of this chapter, these bodies are collectively referred to as 'international courts'.

in specific conflicts, such as Eritrea-Ethiopia and Guyana-Suriname. There is no system of precedent or avenue of appeal between these bodies. Even *within* international courts, there is no doctrine of *stare decisis*⁸—while judges speak of striving to maintain a consistent body of jurisprudence,⁹ they can and do depart from previous decisions.

A multitude of different bodies without an ultimate court of appeal to provide definitive interpretations can potentially lead to such a diversity of opinion that the coherence of international law—and therefore its legitimacy—may be at risk.¹⁰ A degree of diversity is important and welcome. It reflects the expansion of international legal norms and the attendant rise in specialised decision-making. It may also allow for legal innovation, with multiple solutions being experimented with before the adoption of the most appropriate one. The deployment of strategic ambiguity may be a useful tool in treaty-making because it enables States to reach consensus.¹¹ However, one expects a greater degree of precision and clarity in judgments that interpret the rights and obligations of various parties. Substantive divergence in legal interpretations—or the ‘fragmentation of international law’—can diminish legal certainty because legal subjects are no longer able to predict the reaction of official institutions to their behaviour and to plan their activity accordingly. It also has the potential to put legal subjects in an unequal position vis-à-vis each other.¹² As regards the law on the use of force, incoherent approaches to interpreting and developing the law put at risk the attainment of the fundamental

⁸ The Statute of the ICJ provides: ‘The decision of the Court has no binding force except between the parties and in respect of that particular case.’ *Statute of the International Court of Justice* art 59.

⁹ For the ICJ, see the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (*Preliminary Objections*) [1998] ICJ Rep 275, [28] (*‘Cameroon v Nigeria’*): where the Court observed ‘[t]here can be no question of holding [a State] to decisions reached by the Court in previous cases ... [but] [t]he real question is whether, in [the current] case, there is cause not to follow the reasoning and conclusions of earlier cases’. For an excellent study, see Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge University Press, 1996). For the ICTY, see *Prosecutor v Aleksovski (Judgment)* (International Criminal Tribunal for Yugoslavia, Trial Chamber I, Case No IT-95-14/1-A, June 25, 1999) [97], stating that previous decision should only be departed from in ‘exceptional circumstances’.

¹⁰ Jonathan I Charney, ‘Is International Law Threatened by Multiple International Tribunals?’ (1998) 271 *Recueil des Cours* 101, 117.

¹¹ See, eg, the multiple ambiguities in the recent amendment to the ICC Statute on the crime of aggression: Beth Van Schaak, ‘Negotiating at the Interface of Power & Law: The Crime of Aggression’, *Santa Clara University Legal Studies Research Paper Series* (Accepted Paper No 10–09, August 2010).

¹² *ILC Fragmentation Report*, above n 5, 32.

goals of this law, namely the 'the minimization of violence, the maintenance of minimum order, and as approximate an achievement of the policies of human dignity as each situation allows'.¹³

While the term 'fragmentation' is often been associated with conflicts between substantive bodies of law,¹⁴ this chapter, following the approach of the International Law Commission, adopts a broader definition, namely 'where two rules or principles suggest different ways of dealing with a problem'.¹⁵ This sort of fragmentation can occur within one body of law. This chapter will examine the problem of fragmentation through a study of international court decisions on the use of force. It will explore the jurisprudence of several fora with an emphasis on the ICJ, which is the court that has pronounced most frequently on the law on the use of force.

There are, of course, other actors involved in interpreting, applying and developing these aspects of the law on the use of force: States, the UN Security Council and, to a lesser extent, the General Assembly, regional organizations and non-governmental organizations. Nonetheless, international judges and arbitrators have an important impact on the behaviour of States and on the development of the law;¹⁶ they are vital members of what Bianchi terms the 'interpretive community'¹⁷ that influences the common understanding of the legal rules on the use of force. States have been bringing disputes about the use of force before the ICJ and ad hoc tribunals with greater frequency, and they pay close attention to international judgments and decisions.¹⁸ One cannot overlook the fact that States may find it easier to locate the law in the written judgments of international courts rather than in the practice of the Security Council or of other States.¹⁹

¹³ W Michael Reisman, 'Assessing Claims to Revise the Laws of War' (2003) 97 *American Journal of International Law* 82, 83.

¹⁴ *ILC Fragmentation Report*, above n 5, 17–19.

¹⁵ *Ibid.*

¹⁶ Cf Bianchi, above n 1, 654.

¹⁷ This community includes national governments, judges, academics, non-governmental organizations, lobbies, pressures groups, intellectuals, opinion-makers: *ibid.*, 653–4.

¹⁸ Charney, above n 10, 118 (in the context of the ICJ). See also the high compliance rate enjoyed by the ICJ in general: Rosalyn Higgins, 'National Courts and the International Court of Justice' in M Andenas and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press, 2009) 405.

¹⁹ HG Gadamer, *Truth and Method* (Continuum, 2004) 274: 'the sheer fact that something is written down gives it special authority'. This is all the more so given the fact that a State using force against another State usually invokes self-defence: Christine Gray, *International Law and the Use of Force* (Oxford University Press, 3rd ed, 2008) 118–119.

The phenomenon of fragmentation goes beyond small variations in the wording adopted by courts. As Charney points out, '[a]ny qualified lawyer can distinguish cases' and it is inevitable that there will be subtle differences between the judgments of different courts and even within the same court.²⁰ Coherence does not equate to total uniformity. The key question is therefore whether the cases on the use of force exhibit a reasonable level of coherence: are courts engaged in the same dialectic and do they render decisions that are largely compatible?²¹ It is important to acknowledge that fragmentation in international law may be managed through clarification and the application of general principles of interpretation. This chapter will focus on four approaches by international courts. There may be instances of *genuine integration* where courts strive to achieve consistency and their decisions are coherent and compatible (though not necessarily uniform) or *apparent integration* where judges attempt to integrate their decisions with those of other courts, but due to differing facts or the misapplication of legal concepts, cracks appear beneath the surface of a seemingly unified approach. Equally, there may be examples of *genuine fragmentation* where judicial decisions give rise to conflicting developments in the law that are either unconscious due to lack of awareness of other courts' decisions or a conscious departure from existing case law or *apparent fragmentation* where decisions appear to be conflicting, but the variations are due to contextual factors and the underlying legal reasoning can be resolved and rendered compatible through clarification and interpretation.

The law on the use of force is too extensive and complex to address in an exhaustive manner. This chapter therefore considers three clusters of issues on which there has been judicial practice and dialogue within and among courts: the concept of 'use of force'; the definition of 'armed attack' for the purposes of self-defence; and the consequences of a finding of use of force for the classification of the conflict and attribution of responsibility.

This chapter contends that the overall picture of what is happening to the law on the use of force can provide broader insights into the challenge of coordinating judicial bodies to achieve harmonious co-existence, productive dialogue and a more coherent body of international law. In particular, the tendency of the ICJ to avoid pronouncing on many of the

²⁰ Charney, above n 10, 137.

²¹ Ibid.

controversial aspects of the law on the use of force raises questions as to what its proper role should be in emerging international judicial system.

II. USE OF FORCE

Article 2(4) of the UN Charter provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Despite the widespread conviction that the prohibition on the use of force expressed in that Article is a *jus cogens* norm, the contours of that prohibition remain rather unclear.²² There is thus a tension between the general agreement on the *status* of the prohibition and confusion about its *content*.

A. Definition of Use of Force

The definition of the use of force comes under strain from two directions. First, the relationship between ‘use of force’ in Article 2(4) of the Charter and ‘armed attack’ in Article 51 is unclear, as will be discussed below. Second, there is what Gray calls the ‘most basic disagreement’ as to whether the uses of force prohibited under Article 2(4) are limited to those directed ‘against the territorial integrity or political independence of any state.’²³ Interestingly, this debate is more active in academic circles; the ICJ and arbitral tribunals have taken an integrated approach to the question, finding no such limit on the prohibition.

In the *Corfu Channel* case, the UK argued that its forcible intervention in Albanian waters was to recover evidence as to who was responsible for the destruction of two British warships by mines, and thus its action did not threaten the territorial integrity or political independence of Albania.²⁴ The ICJ rejected this argument, saying, it ‘can only regard the alleged right of intervention as the manifestation of a policy of force such as has in the past given rise to most serious abuses and as such cannot find a place in

²² Bianchi, above n 1, 667; Olivier Corten, *Le droit contre la guerre* (Pedone, 2008) 293ff.

²³ Gray, above n 19, 31.

²⁴ *Corfu Channel (Albania v United Kingdom)* [1949] ICJ Rep 4.

international law.²⁵ Limiting the prohibition on the use of force to acts that threaten territorial integrity or political independence would undermine respect for 'an essential foundation of international relations.'²⁶ The Court endorsed this interpretation in the *Nicaragua* judgment in the context of the principle of non-intervention.²⁷ Similarly, in *DRC v Uganda*, the Court found Uganda had violated the principles of non-use of force and non-intervention even if its objectives 'were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war.'²⁸

The arbitral tribunal in *Guyana/Suriname* consciously aligned itself with the ICJ's approach.²⁹ In response to Suriname's contention that the incident occurred in a disputed maritime area and therefore could not have impaired 'the territorial integrity' of Guyana, the tribunal affirmed that the threat or use of force does not have to be directed against the territorial integrity or political independence of a State in order to constitute a violation of the prohibition on the use of force.³⁰ The Eritrea-Ethiopia Claims Commission ('EECC') rejected the argument that recourse to force by Eritrea would have been lawful because some of the territory concerned was territory to which Eritrea had a valid claim, noting that 'border disputes between states are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law.'³¹ This position—apparently consistent with the ICJ's line of reasoning—resulted in the Claims Commission holding that Eritrea had violated Article 2(4) by using force in defence of what the Boundary Commission subsequently determined to be its own territory. This seems to be a result that creates uncertainty and fragmentation, especially with respect to the border established by the Boundary Commission.³²

²⁵ Ibid, 35.

²⁶ Ibid.

²⁷ *Military and Paramilitary Activities (Nicaragua v United States)* [1986] ICJ Rep 14, [202] ('*Nicaragua*').

²⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, [163] ('*DRC v Uganda*').

²⁹ *Guyana/Suriname (Awards)* (Permanent Court of Arbitration, 17 September 2007).

³⁰ Ibid 423.

³¹ *Jus ad Bellum: Ethiopia's Claims 1–8 (Eritrea v Ethiopia) (Partial Award)* (2006) 45 ILM 430, [10].

³² For criticism of this position, see Christine Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps its Boundaries: A Partial Award?' (2006) 17 *European Journal of International Law* 699.

B. 'Armed Attack' for the Purpose of Self-Defence Under Article 51

Article 51 of the UN Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

An integrated approach to the concept of 'armed attack' for the purpose of the right to self-defence enshrined in this Article faces two difficulties. The first difficulty in this area of law is the role of non-State actors. When the UN Charter was conceptualised, the paradigmatic armed conflict was between two States. Globalization has brought with it flows of arms, money, and narcotics across borders, transnational communication and transport networks, and a decline in the State's monopoly on the use of force. As a result, non-State actors such as organised rebel groups, private military companies, insurgents, terrorists, and gangs are now playing significant roles in armed conflicts.³³ While the ICJ has in fact decided cases involving non-State actors—the *contras* in the *Nicaragua* case and the rebel groups in *DRC v Uganda*³⁴—it has been reluctant to address how such non-State actors fit into the framework of the law on self-defence. Its cautious approach has in effect papered over the cracks in the definition and application of Article 51.

Second, the concept of 'armed attack' in Article 51 of the Charter is not necessarily the same as the notion of 'use of force' in Article 2(4). While *all*

³³ For an overview, see Claude Bruderlein, Andrew Clapham, Keith Krause, and Mohammad-Mahmoud Ould Mohamedou, 'Transnational and Non-State Actors: Issues and Challenges' (Concept Note presented at the Seminar on Transnational and Non-State Armed Groups, Program on Humanitarian Policy and Conflict Research, Harvard University, 9–10 March 2007); Program on Humanitarian Policy and Conflict Research (Harvard University), Graduate Institute of International and Development Studies (Geneva) 'Empowered Groups, Tested Laws, and Policy Options: The Challenges of Transnational and Non-State Armed Groups' (Report on Interdisciplinary Seminar on Transnational and Non-State Armed Groups, November 2007) 29–35.

³⁴ In a different category is the ICJ's treatment of Palestine in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 ('Wall').

armed attacks will constitute a use of force, the reverse is not always true. This is called the 'Nicaragua gap',³⁵ referring to the *Nicaragua* Judgment's statement that it is necessary to distinguish 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.³⁶ The ICJ confirmed the 'Nicaragua gap' in the *Oil Platforms* judgment and, implicitly, in the *DRC v Uganda* judgment.³⁷ While the existence of the 'gap' is apparent, it is unclear how the relationship between armed attack and use of force has been affected by contemporary weaponry and the changing nature of armed conflict.

1. *Identity of the Attacker*

Article 51 of the Charter speaks of the 'inherent right of individual or collective self-defence if an armed attack occurs *against a Member of the United Nations*'.³⁸ It is clear that the object of the attack must be a State, but the Charter is silent as to the identity of the attacker. The ICJ's approach to this question has wavered between maintenance of the traditional inter-State paradigm and a cautious acceptance of the role of non-State actors. This is an area where signs of fragmentation are apparent *within one court*. Since there is no *stare decisis* at the ICJ,³⁹ each judgment is comparable to the judgment of another international court.⁴⁰ Variations in the Court's reasoning may be minor and therefore easily distinguished or clarified in later decisions. However, divergences that are substantive in nature pose the genuine risk of incoherence, which undermines the international legal system's ability to promote peaceful relations.

In the *Nicaragua* judgment, the ICJ opened the door to the idea that attacks by non-State actors could constitute 'armed attacks' for the purpose of triggering the right to self-defence. However, it added the requirement of equivalence to a State attack or sufficient State involvement, referring to 'the sending by or on behalf of a state of armed bands, groups,

³⁵ Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press, 2007) 266 n 30, citing Terry D Gill, 'The Law of Armed Attack in the Context of the *Nicaragua* Case' (1988) 1 *Hague Yearbook of International Law* 30; Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 2001) 173–6.

³⁶ *Nicaragua* [1986] ICJ Rep 14, [191], [195], [247].

³⁷ *Oil Platforms (Iran v United States) (Judgment)* [2003] ICJ Rep 161, [51]–[64]; *DRC v Uganda* [2005] ICJ Rep 168, [165].

³⁸ Emphasis added.

³⁹ *Statute of the International Court of Justice*, article 59.

⁴⁰ See *Cameroon v Nigeria* [1998] ICJ Rep 275, [28]; see also *Application of the Convention on the Prevention and Punishment of Genocide (Croatia v Serbia) (Preliminary Objections)* [2007] ICJ Rep 412, [53].

irregulars or mercenaries, which carry out acts of armed force against another state of such gravity *as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein*.⁴¹ The Court clarified that assistance to rebels in the form of providing weapons or logistical or other support did not amount to an armed attack, but could breach the principle of non-intervention.⁴² As it stood in 1986, the ICJ accepted that actions by non-State actors could trigger the right to self-defence, but still included elements of a State-to-State attack in its analysis.

The mixed approach in *Nicaragua* was apparently abandoned for the traditional inter-State concept of 'armed attack' in the *Wall* Advisory Opinion in 2004. On the facts, Israel was not claiming a right of self-defence against another State—it exercised control in the Occupied Palestinian Territory and in its view the threat originated within that territory. Nonetheless, the Court seemed to assume that Article 51 only applied in inter-State situations: 'Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack *by one state against another state*.'⁴³ This brief statement attracted criticism in Separate Opinions and academic circles.⁴⁴ The statement appears to close the door that was cracked open in *Nicaragua* to applying the law of self-defence to actions by non-State actors—it is a reversion to the inter-State paradigm that no longer reflects the reality of contemporary armed conflict. Gray suggests a way to reconcile *Nicaragua* and the *Wall* interpretations, pointing out that the Court in the *Wall* did not say that there is a right of self-defence *only* in an inter-State scenario;⁴⁵ it was thus choosing simply not to address the role of non-State actors rather than resiling from its position in *Nicaragua*. This is, however, unlikely given that the question of non-State actors was squarely before the Court in the *Wall* proceedings,

⁴¹ *Nicaragua* [1986] ICJ Rep 14, [195] (emphasis added). This was based on *Definition of Aggression*, GA Res 3314 (XXIX), UN GAOR, 29th sess, 2319th plen mtg, UN Doc A/Res/3314 (14 December 1974) which the Court said reflected customary international law.

⁴² *Nicaragua* [1986] ICJ Rep 14. The Court did not elaborate on this factor because the parties had not disagreed about the definition of armed attack: Gray, above n 19, 175; see also *Nicaragua* [1986] ICJ Rep 14, [160], [172] (Judge Schwebel).

⁴³ *Wall* [2004] ICJ Rep 136 [139] (emphasis added).

⁴⁴ See *Wall* [2004] ICJ Rep 136, [35] (Judge Kooijmans); [33]–[35] (Judge Higgins); [6] (Judge Buerghenthal); see also Christian Tams, 'Light Treatment of a Complex Problem: The Law of Self-defence in the Wall Case' (2005) 16 *European Journal of International Law* 963; Sean D Murphy, 'Self-defence and the Israeli Wall Opinion – An *Ipse Dixit* from the Court?' (2005) 99 *American Journal of International Law* 62.

⁴⁵ Gray, above n 19, 135.

and that at least three Judges who prepared Separate Opinions no doubt raised the problems with the assumption of a State-to-State attack during the drafting of the Advisory Opinion.

One year after the *Wall* Opinion, the Court took a more equivocal view in the *DRC v Uganda* judgment of the application of Article 51 to non-State actors. The Court found that the actions of the ADF rebel group could not be attributed to the DRC on the facts.⁴⁶ The Court expressly left open the question of 'whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces,'⁴⁷ which suggests a retreat from the inter-State assumption about Article 51 made in the *Wall* Opinion.

The fluctuations of the ICJ in *Nicaragua*, the *Wall* Opinion and *DRC v Uganda* create uncertainty as to the identity of the attacker for the purposes of Article 51.⁴⁸ Instead of attempting to integrate its position, the ICJ has left the question open as to whether the traditional rules on self-defence have been modified by State practice. This shows early signs of genuine fragmentation as regards the legal response to attacks by non-State actors.

2. *Degree of Gravity*

The ICJ's pronouncements on the degree of gravity needed to constitute an 'armed attack' have been narrowly drawn and closely tied to the facts of particular cases. As a result, it has not provided much clarity on the gap that exists between a 'use of force' and an 'armed attack'.

The *Nicaragua* judgment's distinction between the 'most grave forms' (which constitute an armed attack) and the 'other less grave forms'⁴⁹ was expressly reaffirmed in the *Oil Platforms* judgment,⁵⁰ and implicitly confirmed in *DRC v Uganda* in that the Court referred to 'large-scale attacks' by irregular forces.⁵¹ The difficulty of applying the 'Nicaragua gap' in practice is demonstrated by the Court's treatment of two types of force: frontier incidents and a series of incidents.

⁴⁶ *DRC v Uganda* [2005] ICJ Rep 168, [146]–[147].

⁴⁷ *Ibid* [147].

⁴⁸ Christian Tams, 'The Use of Force against Terrorists' (2009) 20 *European Journal of International Law* 359, 384.

⁴⁹ *Nicaragua* [1986] ICJ Rep 14, [191].

⁵⁰ *Oil Platforms* [2003] ICJ Rep 161, [51], [62].

⁵¹ *DRC v Uganda* [2005] ICJ Rep 168, [147].

The *Nicaragua* Judgment suggested that frontier incidents fell outside the category of an armed attack triggering the right to self-defence: 'the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another States, if such an operation, because of its scale and effects, would have been classified as an armed attack *rather than as a mere frontier incident* had to been carried out by regular armed forces.'⁵² The EECC purported to follow this approach, holding that 'localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter.'⁵³ The apparent integration of judicial views is undermined by the possibility that the ICJ in *Nicaragua* was concerned with limiting third-party intervention in conflicts between two States and accordingly set a relative high threshold for 'armed attack' in the context of collective self-defence.⁵⁴

Unlike in the Eritrea-Ethiopia conflict, the concept of frontier incidents did not play a major role in the *Nicaragua* case since there was insufficient information to characterize the trans-border incursions from Nicaragua into Costa Rica and Honduras.⁵⁵ If the ICJ was setting a higher threshold for an armed attack to deter third-party intervention, then the wholesale adoption of its approach by the EECC is misguided. Given that frontier incidents are the 'most common form of force between states,'⁵⁶ dismissing the right to self-defence in bilateral situations would seem to encourage tolerance of low-intensity yet persistent conflict.⁵⁷ It would also seem the policy considerations weigh in favour of a lower gravity threshold in

⁵² *Nicaragua* [1986] ICJ Rep 14, [195] (emphasis added).

⁵³ *Eritrea-Ethiopia*, above n 31, [11].

⁵⁴ Gray, above n 19, 181.

⁵⁵ *Nicaragua* [1986] ICJ Rep 14, [231].

⁵⁶ Gray, *International Law and the Use of Force*, above n 19, 177.

⁵⁷ Reisman argues the Court's approach in *Nicaragua* encourages tolerance of protracted, low-intensity conflict, leading to increased violence in international politics: W Michael Reisman, 'Allocating Competences to use Coercion in the post Cold-War World: Practices, Conditions, and Prospects' in Lori Damrosch and David Scheffer (eds), *Law and Force in the New International Order* (Westview Press, 1991) 39–40. In a similar vein, writing before she joined the ICJ, Higgins said that the Court's adoption of the definition in the GA Res 3314 (XXIX) led to the selection of criteria for an 'armed attack' that are 'operationally unworkable'. The question of the level of violence used by regular armed forces is better treated as an issue of proportionality rather than the definition of armed attack: Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994) 251.

frontier incidents occurring in the context of a serious territorial dispute between two States.⁵⁸

In the *Oil Platforms* Judgment, the ICJ reaffirmed that an armed attack must be of a certain gravity to trigger the right to self-defence.⁵⁹ This could be read either as a general statement excluding frontier incidents from the definition of 'armed attack' or as a statement grounded in the specific factual context of third State intervention (in this case, the US in the Iran-Iraq War).⁶⁰ The uncertainty as to whether the ICJ's position on frontier incidents in *Nicaragua* and *Oil Platforms* was general or specific does not rise to the level of genuine fragmentation. Rather, it is better viewed as confusion over two decisions that have not (yet) been reconciled.

The ICJ has also not taken a clear position on whether a series of incidents may be characterized as an armed attack. The 'accumulation of events' theory provides that a series of minor cross-border incursions, each insufficient to amount to an armed attack, may nevertheless taken cumulatively qualify.⁶¹ This theory was contemplated but not applied by the ICJ in several cases. In *Nicaragua*, the Court declined to characterise the trans-border incursions into Honduras and Costa Rica because there was '[v]ery little information ... as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an armed attack by Nicaragua on either or both states.'⁶² For the same reason, the Court declined to comment on the theory in *Cameroon v Nigeria*.⁶³ The ICJ hinted in the *Oil Platforms* judgment that it was inclined to accept the theory but it did not apply it on the facts, stating that 'even taken cumulatively' the series of incidents did not constitute an armed attack on the US.⁶⁴ In *DRC v Uganda*, the Court also evinced a *prima facie* acceptance of the theory when it said 'even if this series of deplorable attacks could be regarded as cumulative in character,' they could not be attributed to the DRC.⁶⁵ Even if one could discern a provisional acceptance of the 'accumulation of events' theory by the ICJ, there are still many

⁵⁸ Gray, above n 32, 720.

⁵⁹ *Oil Platforms* [2003] ICJ Rep 161, [51], [62].

⁶⁰ Gray favours the latter interpretation: Gray, above n 19, 147–8.

⁶¹ Gray, above n 32, 720; see also Tams, above n 48, 388–9.

⁶² *Nicaragua* [1986] ICJ Rep 14, [231].

⁶³ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep [x], [323].

⁶⁴ *Oil Platforms* [2003] ICJ Rep 161, [64]; see Tams, above n 48, 388.

⁶⁵ *DRC v Uganda* [2005] ICJ Rep 168, [146].

unresolved questions, including the number of minor events requires to constitute an armed attack and, since these events would usually vary in gravity, the 'net gravity' threshold to be achieved on a cumulative basis.⁶⁶

C. Consequences of a Finding of Use of Force

Once a court or tribunal has established that force has been used, there are several consequences that may follow. Among these is the classification of the armed conflict as international or non-international, a question that is dependent on whether it was another State that engaged in the use of force. A related issue is the attribution of responsibility for the acts of non-State entities.

Not only have the ICJ, the ICC and the ICTY engaged with these legal issues in recent years, but they have also had the same factual scenarios before them. The ICJ and the ICC have considered the armed conflict in the Ituri region of the Democratic Republic of the Congo, and the ICJ and the ICTY have addressed the war in the Balkans. Interestingly, the ICC has striven to achieve consistency with the ICJ and the ICTY, but its efforts have led to uncertainty and potential fragmentation. The ICTY, on the other hand, has consciously diverged from the jurisprudence of the ICJ, but this apparent fragmentation in the law can be resolved through careful interpretation.

1. Classification of the Armed Conflict

The classification of an armed conflict as international or non-international is a critical step in determining the applicable law. International armed conflicts, in which at least two States are involved, are subject to a broad range of rules, including the four Geneva Conventions of 1949⁶⁷ and Additional Protocol I of 1977.⁶⁸ A more restricted set of rules

⁶⁶ James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart, 2009) 44.

⁶⁷ *Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

applies to non-international armed conflicts, which involve fighting between the governmental authorities and armed groups or between such groups within a single State.⁶⁹ Common Article 3 of the Geneva Conventions and Additional Protocol II⁷⁰ govern such conflicts. In an important early decision—and a clear example of judicial lawmaking—the Appeals Chamber of the ICTY held that a number of customary rules that originally applied only to international armed conflicts had now been extended to cover non-international armed conflicts.⁷¹ This expansive view of the customary rules applicable to non-international armed conflicts was reflected, in part, in the Rome Statute of the ICC.⁷² Despite these movements to merge the protections available in different types of conflicts, there are still differences in the rules that apply and the classification of the conflict continues to have tangible legal consequences.

In its first substantive decision in its very first case,⁷³ the ICC made a conscious effort to integrate its approach with the *DRC v Uganda* judgment of the ICJ, which involved broadly the same conflict. However, this attempt at enhancing consistency among the courts may have actually increased fragmentation. In *DRC v Uganda*, the ICJ had characterized the conflict in the Ituri region as international in nature, holding that Uganda had engaged in military activities against the DRC and given support to irregular forces, thereby violating the principle of the non-use of force in international relations and the principle of non-intervention.⁷⁴ The case before the ICC also concerned the Ituri region, but it was in the context of a case against Thomas Lubanga, the alleged founder of the armed group

⁶⁸ See also *Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, 1977* (Protocol I), opened for signature 12 December 1977, 1125 UNTS 3 (entered into force in force 7 December 1978).

⁶⁹ This definition comes from the *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for Yugoslavia, [x] Chamber [x], Case No IT-94-1, 2 October 1995) [70] (*'Tadić (Appeal on Jurisdiction)'*).

⁷⁰ *Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts, 1977* (Protocol II), opened for signature 12 December 1977, 1125 UNTS 609 (entered into force in force 7 December 1978).

⁷¹ *Tadić (Appeal on Jurisdiction)*, above n 69 [126]–[127]; see also Allison Marston Danner, 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War' (2006) 59 *Vanderbilt Law Review* 1.

⁷² See *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 8(2)(e) (*'ICC Statute'*).

⁷³ *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 29 January 2007) (*'Lubanga Decision'*).

⁷⁴ *DRC v Uganda* [2005] ICJ Rep 168, [345].

Union des Patriotes Congolais. The Prosecutor argued in favour of characterising the conflict as non-international in nature whereas the Defence took the opposite view.⁷⁵ This was significant because Lubanga had been charged with the crime of child conscription, the elements of which differed depending on whether it was committed in an international or non-international armed conflict.⁷⁶

In the decision on the confirmation of charges, the ICC Pre-Trial Chamber referred to the definition of military occupation used by the ICJ in the *DRC v Uganda* Judgment⁷⁷ and reached the same conclusion as the ICJ that Uganda was an occupying Power in Ituri⁷⁸ and determined⁷⁹ that there were 'substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri can be characterized as an armed conflict of an international character' during the relevant period (July 2002–2 June 2003).⁸⁰ In a later case against alleged leaders of two other armed groups in the DRC, Germain Katanga and Mathieu Ngudjolo Chui,⁸¹ the ICC Pre-Trial Chamber relied on its decision in *Lubanga* and the ICJ Judgment in *DRC v Uganda* to characterise the conflict as of an international character in Ituri from August 2002 to May 2003.⁸²

The apparent integration between the ICC Pre-Trial Chamber and ICJ on this issue in fact resulted in a confusing situation. The ICJ judgment in *DRC v Uganda* had been concerned with the use of force between States

⁷⁵ *Lubanga Decision*, above n 73 [200].

⁷⁶ The non-international armed conflict version reads: 'Conscripting or enlisting children under the age of fifteen years into *armed forces or groups* or using them to participate actively in hostilities: ICC Statute art 8(2)(e)(vii). The international armed conflict version provides: 'Conscripting or enlisting children under the age of fifteen years into the *national armed forces* or using them to participate actively in hostilities: art 8(2)(b)(xxvi). This is a rare situation in which the 'international version' of the crime is probably harder to prove than the 'non-international version'.

⁷⁷ *Lubanga Decision*, above n 73 [212], citing *DRC v Uganda* [2005] ICJ Rep 168, [172]. The ICC also referred to the ICJ *Wall* [2004] ICJ Rep 136, [78], [89] in a footnote to para 212, and adopted the definition of 'international armed conflict' used by ICTY: *Lubanga Decision*, above n 75 [206]–[207]; *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [84] ('*Tadić Appeal*'). This was based on common Article 2 of the Geneva Conventions.

⁷⁸ *Lubanga Decision*, above n 73 [214]–[216], citing *DRC v Uganda* [2005] ICJ Rep 168, [173], [175], [209].

⁷⁹ *Ibid* [218]–[219].

⁸⁰ *Ibid* [220].

⁸¹ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04/01/07, 30 September 2008).

⁸² *Ibid* [240].

and the broad contours of the regional conflict. The ICC *Lubanga* and *Katanga* cases are more localized: they are concerned with armed conflict between a number of Congolese organized armed groups.⁸³ By drawing on the ICJ judgment and applying a broad definition of international armed conflict in context of military occupation, the ICC Pre-Trial Chamber inadvertently took the position that anything that occurs during an occupation—even a clash between local groups—is to be considered in the context of an international armed conflict. This position not only did not match up with the reality of the conflicts that formed the backdrop to the *Lubanga* and *Katanga* cases, but it also led to the Prosecution having to prove the ‘international conflict’ version of crimes, which in some instances have more demanding elements than the ‘non-international conflict’ version.⁸⁴

However, the ICC Trial Chamber in its Judgment of 14 March 2012 in the *Lubanga* case disagreed with the Pre-Trial Chamber’s characterisation of the conflict as international in nature. The Trial Chamber held that conflict consisted of ‘protracted violence carried out by multiple non-state armed groups.’⁸⁵ The Trial Chamber distinguished between a conflict of an international character between the DRC and Uganda (which was the subject of the judgment at the ICJ) and fighting among Congolese organized armed groups (the subject of the *Lubanga* case), noting that both types of conflicts could take place on a single territory at the same time.⁸⁶ Although the ICC Trial Chamber was less obviously deferential to the ICJ as compared to the Pre-Trial Chamber, its careful reasoning respects the conclusions reached by the ICJ in the *DRC v Uganda* Judgment and serves to enhance coherence in this area of the law.

2. Internationalisation of Conflicts and Attribution of Responsibility

In contrast to the ICC Pre-Trial Chamber’s deferential attitude to the ICJ in the *Lubanga* and *Katanga* cases, the ICTY has claimed to reject the ICJ’s

⁸³ *Union des Patriotes Congolais* (‘UPC’) and its military wing *Forces Armées pour la Libération du Congo* (‘FPLC’), *Front Nationaliste et Intégrationniste* (‘FNI’), *Force de Résistance Patriotique en Ituri* (‘FRPI’), *Parti pour l’Unité et la Sauvegarde de l’Intégrité du Congo* (‘PUSIC’). The *Lubanga* case concerns the ongoing conflict between the FNI-FRPI and the UPC/FPLC while the *Katanga* case is about an attack on the village of Bogoro by the FNI and FRPI.

⁸⁴ See above n 76.

⁸⁵ *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (14 March 2012), [563] (‘*Lubanga Judgment*’).

⁸⁶ *Ibid* [540], [563]–[565].

jurisprudence on a question closely related to the classification of conflicts. This is the test for when an apparently internal conflict is to be considered internationalized due to the participation of another State. In the 1999 *Tadić* Appeal Judgment, the ICTY considered what degree of control the Federal Republic of Yugoslavia had to exert over the Bosnian Serbs in order to internationalize the conflict within Bosnia. Thirteen years earlier, the ICJ's *Nicaragua* judgment⁸⁷ had examined the relationship of third States to non-State actors operating on the territory of another State. The ICJ had held that the activities of the non-State actors would be attributable to a third State if it could be shown that 'effective control' was exercised by a State, or that the State's instructions were given in respect of each operation in which the alleged violations occurred, and not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations. In what has been called 'an act of surprising temerity for an newly-established international institution,'⁸⁸ the ICTY Appeals Chamber labelled the *Nicaragua* test to be 'unconvincing' given 'the very logic of the entire system of international law on state responsibility.'⁸⁹ The ICTY developed its own, less stringent standard of 'overall control'.⁹⁰ The *Nicaragua-Tadić* divide has become the classic example of 'fragmentation' in international law.⁹¹

The 2007 ICJ *Bosnia Genocide* Judgment was an opportunity for the ICJ to address this claim of a normative conflict. In 2005, the ICJ had affirmed its 'effective control' test as articulated in *Nicaragua* in the *DRC v Uganda* case,⁹² but the question was raised more starkly in 2007 because one of the parties (Bosnia and Herzegovina) had expressly argued in favour of applying the *Tadić* 'overall control' test. Moreover, this time the ICJ and ICTY were both pronouncing on the same conflict—the war in the Balkans in the 1990s.

The ICJ gave consideration to the ICTY's reasoning, but ultimately decided to follow the *Nicaragua* test of 'effective control'. The ICJ's approach attempted to minimise fragmentation by emphasising the different contexts in which the ICJ and the ICTY decided cases. The ICJ

⁸⁷ *Nicaragua* [1986] ICJ Rep 14, 65.

⁸⁸ Marston Danner, above n 71, 132.

⁸⁹ *Tadić Appeal*, above n 77 [116].

⁹⁰ *Ibid* [120] (emphasis added).

⁹¹ The ILC Study Group on Fragmentation in International Law used the contrast between *Nicaragua* and *Tadić* as an example of a 'normative conflict between an earlier and a later interpretation of a rule of general international law': *ILC Fragmentation Report*, above n 5, 31.

⁹² *DRC v Uganda* [2005] ICJ Rep 168.

observed that the ICTY was not called upon in the *Tadić* case, nor was it in general called upon, to rule on questions of State responsibility, since its jurisdiction was criminal and limited to individuals. Thus, in *Tadić* the ICTY had addressed an issue that 'was not indispensable for the exercise of its jurisdiction.'⁹³ Moreover, insofar as the 'overall control' test was employed to determine whether or not an armed conflict is international—the sole question which the ICTY had been called upon to decide—the ICJ admitted that the test may well be applicable and suitable in that context; it did not think it appropriate to take a position on that point in the *Bosnia Genocide* Judgment, as it was not a question before it.⁹⁴ In sum, the ICJ observed that the tests for (i) the degree and nature of a State's involvement in an armed conflict on another State's territory which was required for the conflict to be 'international' and (ii) the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict, could differ without logical inconsistency.⁹⁵

The ICC appears to have accepted—or at least not taken a position on—the ICJ's view that the test for whether or not a conflict is international can differ from the degree and nature of involvement required to give rise to State responsibility for specific act committed during a conflict. In the *Lubanga* case,⁹⁶ the Pre-Trial Chamber and the Trial Chamber both applied the ICTY *Tadić* 'overall control' test to determine whether armed forces were acting on behalf of a foreign State.⁹⁷ The Chambers did not adopt or comment on the view expressed in *Tadić* that this 'overall control' test also applies to State responsibility.

The measured way in which the ICJ addressed the *Nicaragua-Tadić* divide is a good example of how judicial reasoning can avoid or minimise fragmentation. The ICJ delved into the perceived divergence between the courts and sought to find a way forward that reduced the contradictions, while respecting the essential differences in the roles of each court.⁹⁸

⁹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia)* [2007] ICJ Rep 43, [403].

⁹⁴ *Ibid* [404].

⁹⁵ *Ibid* [405].

⁹⁶ *Lubanga Decision*, above n 75; *Lubanga Judgment*, above n 85 [541].

⁹⁷ *Lubanga Judgment*, above n 85 [211].

⁹⁸ This has not prevented criticism of the Judgment, including by the former President of the ICTY who presided over the *Tadić* Appeals Judgment: Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649. For a positive view of the ICJ's judicially restrained approach, see Richard J Goldstone and Rebecca J Hamilton,

The ICTY in *Tadić*, on the other hand, has been criticized for ‘violat[ing] the basis principle of judicial economy by offering a wholesale criticism of the validity of the *Nicaragua* attribution test.’⁹⁹ The *Nicaragua-Tadić* experience also draws attention to the issue of consistency within international courts.¹⁰⁰ In the *Bosnia Genocide* Judgment, the ICJ sought to maintain the thread of ‘effective control’ that had run through *Nicaragua* and *Uganda*. Meanwhile, the *Tadić* test of ‘overall control’ for determining the nature of an armed conflict has been followed in numerous cases at the ICTY.¹⁰¹ The ICC, for its part, has also placed itself in the ‘overall control’ line of cases.

III. CONCLUSION

The law on the use of force is a rich field for studying international law in the new era of globalization and for exploring ways to achieve the harmonious co-existence of judicial institutions that operate in this field. The circumstances in which force is used have shifted from the inter-State paradigm, and the structures for decision-making at the international level have become more complex. This chapter has explored the impact of globalization through an examination of international court decisions on the use of force. Are we witnessing a descent into incoherence as courts reach their own conclusions on the law without regard for other decisions or in a conscious departure from such decisions? Or are we seeing an ‘iterative process’¹⁰² by which the courts are contributing intermittently to integrate the jurisprudence on the use of force in a coherent manner through judicial dialogue?

The above analysis of three clusters of issues under the law on the use of force reveals a mixed picture. There is apparent integration on the

‘*Bosnia v Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia’ (2008) 21 *Leiden Journal of International Law* 95, 102.

⁹⁹ Goldstone and Hamilton, above n 98, 101. Richard Goldstone was the former Prosecutor of the ICTY.

¹⁰⁰ *Ibid* 111.

¹⁰¹ *Prosecutor v Aleksovski (Appeals Judgment)* (International Criminal Tribunal for Yugoslavia, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) [131]–[134]; *Prosecutor v Celebici (Appeals Judgment)* (International Criminal Tribunal for Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [26]; *Prosecutor v Kordic and Cerkez (Appeals Judgment)* (Case No IT-95-14/2-A, 17 December 2004) [299]–[313]; see Goldstone and Hamilton, above n 98, 102, n 45.

¹⁰² Charney, above n 10, 348.

scope of the prohibition on the use of force, the degree of gravity for an 'armed attack', and the classification of an armed conflict. However, the seemingly unified approach to these issues is undermined by the failure of the ICJ to take a position on certain questions or another international court purporting to apply the ICJ's approach to a new situation. On a positive note, there are few examples of genuine fragmentation. The oft-cited *Nicaragua-Tadić* divide can be explained by the different contexts in which the ICJ and ICTY were operating. There are, nonetheless, early signs of fragmentation as regards the identity of the attacker for the purposes of self-defence. The source of uncertainty is the ICJ taking different positions or avoiding taking a position altogether.

The ICJ has indeed attracted criticism for its cautious approach to the law on the use of force. Kritsiotis notes that the ICJ 'seems to marginalize the seminal opportunities which inhere in the uses of force for the *constituting* of new law, or for the refining of the law in one particular direction or another'.¹⁰³ After studying a number of recent judgments, Green concluded that '[t]he very presentation of the ICJ's position is consistently unhelpful, with much of what the Court has held being unclear'.¹⁰⁴ McKeever agrees that the ICJ has exhibited 'an unwarranted and unhelpful caution in using the judicial tools at its disposal and a reluctance to pronounce clearly on matters of contemporary importance'.¹⁰⁵

While such observations are not without justification, it is important to consider the role of the ICJ in the globalised world of international courts. Although it is the principal judicial organ and one of the main organs of the UN, it does not sit at the apex of any court hierarchy. It has no compulsory jurisdiction and relies on the consent of States to appear before it. It has very limited mechanisms for ensuring compliance with its judgments.¹⁰⁶ Moreover, its fifteen judges are elected to represent the main legal systems of the world,¹⁰⁷ and come to the Bench with different visions

¹⁰³ Dino Kritsiotis, 'Close Encounters of a Sovereign Kind' (2009) 20 *European Journal of International Law* 299, 312.

¹⁰⁴ Green, above n 66, 62.

¹⁰⁵ David McKeever, 'The Contribution of the International Court of Justice to the Law on the Use of Force: Missed Opportunities or Unrealistic Expectations?' (2009) 78 *Nordic Journal of International Law* 361, 396.

¹⁰⁶ *Charter of the United Nations* art 94 (recourse to the Security Council by a State Party to a case); *Statute of the International Court of Justice* art 41 (power to issue provisional measures on its own initiative). Each provision has only been invoked once in 64 years.

¹⁰⁷ *Statute of the International Court of Justice* art 9.

of the Court's role, from a minimalist conception to a view of the ICJ as 'the guardian of legality for the international community as a whole.'¹⁰⁸

The ICJ is, by nature and by tradition, a rather cautious player on the world stage. Yet there are instances in which caution may be the best approach to avoiding the fragmentation of international law. Bold attempts at judicial integration can lead to the inappropriate application of decisions to different situations, as seen in the ICC Pre-Trial Chamber's reliance on the *Congo v Uganda* judgment in the *Lubanga* Decision, which was later corrected by the Trial Chamber. Caution in judicial decision-making can enhance legitimacy by avoiding significant variations that could undermine the 'perceived uniformity and universality of international law.'¹⁰⁹ Judicial caution can also allow the time and space for States to generate a widespread and uniform practice with respect to, for example, attacks by non-State actors.

The indecisive stance of the ICJ on certain issues may in fact reflect the lack of consensus among States. Kritsiotis suggests that in the actual recourse to force 'a particular legal proposition is brought alive in the minds of states ... enough for them to form an official view and to express themselves in terms of their *opinio juris sive necessitatis*,'¹¹⁰ but States rarely take definitive positions; they either invoke self-defence or put forward a variety of possible justifications for the use of force.¹¹¹

What the ICJ and other international courts can do to enhance the coherence of the law on the use of force—and in turn to strengthen the legitimacy of the international judicial system—is to be more explicit about the factors underlying their decisions. A good example of this was the ICJ's treatment of the apparent conflict between its earlier jurisprudence and the ICTY's *Tadić* decision. The policy considerations should be systematically and openly addressed.¹¹² The decisions of other courts should be considered and placed in context. Increased dialogue among judicial bodies, facilitated by periodic meetings, exchanges of

¹⁰⁸ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Provisional Measures)* [1992] ICJ Rep 3, 26 (Judge Lachs).

¹⁰⁹ See Charney, above n 10, 135.

¹¹⁰ Kritsiotis, above n 48, 312.

¹¹¹ See the arguments of the eight Respondents in the *Legality of the Use of Force* cases [2004] ICJ Rep.

¹¹² Higgins, above n 57, 5.

information¹¹³ and the widespread reporting and analysis of decisions, would not only improve the coherence of the law on the use of force, but would also strengthen the legitimacy of the emerging international judicial system. The ICJ should not be expected to be a driver of consensus in this field; that is a responsibility that is shared among all the actors who make up the interpretive community of international law.

¹¹³ Eg, *Relationship Agreement between the International Criminal Court and the United Nations*, 3rd plen mtg, UN Doc ICC-ASP/3/Res.1 (7 September 2004) art 5(1)(b)(ii), according to which the ICC Registrar shall furnish to the UN any information relating to the work of the ICC requested by the ICJ in accordance with its Statute.

CHAPTER SIX

THE 'INTEROPERABILITY' OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: EVALUATING THE LEGAL TOOLS AVAILABLE TO NEGOTIATE THEIR RELATIONSHIP

SARAH MCCOSKER*

I. INTRODUCTION

This chapter will critically evaluate the key international law rules and principles that have been proposed as ways to negotiate the relationship between international humanitarian law ('IHL') and international human rights law. The practical 'interoperability' of the two fields is a topic of increasing relevance for international law in an era of globalization, where the delineation between peace time and war has been complicated by significant changes in the nature of contemporary armed conflict.¹ Such changes include the use of force to counter terrorism; the increase of non-international armed conflicts and conflicts in urban settings, eliding the traditional frontline between the battlefield and the civilian space; and the greater involvement of non-State actors—including private military and security companies and civilians participating directly in hostilities, blurring the distinction between combatants and civilians. There have also been significant developments in international human rights law, including a greater focus on the responsibilities of non-State actors and the extraterritorial application of human rights obligations. This is partly a reflection of the ever more globalised and interconnected world we now live in—a point also evidenced by the way in which, particularly over the last twenty years, the transnational reach of the media and of many non-government organizations has seen increasing use of human rights bodies at the national, regional and global level, to seek redress for alleged human rights violations in armed conflict.

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¹ Helen Durham and Timothy LH McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Kluwer International, 1999) xvii.

Together, the above trends have generated difficult questions about the relationship between IHL and human rights law, and precisely how to determine their respective scope of application in armed conflicts. In the absence of international bodies dedicated to IHL and accessible to civil society, it has largely been in human rights fora that these questions have been instigated so far.

The basic scenario this chapter considers is that of an armed conflict which purportedly triggers the application of IHL² and where the question arises as to whether human rights law also applies, and to what extent.³ Within this basic scenario there can be many permutations—for example, whether the armed conflict is international or non-international in character, and whether the relevant acts occur outside the territory of a party to a human rights treaty. Much of the academic discussion has focused on what Milanovic describes as ‘the high altitude perspective of a relationship between two or more legal regimes.’⁴ There has also, however, been much discussion of particular norms. While some human rights norms are widely accepted as capable of concurrent application with IHL obligations (such as the prohibition on torture, and basic standards of detainee treatment), others are more contested, such as fair trial rights and the prohibition of arbitrary detention. Much debate has centred on the prohibition of arbitrary deprivation of life,⁵ as it is this issue that led to the International Court of Justice’s first pronouncements on the IHL/human rights law relationship, in its 1996 *Nuclear Weapons Advisory Opinion*.⁶ However, the question is more difficult when considered in terms of the relationship between the two systems of law as a whole. This

² That is, an armed conflict within the meaning of common Article 2 of the 1949 Geneva Conventions: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (‘Geneva Conventions’).

³ The chapter will therefore not be addressing in detail the situation of occupation: Geneva Conventions, common art 2.

⁴ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011) 232–3.

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6 (‘ICCPR’).

⁶ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 (‘*Nuclear Weapons*’).

relationship is a deeply complex and multifaceted one,⁷ which has given rise to a large volume of academic commentary, several judicial decisions, and some limited discussion by the United Nations human rights treaty bodies. Many aspects of the relationship remain unsettled. As one commentator, Nancie Prud’homme, observes:

From the adoption of the United Nations Charter the interplay between international human rights law and international humanitarian law has been subject to many questions to which scholars, judges and institutions still struggle to provide a clear answer. At present, there are a number of divergent stances on the parallel application of the disciplines, but they are generally elusive as to their exact methodology and supporting legal basis.⁸

This chapter examines some of the key legal concepts, principles and methodologies currently available as tools to navigate the relationship between the two fields, identifying their advantages and shortcomings. First, Part II will discuss some of the dominant metaphors in international law scholarship in characterising the relationship between the two bodies of law, and will elaborate on the idea of ‘interoperability’. Part III will then discuss some of the key legal principles and concepts, including the *lex specialis* principle; the ‘complementary theory,’ rules regarding derogations from human rights treaties; and general rules of treaty interpretation, focusing in particular on the principle of systemic interpretation in Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* (‘VCLT’).⁹ It will also discuss briefly the extraterritorial application of human rights obligations.

While this evaluation of theoretical tools is a discussion very much about legal theory and reasoning, it has a highly practical objective. The unsettled areas at the intersections of the two systems of law create serious real-life challenges—for the State, for the international lawyer advising the State, and for the soldier and civilian in the field, who need to know their precise legal rights and responsibilities, and the legal consequences of taking a particular course of action. Accordingly, the chapter argues that developing greater clarity about the strengths and weakness of our current legal toolbox, and how the tools can be used, is imperative in order to strengthen the interoperability of the two systems of law.

⁷ Nancie Prud’homme, ‘Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship’ (2007) 40(2) *Israel Law Review* 356, 357.

⁸ *Ibid* 356.

⁹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

II. CHARACTERISING THE RELATIONSHIP: CURRENT PATTERNS AND METAPHORS IN INTERNATIONAL LAW SCHOLARSHIP

The principal differences between the two bodies of law and the history of their relationship are well-known, and will not be revisited in detail here.¹⁰ While their relationship first became the subject of closer interest in the late 1960s, an important new phase of scholarship was generated by the International Court of Justice's ('ICJ' or 'the Court') 1996 *Nuclear Weapons* Advisory Opinion. Some States had argued that the Court should apply Article 6(1) of the ICCPR. Others had argued this was irrelevant, as international human rights law did not apply to loss of life in hostilities. However, the ICJ held that:

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what constitutes an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.¹¹

As Noëlle Quénivet puts it, '[t]his seminal statement led an entire generation of scholars to discuss the meaning of the expression *lex specialis* and, how the ICJ conceived the relationship between the two *corpora juris*.'¹² This discussion was further stimulated by the Court's views in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ('Wall Opinion')¹³ and in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*¹⁴ ('DRC v Uganda') (discussed further below). There has been a voluminous body of literature about the relationship between the two bodies of law, with many different views regarding the interpretation and utility of the *lex specialis* principle.

¹⁰ See, eg, René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002) 1–236; Noëlle Quénivet, 'Introduction: The History of the Relationship Between International Humanitarian Law and Human Rights Law' in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Brill, 2008) 1–12.

¹¹ *Nuclear Weapons* [1996] ICJ Rep 226, [25].

¹² Quénivet, above n 10, 8.

¹³ [2004] ICJ Rep 136.

¹⁴ [2005] ICJ Rep 168.

A close examination of the scholarship reveals some interesting discursive patterns in the way the relationship is characterized. Diverse metaphors have been used to portray the relationship. While varying language has been used, sometimes with only subtle differences, all the metaphors suggest varying degrees of closeness of interaction between the two bodies of law, along a broad spectrum ranging from co-existence, to some degree of overlap, to interdependence, and then to concepts of harmonisation, merger and integration. As Quénivet observes, '[i]n recent years academic literature has referred to the apparent "fusing",¹⁵ "meshing",¹⁶ "complementarity",¹⁷ "convergence"¹⁸ or "confluence"¹⁹ of these two areas of law.'²⁰ Commentators' views differ quite markedly; some commentators continue to regard them as generally separate fields of law, and resist efforts at closer convergence.²¹ Some regard them as having fundamental conceptual and structural differences, but several areas of complementarity and convergence. For example, the UN Human Rights Committee regards the ICCPR and IHL as 'complementary, not mutually exclusive.'²² Many commentators avoid precise delineation,

¹⁵ Felicity Rogers, 'Australia's Human Rights Obligations and Australian Defence Force Operations' (1999) 18 *University of Tasmania Law Review* 1, 2.

¹⁶ Theodor Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument' (1983) 77 *American Journal of International Law* 589–606.

¹⁷ Hans-Joachim Heintze, 'On the Relationship Between Human Rights Law Protection and International Humanitarian Law' (2004) 86 *International Review of the Red Cross* 789–814, 794.

¹⁸ Raúl Emilio Vinuesa, 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law' (1998) 1 *Yearbook of International Humanitarian Law* 69–110; Asbjørn Eide, 'The Laws of War and Human Rights—Differences and Convergences' in Christophe Swinarki (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff, 1984) 675–97.

¹⁹ R Quentin-Baxter, 'Human Rights and Humanitarian Law—Confluence or Conflict?' (1985) 9 *Australian Yearbook of International Law* 94.

²⁰ Quénivet, 'The History of the Relationship Between International Humanitarian Law and Human Rights Law,' above n 10, 1.

²¹ Eg, Michael Dennis, 'Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?' (2006) *International Law Students Association Journal of International and Comparative Law* 459; *European Union Guidelines on Promoting Compliance with International Humanitarian Law* [2005] OJ C327/04, para 12.

²² Human Rights Committee, *General Comment* 31 [80]: *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 11; see also Human Rights Committee, *General Comment No 6: Right to Life*, 16th sess, UN Doc HRI/GEN/1/Rev.6 (27 July 1982) para 2; Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties*, UN Doc E/C.12/1/Add.90 (26 June 2003) para 31.

describing the relationship more as a patchwork, comprising ‘distinct but complementary’,²³ or ‘related but distinct’²⁴ obligations. This approach seems to be reflected also in the practice of many States in resolutions before relevant international bodies—where for example they tend to affirm that international human rights law and IHL are complementary, but do not go further to clarify the particular nature of the relationship between the two bodies of law.²⁵ Others refer to the two fields as ‘overlapping’, operating in ‘symbiosis’ or in a relationship of ‘parallelism’.²⁶ Yet others draw explicitly on metaphors of blurred boundaries, or refer to finding areas of *rapprochement* between the two fields.²⁷ Others argue there is (or should be) an increasing integration of the two fields, for example those advocating the development of ‘fundamental standards of humanity’, to bring together common elements of both fields.²⁸ Noting these diverse ways of portraying the relationship, Orna Ben Naftali’s recent text draws on the metaphor of music to describe their interactions as ‘an ongoing,

²³ Eg, Roberta Arnold, ‘Conclusions’ in Arnold and Quéniwet, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, above n 10, 590; Jean Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff, 1985) 3.

²⁴ Provost, above n 10, 8.

²⁵ Ilia Siatsa and Maia Titberidze, ‘Human Rights in Armed Conflict from the Perspective of the Contemporary State Practice in the United Nations: Factual Answers to Certain Hypothetical Challenges’ (Research Paper, Geneva Academy of International Humanitarian Law and Human Rights, 2011) <<http://www.adh-geve.ch/RULAC/pdf/Human-Rights-Law-in-Armed-Conflict.pdf>>, at 11. This study found that between 2000 and 2010 there were some 300 resolutions from the UN Security Council, General Assembly, the former Human Rights Commission and Council affirming that human rights law is applicable in situations of armed conflict—although with varying language about their precise relationship: 34, 6; Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press, 2011) 6–9. This overall approach was also reflected in the outcomes of two expert consultations convened by the UN Office of the High Commissioner of Human Rights in 2009 and 2010, on ‘the protection of human rights of civilians in armed conflict’: (convened at the request of UN Human Rights Council resolutions): ‘Report of the Office of the High Commissioner on the Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict’ (2 June 2010), UN Doc A/HRC/14/40, paras 1–2, 7, 12 and 60.

²⁶ Alexander Orakhelashvili, ‘The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence’ (2008) 19(1) *European Journal of International Law* 161, 167–68.

²⁷ Eg, Prud’homme, above n 7, 364.

²⁸ Marco Odello, ‘Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law’ in Arnold and Quéniwet, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, above n 10, 18.

fluid conversation', a '*pas de deux*' of different movements unfolding between the two bodies of law.²⁹

There is therefore a kaleidoscope of metaphors used as ways of portraying the IHL/human rights law relationship. Each of these sets of images reflects the particular author's perspective on the relationship, and helps to condition the way their readers understand their arguments. The tensions between some of these different conceptions illustrate that much remains unsettled, and that the relationship continues to evolve. Also, the prevalent use of loose descriptive metaphors is perhaps indicative of the lack of precision yet attained in analysis of the relationship.

This chapter ventures to add the metaphor of 'interoperability', as an additional way of interpreting the relationship—and a means of perhaps encompassing many of the existing metaphors. A central concept in communications and information technology, the term 'interoperability' is also often used to describe the capacity of particular weapons systems to function effectively together,³⁰ or the capacity of different armed forces to operate together for maximum efficiency and effectiveness.³¹ At its core, the concept refers to the ability of two complex systems to interact together in a harmonious way to achieve effective functionality, compatibility and mutual outcomes, through various processes including innovation, adaptation and partial standardisation.

The chapter does not seek to give this concept special meaning or to use it as a term of art. It merely suggests that this concept is particularly appropriate for framing a discussion about the legal tools lawyers use to work out the relationship between IHL and human rights law, in an effort to identify which system of law, and/or which specific rule, applies to a particular set of circumstances. The metaphor also reflects my own view that they remain distinct bodies of law with important differences, and that while

²⁹ Orna Ben-Naftali, 'Introduction: International Humanitarian Law and International Human Rights Law—*Pas de Deux*' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press, 2011) 3–10.

³⁰ The Oxford English Dictionary defines 'interoperable' as 'able to operate in conjunction.' The Merriam Webster Dictionary defines it as: 'ability of a system (as a weapons system) to work with or use the parts or equipment of another system.' Another definition is: '[t]he measure of ease of integration between two systems ... to achieve a functional goal.' Jeff Merriman, *Redefining Interoperability* (2012) Open Knowledge Initiative <<http://www.okiprject.org/view/html/site/oki/node/2916>>.

³¹ In the military context, the most widely accepted definition is that of the North Atlantic Treaty Organization: '[t]he ability to operate in synergy in the execution of assigned tasks.' NATO Standardization Agency, 'NATO Glossary of Terms and Definitions' (Report, AAP-6, NATO, 2005) 200: <http://www.wcnjk.wp.mil.pl/pdf/aap_6_2005_pl.pdf>.

there are growing areas of complementarity and interaction, law and State practice are currently not sufficiently advanced to be able to refer to a merger of the two fields. If one were to draw on language used by NATO, the relationship is still at the stage of standardisation and interoperability, and not yet at the stage of integration.³² Regardless of what metaphor one uses to describe their relationship, the key question is to work out *how* they interact in practice. This leads to the core focus of this chapter—an evaluation of the mechanics of legal reasoning with which lawyers seek to articulate, understand and facilitate the interoperability of the two systems.

III. LEGAL PRINCIPLES AND TECHNIQUES

This is a complex topic, and a comprehensive evaluation clearly exceeds the limited scope of this chapter. The debate about the IHL/human rights law relationship is one example of the broader challenges raised by the increasing specialisation of international law in the last half century, a phenomenon addressed in the International Law Commission's 2006 Fragmentation Report.³³ Much of the report's focus is on legal reasoning processes—the principles and techniques that can be used to address challenges arising from the potential applicability of two 'specialist rule-systems'.³⁴ Together these form 'a toolbox with the help of which lawyers dealing with [the] problem ... may be able to proceed to a reasoned decision'.³⁵

Before discussing this toolbox, it is important to appreciate that there is not one kind of relationship between IHL and human rights law, but a range of possible relationships, between specific norms. At a broad level, this can usefully be understood in terms of the ILC's differentiation between two basic kinds of relationship: those of conflict and those of

³² In the context of NATO operations, it has been argued that the 'relationship of Standardization, Interoperability and Integration' is 'a continuum, where Standardization leads to Interoperability to enable Integration.' DP Finch, 'Approaching Transformational Coalition Operations along the Standardization, Interoperability and Integration (SI2) Continuum' (CCRTS Paper 24, Joint Force Development, 2011) 3 <http://www.dodccrp.org/events/10th_ICCRTS/CD/papers/024.pdf>.

³³ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) para 104 ('ILC Fragmentation Report').

³⁴ *Ibid* paras 7–15.

³⁵ *Ibid* para 20.

interpretation. It seems that much of the literature on the IHL/human rights law relationship is focused on understanding them as being in a relationship of conflict—that is, ‘where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them.’³⁶ However, as will be discussed further below, in some circumstances they may have a relationship of interpretation, in which ‘one norm assists in the interpretation of another,’ as ‘an application, clarification, updating, or modification of the latter.’³⁷ Milanovic suggests some further categories, differentiating between situations of norm conflict, and situations of norm conflict avoidance,³⁸ the latter involving techniques to interpret two norms harmoniously.³⁹ He suggests there is a spectrum of norm conflict avoidance, beginning with the situation when the language, object and purpose, and other structural elements of the two potentially or apparently conflicting norms can be reasonably reconciled without much effort⁴⁰—for example, arbitrary deprivation of life, with ‘arbitrary’ being from IHL. This can be differentiated from a situation of ‘forced avoidance’, namely ‘situations where a court is faced with a result that it deems to be undesirable (for example, a conflict with a *jus cogens* norm, or an unresolvable norm conflict), yet which it cannot avoid through normal means because the text or object and purpose of the relevant provisions simply cannot allow it under any reasonable interpretation.’⁴¹ In such a situation, he suggests that a court ‘might resort not just to invention or innovation, but to the wholesale rewriting of a particular provision or rule.’⁴²

A. *The Lex Specialis Principle*

So far, the bulk of the scholarship regarding the IHL/human rights law relationship has centred on the interpretation and application of the general principle *lex specialis derogat legi generalis*, largely because of the

³⁶ International Law Commission, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* 58th sess, UN Doc A/61/10 (2006) ch.XII, para 251, sub-para 2 (‘ILC Fragmentation Report Conclusions’).

³⁷ *Ibid.*

³⁸ Milanovic, above n 4, 239–42.

³⁹ *Ibid.* 240.

⁴⁰ *Ibid.* 240.

⁴¹ *Ibid.* 241–42.

⁴² *Ibid.* 242.

prominence given to it by the ICJ judgments. However, this principle is only one of many tools, and its application is more complex and vexed than is often recognised.

The classic, restrictive understanding of the principle is as a tool for resolving a conflict between two legal norms, by identifying a hierarchy between them.⁴³ It posits that the specific rule prevails over the general rule, the rationale being that the specific law will regulate the matter more effectively⁴⁴ and be the better expression of State consent.⁴⁵ However, particularly over the last fifteen years or so, the purpose and scope of *lex specialis* has expanded,⁴⁶ with the recognition that its use need not be limited to situations of conflict.⁴⁷ That is, the specific rule may not exclude the general rule, but instead constitute an application of the general rule, where the two rules complement each other.⁴⁸ In relation to the IHL/human rights law relationship, the *lex specialis* principle has been interpreted in both ways—‘as a tool to set aside the general rule,’ and ‘as a way to converge the two rules, where the *lex specialis* simply supplements the *lex generalis*.’⁴⁹

The starting point for much analysis of this relationship is the view expressed in the *Nuclear Weapons* Opinion that in principle, human rights obligations remain applicable in situations of armed conflict, but that what constitutes an arbitrary deprivation of life falls to be determined by IHL as the *lex specialis*. However, this brief statement did not explicate the ICJ’s understanding of the principle. In the *Wall* Opinion, the Court confirmed the continued application of human rights law in times of armed conflict, subject to relevant derogations.⁵⁰ The Court found that Israel’s construction of the barrier through the Occupied Palestinian Territory violated the rights to work, health, education and an adequate standard of living under the ICESCR, and violated the freedom of movement under

⁴³ ILC Fragmentation Report, above n 33, para 119.

⁴⁴ Ibid para 59, citing Hugo Grotius, ‘*De Jure belli ac pacis, Libre Tres*’ in James Scott (ed), *The Classics of International Law* (Clarendon Press, 1925) bk II, ch XVI, s XXIX, 428.

⁴⁵ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relate to Other Rules of International Law* (Cambridge University Press, 2003) 385–439, 388.

⁴⁶ Prud’homme, above n 7, 369.

⁴⁷ ILC Fragmentation Report, above n 33, paras 88–107.

⁴⁸ Kjetil Larsen, ‘Challenges in Applying Human Rights Law to Armed Conflict: The Relationship Between International Human Rights Law and International Humanitarian Law’ (2 June 2009) <<https://bora.uib.no/bitstream/1956/3693/1/58407564.pdf>>; Pauwelyn, above n 45, 410.

⁴⁹ Larsen, above n 48, 20, citing Prud’homme, above n 7, 368.

⁵⁰ *Wall* [2004] ICJ Rep 136, [106].

the ICCPR, by depriving a significant number of Palestinians of their freedom to choose their place of residence.⁵¹ The Court stated:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights and, as *lex specialis*, international humanitarian law.⁵²

However, the Court did not offer specific guidance on how to subdivide rights into these categories,⁵³ nor did it explain precisely 'how a particular right should be interpreted when it is a matter of both branches, and whether IHL is always the *lex specialis* even when [human rights law] provisions may be more specialized ... than those found in IHL.'⁵⁴

In the *DRC v Uganda* case, the Court repeated the view that human rights apply generally in times of armed conflict, and cited the above passage in the *Wall* Opinion. However, it omitted specific reference to the *lex specialis* principle, and to the *Nuclear Weapons* Opinion. Instead it simply noted that in the *Wall* Opinion the Court 'concluded that both branches of international law ... would have to be taken into consideration.'⁵⁵ The Court found the conduct of Ugandan forces during their occupation of Congolese territory gave rise to numerous violations of both IHL and human rights law instruments, including the ICCPR, the *Convention on the Rights of the Child* and its *Optional Protocol on the Involvement of Children in Armed Conflict*.⁵⁶ However, the judgment did not address a potential conflict between the two bodies of law,⁵⁷ leading some experts to describe the Court's analysis as 'utterly unhelpful.'⁵⁸ The three rulings have left the ICJ's position on the *lex specialis* principle very unclear. Iain Scobbie has argued that:

⁵¹ Ibid [133]–[134].

⁵² Ibid [106].

⁵³ Michael Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99(1) *American Journal of International Law* 119, 133.

⁵⁴ Quéniévet, above n 10, 11–12.

⁵⁵ *DRC v Uganda* [2005] ICJ Rep 168, [216].

⁵⁶ Ibid [345].

⁵⁷ Larsen, above n 48, 28.

⁵⁸ 'Report of the Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation' (Report, University Centre for International Humanitarian Law, 1–2 September 2005) 19 <www.cudih.org/communication/droit_vie_rapport.pdf>.

The Court has not provided a transparent account of its view of the relationship between the law of armed conflict and human rights law in an international armed conflict. Despite the poverty of these rulings, they have nevertheless entrenched the idea that legally there is some normative relationship between these two branches of law.⁵⁹

The much more difficult question is identifying precisely how, and to what extent, the *lex specialis* principle can assist in working out that normative relationship. The ICJ's statements have given rise to much debate about how to use the *lex specialis* principle. Some have interpreted it to require the exclusion of human rights law in situations of armed conflict.⁶⁰ Others have suggested that both bodies of law may be *lex generalis* and *lex specialis* in a given circumstance.⁶¹ For example, human rights law is much more specific than IHL regarding judicial guarantees in armed conflict,⁶² while IHL is much more specific regarding targeting during armed conflicts.⁶³ Under such an approach, the question of which body of law would be excluded would be decided on a case-by-case basis, with no general primacy given to either.⁶⁴

Others have used the *lex specialis* principle as a means of interpreting each body of law in a complementary manner. There are several different articulations of this approach. In summary, they suggest the principle should not necessarily be used to give priority to one field in total exclusion of the other; instead, IHL and human rights law are 'mutually supportive regimes,'⁶⁵ with considerable scope for reference to human rights law as a supplement to IHL.⁶⁶ This approach gives rise to different kinds of arguments. One argument is that the specific law may be used to fill gaps in the general law, to give it more detailed normative content. For example, human rights law on the right to a fair trial may fill gaps on this issue

⁵⁹ Iain Scobbie, 'Principle of Pragmatics—The Relationship between Human Rights Law and the Law of Armed Conflict' (2010) 14(3) *Journal of Conflict and Security Law* 449, 452.

⁶⁰ Eg, Dennis, above n 53, 141.

⁶¹ Eg, Louise Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' (1997) 316(41) *International Review of the Red Cross* 40, 41.

⁶² Larsen, above n 48, 23–24.

⁶³ Prud'homme, above n 7, 374.

⁶⁴ Larsen, above n 48, 24.

⁶⁵ Quénivet, above n 10, 9.

⁶⁶ Christopher Greenwood, 'Rights at the Frontier: Protecting the Individual in Time of War' in Barry Rider (ed), *Law at the Centre: The Institute of Advanced Legal Studies at Fifty* (Kluwer, 1999) 277–93.

in IHL.⁶⁷ Similarly, the rule prohibiting torture, inhuman and degrading treatment or punishment has been elaborated under international human rights law and complements and contributes to the substance of the relevant rule in IHL.⁶⁸ Another articulation of this 'complementary' approach is that one can 'use both bodies of law as an interpretive device for the other, therefore using the *lex specialis* principle as an interpretive tool.'⁶⁹ For example, Pauwelyn regards the *Nuclear Weapons Case* as an instance where

lex specialis is used to interpret the terms of another, more general norm (... the words "arbitrarily deprived"). It does not conflict with, nor, *a fortiori*, overrule the other norm. Thus, in this case both the *lex specialis* and the *lex generalis* could be applied side by side, the *lex specialis* playing the greater role of the two.⁷⁰

While some commentators have described this approach as a separate theory of complementarity,⁷¹ or the 'complementary theory',⁷² it is not clear whether it is a stand-alone theory or a variant of the *lex specialis* principle. Larsen notes that 'some commentators feel that using the principle of *lex specialis* to interpret and complement *lex generalis* is not a real application of the principle.'⁷³ For example, William Schabas argues that '*lex specialis* was not really applied in determining the core issues in any of the three [ICJ] cases' and that in the two latter cases, the ICJ treated IHL and human rights law as 'if they were purely complementary.'⁷⁴ Similarly, others have suggested that the ICJ's omission of specific reference to *lex specialis* in *DRC v Congo* represents a jurisprudential retreat from the principle,⁷⁵ and a move 'towards a more complementary approach to the relationship between these two systems.'⁷⁶

⁶⁷ Quénivet, above n 10, 9.

⁶⁸ Siatsa and Titberidze above n 25, 20.

⁶⁹ Larsen, above n 48, 24; John Dugard, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, UN ESCOR, 59th sess, UN Doc E/CN.4/2003/30 (17 December 2002) 5.

⁷⁰ Pauwelyn, above n 455, 410.

⁷¹ Quénivet, above n 10, 9.

⁷² Larsen, above n 48, 18.

⁷³ Ibid 29.

⁷⁴ William A Schabas, '*Lex Specialis*—Belt and Suspenders—The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus Ad Bellum*' (2007) 40(2) *Israel Law Review* 592, 597.

⁷⁵ Prud'homme, above n 7, 385.

⁷⁶ Larsen, above n 48, 27.

1. *Difficulties in Application*

Persuasive criticisms of the use of the principle have been advanced by several commentators, some of the most thorough and compelling being by Nancie Prud'homme, Conor McCarthy and Marko Milanovic.⁷⁷ My view is that the *lex specialis* principle can be useful to some limited extent, and that the broader, more flexible 'complementary' approach of using the principle as an interpretive tool is the more appropriate approach. However, I agree with Prud'homme, McCarthy and Milanovic that the principle's utility in clarifying the interplay between the two bodies of law is frequently overstated; the lack of substantive guidance in the ICJ judgments and multiple possible interpretations of their pronouncements create uncertainty as to how to use it;⁷⁸ the principle is often oversimplified, and its specific interpretation can be ambiguous.⁷⁹ It is not possible to do justice here to all the discussion on the *lex specialis* issue. However, the following draws out some key points from the wealth of literature.

First, there can be difficulties in identifying the distinction between 'general' and 'special' law and also in determining when two rules should be regarded as relating to the same subject matter.⁸⁰ Second, there are differences in addressing the issue in terms of relationships between specific norms, and between two whole systems of laws. The ICJ statement in the *Nuclear Weapons* case was made in the specific context of interpreting the prohibition on arbitrary deprivation of life, but seems to have been interpreted by some as a general comment regarding the relationship between the two bodies of law.⁸¹ In contrast, the ICJ's comments in the *Wall* Advisory Opinion referred to IHL, as a regime, as *lex specialis* to international human rights law—an overly broad characterisation – while the *DRC v Uganda* decision omitted the *lex specialis* reference.⁸² In my view, the ICJ's statements regarding *lex specialis* should be confined to the interpretation of the particular norms in the cases before it, and should not be extrapolated more broadly. Third, the *lex specialis* principle is more

⁷⁷ Prud'homme, above n 7; Conor McCarthy, 'Legal Conclusion or Interpretative Process? *Lex Specialis* and the Applicability of International Human Rights Standards' in Arnold and Quéniévet, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, above n 10, 101–18; Milanovic, above n 4, 232–52.

⁷⁸ Prud'homme, above n 7, 377–78.

⁷⁹ McCarthy, above n 77, 102; Milanovic, above n 4, 249.

⁸⁰ ILC Fragmentation Report, above n 33, para 58.

⁸¹ Larsen, above n 48, 22, citing Doswald-Beck, above n 61.

⁸² See eg, Milanovic, above n 4, 234.

difficult in situations of non-international armed conflict,⁸³ because of the lack of easily identifiable norms in IHL.

Fourth, when the *lex specialis* principle is used, the reasoning underpinning it is frequently unarticulated, or unclear. McCarthy provides a compelling account of this process, arguing that

it tends to mask the underlying rationale for finding a body of law to be *specialis* and can obscure the extent to which importance was attached to factors such as the intent of state parties, the need for effectiveness, the normative weight attached to a body of rules and so forth. While it is quite appropriate and indeed necessary for these factors to be weighted carefully and differentially in a context sensitive manner, it is problematic for this analysis to be unarticulated and left to inference or speculation.⁸⁴

Therefore, merely identifying a body of law or a norm as being more specific should not necessarily be determinative of its applicability; instead, there are other factors that should be considered. McCarthy argues that *lex specialis* is not a 'free-standing' logical technique, because 'the "logic" which *lex specialis* furnishes legal reasoning with, is also, in itself, articulative of a bundle of underlying principles or values.'⁸⁵ Some of these underlying values include consensualism and positivism,⁸⁶ in that giving priority to the more specific law is partially intended to reflect the perceived intention of the States that created the laws in question. Others are more purposive and teleological—for example the pursuit of relevance and effectiveness in the application of legal norms.⁸⁷ However, when courts, States or commentators use the *lex specialis* principle, these values are not always highlighted.⁸⁸ McCarthy suggests that one reason for this opacity may be 'that it often operates as a function of implicit rather than explicit legal reasoning,'⁸⁹ used to assign priority to a particular norm without explicating the underlying steps of reasoning.⁹⁰ That is, once IHL has been identified as the more particular body of rules, it is often assigned priority without deeper investigation of the scope for mutual accommodation

⁸³ Eg, in relation to violations of the right to life: Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87(860) *International Review of the Red Cross* 737, 746–50.

⁸⁴ McCarthy, above n 77, 108.

⁸⁵ Ibid 104; see also ILC Fragmentation Report, above n 33, paras 119–120.

⁸⁶ McCarthy, above n 77, 111–12.

⁸⁷ Ibid 104, 105, citing ILC Fragmentation Report, above n 33, para 67.

⁸⁸ McCarthy, above n 77, 105.

⁸⁹ Ibid.

⁹⁰ Ibid 105–108.

between IHL and human rights law.⁹¹ He argues that one reason why States sometimes use *lex specialis* this way is because 'the broad nature of the legal analysis involved reduces the scope for protracted argumentation on the applicability of certain pointedly sensitive norms.'⁹²

One illustration of this categorical use of *lex specialis* was by the former US Legal Adviser to the Department of State, John Bellinger, who in testimony before the UN Committee Against Torture explained that the US view was that 'US detention operations in Guantanamo, Afghanistan and Iraq are part of ongoing armed conflicts and, accordingly, are governed by the law of armed conflict, which is the *lex specialis* applicable to those particular operations'.⁹³ This argument was rejected by the Committee.⁹⁴

Prud'homme makes a similar argument to McCarthy, observing that the looseness of the principle enables it to be used to justify a range of different stances. She argues that while part of its appeal may be its flexibility, this characteristic is dangerous, because it 'allows ... a maneuvering of the law that supports diametrically opposed arguments from supporters that are both for and against the compartmentalization of [IHL] and human rights law'.⁹⁵ She therefore cautions that the principle's ambiguity means that using it 'leads to decisions being made based on political or other motives rather than on sound legal grounds'.⁹⁶ Prud'homme argues that instead, a theory of 'harmonisation' provides a better model, and that a more specific methodology should be developed to resolve issues regarding the concurrent application of the two fields.⁹⁷ However, she acknowledges that development of such a methodology requires much more work.⁹⁸ Similarly, Milanovic's very useful recent text on the extraterritorial application of human rights critiques the *lex specialis* principle strongly; he argues that as a tool of conflict resolution, it rests on the unstated assumption that for any given situation, there can only be one expression of State consent or intent as to how that situation is to be regulated.

⁹¹ Ibid 106–107.

⁹² Ibid 107.

⁹³ US Delegation, *Oral Statements to Committee Against Torture* (8 May 2006) US Department of State <<http://www.state.gov/g/drl/rls/68562.htm>>.

⁹⁴ Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations*, 36th sess, UN Doc CAT/C/USA/CO./2 (25 July 2006) paras 14–15.

⁹⁵ Prud'homme, above n 7, 383.

⁹⁶ Ibid.

⁹⁷ Ibid 395, 355, 359, 387.

⁹⁸ Ibid 395.

He argues that that assumption is unfounded, given that States are perfectly capable of assuming contradictory commitments.⁹⁹ Accordingly, he regards *lex specialis* as 'nothing more than a sub-species of harmonious interpretation, a method of norm conflict avoidance,' which is unable to resolve conflicts between IHL and IHRL, but merely serves to 'assist in the interpretation of general terms and standards in either IHL or IHRL by reference to more specific norms from the other branch.'¹⁰⁰ He therefore suggests that '*lex specialis* must be abandoned as some sort of magical, two-word explanation of the relationship between IHL and IHRL; it confuses far more than it clarifies.'¹⁰¹ He argues therefore that its use should be avoided as a means of describing the IHL and IHRL relationship.¹⁰²

Fifth, and perhaps most critically, these detailed debates regarding *lex specialis* are not reflected consistently in international jurisprudence, the work of the ILC or in State practice. There have been very few clear, public pronouncements by States on this issue. This makes it difficult to identify the actual reasoning of decision-makers, and to connect this valuable, but complex, academic debate to State practice. One reason for the lack of clear State pronouncements is that it is connected with the controversial issue of the extraterritorial scope of human rights obligations, discussed further below. For example, Australia has previously stated that

If Australia were exercising authority as a consequence of an occupation or during a consensual deployment with the consent of a Host State, in circumstances in which the principles of international humanitarian law applied, *Australia accepts that there is some scope for the rights under the [ICCPR] to remain applicable, although in case of conflict between the applicable standards under the Covenant and the standards of international humanitarian law, the latter applies as lex specialis*¹⁰³

This statement does not provide detail on the Government's interpretation of the *lex specialis* principle, as either a tool of conflict resolution or interpretation, or both.

In summary therefore, the *lex specialis* principle has significant limitations in its capacity to clarify the interplay of IHL and human rights law.

⁹⁹ Milanovic, above n 4, 251.

¹⁰⁰ Ibid 251.

¹⁰¹ Ibid 232.

¹⁰² Ibid 251–52.

¹⁰³ Australia, *Replies to the List of Issues to be taken up in connection with the consideration of the Fifth Periodic Report of the Government of Australia*, 95th sess, UN Doc CCPR/C/AUS/Q/5/Add.1 (5 February 2009) para 19 (emphasis added).

B. Rules Regarding Derogations

The rules on derogations and limitations contained in various human right treaties provide some assistance in identifying whether or not a human rights rule or IHL rule will apply. Derogation enables a State to modify, but not extinguish, the scope of particular human rights obligations.¹⁰⁴ For example, Article 4(1) of the ICCPR specifies that, in an officially proclaimed 'public emergency which threatens the life of the nation,' a State party may derogate from certain treaty obligations. However, the derogation can only be 'to the extent strictly required by the exigencies of the situation,' must not be discriminatory, or inconsistent with the State's 'other obligations under international law,' and must be communicated immediately to other States Parties.¹⁰⁵ The laws on derogations have particular significance for non-international armed conflicts, because without a derogation, human rights law theoretically should apply in its entirety.

One of the main benefits of derogation provisions is that they clearly demarcate a set of non-derogable obligations, which will apply in armed conflict. Under the ICCPR, the most relevant of these norms are the right to life; the prohibition on torture and cruel, inhuman or degrading treatment or punishment; the prohibition on slavery and servitude; the prohibition on prosecution for offences which were not crimes when committed and the right to recognition as a person before the law.¹⁰⁶

However, the laws on derogations have significant limitations in their capacity to help negotiate the IHL/human rights law relationship. First, they set a high threshold. While an armed conflict will often fall within the category of a public emergency, it may not always do so. It may not be officially proclaimed, or 'threaten the life of the nation' seeking to derogate. Second, human rights treaties have inconsistent rules regarding derogations.¹⁰⁷ Third, perhaps because of the high threshold, States do not use derogations very often, and existing State practice is very inconsistent.¹⁰⁸ Where they have been used, some States have misused them in

¹⁰⁴ Françoise J Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90(871) *International Review of the Red Cross* 549, 562.

¹⁰⁵ ICCPR art 4(3).

¹⁰⁶ Ibid arts 6, 7, 8(1), 8(2), 15, 16.

¹⁰⁷ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel, 2nd ed, 2005) 85.

¹⁰⁸ Hampson, above n 104, 563.

order to maintain power.¹⁰⁹ Fourth, in some situations there is disagreement and uncertainty about whether there is an ongoing state of emergency, to be dealt with under the human rights and domestic law enforcement paradigm, or whether there is a non-international armed conflict. An example is the 1996–2006 conflict in Nepal, in which the Nepalese Government sometimes resisted its characterisation as a non-international armed conflict, while others argued that certain attacks by Nepalese Security Forces against armed Maoists violated IHL.¹¹⁰ Fifth, while the requirement for consistency between a derogation and other international obligations clearly means States cannot invoke a derogation to justify acting in violation of IHL,¹¹¹ beyond this, rules on derogations provide little guidance on precisely how to negotiate instances of apparent inconsistency.

Therefore, although derogations can have some utility in identifying applicable human rights obligations, they have significant limitations as a tool for negotiating the IHL/human rights law relationship. The rules regarding derogations take one only part of the way through the legal reasoning process. As the ICJ's discussion of the prohibition of arbitrary deprivation of life shows, the acceptance of a norm as non-derogable in situations of armed conflict does not answer the next question of how to interpret the substantive content of that norm—which can require recourse to other tools, such as *lex specialis*.

C. General Rules and Principles of Treaty Interpretation

As the ILC has noted, the VCLT provides the 'conceptual frame' within which to begin an analysis of questions of fragmentation in international law.¹¹² The basic rules of treaty interpretation in Articles 31 and 32 are well-known, but are primarily directed at interpreting the terms of a particular

¹⁰⁹ Nowak, above n 107, 84.

¹¹⁰ Marco Sassòli and Laura Olson, 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts' (2008) 90(871) *International Review of the Red Cross* 599, citing Kedar Prasad Poudyal, *The Role of National Human Rights Institutions in Armed Conflict Situations, with Special Reference to NHRC–Nepal* (Danish Institute for Human Rights, 2006) 87–8.

¹¹¹ UN Human Rights Committee, *General Comment No 29* [72]: *States of Emergency* (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) para 11; Nowak, above n 107, 99.

¹¹² ILC Fragmentation Report, above n 33, paras 17, 18.

treaty, and not the task of working out relationships of conflict or interpretation between different treaties. Article 30 provides some techniques for dealing with successive treaties relating to the same subject matter, including the principle *lex posterior derogat legi priori* (the later law supersedes earlier law). Here, however, I will focus on the more complex tools offered by Article 31(3)(c) and the principles of “effectiveness” and “harmonisation”.

1. *The Principle of ‘Systemic Integration’: Article 31(3)(c)*

Article 31(3)(c) is the article in the VCLT that offers the greatest potential utility to the task of negotiating the relationship between IHL and human rights law. It provides that when interpreting a treaty one must ‘tak[e] into account,’ together with the ‘context’ (elaborated in Article 31(2)), ‘any relevant rules of international law applicable in the relations between the parties.’ It is said to articulate the objective of ‘systemic integration’ in international law, which recognises that all treaties are ‘predicated for their existence and operation on being part of the international law system.’¹¹³ It therefore enshrines the idea of international law as a coherent system,¹¹⁴ by enabling other treaties, customary rules and general principles of law to be taken into account in interpreting a treaty obligation.¹¹⁵ This may be particularly useful in working out the IHL/human rights law relationship (that is, in identifying the applicable rules) in situations of non-international armed conflict, where there is little IHL treaty law to draw on, thus requiring recourse to custom and other sources of law.

Although initially regarded as offering little assistance to treaty interpretation,¹¹⁶ in recent years there has been a renewed interest in doctrines of systemic interpretation derived from Article 31(3)(c).¹¹⁷ However, Article 31(3)(c) still poses challenges, including working out what rules are ‘relevant,’ what rules are ‘applicable between the parties,’ and critically,

¹¹³ Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International & Comparative Law Quarterly* 279, 280, referring to Martti Koskeniemi, *Study on the Function and Scope of the lex specialis rule and the Question of Self-contained Regimes*, UN Doc ILC (LVI)/SG/FIL/CRD.1/Add.1 (4 May 2004) para 160.

¹¹⁴ Cordula Droegge, ‘The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’ (2007) 40 *Israel Law Review* 310, 337.

¹¹⁵ Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 260–62.

¹¹⁶ Hugh Thirlway, ‘The Law and Procedure of the International Court of Justice 1960–1989 Pt III’ (1991) *LXII British Yearbook of International Law* 1, 58.

¹¹⁷ Scobbie, above n 59, 454; McLachlan, above n 113.

what it means to have an obligation to take other relevant rules 'into account.' Does this equate to an obligation merely to consider them? It has been suggested that there are a number of potential roles for Article 31(3)(c), including:

- resolving time issues (including application of the intertemporal law);
- completing the legal picture, or filling gaps, in a treaty by reference to general international law;
- deriving guidance from parallel treaty provisions;
- resolving conflicting obligations arising under different treaties;
- taking account of international law developments.¹¹⁸

This seems to give Article 31(3)(c) potentially wide scope for addressing questions about the IHL/human rights law relationship. For example when considering the meaning of 'arbitrary detention' (prohibited by ICCPR Article 9) in the context of an armed conflict, a tribunal might draw on Article 31(3)(c) to justify recourse to IHL treaties as an aid to interpretation, where similar terms shed light on the meaning, or to fill in gaps.¹¹⁹ However, this might also be portrayed as an interpretation of the *lex specialis* principle. For example, Larsen argues that the 'complementary' approach to interpreting the *lex specialis* principle 'seems to have close ties to' Article 31(3)(c).¹²⁰

There have been relatively few examples of explicit reliance on Article 31(3)(c) in negotiating the IHL/human rights law relationship. One example is the European Court of Human Rights' reference to the Article in the *Banković* case, where it stated that

the principles underlying the [ECHR] cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law.¹²¹

However, the obligation to 'take into account' other rules does not provide a clear answer to *how* one must take account of those other

¹¹⁸ Gardiner, above n 115, 260.

¹¹⁹ Ibid 281–84.

¹²⁰ Larsen, above n 48, 28.

¹²¹ *Banković & Ors v Belgium & Ors (Admissibility)* (European Court of Human Rights, Grand Chamber, Application No 52207/99, 13 December 2001) [57] ('*Banković*').

rules: to address this therefore requires recourse to other principles of interpretation and conflict resolution. Article 31(3)(c) cannot effectively be used in isolation, but requires drawing on other tools—such as the intertemporal rule, *lex specialis* and *lex posterior* principles, and the principles of effectiveness and harmonisation.

2. *The Principles of Effectiveness and Harmonisation*

The principle of effectiveness is understood as being inherent in Article 31,¹²² and as having two main limbs. One is the principle that a treaty provision should be given an interpretation that would allow it some role rather than one which deprives it of any effect.¹²³ The other limb ‘guides the interpreter towards an interpretation which realizes the aims of the treaty.’¹²⁴ The principle thus emphasises the need to give effective content to all terms of a treaty.¹²⁵

A related principle is that of ‘harmonisation’, the principle ‘that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.’¹²⁶ This reflects the presumption against normative conflict in international law.¹²⁷ That is, ‘when faced with two possible interpretations, one of which harmonises the meaning of the two norms in question, the meaning that allows for harmonisation of the two norms—and hence avoids conflict—ought to be preferred.’¹²⁸ The principle was referred to in the *Banković* case, where the Court stated that the ECHR should be interpreted as far as possible ‘in harmony with other principles of international law of which it forms part.’¹²⁹ Prud’homme has suggested the principle of harmonisation offers an ‘adequate theoretical model for the parallel application of [IHL] and international human rights law’ and notes that it finds support in the VCLT.¹³⁰ However, she does not elaborate on how it would apply, or how it might differ from some of the broader interpretations of the *lex specialis*

¹²² Gardiner, above n 115, 160, 286.

¹²³ Ibid 43, 159.

¹²⁴ Ibid 159–60.

¹²⁵ Ibid 53, citing Hersch Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) *XXVI British Yearbook of International Law* 48.

¹²⁶ ILC Fragmentation Report Conclusions, above n 36, sub-para 4.

¹²⁷ ILC Fragmentation Report, above n 33, para 37; Pauwelyn, above n 45, 240.

¹²⁸ Pauwelyn, above n 45, 240–41, footnote omitted.

¹²⁹ *Banković*, above n 121, [57], citing *Al-Adsani v United Kingdom* (2002) 34 EHRR 11, [60].

¹³⁰ Prud’homme, above n 7, 393.

principle. In my view, the principle of harmonisation alone will not always be an adequate theoretical model, for it assumes that it will be possible to arrive at a harmonious interpretation, which, as Milanovic has pointed out, may not always be the case.

Instead of stretching the *lex specialis* principle to accommodate several different versions of the 'complementary' approach, it may be clearer conceptually to accommodate these under the umbrella principles of harmonisation and effectiveness. Further work however would be needed to clarify the interplay of these tools, and to determine whether, even if they may provide useful explanations of the relationship at a conceptual, theoretical level, they would be capable of providing guidance that could be readily and easily applied in practice.

D. Extraterritorial Application of Human Rights Obligations

In certain circumstances, the task of working out the relationship between IHL and human rights law is made more complex because it is linked to the task of defining the scope of the extraterritorial application of human rights obligations. This is a very topical and unsettled issue, which has generated a growing body of academic commentary.¹³¹ However, so far the effort to clarify the relationship has not received much support from States, which are generally reluctant to accept what they regard as an extension of their human rights obligations.¹³² The case law on this issue remains unclear and inconsistent, in particularly that of the European Court of Human Rights—with the judgements in *Banković*, *Al-Skeini* and *Al-Jedda*,¹³³ for example, generating considerable debate and criticism. It has been argued that the underlying cause of these conflicts in the case law is tension between different policy considerations underpinning the

¹³¹ See, eg, Milanovic, above n 4; Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004).

¹³² Sigrun Skogly, 'Extraterritoriality: Universal Human Rights without Universal Obligations?' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar, 2010) 71–96, 95, 96.

¹³³ *Banković and Others v Belgium and Others (Judgment)* (European Court of Human Rights, Grand Chamber, Application No 52207/99, 12 December 2001); *Al-Skeini & Ors v United Kingdom (Judgment)* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011), [2011] Eur Court HR 1093; *Al-Jedda v United Kingdom (Judgment)* (European Court of Human Rights, Grand Chamber, Application No 27021/08, 7 July 2011), [2011] Eur Court HR 1092.

Court's judgments.¹³⁴ While this issue is unsettled outside the context of armed conflict, it is particularly complicated where there is an armed conflict triggering application of IHL, and where a party's armed forces are operating extraterritorially. In such circumstances, before one can address the question of the IHL/human rights law relationship, one must answer the threshold question of whether human rights obligations apply extraterritorially.¹³⁵

This is a complex topic which cannot be addressed more than briefly here. Much of the debate can be distilled to two broad opposing views on interpreting the concept of jurisdiction.¹³⁶ The first, traditional view is that jurisdiction is related to territory. The second view is that jurisdiction is related to the effect and control a State has over the individual, regardless of what territory the individual is in.¹³⁷ The practical implications of this are critical; where extraterritorial acts occur in the context of an armed conflict, then, on the narrower view of jurisdiction, only IHL would be applicable. On the broader view of jurisdiction, both human rights law and IHL would be applicable. Due to the unsettled nature of this issue, some States have adopted a position of agreeing to the application of certain human rights obligations as a matter of policy rather than of law.¹³⁸

Ultimately therefore, in many circumstances the question of the relationship between IHL and human rights law can be difficult to answer because it depends on the resolution of the logically prior question of how broadly 'jurisdiction' should be interpreted—which remains unsettled. This means that the legal reasoning process encounters a critical obstacle, before one can turn to the task of negotiating their relationship through the use of conflict-resolution and interpretive tools.

¹³⁴ Milanovic, above n 4, 55, 118, and pt III, 'Policy Behind the Rule', 54–117; eg, Milanovic argues that the *Banković* decision was 'the result of the Court's less than transparent weighing of different policy considerations, and its ultimate desire to come up with a superficial, legalistic rationale that would justify making the extraterritorial application of the ECHR exceptional': 55.

¹³⁵ Lubell, above n 83, 753.

¹³⁶ Sigrun Skogly and Mark Gibney, 'Introduction,' in Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010) 1–9.

¹³⁷ Ibid 93.

¹³⁸ Eg, Australia, *Replies to the List of Issues to be taken up in connection with the consideration of the Fifth Periodic Report of the Government of Australia*, 95th sess, UN Doc CCPR/C/AUS/Q/5/Add.1 (5 February 2009) paras 16–20.

IV. EVALUATING THE TOOLBOX: INTEROPERABILITY OR ROUGH *BRICOLAGE*?

The international lawyer currently has several different legal principles and concepts for analysing the relationships between IHL and human rights law. However, each of these tools has limitations, and none of them alone provides a comprehensive theoretical model that can give a dispositive answer as to which particular body of law, and which particular norm, will apply in a situation of armed conflict. In the absence of clear guidance on this issue from international courts, States are left to draw on a combination of tools to tackle this challenge, but without it being clear precisely how some of these relate to each other.

Together, the principles of systemic integration, effectiveness and harmonisation all emphasise the need for an approach that closely examines the broader legal context, that avoids conflict as far as possible, and that seeks to fill gaps by devising an interpretation that achieves a compromise between the two systems of law—that is, an interpretation that best ensures their continued ‘interoperability’, rather than excluding one system completely. These approaches have basic intuitive appeal, and accord with the broader complementary and interpretive articulations of the *lex specialis* rule, currently favoured by the majority of commentators.

What appears clear is that the *lex specialis* principle alone cannot be relied upon to provide a coherent methodology that is easily useable for working out which body of law to apply. A careful analysis demonstrates that the principle’s application is often oversimplified, and that it is important to be clear about exactly how it is being used in a legal reasoning process, and also what other unarticulated steps of legal reasoning it may involve. In my view, a thorough approach to negotiating the interoperability of the two bodies of law requires one to draw on *lex specialis* in conjunction with the range of other key legal principles discussed. This is because the factual and legal context in which the interpretive process occurs is often complex. Particular legal tools therefore cannot be applied mechanically or in isolation, but need to be considered together to identify the most appropriate solution.

However, even when using a combination of these approaches together, they all still offer guidance in a very general form, which means that negotiating the IHL/human rights law relationship must always be based on an examination of particular circumstances. A case-by-case approach has some obvious benefits for States, as it helps to retain flexibility, ensure decisions are tailored to individual situations, and allow for adaptability to new circumstances as they arise. However, a case-by-case approach also

has the significant drawbacks of lack of clarity, and potential for inconsistent interpretations. Having only general guidance makes it difficult for States to identify when obligations will arise and what their content is, and to plan their actions based on estimated risks and potential liability. If the interaction of norms cannot be easily addressed in the abstract, but can only be addressed in relation to particular factual scenarios as they arise on an ad hoc basis, this is not very satisfactory in terms of efficiency and the ability to make rapid, well-informed decisions. It seems that currently, the international community is far from having developed clear, agreed means of ensuring the smooth interoperability of IHL and human rights law, leaving States and commentators to rely instead on a range of legal tools as a form of relatively unsystematic *bricolage*.

Where does this leave States, soldiers and civilians, in a situation of armed conflict, who have to make decisions quickly, based on a clear understanding of their rights and responsibilities? It is obviously not practicable for soldiers in the field to have to engage in a complex process of legal reasoning in order to identify the applicable rule and its content. Parties to armed conflict need to know what to include in their 'decisional calculus'—that is, whether they need to factor in human rights obligations when weighing the legal liabilities associated with particular actions.¹³⁹ In the absence of a clear legal position, parties have scope to adopt policy positions based on their understanding of the law, and give guidance to their forces accordingly. A party may decide to support a particular interpretation of the law (support which may be explained publicly, or kept private), or may decide not to support any particular interpretation, but nonetheless act in a way that is consistent with one or other interpretation.

A. Complicating Factors

As has been shown, there are several factors that complicate the task of using legal reasoning to negotiate the IHL/human rights law relationship. That is, the challenge of working out which system of laws applies (or which norm applies, and its content) is often difficult because it is intricately woven up with other issues that remain unsettled in international law. One issue that has been noted briefly is the ongoing debate about the

¹³⁹ Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2009) 20(4) *European Journal of International Law* 1223, 1230.

extraterritorial application of human rights obligations. Another—which space precludes discussion of here—is the effects of armed conflicts on treaties, the subject of a set of draft articles and commentaries by the ILC, which the ILC has recommended as the basis for a possible future treaty on this topic.¹⁴⁰ Another is the fact that there is frequently disagreement over whether there is an armed conflict, and whether that conflict is international or non-international. Another key difficulty is the paucity of codified IHL pertaining to non-international armed conflict, leaving several lacunae that human rights law may have the potential to fill.¹⁴¹ However, human rights law is also limited here, because it traditionally imposes obligations on States, and not non-State entities such as armed opposition groups. Although recent years have seen growing agreement that certain non-State entities should respect human rights, the legal basis for and the breadth of these obligations remains unclear.¹⁴² Another factor is that the coverage of human rights and IHL treaties is inconsistent globally. Although most States are parties to the Geneva Conventions (though not the Additional Protocols), many States are not parties to particular human rights treaties.

Given all these complicating factors, the task of identifying the precise relationships between IHL and human rights norms can require complex, multi-factorial, analysis. This kind of analysis is not easy to translate into clear legal advice and practical policy guidance—whether for lawyers and governments advising troops, for soldiers to apply in practice and for civilians to understand in order to seek fulfilment of their rights and application of remedies.

¹⁴⁰ ILC, *Effects of Armed Conflicts on Treaties* (10 October 2011) United Nations <http://untreaty.un.org/ilc/summaries/1_10.htm>. On 17 May 2011 the ILC adopted draft articles and commentaries on this topic, and submitted them to the UN General Assembly (International Law Commission, *Report on the work of its 63rd session*, UN GAOR, 66th sess, Supp No10, UN Doc A/66/10 (2011) paras 94–96 ('ILC Draft Articles')). On 5 August 2011, the ILC decided to recommend to the General Assembly to take note of the draft articles in a resolution, and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles: ILC Draft Articles, UN Doc A/66/10, para 97). In December 2011 the UNGA adopted a resolution, taking note of the articles (annexed to the resolution), commending them to the attention of Governments, and deciding to include the topic in the provisional agenda of the UNGA's 69th session, 'with a view to examining, inter alia, the question of the form that might be given to the articles:' *Resolution 66/99*, 66th sess, Agenda Item 81, UN Doc A/RES/66/99 (27 February 2012) paras 3, 4.

¹⁴¹ Konstantinos Mastorodimis, 'The Utility and Limits of International Human Rights Law and International Humanitarian Law's Parallel Applicability' (2009) 5(2) *Review of International Law & Politics*, 129, 132–33, n 16.

¹⁴² *Ibid* 137–38.

B. *Is Legal Reasoning the Answer?*

Is the practical interaction of IHL and human rights law norms ultimately a question that can adequately be addressed by tools of legal reasoning? Much of the current discussion about the relationship focuses on complex processes of legal reasoning and interpretation. In the broad debate about fragmentation in international law, some commentators 'have seen ... a merely technical problem that has emerged naturally with the increase of international legal activity [that] may be controlled by the use of technical streamlining and coordination.'¹⁴³ However, while some aspects of the relationship may be readily addressed through coordination tools like *lex specialis* and derogations, some aspects cannot.

Many commentators describe the objective of their work in a manner similar to that of Prud'homme—as 'the quest for a sound method and basis' for articulating the parallel application of the two fields.¹⁴⁴ Ultimately however, clarifying the IHL/human rights relationship may not be achievable solely by legal reasoning and seeking interpretations of treaties to fit new realities the laws were not designed to address. That is, there may come a point where no further legal reasoning can remedy an inadequacy or gap in the law, and when new laws may need to be created. Otherwise, our legal reasoning tools may become too constrained; for example, while the *lex specialis* principle has been interpreted expansively to accommodate more complex applications, it is questionable how much further it may be stretched before it should really be identified as a new theoretical approach.

Some commentators have suggested that the goal of seeking a perfect, seamless relationship between the two bodies of law is elusive, and should perhaps be abandoned in favour of a more pragmatic approach, focused instead on finding ways to preserve flexibility and adaptability to suit new situations.¹⁴⁵ For example, Milanovic suggests that 'there are limits to what legitimate methods of interpretation can do to harmonize IHL and IHRL,' and that '[f]or human rights-based arguments to be even remotely persuasive in relation to situations of armed conflict,' they must meet certain requirements of effectiveness, namely 'flexibility, impact, regime integrity, clarity and predictability'.¹⁴⁶ This accords with Scobbie's view

¹⁴³ ILC Fragmentation Report, above n 33, para 9.

¹⁴⁴ Prud'homme, above n 7, 358.

¹⁴⁵ Schabas, above n 74, 592.

¹⁴⁶ Milanovic, above n 4, 231, 232; see also 269–261.

that the relationship should be more 'reliant on pragmatics' than 'the application of axiological principle.'¹⁴⁷

I agree with Milanovic's argument that there is little use in general inquiries as to the relationship between IHL and international human rights law as regimes, and that the focus must be on the relationships between specific norms from each body of law.¹⁴⁸ Linked to this is the critical point that when States are negotiating the relationship between IHL and human rights law, this task is likely to be not simply one of applying legal reasoning to find a solution, but to involve a range of political and policy factors. It should not be assumed, for example, that the acts of a party to an armed conflict would occur only after a careful process of legal reasoning—particularly taking into account the dynamic nature of armed conflict; the complex relationship between law and facts; and the impossibility of ensuring that all decisions will be informed by tailored legal advice. The legal reasoning process may often occur after an act or decision is made, in order to advise a party about potential liability.

C. Connecting Theory and Practice

While there is a very large, rich body of discussion about legal principles and their application to the IHL/human rights law relationship, this discussion is dense, often subtly nuanced, and with many diverging views and areas of uncertainty—all of which militates against easy uptake by States. The key question that arises is: how can these principles and techniques, and the commentary interpreting them, be better translated into practice and connected to actual policy development and decision-making? There is clearly more work to be done to synthesise the theoretical discussion into guidance that can be more easily used by the key actors, stakeholders and decision-makers in situations of armed conflict.

There appears to be a significant disjuncture between theory and practice, in that the majority of States have not yet (or at least not publicly) engaged in detail with this discussion, or stated their positions clearly. This of course, is understandable; States and other actors may prefer to preserve the flexibility that comes with not taking a specific public position. The paucity of public statements on these issues means that opportunities to gain insight into the reasoning processes actually used by

¹⁴⁷ Scobbie, above n 59, 457.

¹⁴⁸ Milanovic, above n 4, 234–5.

States in specific instances of application only arise in an ad hoc manner, primarily when raised by a court case, or in questions asked by a UN human rights treaty body. As one commentator has observed, the interplay of IHL and human rights law 'is only slowly being tested in practice, mainly in national and international courts and only the accumulation of decisions and reports will give an overview of the situations that might create tension or synergy'.¹⁴⁹

What are possible ways to advance the discussion further? One method is obviously the ideal of codifying some rules about their interactions, either in a new treaty or revisions of existing treaties. At this stage though, the prospect of this appears remote, given the general lack of appetite on the part of States, and the difficulty of reaching consensus. However, it is possible that the issue of further treaty development may be raised as part of several bodies of work with which the International Committee of the Red Cross is currently engaged. The first is the long-term project to prepare updated commentaries to the Geneva Conventions, and the second is the current discussions about possible means of strengthening compliance with IHL. The latter initiative was the subject of a resolution passed at the 31st International Conference of the Red Cross and Red Crescent in November 2011, which invited the ICRC to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, to identify and propose a range of options and recommendations aimed at ensuring the ongoing practical relevance of IHL to persons deprived of their liberty in relation to armed conflict, and enhancing and ensuring the effectiveness of mechanisms of compliance with IHL.¹⁵⁰ This topic emerged from the ICRC's internal study on 'Strengthening Legal Protection for Victims of Armed Conflict: Study on the Current State of International Humanitarian Law', the outcomes of which were announced in 2010.¹⁵¹

A more realistic goal is for further work to be done on developing a more easily applicable synthesis of the key international law tools and

¹⁴⁹ Droege, above n 114, 355.

¹⁵⁰ *Strengthening Legal Protection for Victims of Armed Conflicts* (1 December 2011) International Committee of the Red Cross, para 6: <<http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm>>. Also see ICRC Report, *Strengthening Legal Protection for Victims of Armed Conflicts* (October 2011), 31/C/11/5.1.1.

¹⁵¹ Jakob Kellenberger, 'The ICRC on the Current State of International Humanitarian Law' (Statement, ICRC President 21 September 2010) <<http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm>>.

other factors that parties to an armed conflict need to take into account when facing an instance of possible tension in the simultaneous application of IHL and human rights norms, including developing recommended best practices in face of legal uncertainty. This work would need to proceed in an incremental manner, concentrating on clarifying a few issues at a time, for example the application, in an armed conflict, of specific human rights treaty norms. Ideally this would involve collaboration between diverse international law experts, including the ICRC, UN treaty bodies, relevant UN Special Rapporteurs, State representatives, key NGOs and experts in civil-military relations. Given the difficulties in facilitating such engagement, the issues selected would need to be narrowly focused, and expectations kept realistic that in the short to medium-term, the achievable result may be merely the strengthening of a more open debate about the issues, while the development of any agreement (whether non-binding or binding) would require considerable time and work. One current body of work that is relevant here, and likely to be informed by both IHL and international human rights law, is the Copenhagen Process on the Handling of Detainees, focused on developing a set of guiding principles on the handling of detainees, for States engaged in international military operations.¹⁵² It will be interesting to see to what extent the Copenhagen Process and the ICRC's ongoing work may offer useful means of clarifying States' and non-State actors' understanding of aspects of the IHL/IHRL relationship.

Parallel to these kinds of processes, greater engagement of States and other experts with the ILC's work on the 'Effects of Armed Conflicts on Treaties' could strengthen the potential for the ILC's draft articles and commentaries progressively to clarify particular aspects of the IHL/human rights law relationship, for example international law applicable to derogations and suspension of human rights treaty obligations during times of armed conflict. It remains to be seen how useful this avenue will be; the UN General Assembly has commended the draft articles and commentaries to the consideration of Governments, 'without prejudice to the question of their future adoption or other appropriate action,' and included the topic on the provisional agenda of its 69th session in 2012, with a view to

¹⁵² The Copenhagen Process on the Handling of Detainees was initiated by Denmark in 2007, with the aim of facilitating a multilateral solution to the challenges that troop-contributing countries in international military operations face in managing detainees in accordance with their international obligations.

examining the form that might be given to the articles.¹⁵³ However, the articles and commentaries themselves do not advance the IHL/IHRL discussion greatly; IHL treaties and human rights treaties are both included in an indicative list, annexed to the draft articles, of treaties ‘the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict’¹⁵⁴ The commentary explains that ‘the basic policy of the draft articles’ is ‘to ensure the legal security and continuity of treaties.’¹⁵⁵ The ILC also notes however that ‘the likelihood of a substantial flow of information from States, indicating evidence of State practice, is small,’ and that ‘[m]oreover, the identification of relevant States practice is, in this sphere, unusually difficult.’¹⁵⁶ The commentaries do not deal in any depth with the relationship between IHL and human rights treaties, other than to note in a rather simplistic manner ‘the problems relating to the applicability of human rights standards in the event of armed conflict,’¹⁵⁷ together with a caveat that ‘[t]he task of the Commission has not been to deal with such matters of substance but to direct attention to the effects of armed conflict upon the operation or validity of particular treaties.’¹⁵⁸ How useful the ILC’s work will be, in the future, will therefore depend largely on the willingness of States to engage in the topic, share and discuss examples of relevant State practice, and take it forward through the UNGA. It is possible that this work may end up focusing on the more technical issues relating to continuation or termination of treaties during armed conflict, and not the relationships between particular treaty obligations during armed conflict.

V. CONCLUSIONS

Both IHL and human rights law have gaps and unsettled issues to which a solution cannot be generated easily by the use of existing legal principles. This gives rise to the need for further rule-making, and/or fresh perspectives on how to expand the scope of existing rules.

Here we return to the concept of ‘interoperability’—an apposite metaphor for these different components of the overarching theme of

¹⁵³ *Resolution 66/99*, UN Doc A/RES/66/99, paras 3–4.

¹⁵⁴ ILC Draft Articles, UN Doc A/66/10, art 7, Annex, paras (a), (f).

¹⁵⁵ *Ibid* 188.

¹⁵⁶ *Ibid* 198.

¹⁵⁷ *Ibid* 210, para 50, citing Provost, above n 10, 247–76.

¹⁵⁸ *Ibid* 210.

globalization, given that globalization is essentially about the growth in complexity brought by new and challenging interfaces between people, places, ideas and systems previously regarded as separate. The challenge is for States and other stakeholders to find ways of ensuring that international law can better make sense of and reflect the dynamic interactions between IHL and human rights law. This calls for international lawyers from different fields to contribute their collective thinking, in order to find better ways of connecting the theory to practice, and making the law more easily useable. The rationale underlying this goal, as Prud'homme puts it so well, is that 'a well-coordinated application of international humanitarian law and international human rights law is vital to ensuring adequate protection during armed conflict and the effective implementation of the legal frameworks.'¹⁵⁹ Developing greater clarity about the strengths and weakness of our current legal toolbox, and how those tools can be used and refined, is therefore imperative in order to improve the interoperability of the two systems of law, and thus to strengthen the integrity and effective functioning of both systems.

¹⁵⁹ Prud'homme, above n 7, 356.

CHAPTER SEVEN

REGIONAL STREAMLINING OF INTERNATIONAL TRADE AND INTERNATIONAL HUMAN RIGHTS NORMS

LJILJANA BIUKOVIĆ*

I. INTRODUCTION

The impact of international trade on human rights and vice versa has been an omnipresent theme in scholarly debates since the establishment of the World Trade Organization ('WTO'). While scholars continued to argue whether it was necessary to integrate the two subsystems of international law, and if so, how to conceptualise the integration, human rights-related issues began to surface in trade relations.¹ For example, it is often pointed out that patent protection granted to pharmaceuticals under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('TRIPS')² created the potential to deprive developing countries of the ability to access HIV/AIDS medications, and ultimately to deny peoples in these countries the human right to health.³ Another criticism of the advancement of the WTO regime at the expense of human rights is directed towards further agricultural trade liberalisation under the Doha Round negotiations of WTO which undermined the right to food of peoples in developing countries.⁴ Yet developing countries often oppose

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¹ *The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights*, UN ESCOR, 52nd sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2000/13 (15 June 2000) para 15.

² *Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995).

³ Thomas Cottier, Joost Pauwelyn, and Elisabeth Burgi Bonanomi, 'Linking Trade Regulation and Human Rights in International Law: An Overview' in Thomas Cottier, Joost Pauwelyn, and Elisabeth Burgi Bonanomi (eds), *Human Rights and International Trade* (Oxford University Press, 2005) 2–3.

⁴ Wenonah Hauter, 'The Limits of International Human Rights Law and the Role of Food Sovereignty in Protecting People from Further Trade Liberalization under the Doha Round Negotiations' (2007) 40 *Vanderbilt Journal of Transnational Law* 1071.

initiatives to include human rights references in the text of WTO laws because they consider those attempts to be disguised protectionism⁵ and a further limitation on their national sovereignty, especially as regards social policy.⁶

This chapter examines whether the international trade regime and human rights can be integrated and, if so, what degree of integration is possible, by looking into how two regional trade blocs—one in Latin America and one in Asia—function. The starting hypothesis is that if it is desirable and possible to integrate the two subsystems, it is more likely to be achieved at the regional level where cultural similarities and shared societal values can assist in integration based on political and economic interests.⁷ In Latin America, the development of the regional trade system parallels that of the regional human rights system. Consequently, State members of trading blocs such as MERCOSUR (*Mercado Común del Sur*)⁸ are also members of the separate regional human rights systems such as the Inter-American human rights system established within the framework of the Organization of American States ('OAS Charter') and its normative instruments including the *American Declaration on the Rights and Duties of Man* and the *American Convention on Human Rights* ('ACHR').⁹ In contrast, Asia, while it has been developing regional trade systems, lacks a regional human rights system. Thus, the recent establishment of the Association of Southeast Asian Nations' ('ASEAN')¹⁰ Intergovernmental Commission on Human Rights is only a subregional

⁵ Joel P Trachtman, 'Unilateralism and Multilateralism in U.S. Human Rights Laws Affecting International Trade' in Frederick M Abbot, Christine Breining-Kaufmann and Thomas Cottier (eds), *International Trade and Human Rights* (The University of Michigan Press, 2006) 360–361.

⁶ See Sisule Frederick Musungu, 'International Trade and Human Rights in Africa: A Comment on Conceptual Linkages' in Abbot et al, above n 5, 321.

⁷ The case of the European Union has often been mentioned to support this perspective. See Ernst-Ulrich Petersmann, 'Human Rights and International Trade Law: Defining and Connecting the Two Fields' in Cottier et al, above n 3, 29.

⁸ *Treaty Establishing a Common Market Between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay*, signed 26 March 1991, 30 ILM 1041 (entered into force 29 November 1991) ('MERCOSUR' or '*Treaty of Asunción*').

⁹ *American Declaration on the Rights and Duties of Man*, 9th sess, OAS Doc OEA/Ser. L/V/1.4 Rev. (1956); *Charter of the Organization of American States*, opened for signature 30 April 1948, 119 UNTS 3 (entered into force 13 December 1951); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

¹⁰ *ASEAN Declaration*, 8 August 1967, 6 ILM 1233 (entered into force 1969) ('*Bangkok Declaration*').

(albeit important) attempt to consider social and political objectives parallel to considering the economic objectives central to the free trade area established earlier in the 1990s by the Member States of the association.

This chapter attempts to identify local systematic (even if limited) forms of coordination of protection of trade and human rights and examines whether those forms of coordination utilised at the local level could enhance our understanding of the relationship between trade and human right regimes beyond the particular local borders. It thus contributes to a broader debate on finding more coordinated ways of existence of different subsystems of international law.¹¹ It argues that rather than mainstreaming human rights into international trade agreements or imposing hierarchy among norms underpinning regional integration, some regional economic arrangements are evolving towards *streamlining* the two regimes in a way that keeps them separate but non-conflicting. The Oxford Dictionary defines 'streamlining' as giving a form to an object that presents the least resistance to motion or 'making an organization process simple or more efficient or better organized.'¹² While mainstreaming human rights involves integrating the human rights agenda into trade agreements and using the language of human rights to interpret trade rules,¹³ the idea of streamlining is based on the premise that both rule-regimes could evolve within separate institutional systems of governance when their objectives lead to common goals of regional integration.

II. (IN)DEPENDENT PATHS OF DEVELOPMENT OF HUMAN RIGHTS AND INTERNATIONAL TRADE

After the end of World War II, the creation of the *General Agreement on Tariffs and Trade* ('GATT')¹⁴ and the *Universal Declaration of Human Rights* ('UDHR'),¹⁵ both fields—international trade and

¹¹ See the contributions to this volume by Philippa Webb (Ch 5), Sarah McCosker (Ch 6) and Karen Scott (Ch 8).

¹² *Canadian Oxford Dictionary* (Oxford University Press, 2nd ed, 2004) 1540.

¹³ For more on the idea of mainstreaming human rights see James Harrison, *The Human Rights Impact of the WTO* (Hart Publishing, 2007); Martti Koskeniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1(1) *Humanity* 47.

¹⁴ *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 194 (entered into force 1 January 1948).

¹⁵ *Universal Declaration of Human Rights* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

human rights—expanded rapidly.¹⁶ The United Nations ('UN') Charter specifies some aspects of the relationship between the UN and other international organizations and agencies with basic responsibilities in the economic, social, cultural, educational, and health fields, and it also stipulates that all of these organizations' activities be in accordance with the Charter.¹⁷ Recent UN documents emphasise 'an unavoidable link between the international trade regime and the enjoyment of human rights'¹⁸ and, ultimately, 'points of potential convergence between trade principles and objectives and the norms and standards of international human rights law.'¹⁹ The UN Committee on Economic, Social and Cultural Rights has called on the members of the WTO to adopt a human rights approach to trade, reminding them that the protection of human rights is the first responsibility of their governments.²⁰

It seems that the underlying argument for a greater degree of incorporation of human rights norms into the WTO law is that it would have a beneficial effect on the welfare of all of its Member States in general and, more particularly, on all individuals living in the Member States. The establishment of an institutional framework based on the rule of law and thus limitation of the role of the State in the regulation of markets and of private actors within them, is the foundation for achieving socio-economic wealth in an open, liberalised market environment. Accordingly, the promotion and protection of social and economic rights should not be prioritised over civil and political rights.²¹

¹⁶ The GATT would eventually be succeeded by the WTO. The UDHR was followed by the *International Covenant on Civil and Political Rights*, (opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)) ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) ('ICESCR'). The recent historical account of the emergence of the post war trade and human rights regimes is given by Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford University Press, 2011). See especially 'Trade and Human Rights in Historical Perspective:' ch 2, 23–60.

¹⁷ *UN Charter* art 57(1).

¹⁸ *Globalization and Its Impact on the Full Enjoyment of All Human Rights: Preliminary report of the Secretary-General*, UN GAOR, 55th sess, UN Doc A/55/342 (31 August 2002) para 13.

¹⁹ *Ibid* para 14.

²⁰ *Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the WTO*, UN ESCOR, 21st sess, UN Doc E/C.12/1999/9 (26 November 1999) para 6.

²¹ Simon Walker, 'Mainstreaming Human Rights in the WTO – Making Headway?' in Michael Windfuhr (ed), *Beyond the Nation State: Human Rights in Times of Globalization* (Global Publications Foundation, 2005) 75–95, and Penelope Simons, 'Binding the Hand

On the other hand, the fact that the WTO mandate is limited to the improvement of social and economic rights argues against the linkage and suggests, instead, that social and political goals should be achieved through other mechanisms and agreements outside of the WTO umbrella, an approach that might exclude an enforcement by the WTO of civil and political rights of individuals. Presently, it is difficult to foresee that the UN would take such an initiative or that there would be a concerted effort by a majority of the WTO members to incorporate explicit reference to the promotion and protection of human rights in that organization's mandate.²² However, the interaction between the two subsystems requires some coordination in order to ensure coherent treaty compliance by States.

The UN occasionally uses trade (and economic) sanctions to discipline member countries committing gross violations of human rights, and developed States use bilateral trade and investment treaties with developing countries to condition access to their markets upon ensuring human rights protection and respect for the rule of law by developing countries. In both cases, use of trade rules to facilitate functioning of the human rights regime is based on a premise that there is some kind of shared understanding of normative foundations of human rights among States. However, academic debates and bilateral and regional practice seem to indicate the lack of such an understanding. Developing countries often consider the concept of human rights as rooted in liberal democracy which focuses on the needs and rights of individuals in conformity with the constitutional values of the developed Western countries but not with those of the rest of the world.²³ They may agree to include human rights clauses in their trade agreements with developed countries in order to benefit from the market access promised in exchange, but their full compliance with those imported international human rights standards is

that Feeds Them: The Agreement on Agriculture, Transnational Corporations and the Right to Adequate Food in Developing Countries' in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing, 2008) 399–427.

²² But see the UN Secretary-General's call for mainstreaming human rights in the UN system of agencies: *Strengthening of the United Nations: an agenda for further change*, 57th sess, UN Doc A/57/387 (9 September 2002) paras 45–49.

²³ In many developing countries it is accepted that individual needs should be met through the local community and that individual rights should not take precedence over community rights. See Pitman Potter and Les Jacobs, 'Selective Adaptation and Human Right to Health in China' (2006) 9 *Health and Human Rights* 113.

tempered by their local perceptions and local practices.²⁴ Consequently, those ratified international standards, even when trade incentives are provided, may never become fully localised and may, at best, be selectively adapted to local conditions—the more they complement local practices, the more likely they are to be localised.²⁵

The fact that international trade law has developed a functioning rule-based system is attractive to international human rights activists seeking more forceful mechanisms for the promotion and protection of international human rights standards.²⁶ Trade scholars, on the other hand, would rather see human rights as ‘a way of defining the boundaries of socially acceptable trade policy choices.’²⁷ Although WTO trade rules and policies do not confer rights directly on individuals,²⁸ they do affect individuals through the policy choices available to Member States which then grant certain rights to individuals.

This is where the issue of coordinating trade and human rights issues becomes complex. Introducing human rights into international trade law in order to help us to define its objectives as extending beyond the principles of economic efficiency and closer to the principles of social justice, may make it more difficult to reach consensus among a very diverse group of countries seeking to distribute the benefits of economic welfare in accordance with different national policies and perceptions of distributive justice. To a number of scholars and politicians from developing countries, the latter is a matter of national sovereignty and should be completely outside of the jurisdiction of international law.²⁹ The next section of this

²⁴ At the same time, developed countries imposing those human rights clauses are doing so because of their own political interests: Emilie M Hafner-Burton, *Forced to be Good: Why Trade Agreements Boost Human Rights* (Cornell University Press, 2009) 165.

²⁵ Ljiljana Biukovic, ‘Compliance with International Treaties: Selective Adaptation Analysis’ (2006) 44 *Canadian Yearbook of International Law* 451–477; Potter and Jacobs, above n 23, 113. Many analyses of regional and bilateral trade agreements concluded between developed and developing countries that include human rights clauses reflect these findings. See also Hafner-Burton, above n 24.

²⁶ Many international human rights principles and standards are incorporated into international non-binding documents and many binding documents are not as widely accepted as WTO law is. In addition, some of WTO rules and disciplines could be used to advance human rights related policy goals (for example, general exceptions in Article XX, waivers, trade policy review mechanism).

²⁷ Andrew Lang, ‘Re-Righting International Trade: Some Critical Thoughts on the Contemporary Trade and Human Rights Literature’ in Shan et al, above n 21, 394.

²⁸ Except for the TRIPS Agreement which provides for protection of individual intellectual property rights.

²⁹ Such limitations would influence the legitimacy of those rules in developing States that are transitioning as they often are, to democracy as well as to a market economy.

chapter gives an overview of the academic debate about the relationship between international trade and the human rights regime.

III. ACADEMIC DEBATES: BETWEEN FRAGMENTATION AND NORMATIVISM

As the WTO mandate has grown into a 'uniform global regulatory infrastructure',³⁰ so have the doubts about its regulatory philosophy³¹ and, in particular, its lack of connection with a social justice framework. Legal scholars use different analytical frameworks to argue for or against integration of the WTO regime and human rights. The debate operates within a broader discussion about the nature of international law, proliferation of treaty regimes, and new actors in the international law sphere. A 2006 study prepared by the International Law Commission, for example, portrays international law as fragmented, being a set of self-contained subsystems, each focused on one specific area of international law to the exclusion of all others.³² Central to this perspective is the fact that there has been a proliferation of laws for dealing with specialised issues, such as international trade law or the law of the sea, and because there are no defined relationships or hierarchy of legal subsystems, their proliferation leads to the fragmentation of international law. Consequently, the WTO regime and human rights are viewed as autonomous subsystems that do not interact. Even when they both apply to a situation, there is no predetermined formula for coordinated implementation of the two different sets of rules.³³

On the opposite side of the spectrum is the perspective of international law as a system of interconnected subsystems, with scholars using different analytical frameworks to explain the degree(s) of integration and compatibility between the various subsystems exhibited. The weakest form of integration would be a situation where integration occurs randomly when

Melding human rights principles with trade principles could thus be detrimental to developing countries.

³⁰ Veijo Heiskanen, 'The Regulatory Philosophy of International Trade Law' (2004) 38 *Journal of World Trade* 12–13.

³¹ Ibid.

³² International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006).

³³ James D Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke Journal of Comparative and International Law* 77.

courts and tribunals coordinate interpretation and application of the two subsystems (primarily relying on the rules in the *Vienna Convention on the Law of the Treaties*) and to the extent allowed by the mandate of these courts and tribunals.³⁴ The strongest form of integration would be created within the unified international law system. In this form of integration of subsystems of international law, human rights would be considered a quasi-constitutional body of law within which the paramount normative premises are that of economic freedom and of the universal recognition of human dignity. Thus, economic, political, social and civil freedoms are the foundation for an emerging human rights constitution in international, regional and national treaties.³⁵

In sum, for those focusing on how complex the impact of the international trade regime is, particularly the impact that trade liberalisation has on other activities and policies, it is impossible, and even unnecessary, to make any global prescriptions of coordinated compliance.³⁶ For those seeing the two subsystems as part of the one universal system built on the principles articulated in the UN Charter and on the norms of justice and dignity, WTO law and human rights law do not conflict at all since they both mandate the promotion and protection of all human rights. Moreover, these normative claims of acceptance of justice and dignity as universal values in all countries and in international law is the basis for a particular conception of the common purpose of trade and human rights regimes: justice and dignity are normative foundations of all fundamental rights and the basis for economic and social reforms as much as civil and political reforms.

Even though it is difficult to deny the attractiveness of normative propositions that emphasise the importance of human rights law over trade law and that argue that human dignity is the underpinning norm of

³⁴ Cottier et al, above n 3, 126–127; Gabrielle Marceau, 'The WTO Dispute Settlement and Human Rights' in Abbott et al, above n 5, 187–188; Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25 *Michigan Journal of International Law* 93.

³⁵ Ernst-Ulrich Petersmann, 'Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution' in Abbott et al, above n 5, 50–51; see also Robert Howse and Makau Matua, 'Protecting Human Rights in Global Economy' in H Stokke and Tostensen (eds), *Human Rights in Development* (Kluwer Law International, 2001); Frederick M Abbott, 'TRIPS and Human Rights: Preliminary Reflections' in Abbott et al, above n 5, 145.

³⁶ Lang, 'Re-Righting International Trade,' above n 27; Susan Ariel Aaronson, 'Is the Wedding of Trade and Human Rights a Marriage of Convenience or a Lasting Union?' (2010) 10 *Human Rights and Human Welfare* 1.

international law in general, it is necessary to understand that countries differ in their perception of what constitute human rights and, that accordingly, they choose to accept different international treaty obligations with respect to the protection and promotion of those rights. Similarly, it is unlikely that the States would accept that international trade courts, which are not democratically elected, should be given the power to prioritise human rights laws over trade laws in a way that involves making normative choices that should be addressed at the domestic level.

Human rights scholars insist that the role of mainstreaming human rights should be more than just an interpretative point of reference for trade tribunals and that it should go as far as is necessary to develop 'acknowledgment of the human dimension of trade' within the WTO system,³⁷ primarily by changing the WTO's nontransparent and undemocratic decision making processes³⁸ and mandating that it 'put the needs and rights of individuals and communities within the trade picture.'³⁹ International trade scholars insist that the world trade regime (meaning GATT and the WTO) has efficiency as a paramount value and has been created for the very specific limited purposes of trade liberalisation; it has neither the institutional capacity nor the legitimacy for a reform that has elements of the establishment of a global constitutional order based on norms of justice.⁴⁰ While these discussions about the future of the multilateral international institutions fail to bring any agreement or institutional reform, countries are turning toward plurilateral negotiations of regional arrangements that would better address the values and interests they share.

IV. PATHS OF REGIONALISM: THE INTERSECTION OF INTERNATIONAL TRADE AND HUMAN RIGHTS

As already argued, developed and developing countries have different understandings of the place of international human rights law in international trade law and, ultimately, of the ways in which these two

³⁷ Walker, above n 21, 76.

³⁸ Caroline Dommen, 'The WTO, International Trade and Human Rights' in Windfuhr, above n 21, 53.

³⁹ Walker, above n 21, 76.

⁴⁰ See, eg, Lang, *World Trade Law after Neoliberalism*, above n 16; John Linarelli, '2021: International law Ten years from Now: International Trade Law; Redesigning Global Trade Institutions' (2011) 18 *Southwestern Journal of International Law* 75.

subsystems of international law should be coordinated. These differences are caused as much by the countries' different economic, social, legal and political objectives as by the complexities of the international rule-making process and the role that international organizations and States play in that process. Regional and bilateral trade agreements ('RTAs' and 'BTAs') concluded between developed and developing countries that include human rights clauses are not always based on the needs of developing countries and they often fail to provide sufficient financial and technical support for building the necessary institutional infrastructure for monitoring and implementing human rights standards.⁴¹ Thus, even when the human rights clauses are incorporated in trade treaties, the linkage may not trigger improvement of human rights in developing countries.

There are many reasons for the countries in a region to join together: the prospect of closer political and economic integration and/or the need for national security, coupled with social, historical, cultural, and even linguistic ties among the nations of a particular region.⁴² In addition, the lack of progress in the WTO's multilateral trade negotiations has prompted many countries to move toward regionalism in order to achieve closer economic integration and benefits from trade liberalisation. The high degree of political, social and economic similarity among the members of a regional economic bloc could lead to the hypothesis that the legal framework for the countries' integration is based on shared values, including those related to promotion of economic welfare, sustainable development and the protection of fundamental human rights. One can further assume that, due to these similarities, regional economic blocs of developing countries would define the priorities of integration and balance the objectives of trade law and human rights law more easily than blocs consisting of both developed and developing countries. An additional hypothesis is that, once the common goals for integration are set, it should be easier to agree on the level of protection of human rights, and on the institutional infrastructure, judicial procedures and remedies available to individuals whose treaty rights have been violated. Thus, regionalism could, at least in

⁴¹ The 1999 US and Cambodia textile agreement is an example of the successful linkage of trade and labour rights by hard regulation which resulted in an improvement in labour standards: *Textile Trade Agreement*, Cambodia–United States, signed on 20 January 1999 (entered into force 1 January 1999); Kevin Koben, 'Note from the Field: Trade, Monitoring and the ILO: Working To Improve Conditions in Cambodia's Garment Factories' (2004) 7 *Yale Human Rights and Development Law Journal* 79.

⁴² Francesco Duina, *The Social Construction of Free Trade; The European Union, NAFTA, and MERCOSUR* (Princeton University Press, 2006).

theory, lead to legal regimes in which trade issues and human rights issues could move forward together determined by a common set of societal values.

RTAs have been increasingly become a vehicle for cooperation among developing countries.⁴³ Although regionalisation in Latin America and Asia was influenced by the economic integration that was taking place in Europe,⁴⁴ the experience of the two regions in using regional law to coordinate interaction between international trade law and human rights law has been very different.

A. MERCOSUR

In 1991, Argentina, Brazil, Paraguay, and Uruguay, by signing the *Treaty of Asunción*, created MERCOSUR. Venezuela joined in July 2006. It is noteworthy that the bloc was created after its members had achieved democratisation internally, had settled old animosities between neighbouring States (primarily those between Argentina and Brazil) and had made slow progress towards integration, starting with creation of a NAFTA-like free trade arrangement. However, MERCOSUR's goal was to establish a customs union and common market among its members⁴⁵ and to ensure the full mobility throughout its Member States of goods, services, financial services and workers, and proper competition between the Member States.⁴⁶ Consequently, since the focus was economic integration, MERCOSUR developed a legal framework that supported a common economic agenda and protected economic rights rather than social, civil and political rights. The Treaty also provided for the harmonisation of laws in the relevant areas, the establishment of a common external tariff, and the adoption of a common trade policy in relation to third countries or groups of third countries.⁴⁷ As a consequence, MERCOSUR adopted a number of

⁴³ WTO, 'World Trade Report 2011' (Report, WTO, 2011) <http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf> noted an increasing number of bilateral and plurilateral agreements concluded among developing countries: 135 bilateral and 39 plurilateral in 2010: see Table B4, 61.

⁴⁴ The Council of Europe adopted the *Convention for the Protection of Human Rights and Fundamental Freedoms* in 1949 (opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953)) while the Economic Coal and Steel Community was established in 1952. Subsequently, in 1958, the European Economic Community ('EEC') and EURATOM were established.

⁴⁵ *Treaty of Asunción* arts 1–2.

⁴⁶ *Ibid* art 1.

⁴⁷ *Ibid*.

laws in the area of economics, public health, and the environment, which provide solid standardisation of economic life and public health within the bloc.

MERCOSUR has been built by setting up regional institutions of inter-governmental nature and by keeping two separate processes of integration. One is economic integration managed by three decision-making bodies (the Common Market Council, the Common Market Group, and the Commission of Trade) and supported by the administrative Secretariat and the dispute settlement mechanism. Political cooperation is managed through annual presidential summits which serve the purpose of determining very broad political directions of development for MERCOSUR. Initially, human rights were not a part of political cooperation by MERCOSUR Member States, and MERCOSUR institutions did not manage human rights claims. The Inter-American system of human rights, established in the late 1940s by the OAS, was charged with protecting human rights for its Member States, which include all MERCOSUR States.⁴⁸

The OAS established the legal framework for protection of human rights by adopting the OAS Charter and the *American Declaration on the Rights and Duties of Man* in 1948 ('the Declaration') and it subsequently created institutions to promote the protection of human rights among the OAS members.⁴⁹ The Inter-American Commission on Human Rights is a body established by the OAS Charter itself with the mission of promoting and protecting human rights in the American hemisphere.⁵⁰ Its human rights functions include receipt of complaints of violations of the *American Declaration* against all members of the OAS (including those not parties to the ACHR), as well as a monitoring and reporting function in relation to all OAS members. The Commission also has the function of investigating, considering and reporting on communications alleging violations of the *American Convention on Human Rights* by States Parties to that treaty. The monitoring role of the Commission was especially important in the 1970s and the 1980s, when it publicised human rights abuses of military

⁴⁸ On 10 September 2012 Venezuela denounced the American Convention on Human Rights, the denunciation to take effect in September 2013.

⁴⁹ For a brief history of the Inter-American Human Rights System see Federico Ramos, '2021: International Law Ten Years from Now: International Human Rights: The Need for an In-time Response: The Challenge for the Inter-American Commission on Human Rights for the Next Decade' (2011) 18 *Southwestern Journal of International Law* 159; Alexandra Huneus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 493.

⁵⁰ See more on the OAS system at the website of the Inter-American Commission on Human Rights: *Inter-American Commission on Human Rights* (2011) Organization of American States < <http://www.oas.org/en/iachr/>>.

dictatorships in the region.⁵¹ The Inter-American Court of Human Rights was established under the 1969 *American Convention on Human Rights*, and may only entertain complaints against States Parties to the Convention (once the matter has passed through the Commission); it also possesses an advisory jurisdiction. The Court also played an important role in dealing with the systematic human rights abuses by dictatorships in the region and developed several important international doctrines such as the doctrine on disappearances and the victim's right to the truth, to name two.⁵²

Initially, apart from the broad wording of its Preamble, the *Treaty of Asunción* did not include explicit human rights provisions nor did it establish any formal relationship between its own text and the human rights law of any universal or regional organizations. Yet, even though membership of the OAS is not a prerequisite for MERCOSUR membership, all members of MERCOSUR are also members of the OAS. The OAS Charter contains a broad reference to the principle of non-discrimination on the basis of 'race, nationality, creed or sex,'⁵³ and while the *American Declaration* mimics the UDHR in its declarative tone and its non-binding legal effect, it does provide an authoritative interpretation of the OAS members' human rights obligations and has been seen by some members of MERCOSUR as an important means of incorporating fundamental principles of international customary law into a regional system for the protection of human rights.⁵⁴ Accession to the *American Convention* is not a requirement for MERCOSUR membership but, again, as of the end of 2012 all MERCOSUR members were party to the Convention.

In 1998, MERCOSUR adopted the *Ushuaia Protocol* and included a 'democracy clause' in its treaty system; this provision required all of its members and associates to maintain domestic democratic institutions.⁵⁵ It provided a mechanism for sanctioning non-democratic acts by governments, the sanctions ranging from consultation to the suspension of all of the rights and privileges of membership.⁵⁶ This political conditionality to

⁵¹ Huneeus, above n 48, 498.

⁵² For more on the Court's practice see Huneeus, above n 48, 500–504.

⁵³ OAS Charter art II(k).

⁵⁴ Frank Garcia, 'Integrating Trade and Human Rights in the Americas' in Abbot, above n 3, 330–331; Hector Fuandez Ledesma, 'The Validity of Economic, Social and Cultural Rights in the Inter-American System' in Windfuhr, above n 21, 193.

⁵⁵ *Ushuaia Protocol on Democratic Commitment in the Southern Common Market, the Republic of Bolivia and the Republic of Chile*, opened for signature 24 July 1998, 2177 UNTS 383 (entered into force 17 January 2002) art 1 ('*Ushuaia Protocol*').

⁵⁶ *Ushuaia Protocol* art 5.

membership in a regional economic bloc appears to be similar to the carrot and stick-like measure used by developed countries and the EU in their preferential trade agreements with developing countries. The Protocol does not protect the political or other rights of individuals who are citizens of MERCOSUR States.

Also in 1998, the Council of Ministers of the MERCOSUR adopted the *Social and Labour Declaration* and established a Regional Social and Labour Commission with the principal mandate to monitor and enforce members' compliance with the principles of the Declaration.⁵⁷ This Declaration emphasizes the social dimension of the bloc but does not confer on the Commission or any other body of MERCOSUR any additional law-making powers in the area of labour rights. The Declaration simply re-affirms the principles of non-discrimination (including equality of migrant workers) and gender equality in the work force, mandates the elimination of child labour, as well as enshrining the fundamental labour rights such as prohibition of forced labour, and freedom of association (including the right to strike and collective bargaining).⁵⁸

These principles have already been incorporated into the national labour legislation of MERCOSUR Member States. However, the Declaration provides for the Commission to examine Member States' annual reports on changes to national legislation and practice in light of their commitments to the Declaration.⁵⁹ The Declaration does not establish any enforcement procedure or provide for sanctions for breach of the obligations related to labour rights, but rather promotes consultation and cooperation. It does not establish any connection with the existing trade dispute settlement mechanisms. On the contrary, it clearly says that no mechanism of the Declaration may be used in any other trade, economic or financial disputes.⁶⁰

Despite its apparently non-binding character, the Declaration has made an impact on the development of a social agenda in MERCOSUR. After the Declaration was adopted, MERCOSUR launched several initiatives related to social issues, such as the adoption of the *Charter of Buenos Aires on Social Commitment* in MERCOSUR in 2000, the *Asunción Protocol on*

⁵⁷ *MERCOSUR Social and Labour Declaration* (signed 19 December 1998) arts 20–22 <http://www.mercosur.int/msweb/Documentos/Publicados/Declaraciones%20Conjuntas/003671668_CMC_10-12-1998_DECL-DPR_S-N_IN_SocioLaboral.pdf>.

⁵⁸ *Social and Labour Declaration* arts 1–11.

⁵⁹ *Ibid* arts 20–23.

⁶⁰ *Ibid* art 25.

the *Commitment to the Promotion and Protection of Human Rights* of MERCOSUR in 2005, and the creation of the MERCOSUR Social Institute in 2007 to work on harmonisation of regional social and economic policies.⁶¹

Since there is no general hierarchy for the economic and human rights subsystems of regional law in Latin America and MERCOSUR nor any direct or explicit cross-reference between them, it is important to look into whether that apparent lack of coordination between the texts of the treaties actually causes problems when conflicts arise between the regional trade and human rights laws. It is also important to look into how the relevant MERCOSUR trade tribunals interpret the link between the two systems of law.

The MERCOSUR dispute settlement body⁶² has dealt with conflicts between trade and human rights rules in two disputes between Uruguay and Argentina: one concerned Argentina's prohibition of the import of Uruguayan remodelled tires⁶³ and the other the use of the Uruguay River.⁶⁴ In the first dispute the ad hoc tribunal found in 2005 that the Argentinean import prohibition was justified, and ruled that free commerce, the main principle of the common market, could be limited because of environmental concerns. On appeal, the Permanent Review Tribunal ('PRT') found, referring to the case law of the European Court of Justice,⁶⁵ that the

⁶¹ At the 2008 MERCOSUR Social Summit funding of US\$227,000 was earmarked for the work of the Social Institute: see *MERCOSUR* (2012) South-South Learning on Social Protection <<http://south-south.ipc-undp.org/international-cooperation/item/314-mercosur>>.

⁶² The current dispute settlement procedure (in force since 2004) was established by the *Protocol of Olivos* (*Protocolo de Olivos para la Solución de Controversias en el MERCOSUR*) (1992) (replacing the earlier system under the *Protocol of Brasilia* of 1991), which was amended by the Modifying Protocol of the Olivos Protocol (*Protocolo Modificadorio del Protocolo de Olivos*). The system involves a requirement to engage in negotiations, and ultimately the appointment of ad hoc arbitral tribunals to hear disputes between member States over the interpretation of the relevant treaties, with the Permanent Review Tribunal having the jurisdiction to consider appeals against arbitral awards. See *Introducción* (2012) MERCOSUR <http://www.mercosur.int/t_generic.jsp?contentid=374&site=1&channel=secretaria&seccion=6>.

⁶³ *Laudo del Tribunal Permanente de Revision Constituido Para Entender en el Recurso de Revision Presentado por la Republica Oriental del Uruguay contra el Laudo Arbitral del Tribunal Arbitral ad hoc de Fecha de 25 de Octubre de 2005 en la Controversia 'Prohibicion de Importacion de Neumaticos Remoldeados Procedentes del Uruguay* (MERCOSUR, Case No 1/2005, 20 December 2005) <www.sice.oas.org/dispute/MERCOSUR/ind_s.asp>.

⁶⁴ Lean Granger, 'The Role of International Tribunals in Natural Resource Disputes in Latin America' (2007) 34 *Ecology Law Quarterly* 1297.

⁶⁵ *Commission v Austria* (C-320/03) [2005] ECR I-9871; *Commission v Federal Republic of Germany* (C-463/01) [2004] I-11705; *Radlberger Getränkegesellschaft mbH & Co and S Spitz*

ad hoc tribunal had erred in its decision and that the exceptional measures imposed by Argentina were disproportionate. The PRT ordered Argentina to modify the law that prohibited importing tires originating from Uruguay.⁶⁶

In the second dispute, Uruguay complained that the failure of Argentina to adopt measures to prevent road blocks and demonstrations by people living in and around the Argentinean city of Gualaguaychín in response to the construction of two paper mills on the border between the two countries constituted an obstacle to the free movement of goods and services and, accordingly, violated the *Treaty of Asunción* and Argentina's WTO obligations.⁶⁷ Both Uruguay and Argentina supported their claims by referring to ECJ case law.⁶⁸ However, the ad hoc tribunal's 2006 award relied rather on the Preamble to the *American Declaration on the Rights and Duties of Man* and found that the right to protest was not absolute and needed to be limited for the benefit of the exercise of other rights.⁶⁹ Finally, the tribunal held that the actions of the government of Argentina were not compatible with its MERCOSUR treaty obligations.⁷⁰ Argentina did not appeal the final award of the tribunal, nor did it prevent the protests and roadblocks on one of the bridges over the river which continued into 2010.⁷¹

KG v Land Baden-Württemberg (C-309/02) [2004] ECR I-11763; *De Peijper* (C-104/75) [1976] ECR 613; *Cassis de Dijon* (C-120/78) [1979] ECR 649.

⁶⁶ The PRT held in 2008 that the initial modifications of legislation were not sufficient: *Laudo del Tribunal Permanente de Revisión en el asunto No 1/2008 'Divergencia sobre el cumplimiento del Laudo No 1/05 iniciada por la República Oriental del Uruguay (art. 30 Protocolo de Olivos)'* (MERCOSUR, Case No 1/2008, April 25 2008).

⁶⁷ *Argentina v Uruguay (Award)* (MERCOSUR, Case No 09/2006, 6 September 2006) <<http://www.mercosur.int/innovaportal/file/Laudo%20de%20Cortes%20de%20Ruta%20-%20ES.pdf?contentid=375&version=1&filename=Laudo%20de%20Cortes%20de%20Ruta%20-%20ES.pdf>>; for the English text see Andrew Lang, 'Society of International Economic Law Translation Project' (Project, Society of International Economic Law, 21 August 2011) <http://www.sielnet.org/Resources/Documents/Paper_Mills_MERCOSUR_Translation_FINAL_Clean_22_August_2011.pdf>.

⁶⁸ Uruguay referred to *Commission v France* (C-265/95) [1997] ECR I-6959; Argentina referred to *Schmidberger v Austria* (C-112/00) [2003] ECR I-5659.

⁶⁹ The tribunal held ECJ case law irrelevant because it is based on very different facts from those of the case in hand, and because of the difference between the EU's supranational character and the intergovernmental nature of MERCOSUR: *Argentina v Uruguay* (MERCOSUR, Case No 09/2006, 6 September 2006).

⁷⁰ *Ibid.*

⁷¹ Before the ad hoc tribunal of MERCOSUR made its decision, Argentina had brought an action against Uruguay before the International Court of Justice ('ICJ'), alleging that Uruguay's construction of the two paper mills on the border between the two countries violated the 1975 Statute of the River Uruguay, a treaty between Argentina and Uruguay (*Statute of the River Uruguay*, Uruguay–Argentina, signed 26 February 1975, 1295 UNTS 340

In conclusion, the dispute illustrates how trade and human rights rules can intersect and the possible outcomes when an international or regional treaty does not make a formal link between the two subsections of international or regional law. The political statements in the preambles to a treaty and even the inter-connectedness of dispute settlement bodies in a particular case (especially if they are ad hoc tribunals rather than courts) are not always sufficient to establish consistent, coherent coordinated compliance by treaty members with international trade and human rights laws. Just as WTO dispute settlement bodies do, the MERCOSUR ad hoc tribunal in the pulp mills case made a reference to the human rights treaty only to reinforce its own interpretation of the trade law and to emphasise that it could not apply any law other than that of the treaty by which it was established. In the remodelled tires case, the PRT attempted to coordinate the countries' compliance with their trade and human rights obligations, and ruled that limitations of trade rights, even for environmental concerns, cannot be excessive and disproportionate.

MERCOSUR's modest integration of human rights law and trade law is an ongoing process, influenced primarily by political necessity—that is, by the current need to ensure that all of its members reach the same level of development of democratic institutions as a prerequisite to building the institutional capacity to monitor and enforce human rights laws. Since there is no hierarchy between the systems and only limited institutional coordination has been established, it is not surprising that trade tribunals will occasionally be asked to decide whether to prioritise the application of trade rules over human rights rules. This implies that trade tribunals are the institutions allowed to prioritise for MERCOSUR Member States protection of some fundamental rights over others (for example, right to trade over right to health or environment), and to make important normative decisions for the regional bloc and its Member States (such as to give priority to efficiency over justice). If the two subsystems continue to develop as two parallel regimes and MERCOSUR decides to deepen its

(entered into force 18 September 1976)). In April 2010, despite finding that Uruguay, by failing to inform the Administrative Commission of the River Uruguay of its plans to build the two pulp mills was in breach of its obligations under the treaty regulating the use of the river, the ICJ held that the breach of a procedural rather than a substantive treaty obligation did not warrant the requested remedy, an order requiring Uruguay to dismantle the mills or an order for compensation. The Court also found that Argentina had failed to produce sufficient evidence to prove that discharges from the mills had 'caused harm to living resources or to the quality of water or the ecological balance of the river: *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14.

level of integration it will be necessary that the two regimes develop common normative foundations.

B. ASEAN and ACFTA

In 1967, Indonesia, Malaysia, the Philippines, Singapore and Thailand formed the Association of Southeast Asian Nations ('ASEAN')⁷² with the objective of 'active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields.'⁷³ Five other countries in the region had joined ASEAN by 1999: Brunei Darussalam, Vietnam, Laos, Myanmar, and Cambodia. The primary focus of ASEAN during the first decade of its existence was to ensure peace and security in this region rendered highly unstable by the Cold War.⁷⁴ Economic issues came to the agenda later.⁷⁵ According to the *ASEAN Declaration*, all of its objectives are to be achieved through cooperation based on consensus 'in the spirit of equality and partnership.' In 1992, ASEAN officially announced the creation of the free trade area ('AFTA').⁷⁶ Subsequently, ASEAN moved to liberalise services and investments.⁷⁷

Due to the great political and economic diversity of its membership ASEAN never established a form of deeper integration nor supranational regional institutions. ASEAN has been the only regional economic bloc on the continent that still lacks a general regional system of human rights.⁷⁸ Although all of the ASEAN countries are parties to at least two of the

⁷² *ASEAN Declaration*, signed 8 August 1967, 35 ILM 1063.

⁷³ ASEAN Secretariat, *From Strength to Strength, ASEAN Functional Cooperation: Retrospect and Prospect* (ASEAN, 1993) 2.

⁷⁴ JoAnn Fagot Aviel, 'Placing Human Rights and Environmental Issues on ASEAN's Agenda: The Role of Non-Governmental Organizations' (2000) 8 *Asian Journal of Political Science* 17.

⁷⁵ *Ibid.*

⁷⁶ See *Framework Agreements on Enhancing ASEAN Economic Cooperation*, signed 28 January 1992, 31 ILM 506 (entered into force 28 January 1992) art 2. The five founding ASEAN member governments signed the *Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area*, signed 28th January 1992, 31 ILM 513 (entered into force 28th January 1992) ('CEPT').

⁷⁷ The *ASEAN Framework Agreement on Services*, signed 15 December 1995, 35 ILM 1074 (entered into force 30 December 1998) ('AFAS'); 1999 *Framework Agreement on the ASEAN Investment Area*, signed 7 October 1998 (entered into force 25 May 1999) ('AIA').

⁷⁸ Seth R Harris, 'Asian Human Rights: Forming a Regional Covenant' (2000) 17 *Asian-Pacific Law and Policy Journal* 17 1.

principal United Nations human rights treaties,⁷⁹ they have been more focused on ensuring economic growth and prioritised economic and social rights over the civil and political rights of individuals. In the early stage of the regional economic integration, the majority of Asian governments were non-democratic⁸⁰ and they consistently refused to engage with other governments and human rights activists at the international and national level in discussion about the protection of human rights. Governments in Asia stood firm in their isolation from the international human rights regime, rejecting it as a Western concept, inapplicable in the Asian context since it contravened the region's societal values, primarily its traditional positivist concept of State sovereignty.⁸¹ Human rights institutions and norms evolved slowly, outside of the scope of official government policies.⁸² The first regional draft of a Human Rights Charter appeared only in 1998, and it was drafted by a non-governmental organization established in 1986, the Asian Human Rights Commission.⁸³

ASEAN was building its human rights agenda, selectively choosing from the catalogue of rights in the *Universal Declaration of Human Rights* those

⁷⁹ The reference to the principal UN human rights treaties includes: the *International Covenant on Economic, Social and Cultural Rights*; the *International Covenant on Civil and Political Rights*; the *International Convention on the Elimination of All Forms of Racial Discrimination* ('ICERD'); the *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW'); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT'); the *Convention on the Rights of the Child* ('CRC'); the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. All of the ASEAN countries are now parties to the CRC and CEDAW. However, regional human rights NGOs such as the Task Force on ASEAN Migrant Workers, Asian Forum for Human Rights and Development and Migrant Forum is Asia found that ASEAN States have the worst UN treaties ratification records and a poor reporting record. For the ratification record see Task Force on ASEAN Migrant Workers, 'ASEAN Member States Urged to Ratify UN Human Rights and ILO Core Conventions' (Press Release, 12 January 2007) <<http://www.mfasia.org/resources/joint-statements/310-asean-member-states-urged-to-ratify-un-human-rights-treaties-and-ilo-core-conventions>>.

⁸⁰ Except for Japan and India. See James Munro, 'Why States Create International Human Rights Mechanisms: the ASEAN Intergovernmental Commission on Human Rights and Democratic Lock-in Theory' (2009) 10 *Asia-Pacific Journal of Human Rights and the Law* 1.

⁸¹ Harris, above n 77, 11.

⁸² The first NGOs in the region emerged in the mid-1980s, supported by financial aid primarily from the EU and its member States, the US, Canada and Japan, focusing on specific rights, such as environmental rights, or the rights of women and children: Aviel, above n 73, 19.

⁸³ See *ASEAN Human Rights Commission* (2012) ASEAN Human Rights Commission <<http://www.ahrchk.net/>>.

that would not interfere with the regulatory sovereignty of its members.⁸⁴ The first rights on its agenda were environmental rights, closely linked to the region's environmental problems in the 1980s and 1990s with watershed management and fires.⁸⁵ As the region's problems with human rights violations by governments continued, specifically in East Timor and Myanmar, NGOs increased their criticism of the ASEAN bloc for not responding to the crises. The governments of the ASEAN Member States struggled to find a proper way to address domestic tensions in Myanmar after it became a member in 1997, and even in Indonesia (regarding East Timor), one of the five founding members.⁸⁶ After all, ASEAN is based on the principle of non-interference in the internal affairs of its Member States and respect for the independence, sovereignty, equality, territorial integrity and national identity of all of them.⁸⁷

In 2007, ASEAN Member States agreed to transform their loose inter-governmental form of integration by giving ASEAN legal personality and endorsing an institutional structure that could support deeper integration. This new vision of the regional integration was embedded in the *ASEAN Charter* signed by all ASEAN members on 20 November 2007. The Charter's preamble clearly expresses the Member States' commitment to establish the community 'through enhanced regional cooperation and integration, in particular, by establishing an ASEAN Community comprising the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community.'⁸⁸ More importantly, the promotion and protection of human rights is now included not only in the preamble of the Charter but also in its main text. Article 14 of the Charter now mandated the establishment of an ASEAN human rights body.

When the *Cha-Am Hua Hin Declaration on the Inauguration of the ASEAN Intergovernmental Commission on Human Rights* ('AICHR' or 'the Commission') was adopted by all ten ASEAN States on 23 October

⁸⁴ *ASEAN Charter*, opened for signature 20 November 2007, (entered into force 15 December 2008) art 2(2)(e). But provisions of arts 1(6)–(7) specifically illuminate as a purpose of ASEAN to be to alleviate poverty, narrow development gap and to strengthen democracy and enhance human rights and fundamental freedoms, it also enumerates as one of its main principles the principle of non-interference in internal affairs of its members.

⁸⁵ Aviel, above n 73, 20.

⁸⁶ Hao Duy Phan, 'The Evolution Towards an ASEAN Human Rights Body' (2008) 9 *Asia-Pacific Journal of Human Rights and the Law* 1.

⁸⁷ *ASEAN Charter* art 2(1)(a)–(b).

⁸⁸ *ASEAN Charter* preamble.

2009 formally establishing a human rights body for which the Terms of Reference ('TOR') had already been agreed upon in July 2009,⁸⁹ skepticism poured in from the West and from regional human rights activists.⁹⁰ With the Commission's limited mandate to focus on the promotion rather than the protection of human rights,⁹¹ and having to rely on dialogue and consultation with Member States and their governments (but not NGOs) instead of robust enforcement powers,⁹² it is clear that the development of ASEAN's human rights standards will take an 'evolutionary approach' as envisioned in Article 2(5) of the Declaration's TOR.⁹³ Although the TOR reveal that ASEAN members wanted to establish a competent body with the financial means to provide technical aid to members developing their national human rights laws and mechanisms for protecting the rights of their citizens, the body has no power to mandate that the requested legislation be introduced.

In sum, the Terms of Reference do not constitute hard regulations nor do they mandate that the governments of ASEAN Member States respect human rights within their territories. Yet, they do reflect the political

⁸⁹ *Terms of Reference* (20 July 2009) ASEAN Intergovernmental Commission on Human Rights <<http://www.aseansec.org/Doc-TOR-AHRB.pdf>>; see generally Hsien-Li Tan, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia* (Cambridge University Press, 2011); Catherine Renshaw, 'Understanding the new ASEAN Intergovernmental Commission on Human Rights: the Limits and Potential of Theory' [2010] UNSWLRS 53; Andrea Durbach, Catherine Renshaw and Andrew Byrnes 'A Tongue But No Teeth? ASEAN's New Human Rights Body' (2009) 31 *Sydney Law Review* 211.

⁹⁰ 'ASEAN's Toothless Council,' *The Wall Street Journal* (online) 22 July 2009 <<http://online.wsj.com/article/SB10001424052970203517304574303592053848748.html>>; Thomas Fuller, 'ASEAN Inaugurates Human Rights Commission,' *The New York Times* (New York) 24 October 2009. However, it is noteworthy that at the 14th ASEAN Summit on 28 February – 1 March 2009, the ASEAN Leaders adopted the *Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community* (2009–2015). The Roadmap is an important step towards building a human rights regime of ASEAN because it includes the ASEAN Political Security Community ('APSC') Blueprint and the ASEAN Socio-Cultural Community ('ASCC') Blueprint. These documents lead to the establishment of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children ('ACWC') and the adoption of its own Terms of Reference: See *Terms of Reference of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children* (2010) ASEAN <<http://www.aseansec.org/documents/TOR-ACWC.pdf>>.

⁹¹ 'to develop strategies of promotion and protection of human rights, to enhance public awareness of human rights through education, research and dissemination of information (but not by enforcement of human rights standards, to encourage (but not require), to consult with other national, regional and international institutions on human rights, etc.' TOR art 4 (emphasis added).

⁹² Art 3 of the TOR specifically said that the Commission is a consultative body.

⁹³ For an overview of the growth of the national human rights institutions in ASEAN bloc and the regional human rights institution see Durbach et al, above n 88, 211.

consensus among the members of the bloc that the linkage of trade and human rights envisioned in the *ASEAN Charter* is worth exploring.

Shortly after establishment of the free trade area, there were reports of economic growth caused by a significant increase in internal market trade among the ASEAN members,⁹⁴ but there were no accounts of the increased trade liberalisation causing human rights-related concerns. However, now that the region has opened its market to foreign investment through free trade agreements ('FTAs') with bigger and economically more developed Asian countries, such as China, the threat of conflict between international trade and human rights has become obvious. The lack of explicit reference to human rights norms and standards in FTAs between ASEAN and other countries⁹⁵ and the consequent lack of any mechanisms to monitor the impact of trade on human rights could become a source of conflict between ASEAN and countries that abide by a different set of standards. This chapter concentrates on the ASEAN-China trade and economic arrangements that were negotiated on the basis of the 2002 *Framework Agreement on Comprehensive Economic Cooperation Between ASEAN and the People's Republic of China*⁹⁶ and under which the two partners agreed to establish a free trade area within a ten-year period. The ASEAN-China Free Trade Area (ACFTA) was indeed established on 1 January 2010.⁹⁷

It is important to analyse the ASEAN-China trade and economic ties against the background of the two partners' current practice in negotiating trade and investment agreements with other countries and their human rights records on the regional level and as individual States. Firstly, neither ACFTA, the subsequent ASEAN agreements on liberalisation of services and investments, or ASEAN's FTAs with third countries,⁹⁸ on the

⁹⁴ Tran Van Hoa, 'The WTO, Regional Trade Agreements and an Enlarged ASEAN' in Tran Van Hoa and Charles Harvie (eds), *Regional Trade Agreements in Asia* (Edward Elgar, 2009) 9–15, reports that intra-regional trade rose from 20 to 25 percent in three years.

⁹⁵ Particularly the ASEAN-Japan FTA, the Korea-ASEAN FTA, and the ASEAN-China agreements, but also to the ASEAN-Australia-New Zealand FTA and the ASEAN-EU agreements.

⁹⁶ *Framework Agreement on Comprehensive Economic Co-Operation Between ASEAN and the People's Republic of China*, ASEAN-China, signed 4 November 2002 (entered into force 1 July 2003).

⁹⁷ See *ASEAN China Dialogue Relations* (16 April 2012) ASEAN <<http://www.aseansec.org/5874.htm>>.

⁹⁸ See the web site of ASEAN for a complete list of FTAs that the bloc concluded with third countries: *External Relations* (2012) ASEAN <<http://www.aseansec.org/20164.htm>>.

one hand, nor China's FTAs with third States,⁹⁹ on the other, go beyond the trade disciplines established by the WTO for its members.¹⁰⁰ China and nine of the ten ASEAN countries are WTO members, with Laos joining from early 2013. Secondly, neither China's nor ASEAN's FTAs with third countries include human rights requirements as prerequisites for market access.¹⁰¹ Thirdly, neither the ASEAN member States nor ASEAN as a group have a particularly good record in human rights promotion and protection. China's human rights record was the subject of numerous political and legal debates in the Western democracies prior its acceptance in the WTO. Interestingly, it has been in the plethora of bilateral trade and investment negotiations that followed China's acceptance in the WTO that most of the non-Western and developing countries' concerns regarding China's disrespect for human rights have started to emerge. However, these have arisen in the context of Chinese outbound foreign direct investment practice rather than the country's internal violations of rights. China's trade and investment agreements in Africa have been criticized for having a harmful effect on the labour, health and environmental rights of Africans.¹⁰² China has often dismissed the criticism by pointing to Western countries' colonisation in Africa as the source of human rights problems and asserting that China's investments have only served to improve the level of enjoyment of economic rights by Africans.¹⁰³

Considering the above comments on both China's and ASEAN's attitudes towards the protection of human rights domestically and externally, it is not surprising that their free trade agreement has no specific reference

⁹⁹ For the list of China's FTAs see *China FTA Network* (2012) Ministry of Commerce, PRC <<http://fta.mofcom.gov.cn/english/index.shtml>>. Not all FTAs texts are available in English.

¹⁰⁰ The agreements on trade in goods concluded between ASEAN and Korea provide that includes that the permissible exceptions to trade liberalization, in addition to those mentioned in GATT art XX, include the prohibition of the import of goods produced by prison labour: *Agreement on Trade in Goods Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of the South East Asian Nations and the Republic of Korea*, signed 24th August 2006 (entered into force 1 July 2006) art 11(e) ('*ASEAN-Korea Agreement on Trade in Goods*').

¹⁰¹ Cf Ibid.

¹⁰² Yunlong Li, 'Sino-African Relations and Human Right Development in Africa' (2009) 2 *Human Rights* 28–31.

¹⁰³ Yingying Huang and Mei Wu, 'Interpreting the Different Comments on Sino-African Relations' (2009) 11 *Manager Journal* 5–6; Wenjie Ruan, 'Lessons for the Controversy Surrounding WTO Social Clauses' (Group Economic Study, No 244, October 2007).

to human rights standards. Consequently, the only mechanism for addressing the potential problem is a provision of Article 10 of their FTA. Article 10 is modelled directly on Article XX of GATT 1994 and provides for exceptions to trade liberalisation in order to protect public morals and human life. The *Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China*¹⁰⁴ provides for an additional exception with respect to the right of the parties to prevent the importation of goods that are the product of prison labour.¹⁰⁵ ASEAN and China have agreed in general terms on eleven priority areas of cooperation—energy, transportation, culture, public health, tourism, agriculture, information technology, two-way investment, human resources development, the Mekong River Basin Development, and the environment.¹⁰⁶ However, a dialogue between the parties, rather than any form of rule making, is the main mechanism that the FTA has stipulated for addressing these issues.

There is no empirical evidence so far that the ASEAN-China FTA has become the source of conflict between trade and human rights norms, but the criticism from ASEAN legal scholars and human rights activists points out potential areas of conflict. Even though the parties are not each other's main trading partners, there is a concern that because they have many of the same industries and because of China's economic power and the strength of its manufacturing sector (in particular, its lower labour costs), the FTA would undermine the competitive advantage of the ASEAN members' industries in their domestic markets as much as it would hurt the bloc's competitive advantage vis-à-vis the rest of the world.¹⁰⁷ In addition, some health and environmental concerns are being raised in the ASEAN Member States.¹⁰⁸ Because the FTA does not have any mediating

¹⁰⁴ *Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China*, signed 29 November 2004 (entered into force 1 January 2005) ('*ASEAN-China Agreement on Trade in Goods*').

¹⁰⁵ The provisions of Art. 12(e) of *ASEAN-China Agreement on Trade in Goods* are identical to these of Art. 11(e) of *ASEAN-Korea Agreement on Trade in Goods*.

¹⁰⁶ *ASEAN China Dialogue Relations*, above n 96, para 4.

¹⁰⁷ Chia Siow Yue, 'ASEAN-China Free Trade Area,' (Paper presented at the AEP Conference, Hong Kong 12–13 April 2004).

¹⁰⁸ Iman Prihandono, 'Human rights and the ASEAN-China FTA,' *The Jakarta Post* (Jakarta) 12 January 2010. Lowering prices in the agriculture and the fisheries sectors by liberalising markets to allow the Chinese agricultural and fisheries industries access to the ASEAN market could lower prices of domestic products and could then further impact negatively on local fishermen living standard.

provisions for balancing economic rules with human rights, ASEAN governments are often called upon to modify their domestic environmental and health standards to protect their citizens from goods imported from China where the safety standards are lower.¹⁰⁹

The dispute settlement mechanism¹¹⁰ established to facilitate this FTA and the surrounding agreements mandates that an arbitral tribunal be established solely¹¹¹ to hear disputes that arise out of the application of the FTA and the agreements that stem from it.¹¹² In other words, since the FTA itself does not deal with the relationship between the economic and human rights aspects of the trade relationship, any balancing of the obligations imposed by the two regimes has to be handled at the dispute settlement stage if the three arbitrators decide to take into consideration human rights law when interpreting trade rules.¹¹³ As already discussed, the ICJ and the MERCOSUR tribunal that dealt with a similar conflict in Latin America both prioritised trade obligations over human rights obligations. Considering the context of the ASEAN-China FTA, especially the absence of a regional human rights treaty, ASEAN and China's poor ratification record of the UN human rights treaties and ILO conventions, and domestic human rights situation in China and some of the ASEAN Member States,¹¹⁴ it is possible to hypothesise that this tribunal will take a

¹⁰⁹ Ibid.

¹¹⁰ *Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-Operation Between the Association of Southeast Asian Nations and the People's Republic of China*, signed 4 November 2002, (entered into force in 2005).

¹¹¹ Ibid art 6: three-member panel of arbitrators to be appointed if the parties could not resolve their controversies by consultation (art 4), conciliation and mediation (art 5).

¹¹² art 2(3)(4).

¹¹³ art 2 excludes explicitly concurrent jurisdiction of any other tribunal once the parties have activated the process under this agreement.

¹¹⁴ The Task Force on ASEAN Migrant workers found that 'Brunei, Burma, Laos, and Vietnam rank the worst in ASEAN for ILO Core Conventions, while Thailand failed to ratify conventions protecting freedom of association and collective bargaining.' See Task Force on ASEAN Migrant Workers, above n 78. China has been criticized for human rights violations ranging from freedom of association, collective bargaining, persecution of human rights activists, and violation of rights of minorities: see Human Rights Watch 'World Report 2012: China' (Report, Human Rights Watch, January 2012) <<http://www.hrw.org/world-report-2012/world-report-2012-china>>; Randall Peerenboom, 'Economic and Social Rights: the Role of Courts in China' (2011) 12 *San Diego International Law Journal* 303; Dana Nicholas, 'China's Labour Enforcement Crisis: International Intervention and Corporate Social Responsibility' (2009) 11 *Scholar* 155; Burma/Myanmar has consistently been ranked one of the world's 'most notorious human rights violators': see Yuval Ginbar, 'Human Rights in ASEAN—Setting Sail or Treading Water?', (2010) 10(3) *Human Rights Law Review* 504, 516.

similar course. There have been no reported cases arising out of the ASEAN-China FTA by the time of writing this chapter.¹¹⁵

In sum, the ASEAN-China FTA and the associated agreements do not make a direct, explicit link between trade and human rights regimes of international law. Instead, they leave potential conflicts to be resolved on an ad hoc basis by the dispute settlement tribunal. Considering the domestic regulation of human rights within ASEAN members and China, it is possible to conclude that the tribunal will give priority to economic rights over civil and political ones. China has rejected all trade agreements with developed countries that proposed to include such clauses and China's bilateral trade and investment agreements with other developing countries usually contain no human rights clauses. Given the economic strength of China in the world market and its external policy with respect to the promotion and protection of international human rights laws and standards, it is almost certain that China would not compromise with ASEAN and engage in coordinated compliance on the two sets of norms. The establishment of the ASEAN Intergovernmental Commission on Human Rights is just the beginning of a slow evolutionary process to consolidate its human rights agenda and to stabilise the region. The fact that the bloc has chosen to establish a commission and not a court could make human rights protection more complex and incoherent.

V. CONCLUSIONS

This chapter has used some of the propositions about the need to define and establish clear linkages between international trade and international human rights, primarily the idea of coordinated compliance, and has examined them in the context of regional economic integration in Asia and in Latin America, specifically ASEAN and MERCOSUR. The first case study was an actual dispute between two members of MERCOSUR arising out of a conflict between the MERCOSUR trade rules and a wider set of regional human rights laws. The second case study was a potential conflict arising out of the ASEAN-China free trade agreement. In both case studies the idea was to examine modalities of the existence of the two regional subsystems of law, the level of their interconnectedness, and the functioning of the two.

¹¹⁵ April 2012.

While the analysis in this chapter reveals that, in very broad, almost abstract terms each of the regional blocs recognises the importance of the human rights considerations in trade treaties, they internalise those general considerations in very different ways. On a practical level, it is very difficult to reach consensus on exactly which human rights to incorporate into the texts of a trade treaty, and for these so incorporated, what mechanisms should be built into the treaty to ensure the promotion of international human rights. Despite the cultural, religious, historical, economic and political similarities between the members of MERCOSUR and ASEAN, it is still difficult for each bloc to agree on even what rights should be protected.

MERCOSUR and ASEAN are taking an evolutionary path towards the coordination of international trade laws and human right laws. They have chosen to prioritise linkages between trade and those human rights for which they have already built institutional capacity and awareness at the national level. While treaties do not explicitly make trade liberalisation conditional on respect for human rights in general terms, there is a movement towards recognising that compliance with some human rights may matter to the membership more than compliance with others. There must first be consensus among the Member States identifying the important rights, then their most powerful actors must have the political will to incorporate them, and, finally, the financial capacity to build the necessary mechanisms of protection must be present. The analysis of the ASEAN-China trade agreement reveals a new economic power beginning to develop its own bilateral and regional web of trade agreements as the US and the EU have done. However, China's agreements are silent on human rights issues and it remains to be seen whether this is the start of the unwinding of the already established linkages between trade and human rights.

CHAPTER EIGHT

MANAGING FRAGMENTATION THROUGH GOVERNANCE: INTERNATIONAL ENVIRONMENTAL LAW IN A GLOBALISED WORLD

KAREN N SCOTT*

I. INTRODUCTION

As demonstrated in other chapters of this book, the concepts globalization and fragmentation provide not only the context within which contemporary international law operates but also a challenge to its relevance and effectiveness in the modern era. Although undoubtedly linked, these concepts are, nevertheless, contradictory. On the one hand, globalization emphasises notions of interdependence and linkage between problems and solutions. Within the field of environmental protection, the concept of ecological interdependence has long been recognised and the globalization of international environmental law is arguably a necessary component of modern international environmental governance. On the other hand, fragmentation of international law—as characterized by ‘the emergence of specialized and (relatively) autonomous rules or rule complexes, legal institutions and spheres of legal practice’¹—emphasises the isolation and disconnect between regimes and institutions. Nevertheless, both globalization and fragmentation create similar challenges to environmental governance: how to manage the interaction between environmental regimes so as to minimise unnecessary conflation of, and conflict between, their regulatory mandates. It is this question that provides the central theme of this chapter.

* School of Law, University of Canterbury, New Zealand. This chapter draws on Karen N Scott, ‘International Environmental Governance: Managing Fragmentation through Institutional Connection’ in (2011) 12 *Melbourne Journal of International Law* 177–216, which was a revised version of a paper presented at the Third Four Societies conference, and is published here with the permission of the Editors of the *Journal*.

¹ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, 58th sess, UN Doc A/CN.4/L.682, (13 April 2006) [8] (‘ILC Fragmentation Report’).

This chapter will explore one emerging governance strategy designed to manage not only duplication and conflict between environmental regimes arising from fragmentation but also to maximise the benefits that result from conflated mandates: the creation of formal cooperative arrangements or other institutional linkages between multilateral environmental agreements ('MEAs'). Institutional linkages inevitably occur beyond this narrow category and include informal linkages as well as cooperative agreements between MEAs and environmental institutions such as the United Nations Environment Programme ('UNEP') and the Global Environment Facility ('GEF'), but these other linkages fall beyond the scope of this chapter. The formal institutional linkages explored in Part II of this chapter are divided into three categories: formal agreements facilitating institutional cooperation; institutional integrated management; and cooperative mechanisms associated with compliance. This chapter will conclude that the creation of cooperative arrangements and other institutional connections provides an important mechanism by which the problems associated with fragmentation can be minimised and, more significantly, the connections and overlaps between regimes can in fact be exploited in order to improve international environmental governance. Nevertheless, closer cooperation and institutional integration raises a number of questions relating to the accountability of the regime or institution to its States Parties and, more generally, the legitimacy of the regime. Moreover, the impact of these new forms of international governance potentially extends beyond the realm of international environmental law. As Part III of this chapter will demonstrate, these newly developing governance strategies actually challenge the fundamentals of the international legal system itself, including whom we regard as participants within the system, the sources of international law and even its ultimate foundations, as a system based on consent.

II. GLOBALIZATION AND FRAGMENTATION: THE COMMON CHALLENGE

It is estimated that there are over 500 global and regional multilateral environmental agreements in force today² and whilst this undoubtedly represents at least one measure of success in addressing environmental concerns, their very proliferation has arguably led to the fragmentation of

² Tadanori Inomata, *Management Review of Environmental Governance within the United Nations System*, Joint Inspection Unit, JIU/REP/2008/3, [42].

international environmental law. Fragmentation of itself does not imply an inherently positive or negative value judgment. Some commentators have suggested that it reflects an 'unprecedented normative and institutional expansion of international law'³ or a 'positive demonstration of the responsiveness of legal imagination to social change.'⁴ In contrast, others have viewed fragmentation as 'leading to inefficiencies, a lack of synergy ... inconsistent or contradictory standards'⁵ or even jeopardising 'the credibility, reliability and consequently, the authority of international law.'⁶ Nevertheless, an undoubted consequence of globalization and fragmentation is the creation of regimes and institutions with similar or even conflated regulatory mandates, which give rise to risks of duplication, divergence and even conflict between standards and legal commitments. Typical examples of actual and potential duplication, divergence and conflict between environmental regimes include the management of forests by the 1997 *Kyoto Protocol*⁷ in contrast to the 1992 *Biodiversity Convention*,⁸ the relationship between ozone-depleting substances and green house gases under the 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*⁹ and the *Kyoto Protocol* and, more recently, geo-engineering under the 1992 *Biodiversity Convention* in contrast to the 1996 *Protocol to the London Convention*.¹⁰ However, conflation and overlap

³ Mario Prost and Paul Kingsley Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much does the Multiplication of International Organizations Really Matter?' (2006) 5 *Chinese Journal of International Law* 341, 343.

⁴ Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553, 575.

⁵ Phillipe Roche and Franz Zaver Perrez, 'International Environmental Governance: The Strive Towards a Comprehensive, Coherent, Effective and Efficient Environmental Regime' (2005) 16 *Colorado Journal of International Environmental Law and Policy* 1, 15–16.

⁶ Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2003–2004) 25 *Michigan Journal of International Law* 849, 856.

⁷ *Kyoto Protocol to the Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (entered into force 16 February 2005).

⁸ *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('*Biodiversity Convention*').

⁹ *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989). Restrictions on the production of hydrochlorofluorocarbons ('HFCs'), which are 10,000 times more potent as a greenhouse gas than carbon dioxide: see Conference of the Parties, *Montreal Protocol, Decision XIX/6*, 19th mtg, UN Doc, UNEP/OzL.Pro.19/7 (21 September 2007) which was adopted with the intention of accelerating the final phase out date of HFCs.

¹⁰ *Protocol to the London Dumping Convention*, opened for signature 7 November 1996, 36 (1997) ILM 7 (entered into force 24 March 2006); cf Conference of the Parties, *Protocol to the London Dumping Convention, Resolution LC-LP.1 (2008) on the Regulation of Ocean Fertilization*, 30th mtg, Res/LC-LP.1 (9 January 2008) with Conference of the Parties,

between mandates and regimes also provides significant potential for improving synergy between commitments, policies and programmes as well as opportunities for mutually supportive and more effective implementation of obligations. For example, trade-related restrictions adopted under the 1973 *Convention on International Trade in Endangered Species of Fauna and Flora* ('CITES')¹¹ undoubtedly support broader measures to protect wildlife promoted by the 1992 *Biodiversity Convention* and the 1979 *Convention on the Conservation of Migratory Species* ('CMS').¹²

The key question for scholars and practitioners in the new era of globalization is: how can the risks associated with fragmentation be managed and its potential benefits maximised? Two broad *approaches* to managing conflation and conflict can be identified: the first approach draws on the international rules and principles relating to the interpretation and application of treaties and focuses on managing conflict between regimes; the second approach seeks to utilise and develop environmental governance mechanisms, not only to manage conflict between regimes, but also to maximise the benefits that can be derived from conflated and overlapping mandates.¹³ The work of the International Law Commission on the fragmentation of international law¹⁴ largely concentrates on the issue of conflict between regimes and the extent to which treaty-based solutions might be utilised to resolve them. By contrast, this chapter will focus on the identification of governance-based mechanisms for promoting institutional interaction with a view to not only minimising conflict, but to improve the overall effectiveness of international environmental law.

III. INSTITUTIONAL INTERACTION AND THE CONCEPT OF 'LINKAGE'

As Oran Perez writes, institutional interaction and the idea of linkage emerged as a response to the problem of managing global dilemmas in an anarchic world that is governed by weak and fragmented international institutions. Linkage can help in coping with this governance "deficit" by

Convention on Biological Diversity, *Biodiversity and Climate Change*, 9th mtg, UNEP/CBD/COP/EC/IX/16 (9 October 2008) para C.4.

¹¹ *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 12 ILM 1085 (entered into force 1 July 1975).

¹² *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 29 June 1979, 19 ILM 15 (entered into force 1 November 1983).

¹³ Rüdiger Wolfrum and Nele Matz, *Conflict in International Environmental Law* (Springer, 2003) 119.

¹⁴ See ILC Fragmentation Report, above n 1.

unleashing hidden synergies between regimes, thereby creating more effective governance structures.¹⁵ Linkage and interaction operates on a number of levels and may arise as a result of a deliberate governance strategy or as a consequence of ecological, sociological or functional interdependence.

Ultimately, all regimes and institutions are linked by the fact that they operate within the realm of public international law. Oran Young describes this form of linkage as 'embedded' and notes that it 'reflect[s] and represent[s] the deep structure of international society'.¹⁶ Public international law implicitly underpins all interaction between environmental regimes and institutions and its principles and concepts—such as rules relating to treaties, international organizations and State responsibility—both facilitate and limit the extent of their interaction. More specifically, connections may be identified between regimes and institutions which might be described as 'functional' linkages.¹⁷ This occurs where the subject matter of the regime is linked or overlaps in 'biogeophysical or socioeconomic terms'¹⁸ but whilst those regimes may intersect with one another on a de facto basis,¹⁹ there may be minimal *deliberate* interaction between them. The term functional linkage might appropriately describe the current relationship between the 1982 *United Nations Convention on the Law of the Sea* ('UNCLOS')²⁰ and the 1992 *United Nations Framework Convention on Climate Change* ('UNFCCC')²¹ in connection with the impacts of climate change on the oceans such as coral bleaching and acidification. Of course functional linkage or the identification of overlaps between regimes and institutions will often provide the basis for further, deliberate interaction. Closely related to functional linkage is a species of interaction which has been described as 'behavioural'²² or 'interaction through commitment'.²³

¹⁵ Oren Perez, 'Multiple Regimes, Issue Linkage and International Cooperation: Exploring the Role of the WTO' (2005) 26 *University of Pennsylvania Journal of International Economic Law* 735, 735.

¹⁶ Oran R Young, 'Institutional Linkages in International Society: Polar Perspectives' (1996) 2 *Global Governance* 1, 8.

¹⁷ Thomas Gehring and Sebastian Oberthür, 'Interplay: Exploring Institutional Interaction', in Oran R Young, Leslie A. King and Heike Schroeder (eds), *Institutions and Environmental Change: Principal Finds, Applications and Research Frontiers* (The MIT Press, 2008) 197; Young, 'Institutional Linkages', above n 16, 6 describes this form of linkage as 'overlapping'.

¹⁸ Gehring and Oberthür, above n 17, 197.

¹⁹ Young, above n 16, 6.

²⁰ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

²¹ Opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

²² Gehring and Oberthür, above n 17, 204.

²³ Ibid, 202; Sebastian Oberthür and Thomas Gehring, 'Conceptual Foundations of Institutional Interaction' in Sebastian Oberthür and Thomas Gehring (eds), *Institutional*

The behaviour or indeed the commitments undertaken in one regime may impact upon or influence conduct within, or indeed treaty obligations agreed to as part of, another regime. Behavioural or commitment interaction may be mutually supportive or, where the commitments are incompatible, may lead to conflict between regimes.

The categories of linkage or interaction described above arise naturally as a result of overlaps in function or the common use of legal tools—such as trade measures—to promote treaty objectives. Other forms of interaction or linkage may be pursued deliberately in order to better implement the objectives of a treaty or to improve international environmental governance. Cognitive interaction for example ‘is driven by the power of knowledge and ideas’²⁴ and occurs when information or ideas generated by one institution or regime impacts on decision-making or activities within another institution or regime;²⁵ in essence, when regimes or institutions learn from one another.²⁶ For example, the compliance mechanism developed under the *Kyoto Protocol* was undoubtedly based on (albeit developed beyond) the compliance mechanism which was successfully operating under the auspices of the 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*,²⁷ and provides a clear illustration of cognitive interaction. Beyond sharing knowledge and ideas, institutions and regimes may choose to actively coordinate their activities through the development of joint work programmes and/ or the creation of joint rules and institutions. Sebastian Oberthür describes this form of linkage as ‘joint interplay management’²⁸ although it is also referred to as ‘clustering’.²⁹ One of the earliest examples of such interaction occurred—and is continuing to occur—in connection with the protection of the North Sea. The North Sea ‘regime’ comprises the soft law Ministerial Declarations

Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies (The MIT Press, 2006) 29, 35.

²⁴ Gehring and Oberthür above n 17, 200.

²⁵ Oberthür and Gehring, above n 23, 35.

²⁶ Sebastian Oberthür, ‘Interplay Management: Enhancing Environmental Policy Integration among International Institutions’ (2009) 9 *International Environmental Agreements* 371, 378; see also Oran R Young, ‘Institutions and the Growth of Knowledge: Evidence from International Environmental Regimes’ (2004) 4 *International Environmental Agreements: Politics, Law and Economics* 215.

²⁷ Ibid.

²⁸ Oberthür, above n 26, 376.

²⁹ See also Sebastian Oberthür, ‘Clustering of Multilateral of Multilateral Environmental Agreements: Potentials and Limitations’ (2002) 3 *International Environmental Agreements: Politics, Law and Economics* 317; Oran R Young, ‘Institutional Linkages’, above n 16, 5.

adopted at periodic North Sea Conferences,³⁰ the 1992 *Convention on the Protection of the North East Atlantic* ('OSPAR')³¹ and EU law. The synergy between these overlapping institutions with regard to the North Sea has undoubtedly contributed to the successful management of the region.³² More recently, joint interplay management or clustering as a means of developing linkages and interactions between environmental regimes and institutions has received significant attention. Numerous examples of such interaction can be identified across a range of pollution prevention, wildlife and fishery instruments and some of these will be discussed in Part II of this chapter below. The final—or ultimate—level of linkage and interaction has been described by Oran R Young as 'institutional nesting'.³³ Regimes or institutions become institutionally nested when they are 'folded into broader institutional frameworks'.³⁴ The most common example of institutional nesting occurs when protocols are adopted under the auspices of one or more conventions such as the UNECE 1979 *Convention on Long-range Transboundary Air Pollution* ('LRTAP')³⁵ or the UNECE 1992 *Convention on the Protection and Use of Transboundary Water Courses and International Lakes*.³⁶ The *Antarctic Treaty* system might also be viewed as an example of institutional nesting.³⁷

³⁰ See OSPAR Commission, *Ministerial Declarations and Statements*, (11 June 2012) OSPAR Commission <http://www.ospar.org/content/content.asp?menu=01310624810000_000000_000000>.

³¹ 1992 *Convention for the Protection of the North East Atlantic*, opened for signature 22 September 1992, 32 ILM 1072 (entered into force 25 March 1998).

³² Jon Birger Skjaerseth, 'Protecting the Northeast Atlantic: One Problem, Three Institutions' in Oberthür and Gehring (eds), *Institutional Interaction*, above n 23, 103.

³³ Young, above n 16, 3–4.

³⁴ Ibid.

³⁵ *UNECE Convention on Long-Range Transboundary Air Pollution*, opened for signature 13 November 1979, 18 ILM 1442 (entered into force 16 March 1983). Eight protocols providing for specific regulation of particular pollutants are 'nested' within LRTAP.

³⁶ *UNECE Convention on the Protection and Use of Transboundary Water Courses and International Lakes*, opened for signature 17 March 1992, 1936 UNTS 369 (entered into force 6 October 1996) ('*UNECE Water Convention*'). The *UNECE Water Convention* is supplemented by two protocols. Most unusually, the 2003 *Protocol on Civil Liability and Compensation for Damage Caused by Transboundary Effects of Industrial Accidents on Transboundary Waters*, opened for signature 21 May 2003, Doc. ECE/MP.WAT/11-ECE/CP.TEIA/9 (not yet in force) is also a protocol to a second, entirely separate instrument: the 1992 *UNECE Convention on the Transboundary Effect of Industrial Accidents*, opened for signature 17 March 1992, 31 ILM 1333 (entered into force 19 April 2000).

³⁷ *The Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961) is supplemented by the *Protocol to the Antarctic Treaty on Environmental Protection*, opened for signature 4 October 1991, 30 ILM 1461 (entered into force 14 January 1998). However, three further closely related instruments (the *Convention on the Conservation of Antarctic Seals*, opened for signature 1 June 1972, 11 ILM 251 (entered

IV. MEAs AND THEIR INSTITUTIONS: THE NATURE AND CAPACITY OF 'AUTONOMOUS INSTITUTIONAL ARRANGEMENTS'

'Autonomous Institutional Arrangements' is the nomenclature coined by Churchill and Ulfstein in their seminal article published in 2000 to describe MEA institutions as a collective.³⁸ In that article the authors asserted that autonomous institutional arrangements ('AIAs') constitute 'a distinct and different approach to institutionalised collaboration between states, being both more informal and more flexible, and often innovative in relation to norm creation and compliance.'³⁹ Although not strictly an international organization,⁴⁰ the composite structure of an AIA—which normally comprises a conference of the parties, a secretariat, scientific or subsidiary bodies and, more than likely, a compliance mechanism—performs functions similar to many international organizations.⁴¹ For the purposes of this chapter, the most significant function is the capacity to develop formal and informal relationships with other MEAs as well as international organizations and institutions; in short, a 'foreign policy' function.⁴²

In order to carry out a foreign policy function, AIAs, or, more narrowly, the Conference of the Parties ('COP') must possess appropriate legal capacity for this purpose. However, whilst it is undisputed that international organizations may possess treaty making powers,⁴³ the extent to

into force 11 March 1978); *Convention for the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 19 ILM 837 (entered into force 7 April 1982) ('CCAMLR'); *Convention on the Regulation of Antarctic Mineral Resource Activities*, opened for signature 2 June 1988, 27 ILM 868 (not yet in force) as well as relevant decisions and other instruments combine with the Treaty and its Protocol to comprise the Antarctic Treaty System.

³⁸ Robin Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623.

³⁹ Ibid 625.

⁴⁰ The terms 'international organization' and 'international institution' are not definitively defined and can be used to describe an intergovernmental body, an international regime or even a set of norms. See also John Duffield, 'What are International Institutions?' (2007) 9 *International Studies Review* 1.

⁴¹ See further Geir Ulfstein, 'Treaty Bodies' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 877.

⁴² Ibid 885.

⁴³ As evidenced by the adoption in 1986 of the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, opened for signature 21 March 1986, UN Doc A/CONF.129/15 (not yet in force). On international organizations and international legal personality more generally see ND White, *The Law of International Organisations* (Manchester University Press, 1996) ch 2.

which either AIAs or the COP possess international legal personality is less clear. Unsurprisingly no MEA has explicitly designated its institutions as international legal persons. However, such an express designation is not necessary under international law.⁴⁴ The possession of international legal personality can be implied by the nature of the organization or institution and its functions. In the words of the International Court of Justice ('ICJ'), an organization's 'members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.'⁴⁵ Although the ICJ was referring to an intergovernmental organization—the United Nations—in this passage, there is no obvious reason why the doctrine of implied powers cannot be applied to AIAs.⁴⁶

A significant proportion of the institutions established by MEAs are required by their parties to cooperate with other appropriate convention bodies or international environmental organizations in order to further the objectives of the treaty. A typical example is provided by Article 23(4) (h) of the *Convention on Biodiversity*, which requires the COP to 'contact, through the secretariat, the executive bodies of conventions dealing with matters covered by this Convention with a view to establishing appropriate forms of cooperation with them.' Other MEAs such as the 1987 *Montreal Protocol*⁴⁷ and 1971 *Ramsar Convention on Wetlands of International Importance*⁴⁸ have developed their foreign policy mandate through the adoption of decisions at the COP.

Even those MEAs that do not expressly provide for collaboration and cooperation clauses will normally include a wide ranging provision that permits the COP or other bodies such as the secretariat to 'exercise such other functions as are required for the achievement of the objective of the Convention as well as all other functions assigned to it under the

⁴⁴ White, above n 43, 27.

⁴⁵ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179.

⁴⁶ This conclusion is supported by Churchill and Ulfstein, 'Autonomous Institutional Arrangements', above n 38, 886.

⁴⁷ See Conference of the Parties, Montreal Protocol, *Decision XIII/29 Recognising the preparations for the world summit on sustainable development 2002*, 13th mtg, UN Doc UNEP/OzL.Pro.13/10 (26 October 2001) para 3.

⁴⁸ *Convention on Wetlands of International Importance*, opened for signature 3 December 1982, 996 UNTS 243 (entered into force 21 December 1975) ('*Ramsar Convention*'); see Conference of the Parties, Ramsar Convention, *Resolution X.1 (The Ramsar Strategic Plan, 2009–2015)*, 10th mtg (4 November 2008) strategy 3.1 ('*Resolution X.1*').

Convention.⁴⁹ Consequently, it can be concluded that to the extent that it is necessary to carry out the functions of the MEA, AIAs, acting collectively or individually have been implicitly endowed with legal personality and capacity by their contracting parties.⁵⁰ In many, if not most, cases that personality extends to include the capacity to enter into treaties and other agreements. These powers are though inevitably limited by the nature and functions of the MEA and, in many (if not all) cases, are restricted to collaboration with other MEAs, international institutions (such as UNEP or GEF) and scientific, technical or other non-governmental organizations.

V. CASE STUDIES ON COOPERATIVE INSTITUTIONAL ARRANGEMENTS BETWEEN AND AMONG MEAS

The creation of formal linkages and institutional cooperative arrangements between MEAs has been identified as one mechanism for addressing the challenges presented by the globalization and fragmentation of international law, and partnerships between MEAs 'have become an important element in the organizational landscape of environmental governance.'⁵¹ The extent to which MEAs develop formal links and cooperative institutional arrangements depends in part upon their legal capacity to do so (discussed above), and in part, upon the enthusiasm and willingness of their institutions acting individually or collectively. In practice, the success or otherwise of these arrangements often comes down to the role

⁴⁹ Although this text was taken from Article 7(m) of the 1992 UNFCCC, it is typical of the vast majority of MEAs.

⁵⁰ This conclusion would appear to be supported by the opinion of the UN Office of Legal Affairs which, in 1993, asserted that the UNFCCC established 'an international entity/organization with its own separate legal personality, statement of principles, organs and a supportive structure in the form of a Secretariat (Articles 3, 7–10):' The Opinion went on to note that the UNFCCC had capacity to establish cooperative arrangements with other competent international organizations and bodies: see United Nations Office of Legal Affairs, 'Arrangements for the Implementation of the Provisions of Article 11 of the UN Framework Convention on Climate Change Concerning the Financial Mechanism,' (1993) *United Nations Juridical Yearbook* 427, [4]; Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, *Matters relating to arrangements for the financial mechanism and for technical and financial support to developing country Parties*, 9th sess, UN Doc A/AC.237/50 (2 December 1993) cited in Churchill and Ulfstein, 'Autonomous Institutional Arrangements', above n 38, 647–648, nn 157–158.

⁵¹ Liliana B Andonova, 'International organizations as entrepreneurs of environmental partnerships' in Frank Bierman, Bernd Siebenhüner and Anna Schreyögg (eds), *International Organizations in Global Environmental Governance* (Routledge, 2009) 220.

played by the MEA secretariat. Increasingly, secretariats are regarded as 'actors in their own right',⁵² capable of driving a normative agenda. A recent study on environmental bureaucracies identified significant differences in the perceived and actual influence of individual secretariats over the direction and operation of their respective MEAs.⁵³ For example, the secretariats to the 1992 *Biodiversity Convention* and the 1994 *United Nations Convention to Combat Desertification* ('UNCCD')⁵⁴ were both viewed as dynamic institutions able to exercise 'significant influence on international negotiations and cooperation'⁵⁵ and 'significant normative influence in the convention process.'⁵⁶ By contrast, the secretariat to the 1992 UNFCCC was perceived as operating within a straitjacket imposed by the parties to the Convention leaving little room for a 'proactive role or [for] autonomous initiatives.'⁵⁷ Unsurprisingly, those MEAs benefiting from a more dynamic secretariat such as the 1992 *Biodiversity Convention* would appear to have engaged to a much greater extent in fostering institutional cooperation between MEAs, as will be demonstrated below.

Although the linkages and examples of institutional interaction between MEAs are now numerous, this chapter will focus primarily on the formal linkages between MEAs and MEA institutions. Moreover, only three categories of institutional linkage will be explored: first, formal agreements between MEAs often referred to as Memoranda of Understanding ('MOU'); second, cooperative agreements which go beyond the typical MOU but which do not amount to nested arrangements, referred to here as institutional integrated management; and third, connections and linkages which occur between MEA compliance mechanisms or in the more general context of compliance.

⁵² Steffan Bauer, Per-Olf Busch and Bernd Siebenhüner, 'Treaty Secretariats in Global Environmental Governance' in Bierman, Siebenhüner and Schreyögg, above n 51, 174.

⁵³ Frank Bierman and Bernd Siebenhüner (eds), *Managers of Global Change: The Influence of International Environmental Bureaucracies* (The MIT Press, 2009). See especially chapters 9, 10, 11 and 12.

⁵⁴ *Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, opened for signature 14 October 1994, 1954 UNTS 3 (entered into force 26 December 1996).

⁵⁵ Bernd Siebenhüner, 'The Biodiversity Secretariat: Lean Shark in Troubled Waters' in Bierman and Siebenhüner (eds), above n 53, 284.

⁵⁶ Steffan Bauer, 'The Desertification Secretariat: A Castle Made of Sand' in Bierman and Siebenhüner (eds), *Managers of Global Change*, above n 53, 300.

⁵⁷ Per-Olf Busch, 'The Climate Secretariat: Making a Living in a Straitjacket' in Bierman and Siebenhüner (eds), *Managers of Global Change*, above n 53, 251, 261.

A. *Formal Agreements and Other Cooperative Arrangements Facilitating Institutional Cooperation*

Concluding a formal agreement or MOU with one or more MEAs provides a clear external demonstration of linkage between those MEAs. An ever-increasing number of MEAs are adopting formal agreements with a growing number of partners. For example, the 1992 Convention on Biodiversity has concluded 134 agreements to date with partners that include international organizations, universities, non-governmental organizations ('NGOs'), botanical gardens and eighteen other MEAs. The 1973 CITES has concluded a rather more modest fourteen partnership agreements, four of which are with other MEAs. However, this trend is not ubiquitous; the 1959 *Antarctic Treaty* for example, has entered into no official partnership agreements to date.⁵⁸

Partnership agreements between MEAs are typically based on synergies or overlaps in subject matter, on the intersection of subject matter between the various MEAs or on the basis of functional synergies.

The largest category of agreements between MEAs is based on synergies or overlaps in subject matter, notably (although not exclusively) in areas of biodiversity protection and fisheries management. For example, the 1992 *Biodiversity Convention* has entered into agreements with more than ten other biodiversity-focused MEAs⁵⁹ and the 1971 *Ramsar Convention* has developed institutional links with twenty-one other MEAs to date.⁶⁰ The importance of partnership agreements between the *Ramsar Convention* and other related MEAs has been endorsed in the recently adopted Ramsar Strategic Plan 2009–2015.⁶¹ Similarly, seven of the thirty CMS partners are MEAs and close cooperation 'with relevant multilateral

⁵⁸ It should nevertheless be noted that in response to the overlap between the mandates of the *Antarctic Treaty* and the International Maritime Organization ('IMO') with respect to shipping safety in the Southern Ocean, the Antarctic Treaty Consultative Meeting adopted in 2010 Resolution 5, which establishes a system of responsibility and procedure for keeping the parties informed of the progress of Antarctic initiatives within the IMO: See Antarctic Treaty Consultative Meeting, *Co-ordination among Antarctic Treaty Parties on Antarctic Proposals under Consideration within the IMO*, 33rd mtg, Resolution 5 (14 May 2010).

⁵⁹ See Convention on Biological Diversity, *Partnership Agreements* (8 June 2012) <<http://www.cbd.int/agreements/>>.

⁶⁰ For the full list of Ramsar partners see Ramsar, *Memoranda of Understanding and Cooperation with Other Conventions and International Organizations* (30 May 2012) Ramsar Convention on Wetlands <http://www.ramsar.org/cda/en/ramsar-documents-mous/main/ramsar/1-31-115_4000_0_>.

⁶¹ *Resolution X.1 strategy* 3.1.

environmental agreement and key partners to maximise synergies and avoid duplication' is a key component of the CMS Strategic Plan 2006–2011.⁶² The 1973 CITES has entered into fewer partnership agreements and only two have been concluded with MEAs on the basis of overlapping subject matter.⁶³ Nevertheless, the conclusion of partnership arrangements with suitable MEA and other organizations has been included as a central component of the CITES Strategic Vision 2008–2013.⁶⁴ One of the most extensive cooperative institutional networks is the Regional Fishery Body Secretariats Network ('RSN') created in 2005.⁶⁵ This is an informal network of up to thirty-five fishery secretariats but is by no means the only form of institutional cooperation within the area of fisheries management; individual regional fisheries management organizations ('RFMOs') are increasingly entering into agreements with other RFMOs or related organizations. For example, the 1982 CCAMLR Commission has recently adopted an MOU with the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean ('WCPFC')⁶⁶ and has also agreed the text for an MOU with the secretariat of the *Agreement on the Conservation of Albatrosses and Petrels* ('ACAP').⁶⁷

The second category of institutional cooperative arrangements comprises those based on intersecting (as opposed to overlapping) subject

⁶² Conference of the Parties, Convention on Migratory Species, *CMS Strategic Plan 2006–2011*, UN Doc UNEP/CMS/Resolution 8.2 (25 November 2005) operational principle 2.

⁶³ See *Memorandum of Cooperation between the Secretariat of the Convention on International Trade in Endangered Species and the Secretariat of the Convention on Biological Diversity* (23 March 1996) available online at <<http://www.cbd.int/doc/agreements/agmt-cites-1996-03-23-moc-web-en.pdf>>; *Memorandum of Understanding between the Secretariat of Convention on International Trade in Endangered Species and the Secretariat of the Convention on Migratory Species* (18 September 2002) available online at <<http://www.cites.org/common/disc/sec/CITES-CMS.pdf>>.

⁶⁴ Conference of the Parties, Convention on International Trade in Endangered Species, *CITES Strategic Vision 2008–2013*, 14th mtg, Resolution Conf. 14.2, (15 June 2007) objectives 3.3 and 3.5.

⁶⁵ The RSN replaces the FAO Regional Fisheries Bodies Group which was established in 1999 and the change of name was agreed in 2005. See the Food and Agriculture Organization of the United Nations, *Report of the Fourth Meeting of Regional Fishery Bodies*, UN Doc FIPL/R778 (14–15 March 2005) paras 5, 7.

⁶⁶ The MOU entered into force in January 2009 and the text of the MOU is reproduced in Committee for the Conservation of Antarctic Marine Living Resources, *Report of the Twenty-seventh Meeting of the Commission*, SC-CAMLR-XXVII (November 2008) annex 6 ('*Report of the Twenty-seventh Meeting of the CCAMLR Commission*').

⁶⁷ The text of the proposed MOU is reproduced in Committee for the Conservation of Antarctic Marine Living Resources, *Report of the Twenty-eighth Meeting of the Commission*, CCAMLR-XXVIII (November 2009) annex 8 ('*Report of the Twenty-eighth Meeting of the CCAMLR Commission*').

matter. The Joint Liaison Group ('JLG'), which was formed in 2001 between the secretariats of the 1992 *Convention on Biodiversity*, the 1992 UNFCCC and the 1996 UNCCD,⁶⁸ provides the most high profile example of a cooperative arrangement based on intersecting subject matter.

The final category of cooperative arrangements exploits synergies in function rather than subject matter. The term function is used here to refer to the tools and mechanisms utilised by MEAs to achieve their objects and purposes. Functions might include regulating trade in the subject matter of the treaty, establishing catch limits, licensing vessels or other users such as importers and exporters. One of the most successful cooperative institutional agreements based on synergies of function is the 2002 MOU between the secretariats of the 1973 CITES, the 1987 *Montreal Ozone Protocol* and the 1989 *Basel Convention*.⁶⁹ This MOU seeks to capitalise on the synergies in functions between these very different instruments—they all to a greater or lesser extent seek to regulate trade in, transport and transfer of (respectively) wildlife, ozone-depleting substances and hazardous waste—in order to improve compliance with all three instruments.

As might be expected, there are significant similarities in the objects and purposes of these various agreements. At the lowest level they all provide for information exchange between institutions and facilitate mutual participation within appropriate meetings: classic support for cognitive interaction. Many agreements—particularly those operating within the area of biodiversity conservation—go beyond this, and provide for the development of joint or mutually supportive work programmes. Notably, the 2002 MOU between CITES, the 1987 *Montreal Ozone Protocol* and the 1989 *Basel Convention* is designed to facilitate the joint training of customs officials, the police and the judiciary as well as promoting the sharing of techniques relating to gathering and analysing information. Perhaps unsurprisingly, those MEAs which benefit from a close correlation of subject matter or function appear to be prepared to engage to a greater extent in institutional cooperation. For example, although the Joint Liaison Group has met nine times since 2001 and has had some success in

⁶⁸ See Conference of the Parties, Convention on Biological Diversity, *Cooperation with Other Organizations, Initiatives and Conventions*, UN Doc UNEP/CBD/COP/6/20 (17–19 April 2002).

⁶⁹ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, opened for signature 22 March 1989, 1673 UNTS 57 (entered into force 24 May 1992) ('*Basel Convention*').

developing joint work programmes on forests and on the biodiversity of dry and sub-humid lands,⁷⁰ its capacity to take policy decisions and to promote further institutional and administrative integration is limited. In part, this is regarded as a result of a 'disconnect' between the roles and mandate given to the JLG by each participating convention.⁷¹ This disconnect may result—at least partially—from the fact that these three instruments have quite different aims and objectives and although their subject matter intersects it does not necessarily overlap. By contrast, the 1998 *Memorandum of Cooperation* between the 1992 CBD and the 1996 UNCCD encourages a harmonised approach to reporting, further integration of their respective secretariats and recommends that the parties explore mechanisms such as the appointment of joint liaison staff to enhance links and process in New York and other UN centres with a view to providing appropriate joint representation at relevant meetings. As noted above, a recent study of international environmental bureaucracies concluded that both the CBD Secretariat and, more particularly, the UNCCD Secretariat were dynamic and influential actors in their own right⁷² and it is highly likely that the exceptional scope of this particular agreement is a result of the dynamic nature of both institutions in combination with the closely related subject matter of both conventions.

A fundamental issue, yet to be definitively determined, is whether these agreements are legally binding or whether they are entirely political or administrative in nature. Whilst a minority of agreements expressly state that they are not intended to be legally binding,⁷³ the vast majority are silent as to their status. Although some commentators take the view that MOUs can never be legally binding,⁷⁴ others suggest that they only *tend* to be legally non-binding.⁷⁵ In fact, the focus on the term 'MOU' is rather

⁷⁰ For further details of these joint work programmes see Convention on Biological Diversity, *Activities* (8 June 2012) <<http://www.cbd.int/cooperation/activities.shtml>>.

⁷¹ See *Report of the Meeting of the Joint Liaison Group of the Convention on Biological Diversity, the United Nations Convention to Combat Desertification, and the United Nations Framework Convention on Climate Change*, 9th mtg (14 May 2009) para 11.

⁷² See the references cited in notes 53–57 above.

⁷³ The MOU between the 1982 CCAMLR and the Western and Central Pacific Fisheries Commission ('WCPFC'), which entered into force in January 2009 expressly states that it does not contain legally binding commitments. The MOU is reproduced in *Report of the Twenty-seventh Meeting of the CCAMLR Commission* annex 6. Similarly, the proposed MOU between CCAMLR and the Agreement on the Conservation of Albatrosses and Petrels ('ACAP') is also expressly intended to be non-binding. The text of the proposed MOU is reproduced in *Report of the Twenty-eighth Meeting of the CCAMLR Commission* annex 8.

⁷⁴ Wolfrum and Matz, *Conflicts in International Environmental Law*, above n 13, 173.

⁷⁵ Ulfstein, above n 41, 887.

misleading. Not all agreements between MEAs are described as MOUs—the terms memoranda of cooperation and cooperative agreements are regularly used—and the title of the agreement is thus of limited assistance in determining its legal status. Moreover, a significant proportion of agreements between MEAs contain what arguably amount to formal obligations in connection with information exchange or participation in joint activities as well as detailed provisions relating to duration, modification and termination of the agreement. In at least two cases, the agreement includes a formal dispute settlement clause⁷⁶ and two further agreements appear to include clauses which purport to limit the liability and agency capacity of each MEA.⁷⁷ To the untrained—and indeed the trained—eye many such agreements appear to wear (if not flaunt) some of the trappings of a legally binding instrument. Nevertheless, even if they are to be considered binding, the extent of their legal obligations is likely to reach no further than the institutions of the MEA including—possibly—the COP. Such agreements are unlikely to bind individual States Parties to the relevant MEA in the absence of an express provision to the contrary.

B. *Institutional Integrated Management*

The second category of institutional cooperation comprises what is described here as institutional integrated management. Examples of cooperation within this category go beyond what is required by the standard MOU. Institutional integrated management requires institutions to

⁷⁶ The 2004 Memorandum of Cooperation ('MOC') between the 1992 Biodiversity Convention and the UN Food and Agriculture Organization on Cooperation between the CBD and the Secretariat of the International Plant Protection Convention ('IPPC'), and the 2009 MOC between the CBD and the Secretariat of the Pacific Regional Environment Programme ('SPREP'), both include dispute resolution clauses.

⁷⁷ Article 3(A) of the 2005 MOC between the CBD and the Ramsar Convention stipulates that 'this MOC constitutes an expression of a shared objective and vision. However, each party's actions will be considered to be that party's sole and separate action, for all purposes, and neither party shall claim to be acting on behalf of, or as agent for, the other party to this MOC': *Memorandum of Cooperation between the Convention on Wetlands and the Convention on Biological Diversity* (10 May 2005) art 3(A). Similarly the 2002 MOU between the Secretariat of CITES and the Secretariat of the CMS stipulates that 'neither secretariat shall be legally or financially liable in any way for activities carried out jointly or independently': *Memorandum of Understanding between the Secretariat of the Convention on International Trade in Endangered Species of Wild Flora and Fauna and the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals* (18 September 2002) art 5(c).

engage in broader and deeper cooperative activities. Three examples are identified in order to demonstrate institutional integrated management: the Biodiversity Liaison Group ('BLG'); the Kobe process and joint activities of the tuna RFMOs; and the 2010 extraordinary meeting of the chemicals conventions.

1. *The Biodiversity Liaison Group*

Initially proposed in 2004,⁷⁸ the Biodiversity Liaison Group was formalised in 2006 with the adoption of the *Memorandum of Cooperation between Agencies to Support the Achievement of the 2010 Biodiversity Target*,⁷⁹ and comprises the *Biodiversity Convention*, CITES, Ramsar, CMS, the *World Heritage Convention* and the secretariat of the 2001 *International Treaty on Plant Genetic Resources for Food and Agriculture*.⁸⁰ The BLG is designed to enhance coherence between, and implementation of, biodiversity-related obligations and initially identified two priority areas of focus: the 2010 Biodiversity Target and the Global Partnership on Biodiversity.⁸¹ However, to date, the achievements of the BLG have been relatively modest and largely confined to integrating the activities of all six biodiversity conventions into current initiatives—such as the adoption of unified biodiversity indicators⁸² and the jointly agreed guidelines for the implementation of

⁷⁸ Conference of the Parties, Convention on Biological Diversity, *Cooperation with other conventions and international organizations and initiatives*, Decision VII/26 (20 February 2004). The mandate of the BLG was renewed in Conference of the Parties, Convention on Biological Diversity, *Cooperation among multilateral environmental agreements and other organizations*, UN Doc UNEP/CBD/COP/DEC/IX/27 (9 October 2008). See also Conference of the Parties, Convention on Biological Diversity, *Cooperation with other conventions and international organizations and initiatives*, UN Doc UNEP/CBD/COP/Dec/X/20 (29 October 2010) ('*Decision CBD X/20*').

⁷⁹ *Memorandum of Cooperation between Agencies to Support the 2010 Biodiversity Target* (27 March 2006).

⁸⁰ Food and Agriculture Organization of the United Nations, *Adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture*, Res 3/2001, UN Doc C/2001/Rep (31 December 2002).

⁸¹ This was also agreed at the second meeting of the BLG.

⁸² See Conference of the Parties, Convention on Biological Diversity, *Report of the Third Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UN Doc UNEP/CBD/COP/3/38 (10 May 2005) para 16 ('*CBD Third Meeting Final Report*'). For further information on the Biodiversity Indicators Partnership (which extends beyond the six biodiversity conventions) see Biodiversity Indicators Partnership, *Tracking Global Biodiversity* (12 June 2012) <<http://www.twentyten.net/>>. The biodiversity indicators are designed to promote the implementation of the goals and targets adopted by the CBD in Conference of the Parties, Convention on Biological Diversity, *Strategic Plan: future evaluation of progress*, UN Doc UNEP/CBD/COP/DEC/VII/30 (13 April 2004).

the *Addis Ababa Principles for the Sustainable Use of Biodiversity*⁸³—rather than developing new projects or programmes.

Although the focus on strengthening participation in existing projects is hardly surprising given the large number of joint and other collaborative programmes that are currently underway involving all conventions, the lack of progress in other areas is disappointing. Whilst the six conventions have established a joint website,⁸⁴ there is little evidence of further administrative integration. This is despite the fact that ideas for closer cooperation—such as harmonised reporting, joint representation at non-biodiversity meetings and joint missions—have been discussed on a regular basis at meetings⁸⁵ and, most recently, at the tenth meeting of the Conference of Parties to the *Biodiversity Convention*, held in Nagoya, Japan in October 2010.⁸⁶ One obstacle to further integration at the international level appears to be the fact that the national focal points for each convention are often in different government departments, which makes coherent implementation a challenge.⁸⁷ Moreover, there is also evidence of an apparent level of tension within the BLG between the six biodiversity conventions resulting from differences in priorities and resources, particularly in relation to the perceived importance of the 2010 Biodiversity Target.⁸⁸ Whilst the work of the BLG was undoubtedly endorsed at the *Biodiversity Convention's* COP 10 held in October 2010,⁸⁹ it was disappointing that the six biodiversity conventions as a collective had taken so few

⁸³ The joint guidelines are reproduced on a CD Rom, which is available to download at: <http://www.cbd.int/doc/programmes/socio-eco/use/aagp/AAGP.zip>. See the Conference of the Parties, Convention on Biological Diversity, *Report of the Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UN Doc UNEP/CBD/COP/5/23 (14 September 2006) paras 20–24 ('*Fifth Meeting Final Report*'). See also Conference of the Parties, Convention on Biological Diversity, *Addis Ababa Principles and Guidelines for Sustainable Use*, UN Doc UNEP/CBD/COP/DEC/VII/12 (13 April 2004).

⁸⁴ See Convention on Biological Diversity, *Liaison Group of Biodiversity-Related Conventions* (12 June 2012) <<http://www.cbd.int/blg/>>.

⁸⁵ See *Third Meeting Final Report*, paras 19–21 and Conference of the Parties, Convention on Biological Diversity, *Report of the seventh meeting of the Conference of the Parties to the Convention on Biological Diversity*, UN Doc UNEP/CBD/COP/7/21 (13 April 2004) paras 47–48.

⁸⁶ See *Decision CBD X/20*.

⁸⁷ See *Fifth Meeting Final Report*, para 1.

⁸⁸ See the concerns raised by the representative of CITES and the representative of the World Heritage Convention in *Fifth Meeting Final Report*, para 11 and Liaison Group of the Biodiversity-Related Conventions, *Sixth Meeting Report*, (31 May 2008) paras 16–20 respectively.

⁸⁹ See *Decision CBD X/20*.

steps to—at the very least—develop a proposed mandate to extend its operation meaningfully beyond 2010.⁹⁰

2. *Cooperation Between Tuna RFMOs and the Kobe Process*

A rather more successful example of integrated institutional management is demonstrated by the cooperative arrangement entered into by the five tuna RFMOs—IATTC,⁹¹ ICCAT,⁹² IOTC,⁹³ WCPFC⁹⁴ and the CCSBT⁹⁵—as part of the so-called Kobe process. The first meeting was held in Kobe in 2007. This was followed by a Chair's meeting in San Francisco in 2008 and a second meeting of the RFMOs in San Sebastian in 2009. Whilst an important function of the joint meetings is to provide a forum within which to share information, knowledge and experiences – the essentials of cognitive interaction—the primary objective is to 'go beyond reinforcing current work of the RFMOs and ... to address issues at a global level where the work of the individual RFMO is not sufficient.'⁹⁶

Although only three years into the Kobe process, the five RFMOs acting collectively have made significant progress towards institutional integrated management. A joint website has been established⁹⁷ and the five RFMOs have agreed to allow access to their Illegal, Unregulated and Unreported ('IUU') vessel lists and licensed vessel lists centrally on this website.⁹⁸ Furthermore, the five RFMOs have agreed that their performance should be reviewed in accordance with a common methodology and that the review reports should be made available collectively on the joint website.⁹⁹ Moreover, the RFMOs have developed the so-called 'Kobe

⁹⁰ The BLG and the Chairs of the Scientific Advisory Bodies of the Biodiversity-related Conventions ('CSAB') held a combined meeting in Paris on 20 January 2010. However, this was not a formal meeting but rather an exchange to coordinate activities amongst conventions for the International Year for Biodiversity. No formal report of the meeting has been issued.

⁹¹ Inter-American Tropical Tuna Commission ('IATTC').

⁹² International Commission for the Conservation of Atlantic Tunas ('ICCAT').

⁹³ Indian Ocean Tuna Commission ('IOTC').

⁹⁴ Western and Pacific Fisheries Commission ('WCPFC').

⁹⁵ Commission for the Conservation of Southern Bluefin Tuna ('CCSBT').

⁹⁶ This is the third principle identified by the Chair of the second meeting. See Joint Tuna RFMOs Meeting, *Report of the Second Joint Meeting of Tuna Regional Fisheries Management Organizations* (29 June–3 July 2009) ('*Report of the Second Joint Meeting of Tuna RFMOs*').

⁹⁷ See Regional Fisheries Management Organizations, *Tuna-Org* (7 March 2012) <<http://www.tuna-org.org/>>.

⁹⁸ This was agreed at the first joint meeting which took place in Kobe in 2007. It should be noted that the CCSBT does not maintain an IUU vessel list that is publicly accessible.

⁹⁹ This was agreed at the first joint meeting which took place in Kobe in 2007.

Chart' which is designed to standardise the presentation of stock assessments and to facilitate the adoption of management decisions on the basis of best scientific advice.¹⁰⁰ Compliance issues and the management of IUU fishing have dominated discussions at all three meetings. Various options for improving compliance through collaborative measures have been explored including the development of harmonised criteria for the listing and delisting of IUU vessels¹⁰¹ and the adoption of centralised and integrated compliance measures.¹⁰²

The progress of the tuna RFMOs through the Kobe process towards integrated institutional management compares favourably with the progress (or lack thereof) of the BLG discussed above. However, it must be acknowledged that the tuna RFMOs, in contrast to the six biodiversity conventions that comprise the BLG, benefit from very similar, if not identical, objects and purposes and approximate mandates for the management of tuna stocks. Nevertheless, the question of how to progress the Kobe process is as pertinent to the five tuna RFMOs as is the question of how to progress the BLG to the six biodiversity conventions. The key issue on which there is currently no consensus is whether the Kobe process should continue to operate outside the political framework or whether a Ministerial meeting should be held simultaneously with Kobe III.¹⁰³

3. *The 2010 Extraordinary Meeting of the Chemicals Conventions*

The final and most extensive example of integrated institutional management to date resulted in the extraordinary joint meeting of the Basel, Stockholm and Rotterdam Conventions in 2010. This was the first simultaneous meeting of autonomous MEAs at the global level¹⁰⁴ and provided the most visible demonstration of the evolving close cooperative arrangement between these three conventions. The origins of the Extraordinary

¹⁰⁰ Ibid.

¹⁰¹ See *Report of the Second Joint Meeting of Tuna RFMOs*.

¹⁰² See Tuna RFMO Chairs' Meeting, *Report of the RFMOs Chairs' Meeting, San Francisco* (5–6 February 2009).

¹⁰³ See the discussion in *Report of the Second Joint Meeting of Tuna RFMOs*.

¹⁰⁴ At the regional level it must be noted that a joint meeting took place between the OSPAR and the Helsinki Commissions (with responsibility for the North East Atlantic and the Baltic Sea respectively) in 2003. This led to a joint declaration: *Declaration of the First Joint Ministerial Meeting of the Helsinki and OSPAR Conventions*, (25–26 June 2003) <<http://www.helcom.fi/stc/files/MinisterialDeclarations/HelcomOsparMinDecl2003.pdf>> and a joint work programme on marine protected areas: *Joint HELCOM/OSPAR Work Programme on Marine Protected Areas* (25–26 June 2003) <http://www.helcom.fi/stc/files/BremenDocs/Joint_MPA_Work_Programme.pdf>.

Meeting and the broader cooperative initiatives developed by these MEAs can be found in decisions taken separately by the three COPs in 2006.¹⁰⁵ These decisions established an ad hoc joint working group for the purpose of developing joint recommendations designed to improve cooperation between the treaty regimes whilst respecting their autonomy. The third report of the working group¹⁰⁶ provided the basis for the adoption of the so-called synergy decisions by the three MEAs in 2008.¹⁰⁷ By virtue of these decisions, the three conferences of the parties initiated a detailed programme of work to develop or explore a wide range of options for enhancing cooperation and coordination among the conventions. Included among the many recommendations were proposals for promoting cooperation and joint implementation at the national and regional levels, as well as enhancing institutional cooperation including options for joint management. Furthermore, the decisions established, on an interim basis, a joint resource mobilization service within the secretariats of the respective conventions in Geneva, and authorised the creation of joint financial, administrative legal, information technology and information services. Finally, the decisions recommended that Basel, Rotterdam and Stockholm meetings should be held in a coordinated manner and, most significantly, that a simultaneous extraordinary meeting should be convened to further consider issues of cooperation and coordination.¹⁰⁸

¹⁰⁵ Conference of the Parties, Basel Convention, *Cooperation and Synergies*, UN Doc UNEP/CHW.8/INF/10 (28 July 2006); Conference of the Parties, Stockholm Convention, *Synergies*, UN Doc SC-2/15 (1–5 May 2006); Conference of the Parties, Rotterdam Convention, *Cooperation and Coordination between the Rotterdam, Basel and Stockholm Conventions*, UN Doc UNEP/FAO/RC/COP.3/RC-3/8 (9–13 October 2006). See also Conference of the Parties, Basel Convention, *Study on Improving Cooperation and synergies between the Secretariats of the Basel, Rotterdam and Stockholm Conventions*, UN Doc UNEP/CHW.8/INF/28 (4 October 2006).

¹⁰⁶ See Ad hoc Joint Working Group on Enhancing Cooperation and Coordination Among the Basel, Rotterdam and Stockholm Conventions, *Report of the Ad hoc Joint Working Group on Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions on the Work of its Third Meeting*, UN Doc UNEP/FAO/CHW/RC/POPS/JWG.3/3 (29 March 2008).

¹⁰⁷ See Conference of the Parties, Basel Convention, *Decision IX/10: Cooperation and coordination among the Basel, Rotterdam and Stockholm Conventions*, UN Doc UNEP/CHW.9/39 (June 2008) ('*Decision IX/10: Cooperation and coordination among the Basel, Rotterdam and Stockholm conventions*'); Conference of the Parties, Rotterdam Convention, *Enhancing cooperation and coordination among the Basel, Rotterdam and Stockholm Conventions*, UN Doc UNEP/FAO/RC/COP.4/RC-4/11 (October 2008); Conference of Parties, Stockholm Convention, *Enhancing cooperation and coordination among the Basel, Rotterdam and Stockholm Conventions*, UN Doc SC-4/34 (May 2009).

¹⁰⁸ *Ibid.*

That first Simultaneous Extraordinary Meeting of the three MEAs was held in Bali in February 2010 and was organised as a back-to-back meeting with the eleventh session of the UNEP Governing Council/Global Ministerial Environmental Forum. In his opening remarks to the meeting, the Executive Director of UNEP noted that the 'synergies process held the potential for a paradigm shift, through which the numerous and disparate instruments in existence would be managed holistically to achieve synergies of purpose and effort.'¹⁰⁹ Nevertheless, as a matter of process, the autonomy of each MEA was maintained and proposals on both substantive and procedural matters were presented separately to, and decided upon by, each of the Presidents of the parties to his or her convention. However, in respect of the Omnibus Decisions, the Presidents of each conference brought their gavels down simultaneously and declared in unison the adoption of the decisions in a gesture symbolising the new cooperative and integrated approach to environmental governance.¹¹⁰ The various joint services initiatives designed to support all three secretariats as set out in the 2008 synergies decisions were endorsed by the Omnibus Decisions,¹¹¹ which also requested that the three secretariats identify cross-cutting and joint activities that may be included in the programmes of work for each of the three conventions.¹¹² Most significantly, the Decisions authorised the creation of a joint head function to manage the three conventions.¹¹³

The relationship between the Basel, Rotterdam and Stockholm conventions represent the clearest example of clustering to date. These three MEAs have built upon the clear overlaps and links between the substance and functions of their respective conventions in order to create an integrated management and administrative structure whilst acknowledging the autonomy of each instrument within its own regulatory sphere. The initiatives developed in the 2008 synergies decisions and confirmed in the 2010 Omnibus Decision are designed to improve implementation through

¹⁰⁹ See Conference of the Parties, Basel, Rotterdam and Stockholm Conventions, *Report of the simultaneous extraordinary meetings of the conferences of the parties to the Basel, Rotterdam and Stockholm conventions*, UN Doc UNEP/FAO//CHW/RC/POPS/EXCOPS.1/8 (7 April 2010) para 7 ('*Report of the simultaneous extraordinary meetings*').

¹¹⁰ *Ibid* paras 10, 27.

¹¹¹ All three decisions are identical apart from a small number of minor differences between their preambles. See BC.Ex-1/1 *Omnibus decision adopted by the conference of the parties to the Basel Convention* reproduced in *Report of the simultaneous extraordinary meetings*, annex I, paras III.1–III.7.

¹¹² *Ibid* para I.9.

¹¹³ *Ibid* para II.3.

mutual support, cognitive interaction, efficiency savings and ultimately, joint management. It is important to acknowledge that in 2006, when the process of review was initiated, neither secretariat established under the Rotterdam and Stockholm conventions were fully functional. Pragmatically, this meant that there were fewer institutional obstacles to the creation of joint managerial and administrative functions. Nevertheless, the inherent logic of clustering as is being developed by these MEAs is abundantly clear. Although it is too soon to assess the success of this arrangement, it is likely that other MEAs that might be similarly clustered, will be watching the progress of the chemicals cluster closely.

C. Cooperation and Compliance

The third category of institutional cooperation focuses on institutional interaction in the context of compliance. A natural consequence of the proliferation of both treaties and non-compliance mechanisms¹¹⁴ is the conflation and possible conflict between proceedings in the event that a State is alleged to be in breach of its obligations under two or more MEAs.¹¹⁵ One high-profile example of such conflation arose out of the dispute between Ireland and the United Kingdom over the Mixed Oxide Fuel ('MOX') reprocessing plant under construction on the northwest coast of the UK in the early 1990s. In that case, Ireland initiated proceedings under the 1982 UNCLOS¹¹⁶ and separately under the 1992 OSPAR Convention¹¹⁷ against the UK, although the dispute ultimately became dominated by the question of the division of competencies as between the EC and its member States with respect to marine environmental protection.¹¹⁸ Notably,

¹¹⁴ There are over twenty non-compliance mechanisms in operation today and a further four are in the advance stages of negotiation. See Karen N Scott, 'Non-compliance Procedures and Dispute Resolution Mechanisms under International Environmental Agreements' in Duncan French, Matthew Saul and Nigel White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart, 2010) 225.

¹¹⁵ The relationship between non-compliance mechanisms and dispute resolution is a further source of possible conflation and conflict but due to space constraints, will not be discussed in this article. See also Malgosia Fitzmaurice and Catherine Redgwell, 'Environmental Non-compliance Procedures and International Law' (2000) XXXI *Netherlands Yearbook of International Law* 35.

¹¹⁶ *The MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)* (2002) 41 ILM 405; *The MOX Plant Case, (Ireland v United Kingdom) (Order No 3, Suspension of Proceedings on Jurisdiction and Merits)* (2003) 42 ILM 1187.

¹¹⁷ *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom) (Final Award)* (2003) 42 ILM 1118.

¹¹⁸ *Commission v Ireland* (C-459/03) [2006] ECR I-4635.

there was little if any institutional interaction between the bodies variously charged with resolving the dispute.¹¹⁹ More recently – and rather more positively from the perspective of institutional cooperation – the Ukraine's controversial decision to construct the Danube-Black Sea shipping canal in the Bystroe estuary of the Danube Delta led neighbouring State Romania and an interested NGO (Ecopravo-Lviv ('EPL')) to institute non-compliance proceedings under five separate MEAs: the 1998 *Aarhus Convention*;¹²⁰ the 1979 *Bern Convention*; the 1979 *Migratory Species Convention*; the 1991 *Espoo Convention*¹²¹ and the 1971 *Ramsar Convention*. While the obligations alleged to have been breached under the various conventions are not identical,¹²² they are nevertheless closely related and mutually reinforcing.

To date, only a minority of non-compliance mechanisms have included provisions that expressly address their relationship and extent of interaction with other non-compliance mechanisms and external bodies.¹²³ Four non-compliance mechanisms currently permit their compliance committee or other relevant body to consult with other relevant organizations and/or to solicit advice or information from other compliance mechanisms as appropriate: the Technical and Compliance Committee of the Western and Central Pacific Fisheries Commission;¹²⁴ the Compliance

¹¹⁹ See further, Robin Churchill and Joanne Scott, 'The MOX Plant Litigation: The First Half-Life' (2004) 53 *International and Comparative Law Quarterly* 643.

¹²⁰ *Convention on Access to Information, Public Participation in decision-making and access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 29 October 2001) ('*Aarhus Convention*').

¹²¹ *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, 1989 UNTS 309 (entered into force 27 June 1997) ('*Espoo Convention*').

¹²² Alleged breaches variously referred to issues connected to an apparent failure to provide for appropriate public participation in the decision to build the canal, a lack of consultation with neighbouring States and the impact of the scheme on a vulnerable ecosystem and associated migratory and wetland species. For the background to this case see Alistair S Rieu-Clarke, 'An Overview of Stakeholder Participation—What Current Practice and Future Challenges? Case Study of the Danube Delta' (2007) 18 *Colorado Journal of International Environmental Law and Policy* 611; Tanya D Sobol, 'An NGO's Fight to Save Ukraine's Danube Delta: The Case for Granting Non-governmental Organizations Formal Powers of Enforcement' (2006) 17 *Colorado Journal of International Environmental Law and Policy* 123.

¹²³ See generally Cesare Pitea, 'Multiplication and Overlap of Non-Compliance Procedures and Mechanisms: Towards Better Coordination?', in Tullio Treves et al (eds) *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press, 2009) 439.

¹²⁴ *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, opened for signature 5 September 2000, (2001) 40 ILM 277 (entered into force 19 June 2004) art 11(5) ('WCPFC').

Committee of the 1998 *Aarhus Convention*,¹²⁵ the Compliance Committee of the 1999 *Protocol on Water and Health*,¹²⁶ and the Compliance Committee of the 1995 *Barcelona Convention for the Protection of the Mediterranean*.¹²⁷

No non-compliance mechanism has thus far developed formal procedures for coordinating on-the-ground information gathering missions and for facilitating the issue of coherent and complementary non-compliance measures. These issues are however, under consideration by the Basel, Rotterdam and Stockholm Conventions pursuant to the directive issued by the conferences of parties under the synergies decisions adopted in 2008¹²⁸ and by the five tuna RFMOs as part of the Kobe cooperation process.¹²⁹ Nevertheless, a successful ad hoc joint compliance operation has been initiated in connection with the Brystoe Canal development referred to above. Representatives from the five MEAs within which non-compliance proceedings had been initiated by Romania together with the European Commission and the International Commission for the Protection of the Danube River ('ICPDR') conducted a joint fact finding mission in the Ukraine in 2004.¹³⁰ Further consultation and joint missions comprising the EU and interested MEAs took place in 2008 and 2009¹³¹

¹²⁵ Economic and Social Council, *Decision I/7(2002): Review of Compliance*, UN ESCOR, UN Doc ECE/MP.PP/2/Add.8 (2 April 2004) para 39.

¹²⁶ *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Water Courses and International Lakes*, opened for signature 17 June 1999, 2331 UNTS 202 (entered into force 4 August 2005); see Meeting of the Parties to the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *Decision on Review of Compliance*, UN ESCOR, UN Doc ECE/MP.WH/2/Add.3 EUR/06/5069385/1/Add.3 (3 July 2007) para 37. Paragraph 38 of this Decision permits the Committee to transmit information to the secretariats of other MEAs for consideration in accordance with their applicable procedures on compliance. The Committee may invite members of other compliance committees dealing with issues related to those before it for consultation.

¹²⁷ *Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean*, opened for signature 16 February 1976, 1102 UNTS 27 (entered into force 9 July 2004) ('*Barcelona Convention*'). See Conference of the Parties, *Barcelona Convention, Decision IG 17/2: Procedures and Mechanisms on Compliance under the Barcelona Convention and its Protocol*, 15th mtg, UN Doc UNEP(DEPI)/MED/IG.17/10 Annex V, 21, para 37.

¹²⁸ See *Decision IX/10: Cooperation and coordination among the Basel, Rotterdam and Stockholm conventions*, paras B.2, B.3.

¹²⁹ See Joint Meeting of the Tuna RFMOs, *Report of the Joint Meeting of the Tuna RFMOs* (January 22–26 2007) appendix 14; *Report of the RFMOs Chairs' Meeting* (February 5–6 2008) para 3(d).

¹³⁰ Joint Mission of the Expert Team of the European Commission and International Conventions to the 'Brystoe project' in the Ukrainian part of the Danube Delta, *Mission Report of the Expert Team* (17 November 2004).

¹³¹ Letter from the Executive Secretary of the UNECE to the Ministry of Environmental Protection of Ukraine, ECE/EHLM/104/2008/1; Background Note (9 May 2008) on file with author.

culminating in the issue of a joint statement whereby the parties agreed to continue to work together and to discuss further possible concerted action which should be taken to ensure that the Ukraine complies with its various international obligations.¹³² This ad hoc informal arrangement between the institutions of up to seven different MEAs, which focuses on not only information sharing but also on the development of mutually reinforcing compliance measures, demonstrates the possible extent and depth of potential cooperation between non-compliance bodies. Nevertheless, it is important to note that despite six years of apparently fruitful cooperation among these institutions, the Ukraine remains in non-compliance with a number of its treaty obligations in connection with the Brystoe Canal project. Moreover, it is far from certain that States Parties to MEAs more generally would be keen to develop formal cooperative arrangements with respect to compliance or establish joint compliance institutions. It is notable that members of the ad hoc joint working group on enhancing cooperation among the Basel, Rotterdam and Stockholm conventions demonstrated minimal enthusiasm for the idea of a joint compliance committee for the three conventions.¹³³ Given that the report of the working group recommended—and indeed led to—unprecedented and wide-ranging integration initiatives amongst the three chemicals conventions, their reservations over a joint compliance committee is significant. However, there is a wide range of measures short of full institutional integration that might be adopted by MEAs to promote the exchange of information and to facilitate the adoption of compatible and mutually supportive compliance measures.

VI. SELECTED RISKS ASSOCIATED WITH INSTITUTIONAL INTEGRATION AND CLOSER COOPERATION BETWEEN MEAs

Whilst it is generally agreed that institutional integration will improve and strengthen environmental governance, mitigating the risks of fragmentation and facilitating more effective implementation of environmental commitments, there are also risks associated with closer cooperation.

¹³² Note: *Current activities related to the Brystoe canal project under multilateral environmental agreements and by intergovernmental organizations* (28 September 2009) (on file with author).

¹³³ Ad Hoc Joint Working Group on Enhancing Coordination and Cooperation among the Basel, Rotterdam and Stockholm Conventions, *Report of the ad hoc joint working group on enhancing cooperation and coordination among the Basel, Rotterdam and Stockholm conventions on the work of its second meeting*, UN Doc UNEP/FAO/CHW/RC/POPS/JJWG.2/18

First, from the perspectives of States—and potentially other participants—there is a risk that they may become drawn into regimes which they are not party to, or affiliated with, but, by virtue of a cooperative arrangement, may become implicitly subject to that regime's obligations. Such concerns have been recently implicitly expressed by Argentina in connection with CCAMLR's participation in the Regional Fisheries Bodies Secretariat Network ('RSN'),¹³⁴ and appear to be based on a fear that increased cooperation between RFMOs through the Network supports the implementation of the 1995 *Fish Stocks Agreement*¹³⁵—to which Argentina is not a party—under customary international law. From an environmental perspective this risk as perceived by States and other participants may have positive effects; increasing participation within environmental and fishery regimes directly or indeed indirectly will likely contribute to better and more comprehensive environmental management. However, there is—at least potentially—a further risk in that a State or other participant that objects strongly to a cooperative arrangement may withdraw from the cooperating regime altogether.

The second risk arises from the possibility that through participating in a cooperative arrangement, a regime or institution may overreach its regulatory mandate and may act in a manner which might be considered *ultra vires*. This may occur if the cooperative arrangement has the practical effect of extending the geographic scope of the regime or where the subject matter of the regime has been expanded to include species, ecosystems, substances or issues not previously regulated by that regime. This risk was similarly demonstrated during the negotiations within the CCAMLR Commission in connection with the proposed MOU with ACAP in 2009, where there was some disagreement between members over whether the Commission was entitled to regulate activities taking place outside of the CCAMLR area but which impact upon CCAMLR species.¹³⁶ Whilst the development of—particularly wide-ranging—cooperative arrangements may lead to tensions within individual respective regimes,

(29 March 2008) para 36. One member commented that a joint compliance committee was a 'long term option' and another said that such a committee 'could not be envisaged.' A third member indicated that 'the scope for coordinated activities on compliance overall was very limited.'

¹³⁴ See *Report of the Twenty-eighth Meeting of the CCAMLR Commission* paras 15.17, 15.19.

¹³⁵ *Agreement for the Implementation of the Provisions of the 1982 UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 34 ILM 1574 (entered into force 11 December 2001).

¹³⁶ See *Report of the Twenty-eighth Meeting of the CCAMLR Commission* paras 15.8–15.10.

the implicit expansion of a regime's or institution's regulatory mandate may also nevertheless have positive implications for the effectiveness of environmental protection overall.

The third risk is associated with the cooperative arrangement itself and its participating regimes and institutions rather than with the individual States Parties and other participants within those regimes. Where a cooperative or institutional integrated management arrangement comprises participants that are unequal in size or status it is possible that the arrangement may become dominated by those participants. This may lead to the prioritisation of the dominant participant's interests and objectives and ultimately, may result in the diversion of scarce resources away from the priorities of other participants. Similarly, it is also possible that a cooperative arrangement may become dominated by procedures, principles and concepts that are prevalent within one regime at the expense of other procedures, principles and concepts that are utilised within other regimes and institutions. This has already occurred to a limited extent within the Biodiversity Liaison Group, which is dominated by the 1992 *Biodiversity Convention*. A degree of tension, as noted above, has been observed between a number of the participants over differences in priorities—including the 2010 Biodiversity Target—and the allocation of scarce resources.¹³⁷

Finally, increased integration and closer cooperation may, in rare instances, simply transfer a problematic issue from one regime to another without resolving the problem and with potentially dire consequences for the future effectiveness of that other regime. Such a risk would be apparent, for example, if the parties to the 1959 *Antarctic Treaty* decided to actively consider the dispute over Japanese scientific whaling taking place within the Southern Ocean. In light of the fact that the whaling activities taking place are ostensibly 'scientific' and that they are located within the *Antarctic Treaty* area, there is a strong legal argument for suggesting such activities should be subject to the principles of environmental impact assessment under Article 8 and Annex I of the 1991 *Environmental Protocol to the 1959 Antarctic Treaty* and, consequently, considered by the ATCM.¹³⁸

¹³⁷ See the text accompanying n 88 above.

¹³⁸ The extent of the relationship between the *Environmental Protocol* and the *International Convention on the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) is unclear. Annex II of the 1991 *Environmental Protocol to the 1959 Antarctic Treaty*, which sets out restrictions in connection with the taking of or harmful interference with species, is not applicable to Japanese whaling activities as it contains a without prejudice clause, which confirms that

Irrespective of the legal merits of this argument,¹³⁹ the political implications of involving the *Antarctic Treaty* directly or indirectly—through increased cooperation with the IWC—in the scientific whaling dispute could be disastrous. The disagreement over Japanese scientific whaling has polarised and virtually paralysed the International Whaling Commission to the extent that its very existence has been called into question. By contrast, the *Antarctic Treaty* system works well—notwithstanding the dispute over scientific whaling—principally because thus far it has sensibly avoided directly addressing Japanese whaling activities within the ATCM.¹⁴⁰ In the Antarctic it might be suggested that fragmentation helps rather than hinders effective environmental governance!

The risks identified above relate to both the effectiveness and the legitimacy of international environmental governance. In particular, increasing and more complex cooperative institutional arrangements raise important questions of accountability. This is particularly the case where the cooperative arrangements comprise, or are largely driven by, treaty secretariats rather than by States Parties. It has been noted that 'while environmental governance by no means achieves a democratic or deliberative ideal, it is among the most transparent, participatory, and accessible realms of global governance to state and non-state actors alike.'¹⁴¹ The development of cooperative and integrated institutional regimes in pursuit of effectiveness should not come at the expense of legitimacy and

'[n]othing in this Annex shall derogate from the rights and obligations of Parties under the International Convention on the Regulation of Whaling: annex II, art 7. There is no such clause in Annex I of the Environmental Protocol or in the Protocol itself. However, the Final Act of the Eleventh Special Antarctic Treaty Consultative Meeting at which the Protocol was adopted stipulates that '[t]he meeting noted that nothing in the Protocol shall derogate from the right and obligations of Parties under the Convention on the Conservation of Antarctic Marine Living Resources, the Convention for the Conservation of Antarctic Seals and the International Convention for the Regulation of Whaling:' para 7.

¹³⁹ A discussion of the merits is beyond the scope of this article. For a detailed analysis of some of the issues raised by Japanese whaling issues within the Southern Ocean see the special issue of the (2008) 11(3) & 11(4) *Asia Pacific Journal of Environmental Law*.

¹⁴⁰ The closest the ATCM has come to discussing Japanese whaling was in 2007 when New Zealand presented Information Paper 40 (2007) relating to the fire on board the Japanese whaling vessel the *Nisshin Maru*, which took place in February 2007. The discussion at the XXX ATCM focused on the safety and search and rescue aspects of this incident and was promptly shut down by Japan which stated that 'it would not be constructive to further discuss the *Nisshin Maru* incident in the next Meeting because further discussion on this incident might lead to discussion on the whaling issue, on which Parties had differing views.' See Antarctic Treaty Consultative Meeting, *Final Report of the Thirtieth Antarctic Treaty Consultative Meeting*, (30 April–11 May 2007) paras 225–231.

¹⁴¹ Steven Bernstein, 'Legitimacy in Global Environmental Governance' (2005) 1 *Journal of International Law and Relations* 139, 140.

accountability. Ideally, the development of governance solutions based on cooperation and institutional integration should be designed to promote *both* effectiveness and legitimacy. The clustering of the Basel, Rotterdam and Stockholm conventions provides an excellent example of such an arrangement. The development of the chemicals cluster has been driven by the States Parties themselves and decisions relating to substance, administration and management have been taken by both ordinary and extraordinary conferences of parties. It is notable that the less ambitious—and arguably less effective—examples of the Biodiversity Liaison Group and (to a lesser extent) the five tuna RFMOs acting collectively pursuant to the Kobe process, are both driven by treaty institutions without direct involvement of States Parties. Consequently, it would appear that States Parties to MEAs must themselves play a meaningful role in developing cooperative and integrated governance mechanisms, not only with a view to promoting the legitimacy and accountability of MEAs, but ultimately, their effectiveness.

VII. CONCLUDING REMARKS: ENHANCING INSTITUTIONAL INTERACTION AND ENVIRONMENTAL GOVERNANCE AND ITS IMPLICATIONS FOR INTERNATIONAL LAW

The processes of globalization and fragmentation of international law cannot be reversed but can be managed. Moreover, governance mechanisms promoting institutional cooperation and integration offer substantial potential to not only manage but also to exploit the overlaps and synergies that exist between MEAs and environmental institutions in order to improve environmental protection. To a greater or lesser extent many MEAs—often as a result of institutional initiatives—are already beginning to engage in project and programmatic collaboration, integrated or even joint administration and management of MEAs and cooperation with respect to implementation and compliance mechanisms. Whilst these initiatives are broadly aimed at improving the effectiveness of MEAs they can also enhance their legitimacy at the national, regional or international level. Nevertheless, extensive cooperation and institutional integration also poses risks—actual and perceived—to the legitimacy and accountability of MEAs to their States Parties. Maximising the potential of institutional cooperation and integration, whilst minimising its risks to legitimacy, accountability and indeed effectiveness, is likely to prove a significant challenge for future international environmental governance

and one that is under consideration by a number of different international review processes.¹⁴² One possible response to that challenge is to deliberately manage institutional integration and other cooperative arrangements through an overarching global environmental institution such as a strengthened UNEP¹⁴³ or even a newly created 'world environmental organisation'.¹⁴⁴

Regardless of how initiatives promoting institutional integration or cooperation are managed in the context of future international environmental governance, there is little doubt that their impact is already challenging the traditional landscape of international law. Non-State actors have long been present within the field of environmental governance but they are becoming increasingly dominant through their participation within the areas of creation, implementation and enforcement of international environmental law. A vast number of decisions, resolutions, agreements and other instruments are now integral components of the rich tapestry of an MEA, and the hard distinction between binding and non-binding instruments is increasingly blurred. Moreover, the very nature of international law as a system of law based on the consent of States is being brought into question. The development of complex systems of cooperation and integration in practice has the potential to lead to the development of norms outside of the fora within which States normally give their consent. This may occur in circumstances where MEA institutions acting collectively develop norms that become binding on States without their formal acceptance or where the practice of MEAs acting individually or

¹⁴² No less than four major international environmental governance reviews have been initiated by the UN within the last ten years in addition to the numerous smaller studies, which have been carried out by MEAs acting individually or collectively. It is ironic that the process of international environmental governance review is as fragmented as the system of governance under review!

¹⁴³ See Maria Ivanova, 'UNEP as anchor organization for the global environment' in Bierman, Siebenhüner and Schreyögg, *International Organizations*, above n 51, 151; Philippe Roche and Franz Zaver Perrez, 'International Environmental Governance: The Strive Towards a Comprehensive, Coherent, Effective and Efficient Environmental Regime' (2005) 16 *Colorado Journal of International Environmental Law and Policy* 1.

¹⁴⁴ The creation of a new 'world environment organisation' has been suggested by a number of commentators. See Frank Bierman et al, 'Environmental Policy Integration and the Architecture of Global Environmental Governance' (2009) 9 *International Environmental Agreements* 351; Dena Marshall, 'An Organization for the World Environment: Three Models and Analysis' (2002–2003) 15 *Georgetown International Environmental Law Review* 79. For a critical view of the 'world environment organisation' proposal see Sebastian Oberthür and Thomas Gehring, 'Reforming International Environmental Governance: An Institutional Critique of the Proposal for a World Environment Organisation' (2004) 4 *International Environmental Agreements: Politics Law and Economics* 359.

collectively contributes the formation of customary international law. The potential impact of these new forms of international environmental governance mechanisms thus extends well beyond the realm of international environmental law; they challenge the very fundamentals of the system itself: who we regard as legitimate participants within the system; the nature of sources of international law; and even its ultimate foundations, as a system based on the consent of nation States.

PART 3

GLOBALIZATION AND THE DIVERSIFICATION
OF ACTORS

CHAPTER NINE

THE PUBLIC POLICY DIMENSIONS OF MNE LEGAL PERSONALITY: IS IT TIME TO UNVEIL THE MASTERS OF GLOBALIZATION?

ROBIN F HANSEN*

Multinational enterprises ('MNEs'), often referred to as multinational corporations or transnational corporations, are business organizations which own and control 'income-generating assets in more than one country.'¹ Some MNEs are global or regional actors, operating across multiple States by controlling unique intellectual property, executing multi-market business strategies and orchestrating expansive networks of production and supply. In 2010, the United Nations Conference on Trade and Development ('UNCTAD') noted that the proportion of global GDP generated by MNEs had reached a record 11%,² up from 5%³ in 1982.

Despite the economic, political and social influence such firms wield in the world economy and within the world's societies, public international law adopts a seemingly oblivious official stance to MNEs. Soft law aside, mainstream public international law does not regard the MNE as having an independent existence or personality itself, but sees the MNE as a series of distinct persons, corporate nationals of their respective States of incorporation and lacking in collective agency or identity.⁴

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¹ John H Dunning, 'The Distinctive Nature of the Multinational Enterprise' in John H Dunning (ed), *Economic Analysis and the Multinational Enterprise* (George Allen and Unwin Ltd, 1974) 13.

² UNCTAD, 'World Investment Report 2010' (Report, UN Doc UNCTAD/WIR/2010, 2010) xviii <http://www.unctad.org/en/docs/wir2010_en.pdf>. MNEs are responsible for about two-thirds of world trade, with one-third of world trade comprised of intra-MNE trade: Debra Johnson and Colin Turner, *International Business* (Routledge, 2003) 101. UNCTAD reports the existence of 82 000 MNEs with 810 000 affiliated entities: UNCTAD, 'World Investment Report 2010' (Report, UN Doc UNCTAD/WIR/2010, 2010) xxi.

³ UNCTAD, 'World Investment Report 2003' (UNCTAD, UN Doc UNCTAD/WIR/2003, 2003) 23 <http://www.unctad.org/en/Docs/wir2003_en.pdf>.

⁴ Eg, Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 249–250. This view relies in part on *Barcelona Traction* and the ICJ's maintenance of the corporate veil in that decision: *Case Concerning the Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, [56]–[58].

Conceptualising international law as a system of public policy direction and generation, this chapter explores two related questions:

1. Why has MNE legal personality not been significantly recognized within international law thus far?
2. How might future acknowledgement of MNE legal personality lead to policy effects as well as affect the international legal system itself?

It is perhaps helpful to introduce the type of personality that I refer to in this chapter. MNE personality is not equivalent to State subjecthood. MNEs are not the primary subjects of international law and do not have the power to create international law, as they do not have treaty-making power,⁵ nor can they establish custom. Rather, MNEs may be understood as a type of super-individual, as a private actor present in multiple countries, with one primary head of controlling corporate personhood. In other words, the personality definition employed herein sees the MNE as commonly-controlled business enterprise with an identifiable home State.

This chapter employs a policy-oriented theory⁶ about international law to assess the present and future public policy dimensions of MNE personality. Under this approach, international law is both a set of rules which frames State decisions as well as an ever-evolving and influential framework which is determined by the decisions of States.⁷ International law's authority stems from the international community's expectations of the system.⁸ Public international law thus evolves according to, and is a manifestation of, the policy objectives of actors within the international community.⁹ Objectives are found through a process of values clarification, whereby actors pursue implicitly or explicitly selected goals in their international law practice and their formation of international public policy.¹⁰

A policy-oriented perspective does not disregard the role of power within the world community. States in fact value power and may act in pursuit of power.¹¹ Furthermore acts of power may be divided into two

⁵ *Anglo-Iranian Oil Co (United Kingdom v Iran) (Judgment)* [1952] ICJ Rep. 93, 98.

⁶ Myres S McDougal and W Michael Reisman, 'International Law in Policy-Oriented Perspective' in Ronald St J Macdonald and Douglas M Johnston (eds), *The Structure and Process of International Law* (Martinus Nijhoff Publishers, 1983) 103–130.

⁷ *Ibid* 113.

⁸ *Ibid*.

⁹ Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181, 181.

¹⁰ McDougal and Reisman, above n 6, 115, 124.

¹¹ *Ibid* 105–106.

types, 'decisions that are taken by sheer naked power or calculation or expediency only and those that are taken from perspectives of authority, in the sense of community expectation.'¹² A policy-oriented approach does not presume consensus regarding the objectives of the international community. It acknowledges rival systems of values at work internationally.¹³

My analysis assesses the present and future role of MNE personality within the international system of public policy in three parts. Part I examines the present status of MNEs in public international law. Part II explores how strengthened recognition of MNE personality in the future may affect global public policy, in terms of its direct effects and its impact upon public international law itself. Part III concludes by surveying the practical forms that deepened affirmation of MNE personality may take, such as through incremental State practice which may crystallise into custom.

I. MNEs IN INTERNATIONAL LAW TODAY

MNEs currently participate in public international law as parties to State contracts, as direct disputants within public international law treaty claims, and as influential indirect disputants. Despite MNEs' interaction with the international legal system in these ways, neither treaty nor custom directly acknowledges MNEs as holistic, transnational actors.

State contracts,¹⁴ between a foreign investor such as an MNE and a host State agency, are pacts which outline the terms of investment in the host State; these may include State obligations to freeze local laws in relation to the investment for a given period of time.¹⁵ The theory of State contract internationalization was developed in State contract dispute arbitrations, likely first in 1967.¹⁶ The theory holds that, despite any designation of applicable law contained in a State contract, international law is

¹² Ibid 119.

¹³ Ibid 122.

¹⁴ Eg, Jernej Letnar Cernic, 'Corporate Human Rights Obligations under Stabilization Clauses' (2010) 11(2) *German Law Journal* 210; Sheldon Leader, 'Human Rights, Risks, and New Strategies for Global Investment' (2006) 9(3) *Journal of International Economic Law* 657.

¹⁵ UNCTAD, 'State Contracts, Series on Issues in International Investment Agreements' (Report, UNCTAD/ITE/IIT/2004/11, 2004) 3 <http://www.unctad.org/en/docs/iteiit2004_11_en.pdf>.

¹⁶ *Sapphire International Petroleum Ltd v National Iranian Oil Co* (1967) 35 ILR 136, 171–73; Mansour Al-Saeed, 'Legal Protection of Economic Development Agreements' (2002) 17(2) *Arab Law Quarterly* 150, 154.

superimposed onto the parties' choice and 'applies automatically as the overriding governing law'¹⁷ due to the character of the contract itself. State contract internationalization theory is not universally accepted,¹⁸ but nonetheless has been applied in several arbitrations, granting a measure of international law rights and recognition to contracting investors.¹⁹ Furthermore, in recent years the conception of State contract obligations as international in character has been advanced in investor-State arbitrations concerning so-called 'umbrella' clauses.²⁰

As direct disputants within international law, MNEs may initiate arbitral claims under investment treaties, with public international law as the law applicable to the dispute. Most investment treaties define investment as including 'shares', and indirect shareholder investment claims are thus generally permitted.²¹ Investment treaties commonly define nationality according to place of incorporation alone and tribunals thus tend to ignore foreign ownership or control in their nationality determination.²² The result of indirect shareholder standing and nationality according to place of incorporation is that MNEs may hold and exercise their rights under investment treaties as common-controlled enterprises; they may launch investment claims from any entity of the requisite nationality within their ownership chain.

MNEs within the *Financial Times* Global 500 have acted as treaty claimants, alleging violations of such rights as fair and equitable host State

¹⁷ AFM Maniruzzaman, 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies' (2001) 12(2) *European Journal of International Law* 309, 309.

¹⁸ Eg, Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, 2007) 580.

¹⁹ Bin Cheng, 'Introduction to Subjects of International Law', in Mohammed Bedjaoui (ed) *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers, 1991) 33.

²⁰ Eg, *SGS v Philippines (Jurisdiction)* (ICSID, Case No ARB/02/6, 29 January 2004).

²¹ Eg, *Azurix Corp v Argentina (Jurisdiction)* (ICSID, Case No ARB/01/12, 8 December 2003) (indirect investor standing via Cayman Islands company); *Waste Management Inc v Mexico (No 2) (Award)* (ICSID, Case No ARB(AF)/00/3, 30 April 2004). At least 161 States have ratified bilateral investment treaties that define investment as including 'shares.' Robin Hansen 'The International Legal Personality of Multinational Enterprises: Treaty, Custom and the Governance Gap' (2010) 10(1) *Global Jurist (Advances)* 9, 93.

²² Eg, *Tokios Tokelés v Ukraine (Jurisdiction)* (ICSID, Case No ARB/02/18, 29 April 2004) (disregard of de facto host State control); *Aguas del Tunari, SA v Republic of Bolivia (Jurisdiction)* (ICSID, Case No ARB/02/3, 21 October 2005) [332] (disregard of third State control); *Saluka Investments BV v Czech Republic (Partial Award)* (UNCITRAL, 17 March 2006) [229] (disregard of third State control); *ADC Affiliate Limited and ADC & ADMC Management Limited v Hungary (Award)* (ICSID, Case No ARB/03/16, 2 October 2006) [82] (disregard of third State control); *Rompetrol Group NV v Romania (Jurisdiction)* (ICSID, Case No ARB/06/3, 18 April 2008) [50]; but note *Phoenix Action, Ltd v Czech Republic (Award)* (ICSID, Case No ARB/06/5, 15 April 2009) [93] (nationality acquisition found an abuse of process).

treatment.²³ Such arbitrations tend to reference preceding treaty awards as subsidiary means of treaty interpretation; one interesting result of this is that investor pleadings, to the extent that they are followed in tribunal awards, are entering into international law as this type of persuasive subsidiary source. MNEs, along with other types of investors, are creating international law through their influence upon investment arbitration awards.

As indirect disputants, MNEs encourage States to bring particular international claims, including those before World Trade Organization ('WTO') panels.²⁴ MNEs also influence treaty negotiations, acting as indirect international law makers.²⁵ They hold positions of influence in international standard-setting agencies, such as the Codex Alimentarius Commission, leading to practical impacts in areas such as WTO commitments under the *Agreement on Sanitary and Phytosanitary Measures*.²⁶ Some types of MNEs are allotted roles of considerable practical importance in international regimes, such as ship classification agencies which determine vessels' seaworthiness on the behalf of flag States.²⁷ Finally, some MNEs publicise their adherence to international law standards, with mining companies using the *World Heritage Convention* to set the bounds of voluntary 'no go' sites.²⁸

²³ Eg, *Chevron Corporation and Texaco Petroleum Company v Ecuador (Interim Award)* issued (UNCITRAL, PCA Case No 34877, 1 December 2008); *IBM World Trade Corporation v Ecuador (Jurisdiction)* (ICSID, Case No ARB/02/10, 22 December 2003); *Total SA v Argentina (Jurisdiction)* (ICSID, Case No ARB/04/01, 25 August 2006); 'FT Global 500 2009' *Financial Times* (online) 29 May 2009 <<http://media.ft.com/cms/8289770e-4c79-11de-a6c5-00144feabdc0.pdf>>.

²⁴ Eg, 'Japan – Measures Affecting Consumer Photographic Film and Paper' (Panel Report, WT/DS44/R, WTO, 31 March 1998) <<http://www.worldtradelaw.net/reports/wtopanels/japan-film%28panel%29.pdf>> (note the importance of the claim to Kodak).

²⁵ Dinmukhamed Eshanov, 'The Role of Multinational Corporations from the Neoinstitutionalist and International Law Perspectives: The Concept of The Three-Level Game' (2008) 16 *New York University Environmental Law Journal* 110, 143 (on the development of deepseabed mining rules); Committee on Non-State Actors, 'First Report of the Committee—Non-state Actors in International Law' (International Law Association, 2010) n 28–29 <<http://www.ila-hq.org/en/committees/index.cfm/cid/1023>> (on intellectual property treaty negotiations).

²⁶ Leslie Sklair, 'The Transnational Capitalist Class and Global Politics: Deconstructing the Corporate-State Connection' (2002) 23(2) *International Political Science Review* 159, 161–164.

²⁷ *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships 1973*, opened for signature 17 February 1978, 17 ILM 546 (entered into force 2 October 1983) Annex 1, regs 5–8.

²⁸ Natasha A Affolder, 'The Private Life of Environmental Treaties' (2009) 103(3) *American Journal of International Law* 510.

MNEs are also subjects of international legal standards to the extent that treaties impose obligations on their corporate components.²⁹ In addition, *Alien Tort Claims Act* litigation in the US has seen the application of customary international law rules to MNE conduct.³⁰ John Ruggie, Special UN Representative, notes a gradual trend within domestic law of corporate liability for international crimes.³¹ The Organization for Economic Cooperation and Development ('OECD') Guidelines on Multinational Enterprises establish a National Contact Point complaints process, whereby an MNE may participate in consultations, facilitated by a home government representative, concerning the MNE's conduct abroad. This process is primarily non-judicial in character, however, and the process does not involve enforcement sanctions.³²

A. *Why the Non-Acknowledgement of MNEs thus Far?*

All direct international law treatment of MNEs as enterprises remains confined to the realm of soft law. Declarations, guidelines and policy statements acknowledge that MNEs exist holistically, but treaties do not contain such provisions.³³ Some treaties in effect operationalise aspects of

²⁹ Eg, *Global Convention on the Control of Transboundary Movements of Hazardous Wastes*, opened for signature 22 March 1989, 1673 UNTS 126 (entered into force 5 May 1992) arts 2, 4.

³⁰ Eg, *Doe v Unocal Corp*, 248 F 3d 915, 926 (9th Cir, 2001); cf *Kiobel v Royal Dutch Petroleum*, 621 F 3d 111 (2nd Cir, 17 September 2010). As of May 2012 the *Kiobel* decision is before the US Supreme Court. The 2010 decision under appeal found that claims could not be made against corporations under the *Alien Tort Claims Act*. Another ongoing case concerning corporate liability under this statute is *Sarei v Rio Tinto*, which has thus far permitted claims against the corporate defendants to continue: *Sarei v Rio Tinto, PLC* (9th Cir, No 02-56256, 25 October 2011) slip op.

³¹ John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc A/HRC/4/035 (9 February 2006) 23.

³² Larry Cata Backer, 'Rights and Accountability in Development ('Raid' v Das Air and Global Witness v Afrimex)' (2009) 10 *Melbourne Journal of International Law* 258; Joris Oldenzil, Joseph Wilde-Ramsing and Patricia Feeney, '10 Years On: Assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct' (Report, OECD Watch, June 2010) <http://oecdwatch.org/publications-en/Publication_3550>.

³³ International Labour Organization ('ILO') 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (1978) 17 ILM 423; Foundation for the Global Compact, *The Global Compact* (2012) United Nations <www.unglobalcompact.org>; Organization for Economic Co-operation and Development, 'OECD Guidelines for Multinational Enterprises' (Report, OECD, 2008) <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>>.

MNEs within a public international law setting, such as many of the world's 2,805 bilateral tax treaties³⁴ which refer to corporate ownership and control; however, these treaties do not address the dimensions of MNEs which exist beyond the bilateral State relationship. Other treaties place direct or State-intermediated legal duties upon corporate persons,³⁵ but they do so without involving the notion of trans-veil control, fundamental to the MNE's character. Missing from the public international law legal landscape is an instrument that acknowledges that MNEs are international economic players, some of them operating with larger budgets than those of many States.³⁶

Why is acknowledgement of MNEs as commonly-controlled actors thus far restricted to soft law? Perhaps States simply do not view such a development as furthering their goals or community values. In Part II of this paper I explore this possibility by reviewing the goals and values most implicated by MNE personality recognition.

On the other hand, it is possible that States have not yet seriously acknowledged MNEs in their international law practice because it is practically infeasible to do so. Capturing the MNE in an enterprise-level legal definition poses a considerable challenge. MNEs are diverse and complex legal creatures, including not only pyramid-shaped equity-linked corporate networks of parents and subsidiaries, but also cross-holding equity and/or common management relationships, structures which use non-corporate instruments such as partnerships and trusts, and contractual connections such as licensing agreements.³⁷ While an economic

³⁴ UNCTAD reports such totals as of the end of 2008: UNCTAD, *Recent Developments in International Investment Agreements*, UN Doc UNCTAD/WEB/DIAE/IA/2009/8 (June 2009) 2, 8.

³⁵ *Global Convention on the Control of Transboundary Movements of Hazardous Wastes*; *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, 39 ILM 268 (entered into force 10 April 2002) arts 2, 5; *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, UN Doc A/55/383 (entered into force 29 September 2003) Annex I, arts 5, 6, 8, 23; *United Nations Convention against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005) art 26; *Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971*, opened for signature 27 November 1992, 1110 UNTS 57 (entered into force 30 May 1996) art 29.

³⁶ UNCTAD, 'World Investment Report 2002' (Report, UNCTAD/WIR/2002, UNCTAD, 2002) 90 <http://www.unctad.org/en/docs/wir2002_en.pdf> (ranking MNEs and States together on annual value added, noting that 29 of the world's 100 largest economies were MNEs).

³⁷ Irit Mevorach, 'The "Home Country" of a Multinational Enterprise Group Facing Insolvency' (2008) 57 *International and Comparative Law Quarterly* 427, 429–431.

understanding of the MNE is able to see past such legal details and recognise within an MNE constituting realities such as common management, branding, strategy and control, a legal definition of an MNE must seek to capture this diversity of form. An effective legal definition of the MNE must be flexible enough to take into account the variance in corporate (and other) law which exists. Thus, some level of harmonization, or at least mutual recognition, of corporate law is likely needed in order for the MNE to be deeply operationalised within a legal definition.³⁸ Moreover, the elusive but defining concept, of common control within the MNE,³⁹ also must be captured in a definition.

Practicality is likely not the sole reason, however, why MNEs have not yet been formally acknowledged within the system. Considering that the largest MNEs are highly visible and well researched,⁴⁰ it seems that conceptualizing these actors within a legal definition is not an insurmountable challenge. Practical obstacles aside, there are undoubtedly political reasons for the present-day lack of acknowledgement of MNEs.⁴¹ A policy-oriented approach to international law understands that international actors value power and make choices accordingly; this includes their choices in relation to the creation and direction of international law. The present lack of MNE acknowledgement may be a result of participant actions which are motivated by power-seeking, rather than by the pursuit of other goals. By this rationale, there may indeed be policy goals and values in the international community which support acknowledgement of MNE personality, but other agendas relating to power relationships may overwhelm the pursuit of such goals.

Review of State-to-State and MNE-to-State power relationships offer at least four possible rationales for States' lack of political appetite for MNE

³⁸ Pierre-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits' (2009) 34 *Yale Journal of International Law* 113, 147.

³⁹ Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (Martinus Nijhoff Publishers, 2002) 156 (on common control as the hallmark of an MNE).

⁴⁰ Eg, 'FT Global 500 2009,' above n 23.

⁴¹ Note the UN Human Rights Commission's non-adoption in 2004 of the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: Mike Omotosho, *Report to the Economic and Social Council on the Sixtieth Session of the Commission: Draft Report*, 60th sess, Agenda Item 21(b), UN Doc E/CN.4/2004/L.11/Add.7 (22 April 2004) 81; see also the General Assembly's non-adoption of the Commission on Transnational Corporations' Code of Conduct for TNCs: *The Impact of the Activities and Working Methods of Transnational Corporations on the Full Enjoyment of Human Rights: Report of the Secretary-General*, 48th sess, Agenda Item 8, UN Doc E/CN.4/Sub.2/1996/12 (2 July 1996) paras 60–62.

acknowledgement: (1) State opposition to increased State responsibility arising from MNE personality; (2) States' desire to maintain their status quo use of MNEs as under-acknowledged vehicles of foreign policy; (3) States' status within the MNE-State bargaining relationship and resulting narrowed State action; and (4) shared MNE and State elite interests.

1. *State Opposition to Increased Responsibility*

One ready inference regarding the current lack of MNE acknowledgement is that powerful States⁴² are either apathetic to or oppose such a development. MNE personality presents not only the possibility of MNE liability under international law, but also the possibility of home or Host State responsibility in relation to MNE conduct.⁴³ Two types of potential State responsibility require brief mention, although a full discussion of each is beyond the scope of this chapter: (1) responsibility for MNE acts directly attributable to the State; and (2) State failure to fulfil the positive obligation to protect⁴⁴ the rights of third parties in the context of regulating MNE conduct.

The home States of important MNEs are likely in no hurry to instigate a legal structure that would underpin and trigger State responsibility in

⁴² Citing UNCTAD's 2005 World Investment Report, Cernic notes that 'The 71 non-financial largest corporations from a list of the World's 100 largest non-financial corporations are based in only five countries (France, Germany, Japan, the United Kingdom and the United States)'; Jernej Letnar Cernic, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (2008) 3(1) *Hanse Law Review* 71, 78.

⁴³ On home State responsibility for MNE conduct abroad see Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598; DM Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5(1) *Melbourne Journal of International Law* 1; Vassilis P Tzevelekos, 'In Search of Alternative Solutions: Can the State of Origin be Held Internationally Responsible for Investors' Human Rights Abuses that are not Attributable to it?' (2010) 35(1) *Brooklyn Journal of International Law* 156; M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2nd ed, 2004) 184–203.

⁴⁴ Note the State's duty to protect as discussed in the work of UN Special Representative: John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN HRCOR, 8th sess, Agenda Item 3, UN Doc A/HRC/8/5 (7 April 2008). A State's responsibility to protect human rights within this framework was discussed further in the document 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' endorsed by the Human Rights Council in June 2011: Human Rights Council, *Resolution 17/4 Human rights and transnational corporations and other business enterprises*, 17th sess, Agenda Item 3, UN Doc A/HRC/RES/17/4 (6 June 2011).

relation to the conduct of 'their' MNEs abroad since this would lead to greater State liability exposure and undermine States' respective positions of power within the international system. States have resisted developments to expand the scope of their responsibility in other instances. For instance, there is debate as to the meaning of Article 14 of the *Convention against Torture*, with the Committee against Torture having issued views to the effect that this provision requires States to provide a forum for redress for victims of torture even if that torture occurred outside of the State's territory.⁴⁵ States such as Canada have resisted this understanding of a State's obligation as regards torture victims' right to redress, arguing that the State's obligation is only to provide a forum for redress if the torture occurs within the State.⁴⁶

2. *State Reliance on MNEs as Vehicles of Foreign Policy*

If Raymond Vernon's 'Sovereignty at Bay' thesis concerning MNE conduct remains current into the twenty-first century, home States of MNEs use MNEs as a means of influence in foreign affairs, with MNEs serving as conduits for home States' interests. The historic presence of charter companies and the role of businesses in colonial and foreign policy support this theory (eg, the Hudson's Bay Company, the Anglo-Persian Oil Company, the East India Company, the British South Africa Company, the United Fruit Company and ITT Corporation).⁴⁷ According to this theory, in

⁴⁵ Eg, *Conclusions and recommendations of the Committee against Torture: Canada*, 34th sess, UN Doc CAT/C/CR/34/CAN (7 July 2005) paras 4(g), 5(f).

⁴⁶ Eg, *Bouzari v Iran* [2002] OJ No 1624 (Ontario Court of Justice) [54]; *Bouzari v Iran* (2004) CanLII 871 (Ontario Court of Appeal).

⁴⁷ During British colonialism, corporations such as the Hudson's Bay Company, the Anglo-Persian Oil Company, the East India Company and Cecil Rhodes' South Africa Company were central players in the economic exploitation and political organisation of British territories. Additionally, in twentieth century, United States-based corporations directly influenced several political changeovers in foreign States, such as the United Fruit Company in 1954 Guatemala and ITT in 1973 Chile. Furthermore, it is worth recalling that the Grotius' initial work on the freedom of the high seas was supportive of Dutch state interests and commissioned in relation to a claim against the an affiliate of the Dutch East India Company: FW Laing, 'Hudson's Bay Company Lands and Colonial Farm Settlement on the Mainland of British Columbia 1858–1871' (1938) 7(4) *Pacific Historical Review* 327; 'From Anglo-Persian Oil to BP Amoco' *BBC News* (online) 11 August 1998 <<http://news.bbc.co.uk/2/hi/business/149259.stm>>; John S Galbraith, 'The British South Africa Company and the Jameson Raid' (1970) 10(1) *Journal of British Studies* 145; Stephen M Streeter, 'Interpreting the 1954 US Intervention in Guatemala: Realist, Revisionist, and Postrevisionist Perspectives' (2000) 34(1) *History Teacher* 61; US Department of State, *Hinchey Report on CIA Activities in Chile* (18 September 2000) Bureau of Administration, US Department of State <<http://foia.state.gov/Reports/HincheyReport.asp#17>>; Peter Borschberg, 'Hugo Grotius, East India Trade and the King of Johor' (1999) 30(2) *Journal of Southeast Asian Studies* 225.

exchange for a favourable relationship with the home State, the MNE acts according to its home State's interests in its conduct abroad. Bringing MNEs formally into international law, possibly leading to increased MNE transparency and formal MNE obligations is not an advantageous development from the perspective of a home State whose interests are better served by the status quo; the status quo cloaks the use of MNEs as foreign policy vehicles because it only acknowledges an MNE's components, and not its existence as a whole. This obfuscates the fact that MNEs are subject to common control in their international actions, and that they have at least one home State which is the locus of control. To the extent that MNE interests and home State interests converge, such as in situations where MNEs represent home State agendas, home States are not likely to favour an MNE treaty which would highlight this collusion.

3. *The State–MNE Bargaining Relationship*

A further explanation focuses on the MNE-State bargaining relationship, and on the role of MNEs themselves within international affairs. The work of Vernon and others portrays the MNE-State relationship as defined by bargaining which mediates contrasting objectives.⁴⁸ This bargaining relationship is subject to power differentials, however, and either side may dominate depending on the relevant facts.⁴⁹ This third explanation for the lack of State action on an MNE treaty could thus be that States are not in a strong enough bargaining position vis-à-vis the world's global and semi-global firms to pursue an action which is hostile to MNE interests, considering long-term strategic bargaining interests. MNEs themselves would likely prefer to remain invisible to the international legal system, considering that overt inclusion presents possibly increased transaction costs in the form of additional administrative red tape or even exposure to legal liability.⁵⁰ International personality is likely to bring with it international obligations and perhaps some level of enforcement of such obligations, despite the practical challenges associated with enforcement. It may be that influential MNEs have used their bargaining influence to either

⁴⁸ Raymond Vernon, *In the Hurricane's Eye: The Troubled Prospects of Multinational Enterprises* (Harvard University Press, 1998) 28.

⁴⁹ Lorraine Eden, Stefanie Lenway and Douglas Schuler, 'From the Obsolescing Bargain to the Political Bargaining Model' in Robert Grosse (ed), *International Business—Government Relations in the 21st Century* (Cambridge University Press, 2005) 251.

⁵⁰ On the influence of transaction costs on MNE conduct see, eg, Jean-François Hennart, 'Transaction Costs Theory and the Multinational Enterprise' in Christos N Pitelis and Roger Sugden (eds), *The Nature of the Transnational Firm* (Routledge, 2nd ed, 2000) 73.

directly or indirectly discourage both home and host States from pursuing formal acknowledgement of MNEs as international legal persons. This would be similar to how MNEs have exerted influence over the outcome of treaty negotiations.⁵¹

It is difficult, and indeed beyond the scope of this paper, to quantify or render empirical⁵² an argument stating that States are under the bargaining influence of MNEs and as a result have not pursued concerted action to bring MNEs formally within the rule of public international law. While financial resources vary immensely among States, all States rely to some degree on MNEs for tax and other revenues. Anecdotally, it does seem that many States and sub-State entities are now vocally seeking to attract foreign investment; States and sub-State jurisdictions market themselves using slogans and advertising campaigns.⁵³ Furthermore, the global economic recession of recent years has likely intensified the pressure on States to attract capital and general revenues, with even G-8 countries facing record national debt levels.⁵⁴ Even before the global financial crisis, the largest MNEs have long been comparable to States in terms of their annual economic output.⁵⁵ States' drive to attract revenue from MNEs thus perhaps weakens States' bargaining position vis-à-vis MNEs and contributes to States' reticence to bring MNEs into the international law system against MNE wishes. This is ironic considering the role that a lack of coordinated international financial regulation has played in the financial crisis and resulting recession.⁵⁶

⁵¹ Eg, Eshanov, above n 25.

⁵² Eg, James Nebus and Carlos R Rufin, 'Extending the Bargaining Power Model: Explaining Bargaining Outcomes Among Nations, MNEs, and NGOs' (2010) 41(6) *Journal of International Business Studies* 996.

⁵³ The branding slogan of the Canadian province of Alberta is 'Alberta: Freedom to Create. Spirit to Achieve.' *Alberta Government* (2012) Government of Alberta <<http://albertabrand.com/>>.

⁵⁴ Andrew Whiffin, Emily Cadman, Caroline Nevitt and Steve Bernard, 'Sovereign debt levels by country,' *Financial Times* (online) 23 June 2010 <www.ft.com/cms/s/0/c71a3b60-73c4-11df-bc73-00144feabdco.html>.

⁵⁵ UNCTAD, 'World Investment Report 2002,' above n 36 (Using year 2000 data UNCTAD ranked MNEs and States alongside each other according to value added annually and found that 29 out of the world's largest economies were MNEs rather than States. The first MNE on the list was Exxon Mobil at 45, ranked between Chile and Pakistan).

⁵⁶ Clive Birault, 'Trust Less, Verify More: Financial Supervision in the Wake of the Crisis' (World Bank Crisis Response Note No 5, World Bank Group, July 2009) 1 <<http://rru.worldbank.org/documents/CrisisResponse/Note5.pdf>>; Constantinos Stephanou, 'The Reform Agenda: Charting the Future of Financial Regulation' (World Bank Crisis Response Note No 2, World Bank Group, June 2009) 1 <<http://rru.worldbank.org/documents/CrisisResponse/Note2.pdf>>; see also 'Report of the Commission of Experts of the President of the United

Even before the recent global economic recession, States have long faced forms of political discipline by the global financial system, and by MNEs as players within that system. The structure of global finance is such that investors' expectations can have tangible effects on variables such as currency valuation and capital flows (including capital flight).⁵⁷ Governments and political movements are judged by investors for their creation of political risk;⁵⁸ perceived political risk affects investor expectations and thus other economic variables, sometimes to the detriment of the State's economy. In other words, investors' views of a particular State's investment friendliness can actually affect a State's economy since investor expectations, like self-fulfilling prophecies, can affect important phenomena including currency valuation and capital flows. It is possible that a desire to avoid negative investor sentiment contributes to States' hesitation in formally bringing MNEs into the public international system, since such a move is presumably hostile to MNE investor wishes and may be perceived as risk-creating.

4. *Convergence of Interests of State Elites and MNEs*

A fourth possible explanation for States' lack of political appetite for MNE-acknowledgement relates to Stephen Hymer's theorization of MNEs, which understands such organizations as systems of hierarchization which promote uneven development.⁵⁹ Hymer noted that the core of an MNE, which contains the top management, increasingly grows wealthier than the periphery, including low-level workers. One element of this characterization of the MNE addresses the connection between MNEs and national elites, whereby the MNEs' surplus value is captured by or

Nations General Assembly on Reforms of the International Monetary and Financial System' (Report, United Nations, 21 September 2009) 18 <http://www.un.org/ga/econcrisis/submit/docs/FinalReport_CoE.pdf>.

⁵⁷ Paul R Krugman and Maurice Obstfeld, *International Economics: Theory and Policy* (Addison Wesley, 6th ed, 2003) 346–350, 502–505 (on exchange rates and capital flight, respectively).

⁵⁸ Eg, Economist Intelligence Unit, 'Cameroon: Country risk summary,' *EIU ViewsWire* (New York) 27 July 2010; Rodolphe Desbordes, 'Global and Diplomatic Political Risks and Foreign Direct Investment' (2010) 22(1) *Economics & Politics* 92; Paul M Vaaler, 'How Do MNCs Vote in Developing Country Elections?' (2008) 51(1) *Academy of Management Journal* 21.

⁵⁹ For relevant empirical analysis see, eg, Philipp Fink, 'FDI-led Growth and Rising Polarisation in Hungary: Quantity and the Expense of Quality' (2006) 11(1) *New Political Economy* 47.

distributed to governing elites as part of this mode of uneven development.⁶⁰ By this rationale, a reason for lack of State action on the MNE treaty issue is that many national elites, including ruling members of government, share some common interests and perspectives with MNEs⁶¹ and thus do not seek to pursue a course of action hostile to MNE interests. This nexus of MNE-State elite interests thus creates a systemic disincentive against State action in contravention of MNE wishes, and discourages MNE acknowledgement. In addition to the structural convergence of MNE-elite interests is the compounding effect of bribery itself, a problem that continues to surface and to concern a wide range of countries and MNEs.⁶²

B. Implications

In addition to the practical challenge of appropriately defining MNEs, there are at least four possible explanations for the current lack of MNE acknowledgement which take into account the power relationships which exist among States, and between States and MNEs. While it is not clear how the power-related obstacles to MNE recognition may be overcome, it is worth considering the words of Keohane and Ooms who opined that 'We can only expect extensive international regulation on a global scale where the principal issues pit the State against the enterprise, rather than

⁶⁰ Eg, Stephen H Hymer and Steven A Resnick, 'International Trade and Uneven Development' in JN Bhagwati et al (eds), *Trade, Balance of Payments and Growth* (North-Holland Publishing Company, 1971) 485.

⁶¹ Paul Haslam, 'The Firm Rules: Multinational Corporations, Policy Space and Neoliberalism' (2007) 28(6) *Third World Quarterly* 1167, 1181; Hazel Henderson, 'Transnational Corporations and Global Citizenship' (2000) 43(8) *American Behavioral Scientist* 1231, 1237; David Barnhizer, 'Waking from Sustainability's Impossible Dream: The Decisionmaking Realities of Business and Government' (2006) 18 *Georgetown International Environmental Law Review* 595, 605–606.

⁶² Eg, complaints in recent years under the US *Foreign Corrupt Practices Act* have related to Siemens in Bangladesh, Venezuela and Argentina, Halliburton in Nigeria, Daimler in Russia, China and others, and Alcatel-Lucent in Costa Rica, Taiwan, and Kenya: US Department of Justice, '2008 Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines' (Press Release, TDD (202) 514-1888, 15 December 2008) <<http://www.justice.gov/opa/pr/2008/December/o8-crm-1105.html>>; *Securities and Exchange Commission v Halliburton Company and KBR Inc* (US District Court SD Texas, Civil Action No 4:09-399, 11 February 2009) slip op; US Department of Justice, 'Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay \$93.6 Million in Criminal Penalties' (Press Release, 10-360, 1 April 2010) <<http://www.justice.gov/opa/pr/2010/April/10-crm-360.html>>.

State against State, with the enterprise only as a willing or unwilling intermediary.⁶³

If this observation is correct, then the first two reasons for non-acknowledgement of MNEs, relating to (1) States' avoidance of increased legal responsibility, and (2) to States' use of MNEs as foreign policy vehicles, are the initial challenges to be overcome if MNE acknowledgement is to occur. On the first reason, it is possible for States to lose their aversion to possibly increased State responsibility, as recognized MNE home States, if States are convinced that any change to their existing obligations will be minimal, since they will perceive any potential diminishment of their position of power within the international system to also be minimal. Further, this challenge will also be reduced where MNE acknowledgement is realised across many States at once, ensuring that all States will be affected as similarly as possible.

On the second reason, relating to MNEs as foreign policy mechanisms, this factor will cease to function as a political deterrent to MNE acknowledgement to the extent that States become aware of the independence of MNEs. If MNEs behave in a manner which is independent from their home State's wishes, home States will cease to rely on MNEs as foreign policy vehicles.

If States overcame reasons (1) and (2) above and moved from being adversarial against one another in their MNE policies towards a cooperative stance,⁶⁴ they would still be faced with the challenge posed by restrictions inherent in the MNE-State bargaining relationship. However, if States cooperated with each other they would increase their bargaining power vis-à-vis MNEs and could achieve a wider degree of policy freedom. Finally, there remains the fourth explanation for the current lack of MNE acknowledgement in international law, that of the confluence between MNE and State elite interests. This challenge is difficult to conceptualise and address, but it is clear that it likely must be overcome if MNEs are to be addressed by international law in a manner that is against MNE wishes.

⁶³ Robert O Keohane and Van Doorn Ooms, 'The Multinational Firm and International Regulation' (1975) 29(1) *International Organization* 169, 184 (cited in Mathias Koenig-Archibugi, 'Transnational Corporations and Public Accountability' (2004) 39(2) *Government and Opposition* 235, 249).

⁶⁴ Notably, the WTO recently called upon States to increase their cooperation in resource management: WTO, 'World Trade Report 2010: Trade in Natural Resources' (Report, WTO, 2010) <http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_reportio_e.pdf>.

II. POTENTIAL ACKNOWLEDGEMENT OF MNE PERSONALITY

Setting aside MNEs' current status, the question remains: what are the policy goals and values which might support, or not support, the acknowledgement of MNEs as commonly-controlled persons? There are at least four levels of policy analysis concerning MNE recognition which require address, those concerning the effects of MNE personality: (1) on persons and processes within States; (2) on the relationship between MNEs and States; (3) on the relationship between States, and (4) on public international law itself as a mode of public policy creation. Dividing the analysis in this fashion, particularly with respect to the first two categories, is appropriate considering that MNE conduct has both aggregate and particularised effects.⁶⁵ For instance, on an aggregate level, MNEs have an impact upon a State's national economic growth. On a specific level, MNEs also have particularised effects within a given host State, depending each MNE's precise activities.

A. *Relations Between MNEs and Persons and Processes within the State*

International law as a policy generation system has wide-ranging effects on persons within States. It places legal obligations upon persons, confers legal rights upon persons, and affects State action. Especially since the Nuremberg trials after World War II and the rise of international criminal law, international law sets customary standards of human conduct that apply to everyone. Crimes against humanity, slavery, war crimes and other types of similarly grave behaviour are prohibited⁶⁶ and give rise to individual criminal liability. To the extent that domestic regimes or international organizations enforce this prohibition, international law reflects global public policy that does not accept certain types of individual behaviour. The rights granted to individuals under international human rights law affect State conduct and domestic legal rights regimes, although most enforcement of human rights takes place at the domestic level, with

⁶⁵ Bjorn Letnes, 'Transnational Corporations and Human Rights: Silencing the Ontological Controversy' (2004) 4 *Public Organization Review* 259.

⁶⁶ Eg, Erica-Irene A Daes, *Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at National, Regional and International Levels* (United Nations, 1992) 4; Carle Aage Norgaard, *The Position of the Individual in International Law* (Munksgaard, 1962) 42, 72–75.

important exceptions.⁶⁷ International law shapes State conduct in ways which affect citizens' well-being. For instance, international trade and investment law influence States' policy decisions, with domestically felt effects. In this way, if international law were to oblige home and host States to ensure a certain level of MNE conduct, such as in the field of labour rights, States' actions in fulfilment of this obligation would have public policy effects within the State.

The effects that recognition of MNE personality would have, and the values which would be consistent or inconsistent with such a move, depend on the rights and obligations that would accompany MNE personality. In my view, if MNEs were added officially to the international law stage they would necessarily be holders of the customary international law obligations of private individuals, noted above. All private persons in international law have the obligation not to commit genocide, slavery or certain other acts, and MNEs would be no different. If MNEs were granted personality without such obligations, this would result in personality without the basic obligations that other international actors have. It would suggest that persons of international law do not have basic obligations as a part of their very entry into the legal system. In my view, immunising this type of person from such obligations would be contrary to the *jus cogens* status of the norms underpinning many of these paramount obligations.

Regarding rights, it is not clear that MNEs would have any automatic customary international law rights. As persons they would have the capacity for treaty-granted rights, but State practice would need time to develop before customary rights could be identifiable.

The question remains, if MNEs were defined as persons under international law, with requisite obligations and an identifiable home State, what policy effects within States would result? Moreover, what goals or values would be furthered, or not furthered, by such a move? It is worth noting that there is currently considerable controversy concerning the local and aggregate human rights impact and accountability of MNEs.⁶⁸ This relates

⁶⁷ Eg, *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976). Note also regional human rights courts such as the Inter-American Court of Human Rights.

⁶⁸ Eg, Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises Addendum: Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, UN HRCOR, 8th sess, Agenda Item 3, UN Doc A/HRC/8/5/Add.2 (23 May 2008); see, eg, DM Chirwa, 'The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law' (2006)

to: investment in conflict zones;⁶⁹ collusion between MNEs and local governments, associated with crackdowns on dissent;⁷⁰ and local attempts to hold MNEs accountable that are hindered by territorially bound jurisdiction in the face of extra-national MNE actors.⁷¹

If MNE personality alone were added to international law, without additional international law enforcement or adjudicative processes, the actual relationship between MNEs and persons within States would remain largely managed by States themselves. Nonetheless it is possible that three potentially positive policy effects within States could result. First, by setting basic levels of conduct, international law would offer individuals a better bargaining position to lobby MNEs to comply with their international obligations. With respect to human rights violations in conflict zones and collusion with local governments, respectively, MNE personality would possibly assist individuals in shaming MNEs directly, since the MNE could not rely on a fragmented conception of legal identity to cloak its centrally-controlled activities. Even without a forum for direct enforcement against the MNE in question, the court of public opinion would note the MNE's contravention of its customary obligations as a private actor in international law.

Second, since MNEs would be defined as having designated home States, individuals could also lobby MNEs' home States to institute enforcement proceedings against their MNEs or to comply with their own oversight obligations. States' obligation to provide legal remedies for redress of human rights violations committed by non-State actors including MNEs would likely be of particular relevance. Where the human rights violation takes place with the sanction or involvement of a national (or sub-national) government it is possible that MNE personality might give the persons affected more leverage in complaining internationally. This is

22 *South African Journal of Human Rights* 76; Maria McFarland Sanchez-Moreno and Tracy E Higgins, 'No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia' (2004) 27(5) *Fordham International Law Journal* 1663; Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20(1) *Berkeley Journal of International Law* 45.

⁶⁹ Eg, *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, UN Doc S/2001/357 (12 April 2001).

⁷⁰ Eg, *Wiwa v Royal Dutch Petroleum*, 2002 US Dist LEXIS 3293 (SDNY, 22 February 2002) 9–10.

⁷¹ Eg, Phillip Blumberg, 'Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems' (2002) 50 *American Journal of Comparative Law* 493; *Bauman v DaimlerChrysler AG*, 579 F 3d 1091 (2009) (rejecting jurisdiction over German parent company).

because the basis for the complaint would be the breach of international law by an international actor that has a connection to a home State. The basis for the complaint would not be a purely local affair either practically or legally. However, without further changes to international enforcement regimes, conferral of international personality on MNEs alone would not ensure direct legal recourse for those whose rights are violated in these scenarios, except to the extent that recourse is facilitated by the MNE's home State through the provision of domestic-level remedies.

Third, the addition of MNE personality to international law may change the discourse among States concerning MNEs so that States might cooperate with each other more fully in coordinating their adjudicative and regulatory jurisdiction over MNEs, granting persons within States a better chance of enforcing their rights effectively. The current mainstream international law understanding of the MNE, which sees the MNE as its components alone, serves to reinforce the liability-insulating properties of the corporate veil separating such MNE components. An enterprise-level understanding of the MNE in international law would assist in having international and domestic law see the whole MNE at once in the course of legal scrutiny of MNE conduct vis-à-vis persons within a State. Recognition of MNE personality could facilitate local accountability by setting obligatory benchmarks globally for MNE conduct and by encouraging higher levels of interstate cooperation in investigation and enforcement proceedings.⁷²

These three possible policy impacts of recognising MNEs' international legal personality—increased pressure on MNEs to comply with basic international obligations, the increased involvement of home States in MNE oversight, and increased interstate cooperation on jurisdiction matters—would serve the values and goals of legal accountability, the rule of law, legal recourse for wrongs experienced and deterrence of violations of customary international law.

Looking to the contrary perspective, MNE personality might have two negative policy effects. First, if MNEs are regarded as legal persons with sweeping international law rights such as treaty-making power (unlike the mode of personality which I have suggested would be appropriate), then this might lead to a policy result of entrenchment of private power within

⁷² Eg, *Abad v Bayer Corp*, 563 F 3d 663, 666 (7th Cir, 2009) (dismissing tainted blood claim under *forum non conveniens*, and rejecting the argument that a Friendship, Commerce and Navigation Treaty obliged the US to assume jurisdiction over Argentinean plaintiffs' claims).

international law. If MNEs' power were increased vis-à-vis persons within States, and as against States themselves, as a result of MNE personality, then the positive policy scenarios of home State enforcement and increased cooperation in regulatory and adjudicative matters might not arise due to MNE pressure. A second negative result relates to the increased costs that the paperwork of designating a home State may cause—costs which may affect consumers or employees. However, it should be possible to keep this cost to a very minimal level, and as long as MNE personality is universal such effects should not be felt unequally.

The present invisibility of MNEs within international law arguably grants them more power than would legal personality. The risks of increased rights could be managed by States in their mode of granting personality. Furthermore, economic effects of personality recognition will not necessarily be significant, as long as the reporting requirement is as simple as the designation of a home State. In my view, therefore, in the area of intra-State effects, the values and goals in favour of MNE personality outweigh those against.

B. *State-MNE Relations*

I turn now to the impact of international law on public policy as it exists concerning State to MNE relations. The State-MNE relationship is complex and its character depends on the State's wealth, the sector of investment, and other factors. Overall, the State generally represents public interests, and the MNE generally represents private interests (unless the MNE is a foreign government-owned entity). States are responsible for ensuring that the terms of investment are such that the investment will contribute to social and economic development.⁷³

Considering that States are the primary instruments of regulation and public policy, and are sovereign international law actors, States have a great responsibility for the stewardship of the earth's future. Without coordination States seek to undermine one another in order to attract investment; it thus appears that State cooperation on the status and responsibilities of MNEs is beneficial to ensuring the establishment of base levels of MNE obligations, both with respect to local development contributions, and wider global stewardship agendas. MNE personality is

⁷³ Letnes, above n 65, 267 (discussing prerequisite factors for contribution to economic development).

likely a prerequisite for such an activity. Goals in support of MNE personality thus include standard-setting and State cooperation in management of MNE relations.

A possible negative result of MNE personality might be increased competition in association with the choice of home State for regulatory purposes, adversely affecting the MNE-State bargaining relationship. However, the risk of such competition occurring in a manner that exceeds present competition for investment is likely to be minimal and the value of standard-setting outweighs that of conservatism.

C. Interstate Relations

In addition to facilitating cooperation with regard to standards of conduct for MNEs, one positive policy scenario offered by MNE personality is the furtherance of State-to-State cooperation generally. Increased consistency of international law concepts with contemporary economic practices could add accuracy and sophistication to the concepts available to States in their pursuit of interstate public policy, and may facilitate more effective public policy initiatives at this level. UN experts, in the context of the current global recession, have called for better State cooperation in strong language:

8. Global economic integration ('economic globalization') has outpaced the development of the appropriate political institutions and arrangements for governance of the global economic system. Economic globalization means that actions that occur in one country have effects on others. There is a need for global collective action to address not only these issues of global 'externalities' but also the provision of global public goods. Among the global public goods are the stability of the global economic system and fair trading rules.

9. In short, strong global collective action is needed in order to pursue joint goals, particularly the adequate and appropriate provision of global and regional public goods and the broader objectives agreed to in the UN Summits and Conferences of the past two decades. By definition, without coordination, countries do not have sufficient incentives to invest in global and regional public goods (e.g. economic, financial, and ecosystem stability).⁷⁴

⁷⁴ 'Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System,' above n 56, 87.

If it is useful to States in their interstate affairs to acknowledge that there exist in the global economy centrally-controlled non-State entities which organise large-scale activities, then acknowledgement of MNE personality is useful from a public policy perspective. Using a more accurate model in interstate regulation, one that takes into account the existence of MNEs, may be useful to States in their regulation of air, water and other matters. States could share information on MNE-wide pollution activities, for instance, rather than use a more fragmented understanding of such activities that does not acknowledge the MNE as a unified firm. More accurate analytical tools, however, are only as useful as the extent to which they are applied in negotiations and actually implemented domestically or internationally afterwards.

A further positive public policy result of MNE personality is the more specific delineation of State responsibility, particularly with respect to home States. On the other hand, a negative result might be that linking States with MNEs could lead to greater conflict among States. That said—if home State responsibilities are not interpreted too onerously, then it is possible that the recognition of MNE personality may not unduly contribute to the disharmony of States.

D. *International Law as a Public Policy Development System*

Perhaps the most important element of international law, in relation to its ability to carry out the public policy of the international community, is its legitimacy as seen in the eyes of its participants. Legitimacy refers to the 'buy in' of participants in the system, or in other words the extent to which it is perceived as a valid mode of public policy direction and execution.⁷⁵

MNE personality may be good for the legitimacy of international law by making it appear more attuned to contemporary affairs and able to grapple with twenty-first century realities. Conversely, if MNE personality is not managed correctly, it could be detrimental to international law's legitimacy, because it may take away from the obligations and authority of States. Specifically, States give international law its legitimacy for several reasons. First, it is primary a State-to-State system, a club of sovereign

⁷⁵ Eg, Thomas Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990) 4 (defining legitimacy as 'a property of a rule or rule-making institutions which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process').

equals, regardless of the legal fiction that this entails. States have the power to comply with international law, and to enforce international law domestically, and when they do, this strengthens the system because it shows that the system is capable of being enforced. If MNEs are formally brought into the system in a way that does not place them as being subordinate to States, then the system will be bent out of shape because entities without a history of accepting the fundamental norms of international law (like *pacta sunt servanda*) will be brought into the system, implicitly suggesting that acceptance of such norms is not necessary in order to be a member of the system. Furthermore, if international law is held to impose obligations directly on MNEs, without States as intermediaries, this could signal a weakening of the role of States within the system, a problematic outcome since States are the only link that international law has with democracy, and also problematic considering the weakness or absence of direct enforcement mechanisms under international law.

For these reasons, in order for MNE personality to further the policy goal of maintaining international law as a public policy mechanism, such personality must be grounded within the State-to-State framework, with MNEs clearly subservient to States in this system. It is for this reason that an anchoring system linking MNEs to particular home States is so important. The home State will be the conduit for international law to reach MNEs without upsetting the dominant role of States within the system. While a corollary problem to the flag of convenience issue evident in the 'home State' system for sea-going vessels is likely to surface in an MNE home State registration system as well, a registration system will at least ensure a slightly higher standard of transparency than currently exists, since MNEs would be publically connected to a particular home State. Under the current lack of an international structure of MNE acknowledgement, an MNE may appear from a layperson's perspective to be based in one particular country, but it may in fact be legally headed by a company in an offshore jurisdiction. Increased transparency regarding the locating practices of MNEs may thus be a result of MNE personality acknowledgement and the designation of a specific home State. This may in turn assist in clarifying the status and public expectations of MNEs in their worldwide operations. Transparency and dialogue regarding public expectations are thus values and goals which are consistent with MNE personality recognition.

In sum, an argument in favour of MNE personality which relates to international law as a policy-making system holds that the international law system will be strengthened by the addition of MNEs since it will be

made effective as against more actors and will be better suited to address the reality of the globalised world economy, complete with the role played by MNEs.⁷⁶

Conversely, one could argue that the character of international law will be negatively affected if MNEs are brought into the legal system in an inappropriate fashion since States may interpret this as licence to take their own international law obligations less seriously. For instance, one argument is that giving human rights obligations to MNEs usurps the role of States.⁷⁷ Second, MNE legal personality could be problematic for international law's function as a policy making medium if such personality intensifies MNE power,⁷⁸ and permit MNEs to influence international law in a fashion disadvantageous to otherwise supported community values and goals. A third argument against MNE personality could be that it would undermine the already tenuous legitimacy of international law by adding private actors into the system, diluting the enforcement role of States.⁷⁹ Despite the importance of these concerns, in my view the legitimacy of international law could be safeguarded while still permitting the introduction of MNEs as legal persons, thereby serving the values of transparency and accuracy in international law.

III. CONCLUSION: MODES OF MNE ACKNOWLEDGEMENT

In this chapter I have argued that the current lack of personality recognition is likely due to States' safeguarding of their positions of power within the international system, as well as to their limitations of action resulting from the bargaining relationship in effect between major MNEs and States. I have also argued that acknowledgement of MNE personality

⁷⁶ Eg, Jonathan I Charney, 'Transnational Corporations and Developing Public International Law' (1983) 4 *Duke Law Journal* 748, 788.

⁷⁷ See, eg, the discussion of State views on the *Draft Norms on the Human Rights Responsibilities of Transnational Corporations* profiled by Backer: Larry Cata Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (2006) 37 *Columbia Human Rights Law Review* 287, 376–377.

⁷⁸ François Rigaux, 'Transnational Corporations' in Mohammed Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers, 1991) 121–134, 129.

⁷⁹ Carlos M Vázquez, 'Direct vs Indirect Obligations of Corporations under International Law' (2004) 43 *Columbia Journal of Transnational Law* 927.

could further the policy values and goals of human rights promotion and protection within States, as well as affect interstate and State-MNE relations.

The recognition of MNE personality could be achieved in at least three ways. First, a formal treaty could affirm the existence of MNEs and create a system of home State registration. This development could also address the scope of home State responsibility for MNE conduct abroad, such as responsibility for information-sharing and some measure of due diligence oversight.

The second mode of recognising MNE personality could be through continued incremental State actions by which an enterprise-wide understanding of the MNE would gain prominence and acceptance into customary international law. These actions might include OECD guidelines⁸⁰ complaints, or national court processes against MNE parent (or subsidiary) companies that lead to veil-piercing or otherwise permit the assumption of jurisdiction over significant parts of the MNE. Through continued State practice it is possible that home State and MNE obligations will develop in clarity and acceptance. Furthermore, States may take a more active role⁸¹ in encouraging voluntary, but MNE-wide and audited codes of conduct. Future treaties may also contribute to the formation of MNE personality by treating MNEs as enterprises without going so far as to declare their formal existence.

This second scenario is certainly more feasible in light of political factors militating against MNE recognition.⁸² An incremental approach may be counterproductive, however, if it does not actually lead to any significant acknowledgement of MNE personality, or to advancement toward public policy objectives including redress for human rights violations.

A third mode of recognition might take the form of a non-binding instrument, such as a General Assembly declaration, which would contribute to the formation of custom, and would be of greater persuasive value than a regional instrument, yet would hopefully not be stalled by treaty-making politics, nor have its contents boiled down to a lowest common denominator. This instrument could declare the existence of MNEs,

⁸⁰ Organization for Economic Cooperation and Development, 'OECD Guidelines for Multinational Enterprises' above n 33.

⁸¹ Eg, Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 *Vanderbilt Journal of Transnational Law* 501.

⁸² Backer, above n 32.

note their basic obligations and identify the unique responsibilities of home States regarding MNE oversight. It would differ from the Global Compact, for instance, because such a document would not espouse volunteerism, and would have a UN General Assembly vote as its legitimacy and source.⁸³

Several important policy values and goals support the recognition of MNE personality, including redress for human rights violations, transparency and accurate standard-setting in international affairs. While it may well be time from a policy perspective to unveil MNEs as the masters of globalization, States themselves must choose to do so;⁸⁴ States must in fact choose to transcend pressure in the contrary direction in order for MNEs to be acknowledged as enterprise level persons in mainstream international law.

⁸³ The endorsement of UN Special Representative John Ruggie's reports by the Human Rights Council provides an example of this type of mechanism in action, albeit with different substance: John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN HRCOR, 8th sess, Agenda Item 3, UN Doc A/HRC/8/5 (7 April 2008).

⁸⁴ Eg, Christoph Schreuer, Peter Muchlinski and Federico Ortino, 'International Law on Foreign Investment' (Final Report of the Rio de Janeiro Conference, International Law Association, 2008) pt 2(j) <<http://www.ila-hq.org/en/committees/index.cfm/cid/1015>> ('At present there are few sign that host country responsibilities will be balanced out by the introduction of corporate responsibilities in such agreements ... [I]t is hard to see where the political will for such a development will come from').

CHAPTER TEN

NORMS OF CONSULTATION WITH INDIGENOUS PEOPLES: DECENTRALIZATION OF INTERNATIONAL LAW FORMATION OR REINFORCEMENT OF STATES' ROLES?

DWIGHT NEWMAN*

I. INTRODUCTION

In July 2008, a global Indigenous Peoples Summit in Ainu Mosir (in Hokkaido, Japan) culminated in the *Nibutani Declaration*.¹ This came one month after the historic recognition by the Japanese government of the Ainu of Japan as Indigenous peoples.² The transnational network of Indigenous peoples who met in Ainu Mosir called, in part, for Canada, the United States, New Zealand, and Australia to move toward adoption in some form of the United Nations *Declaration on the Rights of Indigenous Peoples* ('DRIP'),³ which these four States had voted against in the United Nations General Assembly in late 2007. These four States, acting in transnational unison, had been the only four States to vote against the Declaration at that final vote and had done so partly on account of some of its provisions on consultation with Indigenous peoples,⁴ although all of them have since moved to indicate support for the Declaration.⁵ Japan, as

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¹ *Nibutani Declaration of the 2008 Indigenous Peoples Summit in the Ainu Mosir* (4 July 2008).

² Philippa Fogarty, 'Recognition at Last for Japan's Ainu' *BBC News* (online) 6 June 2008 <<http://news.bbc.co.uk/2/hi/7437244.stm>>.

³ *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('DRIP').

⁴ Paul Joffe, 'UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation' (2010) 26 *National Journal of Constitutional Law* 121, 127.

⁵ Australia commenced such moves in April 2009, New Zealand in May 2009, Canada in November 2010, and the United States in December 2010, with each offering interpretive statements to limit the effect of their new subscription to the Declaration.

one of forty countries offering explanatory comments on its vote, and one now recognising that it has obligations under the Declaration, had included explanations also bearing on those provisions.⁶ The legal positions of the five States encompassed within the Four Societies Conference at the origin of this volume would in themselves provide strong reason for seeking to better understand the emerging international law norm of consultation with Indigenous peoples.

An international law norm of consultation with Indigenous peoples is, in itself, an intellectually fascinating norm. Such a norm amounts to a requirement at international law that States engage in consultation with non-State actors, most specifically enunciated in the context of a new globalised instrument on Indigenous rights. In other words, the duty to consult with them now gives an international law standing of sorts to communities denied membership in the State system at the Westphalian moment and subsequently, albeit communities with which some colonial powers considered that they had to engage in treaty relationships even from early contact.⁷ A similar point would apply, of course, to some other norms in the minority rights and Indigenous rights context, particularly so with any norm of Indigenous self-determination. However, the norm of consultation provides a particular focus of study removed from some of the more complex and controversial dimensions of self-determination. In the process, it provides a useful lens with which to examine some of the broader theoretical issues arising. Notably, a norm like consultation with Indigenous peoples raises fundamental questions about legitimate modes of international law formation.

As with the traditional formation of customary international law more generally, one might frame a case for norms of consultation with Indigenous peoples in terms of State practice and *opinio juris*, and some have done so in at least partial ways.⁸ Such an account would naturally

⁶ UNGA, 'General Assembly Adopts Declaration on the Rights of Indigenous Peoples' (Press Release, GA/10612, 13 September 2007) <<http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>>.

⁷ For a rich tracing of the history, see generally Paul McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2005); see also Paul McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011).

⁸ See, eg. James Anaya, *Indigenous Peoples in International Law*, (Oxford University Press, 2nd ed, 2004); Stefan Matiation and Josée Boudreau, 'Making a Difference: The Canadian Duty to Consult and Emerging International Norms Respecting Consultation with Indigenous Peoples' in Oonagh E Fitzgerald (ed), *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Irwin Law, 2006) 397.

take account of some soft law material as well, especially legal developments related to World Bank processes that have engaged at length with questions about norms of consultation. That account would naturally involve amassing significant quantities of legal material and is appropriately pursued further elsewhere.⁹ This chapter focuses, rather, on what has arguably become the most significant post-*DRIP* comment on consultation, that issued by Special Rapporteur James Anaya in his second report to the United Nations Human Rights Council as Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People.¹⁰ As Part II of the chapter will show in the context of a larger description of the report, the Special Rapporteur's Report actually tends to eschew reference to the traditional customary international law arguments. Part III will consider the claim that the Report manifests a significant fracturing around the legitimate formation of customary international law, with the possibility of something other than State practice and *opinio juris* more appropriately grounding customary international law formation in some contexts. Part IV argues that the norm formation in this instance paradoxically reflects both an interesting transformation in the role of non-State actors in law formation within the global legal order and reinforcement of more traditional State-centred law formation.

II. THE POST-DECLARATION DUTY TO CONSULT AND THE SPECIAL RAPPORTEUR'S ANALYSIS

International law developments related to the rights of Indigenous peoples have taken on a new force in recent decades, as Indigenous communities have formed new international networks for purposes of furthering their rights advocacy and participated in transnational ways in norm formation exercises. At the same time, as these networks' efforts have gained momentum, particular communities, especially in the African and Asian contexts where definition of Indigeneity has been more complex, have sought recognition of an identity as Indigenous peoples in order to become

⁹ I am engaged in this process within my SSHRC grant on 'International Law Norms of Consultation with Indigenous Peoples: Doctrinal, Methodological, and Theoretical Considerations.'

¹⁰ James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/12/34 (15 July 2009) ('*Special Rapporteur 2009 Report*'). The Special Rapporteur has been subsequently renamed (with the name now referring to Indigenous Peoples), but this chapter will use the name in place at the time of the report under discussion.

part of this broader transnational movement.¹¹ This movement's efforts have culminated most recently in the *DRIP*, following on long negotiations between States and Indigenous communities and thus involving from the outset non-State actors in the norm formation process.¹² As a matter of strictly doctrinal international law, different parts of the Declaration will differ in whether they do or do not reflect international law, some potentially embodying pre-existing customary international law, others crystallising it, and yet others reflecting merely aspirational norms.¹³ This is so, even though various advocates, sometimes even scholarly advocates, make claims premised implicitly or explicitly on the entire Declaration being a definitive statement of international law, without always seeking to justify such claims.¹⁴ Nonetheless, even on these strictly traditional theories of customary international law, the Declaration is an immensely significant instrument that fundamentally transforms the analysis of particular norms of international law related to Indigenous peoples. In this sense, if we are concerned with the present state of international law on Indigenous rights, it is proper to focus on this law specifically within the post-*DRIP* context.

On the matter of the norm of consultation with Indigenous peoples, the Declaration has a particular clarifying force. Many activists and some scholars have attempted to assert the existence of a broadly applicable international legal norm of free, prior, and informed consent ('FPIC') required from Indigenous communities on a wide variety of matters of governmental action and policy before the relevant government actions are permissible.¹⁵ There are of course instances of this norm's application in specific contexts. But the claim that a widely applicable norm of this

¹¹ For some examples, see Will Kymlicka, 'Beyond the Indigenous/Minority Dilemma?' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 183, 205–206.

¹² For a set of excellent comments on the *Declaration*, see Allen and Xanthaki, above n 11.

¹³ For some discussion, see Emmanuel Voyiakis, 'Voting in the General Assembly as Evidence of Customary International Law?' in Allen and Xanthaki above n 11, 209.

¹⁴ See, eg, *Union of BC Indian Chiefs, Implementation of UN Declaration on the Rights of Indigenous Peoples* (18 May 2011) <http://www.ubcic.bc.ca/News_Releases/UBCICNews05181101.html>; Australian Human Rights Commission, *United We Stand—Support for United Nations Indigenous Rights Declaration a Watershed Moment for Australia* (3 April 2009) <http://www.hreoc.gov.au/about/media/media_releases/2009/21_09.html>; Siegfried Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2008) 41 *Vanderbilt Journal of Transnational Law* 1141.

¹⁵ See, eg, Jérémie Gilbert and Cathal Doyle, 'A New Dawn Over the Land: Shedding Light on Collective Ownership and Consent' in Allen and Xanthaki, above n 11, 289.

sort has clear international law status has often depended on a distortion of particular materials, including claims that the World Bank has already acceded to such a legal norm.¹⁶ In fact, the World Bank has taken the more moderate position that a norm of free, prior, and informed *consultation*—for which it also confusingly uses the acronym ‘FPIC’—is the actual legal standard applicable in many of the contexts at issue,¹⁷ although it has referred to achieving consent as an aim of such consultation and indeed reflective of good policy.¹⁸ In order to avoid confusion in this chapter, ‘FPIC’ will be used only to refer to free, prior and informed *consent*.

Special Rapporteur James Anaya has treated duties of consultation with Indigenous communities as a particularly important obligation owed to Indigenous communities. Indeed, consultation features as the ‘core issue’ in his second report to the United Nations Human Rights Council as Special Rapporteur,¹⁹ with this report being his first on a specific substantive issue after his first report focused on analysing more generally the legal significance of the new *DRIP*.²⁰ This second Report takes up the potentially more straightforward terminology of a ‘duty to consult’ and seeks to define the duty contextually and in the general light of the Declaration, of International Labour Organization (‘ILO’) *Convention No 169*,²¹ of human rights norms from which the Special Rapporteur suggests the duty can be derived, of observations particularly by the Committee on the Elimination of Racial Discrimination (‘CERD’),²² and of the Special Rapporteur’s own ‘purposive interpretation’ of the duty.²³

Interestingly, although in his own leading scholarly work on international law and Indigenous peoples, Anaya has advocated a broader

¹⁶ See, eg, World Resources Institute, *Empowering Communities Through Free, Prior, and Informed Consent* (2005) <<http://www.wri.org/publication/content/8082>>.

¹⁷ Senior Vice President and General Counsel of the World Bank, ‘Legal Note on Indigenous Peoples’ (Legal Note, World Bank, 8 April 2005).

¹⁸ *Ibid.*

¹⁹ See *Special Rapporteur 2009 Report*, above n 10.

²⁰ See James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, 9th sess, Agenda Item 3, UN Doc A/HRC/9/9 (11 August 2008) (‘*Special Rapporteur 2008 Report*’).

²¹ See *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) (‘*ILO Convention No 169*’).

²² See *Special Rapporteur 2009 Report*, above n 10, [40] (listing a number of such observations). The CERD is a body of experts monitoring implementation by States Parties of the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (‘*ICERD*’).

²³ See *Special Rapporteur 2009 Report*, above n 10, [43].

application of FPIC,²⁴ his new analysis as Special Rapporteur now opts for the more limited conception of consultation envisioned by one side within the ongoing scholarly debate on the issue and thus somewhat moves back from his own past position. There is, however, no doubting that the Special Rapporteur intends the view in the second Report as reasonably authoritative. The Special Rapporteur's third and fourth annual Reports also refer to the duty to consult (as have some of the Special Rapporteur's country reports)²⁵ but cite their legal claims on the duty back to the second Report.²⁶

DRIP itself, it bears noting, contains requirements of consultation in different contexts and to different standards. First, in terms of the scope of consultation requirements, it requires consultation both in the context of permitting specific operations on established lands or traditional territories of Indigenous peoples²⁷ and in the context of legislative or administrative measures that affect the interests of Indigenous peoples.²⁸ It is the second of these aspects that the Special Rapporteur considers requires particular interpretation, offering the 'purposive interpretation' that a duty to consult applies 'whenever a state decision may affect indigenous peoples in ways not felt by others in society.'²⁹ The Special Rapporteur's interpretation on this point probably itself needs to be read purposively, for if read literally, difficulties would arise where a State decision affected both Indigenous communities and other non-Indigenous minority communities with some shared characteristic such as a close connection to lands. The Special Rapporteur's purposive interpretation carefully seeks to avoid overextending the duty. In the process, as literally framed, there is a danger of its under-extending the duty. It will be relatively common in the more complex circumstances of African and Asian States with many different minority communities, some recognised as Indigenous and some

²⁴ See Anaya, *Indigenous Peoples in International Law*, above n 8.

²⁵ There would be many examples of this point. See generally <<http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm>>.

²⁶ See James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, 15th sess, Agenda Item 3, UN Doc A/HRC/15/37 (19 July 2010) [60]–[67] ('*Special Rapporteur 2010 Report*') (citing repeatedly to the second Report); James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, 18th sess, Agenda Item 3, UN Doc A/HRC/18/35 (11 July 2011) (not adopting new legal principles on duty to consult).

²⁷ *DRIP* arts 10, 28, 29, 30, 32.

²⁸ See *ibid* art 19.

²⁹ *Special Rapporteur 2009 Report*, above n 10, [93].

not,³⁰ that a State decision might impact on these communities but not others. To fail to apply the duty to consult in such circumstances would be unfortunate.

Second, the text within different provisions of the Declaration refers to the two distinct concepts of 'consultation' and 'free, prior, and informed consent' ('FPIC').³¹ The Special Rapporteur rightly notes that the terms reflect differentiated consultation processes,³² and the Report essentially arrays them into a sort of spectrum analysis, with a more stringent FPIC standard of consultation applying in certain contexts where the underlying reasons for consultation in terms of the nature of measures and the potential impact on Indigenous peoples give rise to particularly elevated standards of consultation.³³ Possibly seeking to render the Declaration requirements more acceptable to States, the Special Rapporteur minimises any discussion of FPIC as a veto power and instead seeks to consider in a unified way all consultation as geared in good faith to seeking agreement and building dialogue, with particularly stringent standards applicable to FPIC situations, but without those situations necessarily embodying the sort of veto power that FPIC is sometimes read as containing.³⁴

In these sorts of modulations, the Special Rapporteur overcomes some criticism that could otherwise come from States on the Special Rapporteur's tendency to assume both the Declaration and *ILO Convention 169* relatively definitively representative of legally established views. At the time of its adoption the Declaration met with stronger opposition from some States whose position on Indigenous rights would be considered highly pertinent than the Special Rapporteur admits in the 2008 and 2009 Reports. In addition to the abstentions that these Reports acknowledge, there were also a very significant number of absences from the final vote, there having been some significant controversies outstanding at the time of the final vote that also dilute the status of the Declaration as

³⁰ Definitional issues feature significantly in the African Commission on Human and Peoples' Rights, *African Commission's Working Group of Experts on Indigenous Populations/Communities*, 28th sess (2005); see also Douglas Sanders, 'Indigenous Peoples: Issues of Definition' (1999) 8 *International Journal of Cultural Property* 4.

³¹ Cf *DRIP* arts 10, 11, 15, 17, 19, 28, 29, 40, 32, 36, 38.

³² *Special Rapporteur 2009 Report*, above n 10, [42].

³³ *Ibid* [45]. The Report lists some of the contexts giving rise to FPIC requirements:[47], though there are others within the Declaration not listed.

³⁴ *Ibid* [45]–[49].

representing current customary international law.³⁵ And *ILO Convention 169*, of course, has had a very limited number of ratifications.³⁶

The Special Rapporteur's Report extends requirements from the duty to consult to corporations, both by suggesting the incorporation of duty to consult-related components into corporate codes and by recommending State monitoring of corporate compliance.³⁷ In so doing, the Special Rapporteur draws on a developing practice by various stakeholders of evaluating corporations for their compliance with international human rights standards.³⁸

The Special Rapporteur seeks to provide additional support for the legal status of the duty to consult by referring to the practice of the Committee on the Elimination of Racial Discrimination, which in a number of concluding observations on State party reports has called on States Parties to the associated *ICERD* to adopt consultative processes.³⁹ However, these observations, almost without exception, consist of very brief statements recommending consultative processes as part of State action to respond to an ongoing wrong of racial discrimination in particular contexts. In the instances cited, the call for consultation is not clearly asserted as a generalisable legal requirement and could be read as more pragmatically oriented, although the inferences to come from concluding observations are of course complicated by the diplomatic language involved.⁴⁰ That said, this use of 'soft law' is subject to critique on the basis that its legal content may not be entirely clear, although the Special Rapporteur's development of a norm of consultation out of the various materials at hand also represents a very reasonable interpretation fitting with a generally recognised emerging principle concerning interactions with Indigenous communities.

³⁵ See Dwight Newman, 'The Law and Politics of Indigenous Rights in the Postcolonial African State' (2008) 102 *American Society of International Law Proceedings* 69; Dwight Newman, 'Africa and the United Nations Declaration on the Rights of Indigenous Peoples' in Solomon A Dersso (ed), *Perspectives on Minority and Indigenous Peoples' Rights in Africa* (Pretoria University Law Press, 2010).

³⁶ As of this writing, it has twenty-two ratifications, mostly in Latin America: International Labour Standards Department, *List of Ratifications of International Labour Conventions* (3 July 2012) International Labour Organization <<http://webfusion.ilo.org/public/applis/appl-byconv.cfm?conv=C169&hdroff=1&lang=EN>>.

³⁷ *Special Rapporteur 2009 Report*, above n 10, [73].

³⁸ *Ibid* [56]. The 2010 Report further explores duties on corporations: see generally *Special Rapporteur 2010 Report*, above n 26.

³⁹ *Special Rapporteur 2009 Report*, above n 10, [40].

⁴⁰ This would be descriptive of the various observations cited in *Special Rapporteur 2009 Report*, above n 10.

Interestingly, despite the implication that the duty to consult represents a norm of customary international law, the Special Rapporteur's Report makes very little reference to the traditional elements of customary international law, namely State practice and *opinio juris*.⁴¹ In the context of prior claims for the legal status of the Declaration, the previous year's report had at least briefly cited supportive practice in Bolivia's steps to implement the Declaration and referenced citation of the Declaration in Bolivia, Ecuador, and Nepal.⁴² The duty to consult discussion, however, makes no direct use of State practice or of statements by State representatives that would show *opinio juris* for the norm.⁴³

There is such evidence available, and though some of it arose after the Special Rapporteur's Report,⁴⁴ some also existed prior to the Report.⁴⁵ Indeed, an increasing number of States now have domestic practices of consultation or even FPIC embodied within case law, statute, or governmental practice, a point to which this chapter will return. However, one of the most interesting instances that existed prior to the Special Rapporteur's Report relates in a particularly complex way to any customary law norm and to the Report. In Canada, within Canadian domestic law, the Supreme Court of Canada has developed a duty to consult doctrine since a series of cases in 2004 and 2005 in which it announced a constitutional duty on Canada's federal and provincial governments to consult with Indigenous communities in the context of possible impacts on their Aboriginal rights

⁴¹ See *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3, 43 (requiring a uniform degree of State practice backed by *opinio juris*); see also A D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971).

⁴² *Special Rapporteur 2008 Report*, above n 20, [52]–[53].

⁴³ It also does not use World Bank practice, as has been common with this argument.

⁴⁴ See, eg, *Norwegian response to Questionnaire from Permanent Forum on Indigenous Issues*, UN ESCOR, 9th sess, Agenda Items 3 and 4, UN Doc E/C.19/2010/12/Add.6 (19 February 2010). The Permanent Forum on Indigenous Issues has also received submissions from other States that have similarly referred to their consultation with Indigenous peoples, with arguable implications that they have done so in response to international law obligations of consultation. Asian States have not featured large in this context, although Cambodia has made similar submissions: *Cambodian response to Questionnaire from Permanent Forum on Indigenous Issues*, UN ESCOR, 9th sess, Agenda Items 3 and 4, UN Doc E/C.19/2010/12/Add.5 (16 February 2010). There are ongoing developments of major significance in Latin America and elsewhere, but a full study on the point is best pursued elsewhere.

⁴⁵ See, eg, Norway's submissions to the Permanent Forum on Indigenous Issues, Norway: Mission to the UN, *Implementation of the United Nations Declaration on the Rights of Indigenous Peoples* (21 May 2009) <http://www.norway-un.org/Statements/2009/Other-Statements/210509_Valle/>.

or treaty rights that applied, where the governments had actual or constructive knowledge of a claim, prior to final proof in the courts or settlement through negotiation of that claim.⁴⁶

The Canadian 'duty to consult' in fact tracks closely the duty to consult that the Special Rapporteur now advances.⁴⁷ To the best of my knowledge, it was the Supreme Court of Canada that pioneered the specific 'duty to consult' terminology coinciding with that which the Special Rapporteur now uses.⁴⁸ The Court's 'duty to consult' jurisprudence also enunciated a flexible analysis very much along the lines of what the Special Rapporteur has now adopted in the international law context. Writing for the Court, Chief Justice McLachlin described the duty to consult in these terms:

The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.⁴⁹

The Special Rapporteur's account of the duty to consult in international law contains a remarkably parallel spectrum, with the Special Rapporteur stating that '[t]he character of the consultation procedure and its object are ... shaped by the nature of the right or interest at stake for the indigenous peoples concerned and the anticipated impact of the proposed measure.'⁵⁰ The Special Rapporteur's approach to the consultation duties of corporations also has a close parallel to the Canadian approach, as do some other minor elements raised within the Special Rapporteur's Report.⁵¹

The parallelism between the Canadian duty to consult and the Special Rapporteur's account of the international law duty to consult is not

⁴⁶ See *Haida Nation v British Columbia (Minister of Forests)* [2004] SCR 511 ('*Haida Nation*') (the lead case in enunciating the doctrine); Dwight G Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Purich Publishing, 2009) (discussing the initial trilogy and subsequent case law).

⁴⁷ *Haida Nation* [2004] SCR 511, [44].

⁴⁸ There had of course been uses of this terminology in labour law contexts.

⁴⁹ *Haida Nation* [2004] SCR 511, [39].

⁵⁰ *Special Rapporteur 2009 Report*, above n 10, [45].

⁵¹ *Ibid* [54] (main duty on governments and not delegable in full but corporations may as a pragmatic matter carry out consultation), [48]–[49] (duty to consult not creating veto power), [70] (relevance of making information available as part of consultation process and helping to build capacity if needed). All are close parallels to the Canadian model: see generally Newman, *The Duty to Consult*, above n 46.

referred to by the Special Rapporteur. This is not surprising. The complex element of the Canadian State practice is that, although there are sometimes references made by Indigenous rights advocates to its fulfilling an international law duty to consult, it was actually adopted simply as a constitutional doctrine without any direct reference to international law.⁵² Indeed, perhaps more interestingly yet, Canada was one of the four States to actually vote against the Declaration, citing as one reason for doing so its concern about the consultation provisions in the Declaration as compared to well-functioning domestic consultation processes.⁵³ Thus, Canada presents an interesting example of State practice but it does not fit well with arguments seeking to establish *opinio juris* for an international norm as articulated by the Special Rapporteur. If, as the parallelism of doctrine suggests, Canada's duty to consult doctrine influenced the Special Rapporteur, there was nonetheless good reason in Canada's vote against the Declaration for this influence to operate *sub silentio*.

This conclusion reiterates the point that the Special Rapporteur, then, advances a customary international norm with reference to soft law and without reference to the State practice and *opinio juris* traditionally required to establish a rule as a norm of customary international law. The formulation related to State practice and *opinio juris*, of course, has been contested for having an overly positivist focus and giving rise to various enigmas concerning the formation of new customary international law, such as questions about how States can consider themselves to be bound by a new norm as it is forming. As a result, there are competing formulations of customary international law that modify the traditional focus on these elements.⁵⁴ The Special Rapporteur's approach to arguing for a customary international law norm without relying on State practice or *opinio juris* thus is not a simple failure to satisfy the standard legal requirements; in fact it implicitly adopts a particularly novel form of these different contested approaches to customary international law. The next Part turns to an underlying theoretical significance of the Special Rapporteur's methodological approach to articulating this new customary international law norm.

⁵² I discuss some of its relation to international law in Newman, *The Duty to Consult*, above n 46, ch 5.

⁵³ *Ibid.*

⁵⁴ See Brian D Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, 2010) (a recent comprehensive survey of theory on customary international law and an interesting attempt to formulate a new theory).

III. CONTEXTUALLY AFFECTED METHODOLOGY OF CUSTOMARY INTERNATIONAL LAW

The Special Rapporteur's decision not to prioritise State practice and *opinio juris* in the advancement of a customary international law norm could represent simply one untraditional and contestable approach to determining the existence of customary international law norms. This choice would come in an era when the traditional methodology is under increasing attack from various sides in more general terms.⁵⁵ That contestation of the traditional methodology would arise specifically in the context of international law related to Indigenous peoples is perhaps unsurprising. To ascribe significance to a rigid State-centered methodology of analysing customary international law in this context would actually be to adopt a methodology at theoretical odds with the very norm at issue. Indeed, there would be a significant irony in developing a norm of consultation with Indigenous peoples that has normative force precisely because particular entities other than States have a compelling claim for a form of international law standing if one did so by using legal methodologies specifically denying the legal relevance of these very entities. The duty to consult, as other Indigenous rights, acknowledges in some senses a limit on the legitimacy of the claims of States to carry out all legal ordering. In opening to a legal pluralism that embraces interests and norms of Indigenous communities, the normative relevance of a methodological principle focused solely on States themselves is put particularly at issue.

This point can be couched in a broader theoretical framework. Modern analyses of international law have increasingly accepted Thomas Franck's argument that international law must aspire to norms that have legitimacy.⁵⁶ To adopt the line of argument as put well by Samantha Besson, if part of what makes law actually binding, as opposed to a mere command, is its legitimacy, then 'legitimacy is an essential part of legality, in the sense

⁵⁵ See eg, David P Fidler, 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law' (1996) 39 *German Yearbook of International Law* 198; Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005) 23–43; Lepard, above n 54; Samantha Besson, 'Theorizing the Sources of International Law', in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 163.

⁵⁶ Thomas Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1995) 22–26.

that the law should be made in such a way that it *can claim* to be legitimate and hence to bind those to whom it applies.⁵⁷

To achieve this legitimacy, many have focused on the idea that some international norms may need to be subjected to processes of democratic legitimation. However, any attempt at majoritarian democratic legitimation of international law norms affecting Indigenous peoples would actually carry severe risks of delegitimizing the norms, given that the norms exist precisely in response to the devaluation of Indigenous communities by hegemonic majoritarian decision-making processes over time. The consultation norm used as the central example here is one concerned with a set of limitations on State actors consisting of duties owed to specific non-State nations denied State status within the Westphalian system. The legitimation of such a norm comes not from opening more general democratic processes in international law-making but from opening the contextually appropriate legitimation processes. The appropriate processes in the context of law affecting Indigenous peoples will be processes involving Indigenous peoples, their views, and their interests as part of the law formation processes.⁵⁸ The way in which the Special Rapporteur writes about the content of customary international law here show preference to *DRIP* over more general State practice precisely because the *DRIP* negotiation process was one with elements furthering the legitimation of the norms.

Such reasoning would highlight implicitly a possibility not necessarily bearing on any need for any general shift in the theory of customary international law formation but to the potential for a context-specific approach to analysis and methodology of customary international law. In areas of law formation not giving rise to legal pluralism issues, an argument grounded in legal pluralism does not call for a shift in the methodology of customary international law—though other arguments may call for other forms of legitimation. The argument from pluralism concerns thus contains no general pressure to move, for instance, to a natural law-based

⁵⁷ Besson, above n 55, 176. For a different, and extended analysis relevant to these discussions, see Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010).

⁵⁸ For an example of a State adopting Indigenous participation in the State's international treaty-making processes, see Gib van Ert and Stefan Matiation, 'Labour Conventions and Comprehensive Claim Agreements: A New Model for Subfederal Participation in Canadian International Treaty-Making' in Oonagh E Fitzgerald (ed), *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Irwin Law, 2006) 203.

conception of custom.⁵⁹ Rather, it speaks to the appropriateness of using more soft law and, implicitly, normative reasoning within a specific context where the legal claims of entities other than States are at issue.

This account of context-specific methodology, it bears noting, is in accord with broader tendencies in international law formation. There is no doubting that certain specialised areas appear to feature different degrees of reference to soft law instruments and to less traditional forms of customary law analysis as compared to other areas. For example, specialised law formation processes are widely acknowledged as having play in the context of international trade and investment law, where non-State actors have significant roles in the development of norms and where non-State actors' interests are of significance within the norms.⁶⁰ Similarly, soft law enumerations feature more widely in human rights law analyses than in other areas of law, with this tendency sometimes leading to critique of the area,⁶¹ but with it actually representing the nature of the area as likewise involving the international law claims of non-State entities and, thus, the appropriateness of a broader set of interests than mere State practice being under consideration, as compared to in areas of the law concerned solely with the traditional interactions between States and thus more appropriately formed by the processes of interactions between States.

In these areas of specialised norm formation, those affected by the norm are not necessarily a general democratic populace but a more specific set of non-State actors working within the coordination of the specialised norms. The non-State actors affected require careful attention. For instance, effects on local peoples from international investment law are drawing and meriting increasing attention,⁶² and norms on diplomatic immunity are receiving increasing scrutiny when they run up against aspirations of criminal prosecution for harms against civilian populations.⁶³

⁵⁹ For discussion, see generally Lepard, above n 54.

⁶⁰ John Jackson, 'The Role of International Law in Trade' (2005) 36 *Georgetown Journal of International Law* 663, 663.

⁶¹ John Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1.

⁶² See generally Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003).

⁶³ See, eg, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3. Cf *Jurisdictional Immunities of the State (Germany v Italy) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) (with the dissenting opinion of Judge Cançado Trindade particularly subjecting traditional civil State immunities to interrogation).

Nonetheless, the point stands that different areas of international law may actually receive legitimation in different ways, and this principle has some fit with observable features of law formation as already practised. A pluralization of processes of norm formation has a significant fit with otherwise unexplained differentiations in actual practice that would have otherwise been subject to puzzlement and critique but that may actually be entirely justifiable and legitimate.

Though the Special Rapporteur's report gives no explicit explanation along these lines but simply makes the argument for the customary international norms in a different way, James Anaya had hinted in related directions in some of his own past writing. He has explicitly suggested that 'actual state conduct is not the only or necessarily determinative indicia of customary norms' and argued for the role of prescriptive or normative or moral dialogue between pertinent actors as an alternative component of customary international law formation.⁶⁴ Others have previously alluded to the possibility of customary law formation through such discursive processes,⁶⁵ but their arguments belong most properly in certain limited contexts, and an explanation of why this is so is an important task of this chapter.

Accepting the possibility of pluralised processes of norm formation more explicitly actually opens room not for context-specific escape from accountability in relation to decision-making processes but for new attention to appropriate forms of accountability. The traditional State practice-focused approach to customary international law is obviously subject to its own imprecision, but it does nonetheless provide a set of legal standards subject to application and capable of intelligibly guiding legal debate. Context-specific approaches to methodology in contexts calling for less emphasis on the State and thus less emphasis on State practice actually open the possibility of developing more specific standards for these different contexts. Given that the traditional standards would have led to criticisms of the Special Rapporteur's approach, but given that they

⁶⁴ See S J Anaya, 'The Emergence of Customary International Law Concerning the Rights of Indigenous Peoples' (2005) 12 *Law & Anthropology* 127, 128. Cf S James Anaya, *Indigenous Peoples in International Law*, above n 8, 50–51 (discussing a human rights discourse that 'seeks to define norms not by mere assessment of state conduct but rather by the prescriptive articulation of the expectations and values of the *human* constituents of the world community').

⁶⁵ See especially Myres S McDougal, Harold D Lasswell and Lung-Chu Chen, *Human Rights and World Public Order: The Basic Politics of an International Law of Human Dignity* (Yale University Press, 1980) 269–274.

do not entirely apply, there needs to be careful articulation of what now justifies the determination of a specific legal norm in relation to State obligations to Indigenous peoples.

Here, the Special Rapporteur's use of purposive reasoning in light of more generally agreed legal starting-points has significant potential and, notably, is in keeping with the practices of other institutions having decision-making roles in this area.⁶⁶ Adoption of purposive and structural forms of reasoning of the sorts perhaps more familiar in constitutional law contexts offers a specific means by which different possible approaches can be put to relevant tests. This sort of purposive and structural reasoning looks both to what legal norms live out the meaning of Indigenous rights and to what norms are pragmatically viable within the intersecting legal orders at issue.

These approaches may not, of course, remain entirely separate from traditional modes of customary norm formation. If they are successful, over time, at reshaping the conduct of States—and there is, to be clear, an ongoing development of State practice of consulting with Indigenous peoples—then they may create the very State practice by which customary international law has traditionally formed. Moral argument has influenced State practice in various areas and thereby contributed ultimately to law formation,⁶⁷ without this reality having led to widespread claims that moral argument is a means of law formation. However, here the approach explicitly adopts a sort of normatively structured legal reasoning as part of the analysis of existing law, putting the role of moral argument more squarely at issue. Purposive and structural reasoning becomes part of the process of law formation in a way that overcomes some of the limits of the traditional approach if applied in this context. At the same time, the Special Rapporteur's elaboration of the reasoning behind the conclusions within the specific Report is necessarily brief. Specific adoption of these sorts of methodologies also calls for ongoing academic engagement in the project of analysing and rendering normatively coherent the emerging principles at stake.

⁶⁶ The African Commission decision in the *Endorois Case* is illustrative: *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (African Commission on Human and Peoples' Rights, Case 276/2003, 4 February 2010) [226]–[228] ('*Endorois Case*').

⁶⁷ See generally Neta Crawford, *Argument and Change in World Politics: Ethics, Decolonization, Humanitarian Intervention* (Cambridge University Press, 2002).

IV. THE SIMULTANEOUS TRANSFORMATION AND REINFORCEMENT OF THE GLOBAL LEGAL ORDER

As intimated at the outset, it is easy to focus on the self-determination aspects of *DRIP* as its key transformative move, with one author rightly describing the Declaration as ‘one of the most significant stages in the development of the right to self-determination since decolonisation’.⁶⁸ But the participation guarantees within the Declaration are also key transformations.⁶⁹ The duty to consult, one of these participation guarantees, receives clear shape and force through *DRIP*. Although some might try to dismiss something like a duty to consult as a mere procedural mechanism, and thus less significant than more substantive rights guarantees or full-fledged transformations of jurisdiction, the purposively read duty to consult marks a larger set of transformations. As in other parts of the Declaration, a group becomes a right-holder at international law, opening new realms of discussion for collective rights.⁷⁰ At the same time, the international law duty to consult recognises a broader scope and subject of international law and limit on unconstrained State power in the specific context of communities that have felt particularly harshly the effects of past adherence to a Westphalian State sovereignty. Shifting any conceptions of zero-sum games pitting development against culture, a rich account of the duty to consult can see it as making new room for trans-cultural conversations about living together and opening new spaces within the interstices of international law.

At the same time, any proclamation of a fundamental transformation of the State-centric system of norm formation must be moderated. Two points are worth developing in this regard. First, transformation of law has been achieved not only through transformation of the normative discourse but also partly through transformation of the claims at issue. Second, change has been achieved partly even through alignment with very ordinary power interests that sought, and perhaps even attained to

⁶⁸ See Helen Quane, ‘The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights’ in Allen and Xanthaki, above n 11, 259, 260.

⁶⁹ Ibid 272–84.

⁷⁰ See Alexandra Xanthaki, ‘The UN Declaration on the Rights of Indigenous Peoples and Collective Rights: What’s the Future for Indigenous Women?’ in Allen and Xanthaki, above n 11, 414–16 (describing key evolution toward collective rights in *DRIP*). See also Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Hart Publishing, 2011) (offering a theoretically grounded approach to collective rights).

some degree, reinforcement of old power through this very process of change.

The Declaration receives expression in the modality of legal text, achieved legal standing substantially through support by States, and presumes relatively unchanged national and international jurisdiction.⁷¹ Indigenous communities' alignment with the Declaration marks not only the transformative recognition discussed above but also alignment with a very ordinary instrument of international law and a State order that has undergone only limited alteration, thereby also effectively reinforcing that State order.⁷² State support for the Declaration was achieved through decades of negotiation, followed by last-minute alterations to the text,⁷³ but accompanied in a number of instances by reassurances to States of the limited effects of the Declaration generally and the duty to consult specifically.⁷⁴ Particularly importantly, States were assured in various ways that the rights being guaranteed to Indigenous peoples were guaranteed to them on account of their uniqueness and not because of their own membership in any larger category of minority groups that would now make similar claims.⁷⁵

This latter decision within the negotiations and advocacy, one categorised by a number of scholars as the construction of a 'firewall' between Indigenous rights claims and other minority rights claims,⁷⁶ limits the force of any overstated conceptions of the *DRIP*-transformed field of international law. The maintenance of this 'firewall' may not stand, particularly in African and Asian contexts, in which Indigenous rights norms may yet take on further importance through further groups' alignment with Indigenous identity. But to the extent that there is movement across the categories of minority and Indigenous identity, as there has already been in some instances,⁷⁷ such a move by rights-claiming groups may actually have the effect of reinforcing the distinction for other groups left in the category of non-Indigenous minorities. Achievement of international legal force for such concepts as the duty to consult comes about partly

⁷¹ See HP Glenn, 'The Three Ironies of the UN Declaration on the Rights of Indigenous Peoples' in Allen and Xanthaki, above n 11, 171.

⁷² Ibid 175–78.

⁷³ For an account of these last-minute negotiations, see Newman 'Africa and the United Nations Declaration on the Rights of Indigenous Peoples,' above n 35.

⁷⁴ See, eg, Kymlicka, above n 11, 200–202.

⁷⁵ Ibid.

⁷⁶ Ibid 199.

⁷⁷ Ibid 205–206.

through transformation of the scope of the claimed right and partly through transformation of the potential rights-holders in ways that actually limit what was sought by the transnational Indigenous movement and by relevant sectors of the international human rights movement.

Second, although normative suasion obviously had its role in the acceptance by States of Indigenous rights norms, as with decolonization norms more broadly,⁷⁸ one should not underestimate the role of crass *realpolitik*. There is some evidence of certain States, including China, being enthusiastic to support the Declaration on the presumption that they do not themselves have any Indigenous communities but can thereby complicate the position of other States that they had seen as beneficiaries of colonialism.⁷⁹ In this sense, international law affirmations of Indigenous rights can, whatever the normative force of these claims, also function partly as a power play as between different States, thus again reinforcing State power within the international legal order through the very processes that seem aligned with change to a State-centric order.

V. CONCLUSIONS

In this chapter, within a discussion of international law norms of consultation with Indigenous peoples, I have sought to describe and analyse the Special Rapporteur's recent advancement of the duty to consult doctrine, arguing that this doctrine is substantively significant and, in addition, that the Special Rapporteur's method of advancing it has a theoretical salience with the substantive norms at issue. Second, I have argued briefly for the possibility of an account of context-specific modes of formation of customary international law within the changing international legal order. Third, I have argued that the development of this duty to consult doctrine, as the Indigenous rights discourse more generally, embodies a Janus-like simultaneous transformation and reinforcement of the existing global legal order, potentially expanding the subjects and scope of international law while also implicitly closing the door on some such expansion. The development of one seemingly small norm may both open and close many possibilities.

⁷⁸ See generally Crawford, above n 67.

⁷⁹ Cf Andrew Erueti, 'The International Labour Organization and the Internationalisation of the Concept of Indigenous Peoples' in Allen and Xanthaki, above n 11, 93, 103–104.

CHAPTER ELEVEN

CO-REGULATION AND THE ROLE OF TRANSNATIONAL CORPORATIONS AS SUBJECTS IN IMPLEMENTING INTERNATIONAL ENVIRONMENTAL LAW

ANASTASIA TELESETSKY*

I. INTRODUCTION

With revenues that exceed the gross national product of many countries and corporate networks that engage in more global governance activities than many States, transnational corporations (“TNCs”) have become the most influential socioeconomic force within the phenomenon of globalization. In a world of collapsing physical boundaries and expanding markets, the largest economic actors have become more and more integrated in their governance activities, while political actors have become more fractious. Yet, our current international legal order where the political State is the dominant international actor remains detached from the new social reality of TNCs as the primary natural resource extractors. This chapter argues that the classical legal notion that international legal personality is exclusive to States and some international organizations is nothing more than a fiction based on outdated theories about legal personality.

In the context of international environmental law, maintaining the fiction that international authority is exclusive to State actors is particularly dangerous. In 2008, the world’s top 3,000 public companies were responsible for one-third of all global environmental damage.¹ Five industry sectors accounted for the bulk of these impacts: oil and gas production, electricity, mining, food production, and construction materials.² With

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¹ United Nations Environmental Programme Financial Initiative and the Principles for Responsible Investment, *Universal Ownership: Why Environmental Externalities Matter to Institutional Investors* (Report, UNEP, 2010) 3. The UNEP report measured environmental damage in relation to industry’s contribution to global greenhouse gas emissions, water resources, air pollution, waste generation, exploitation of natural resources, and other ecosystem services.

² Ibid 7.

unmitigated global warming and crashing fish stocks being some of the most pressing transboundary issues of our times, international lawyers need to abandon the rigidity of classical Westphalian international law canons and propose instead new concepts of law to bridge the gulf between legal fictions and operational realities. Because so many of the global environmental impacts are not the result of State action but rather the product of non-State actors engaged in customary business practices, there is an urgent need to recognise the role that non-State actors should be playing in fashioning and implementing international environmental law.

We need to focus greater international attention on incorporating non-State international actors into process of international policymaking and implementation particularly where those actors' decisions already de facto influence international practices. This is already occurring in areas of international economic law. With the encouragement of TNCs, States have willingly drafted relatively uniform international investment and trade laws to facilitate global economic exchange.³ Arbitrator Karl-Heinz Böckstiegel has observed that 'The traditional scenario of states as the only subjects of international law and the only ones having the capacity to raise international claims against other states in legal proceedings has gone. Private enterprises in international trade and investment no longer depend on the discretion of their home states in the context of diplomatic protection as to whether a claim should be raised against another state.'⁴ TNCs have distinctive public rights to pursue economic remedies against sovereign States.

Yet, rights and responsibilities are not ordinarily divisible when legal personality is at issue. In an equitable international legal system, should TNCs have the benefit of their investments being safeguarded without the international burden of addressing corporate impacts on environmental systems? While TNCs have access to arbitration panels, there is no equivalent institutional framework for States on behalf of their citizens or citizens on behalf of their States to bring action regarding corporate environmental performance. Should TNCs be legally obligated to implement internationally negotiated minimum standards for environmental protection in their transboundary economic activities? After all there is

³ See, eg, *North American Free Trade Agreement*, opened for signature 17 December 1992, 32 ILM 289 (entered into force 1 January 1994) ch 11, 605.

⁴ Karl-Heinz Böckstiegel, 'Enterprise v State: The New David and Goliath' (2007) 23 *Arbitration International* 93, 103.

harmonization of trade rules, why shouldn't there be similar harmonization of environmental rules? In parallel with the existing rights that TNCs have under international economic law such as non-discrimination and national treatment, TNCs should also bear the responsibilities of being responsible subjects under international environmental law. Extending legal personality beyond one subset of public international law to a second subset of law is a natural progression of assigning full legal personality to TNCs.

This chapter aims to bridge the gap between the legal fiction of international law being an exclusive State club and the *de facto* power of TNCs over the global environment by proposing an evolution in the legal theory of personality. Whether TNCs have international legal personality under public international law may be open to debate for some scholars such as Ian Brownlie.⁵ But if we hope to create an adaptive transnational governance mechanism that can respond in a timely fashion to the global environmental challenges we are facing, then TNC international legal personality needs to be recognised not just for the practice of international economic law but also international environmental law. As long as TNCs are identifiable international actors ascribed certain rights by States, they also have independent obligations in relation to those rights such as customary duties to prevent environmental harm to host States.

To explore this theoretical concept, this chapter examines first how TNCs have directly and indirectly influenced international environmental policymaking. Given their extensive influence in environmental policymaking, this chapter then argues for a legal presumption that TNCs must have international personality in the arena of international environmental law. When TNCs are recognised as international subjects with both rights and responsibilities, opportunities will emerge to generate new dialogues between sovereign States and TNCs on measurable environmental goals and effective implementation of those goals.

The remainder of this chapter proposes one pragmatic model for more effective interaction between State and TNC actors in the context of international environmental policymaking. The model is called *international co-regulation* because it shares environmental regulatory roles between State and non-State actors. The model begins with scientists identifying flexible but quantitative environmental targets for global environmental

⁵ Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6th ed, 2003) 65.

regulation that are needed to mitigate or adapt to global environmental impacts. State representatives select from the targets proposed by scientists and adopt scientifically meaningful environmental goals for transnational global business sectors. As subjects of international law with internationally recognised responsibilities, transnational corporations may meet their legal responsibilities by negotiating binding compliance contracts. As an incentive for participating in a co-regulatory framework, States would agree to individually regulate transnational corporations which decline to enter a compliance contract under an alternative national regulatory system with international oversight. At some point, if international environmental law is to succeed as a discipline of law, TNCs must be recognised not just as corporations subject to domestic law but also transnational actors that can be held accountable under public international law standards. Because international efforts to impose legal standards on TNCs have failed to gain political traction⁶ and there is no harmonization across domestic standards for TNC responsibility, this paper proposes a co-regulatory approach as an alternative for improving the efficacy of international environmental law by creating new formal frameworks for State and TNC interactions on global environmental matters.

II. ROLES OF TRANSNATIONAL CORPORATE ACTORS IN INFLUENCING INTERNATIONAL ENVIRONMENTAL LAW

Corporate actors serve a combination of explicit and implicit roles in the production and implementation of international environmental law. While the bulk of corporate attention is on national policymaking frameworks, there are numerous opportunities for corporate actors, and especially TNCs, to influence international policymaking.

Corporate actors already have marked informal influences on international environmental law-making processes. As environmental lawyer Jody Freeman argues, non-State organizations, especially businesses, exercise 'coercive power' in governance processes because they are able to

⁶ UN Commission on Transnational Corporations, *Draft United Nations Code of Conduct on Transnational Corporations: Report to the Special Session*, UN ESCOR, 38th sess, Supp No 7, UN Doc E/1983/17/Rev.1 (1983) Annex II, 12–27; United Nations Subcommission for the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, UN ESCOR, 55th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

create standards and self-monitor for compliance with these standards.⁷ As the creators of products and services for the global marketplace, transnational corporations actively define the parameters of international environmental regulation as States frequently develop international environmental standards such as MARPOL 73/78⁸ with input from the industry advisory groups. Where corporate actors have some latitude to self-regulate at the international level, corporations will legislate the technical aspects of their business through active lobbying and negotiation within international organizations such as the International Organization for Standardization, a network of national standards institutes of 163 countries, some of which are government-mandated and others of which are set up by industry associations.⁹

These same corporate actors also play key roles in broader international environmental policymaking by supplying experts, lobbying State representatives, and participating as non-State observers at intergovernmental meetings. International organizations have encouraged active participation and input from business interests likely to be affected by the activities and decisions of the organizations. For example, the Food and Agriculture Organization has industry representatives on its advisory committee on paper and wood products.¹⁰ Likewise, the International Maritime Organization relies on the involvement of the shipping and oil industries to inform the institution of the viability of its policy proposals.¹¹ In certain ongoing intergovernmental processes such as the drafting and updating of the Codex Alimentarius, industry provides regular input on whether proposed rules and standards are technically feasible for commercial

⁷ Jody Freeman, 'The Private Role in Public Governance' (2000) 75 *New York University Law Review* 543, 547.

⁸ *International Convention for the Prevention of Pollution from Ships*, opened for signature 2 November 1973, 1340 UNTS 184 (entered into force 2 October 1983) ('MARPOL').

⁹ ISO has cooperative relationships with numerous industry and industry trade association players including Aluminum Anodizers Council, Airport Council International, Association of Equipment Manufacturers, American Oil Chemist's Society, American Express, Consumer Electronics Association, European Cement Association, International Council on Combustion Engines. A complete list is available at *Organizations in Cooperation with ISO*, International Organization for Standardization <http://www.iso.org/iso/about/organizations_in_liaison.htm>.

¹⁰ See, eg, *39th Session of Advisory Committee on Paper and Wood Products*, (April 23–24 1998) Food and Agricultural Organization of the United Nations <<http://www.fao.org/docrep/field/383685.htm#ANNEX%201>>.

¹¹ See, eg, 'Report of the 2006 IMO/UNEP Forum on Regional Co-operation in Combating Marine Pollution,' (Report, International Maritime Organization and the United Nations Environment Programme, May 2–5 2006) (including participation by the International Petroleum Industry Environmental Conservation Association, Oil Spill Response Limited, and the International Tanker Owners Pollution Federation).

production. Industry representatives may also participate actively as representatives of State delegations.¹²

Corporations, particularly TNCs, participate regularly as non-State observers at intergovernmental meetings on international environmental law topic. They typically register as Business and Industry Non-governmental Organizations ('BINGOs'). As non-State observers, private for-profit entities, through their respective BINGOs, have the opportunity to attend most sessions of an intergovernmental meeting, make oral interventions, disseminate information either directly at the meeting or through side events, and informally lobby members of State delegations. For example, at the meetings associated with the *Cartagena Protocol on Biosafety*,¹³ executives from major biotech companies including Monsanto, Dupont, and Sygenta officially attended and participated in the meetings as non-State observers.¹⁴ At the 2009 Conference of Parties for the *United Nations Framework Convention on Climate Change* ('UNFCCC') in Copenhagen, the International Petroleum Industry Environmental Conservation Association ('IPIECA') appeared as a non-State observer and featured presentations by its members including Chevron, Canada's Nexen, Brazil's Petrobras, Norway's Statoil, and France's Total at a conference side event. The IPIECA has also been involved more formally in the development of climate change policy as a participant in the Expert Group on Technology Transfer to the Subsidiary Body for Scientific and Technological Advice.¹⁵

In recent intergovernmental meetings, transnational business interests have advocated for States to adopt specific policy positions. In the negotiations leading up to the adoption of the *Cartagena Protocol on Biosafety* by the meeting of the Conference of the Parties to the Convention,¹⁶

¹² See, eg, 'Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission' (Report of the 32nd Session, ALINORM 09/32/REP, Food and Agricultural Organization and the World Health Organization, June 2-July 4 2009) (including State delegations with representatives from companies such as Danone and Nestle, as well as special interest groups such as the American Feed Industry Association, National Pork Producers Council).

¹³ *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 2226 UNTS 208 (entered into force 11 September 2003).

¹⁴ Jennifer Clapp, 'Transnational Corporate Interests and Global Environmental Governance: Negotiating Rules for Agricultural Biotechnology and Chemicals' (2003) 12(4) *Environmental Politics* 1, 7.

¹⁵ International Petroleum Industry Environmental Conservation Association ('IPIECA'), 'Guide to the United Nations Framework Convention on Climate Change and the Kyoto Protocol: A Guide to the Climate Change Negotiations' (Report, IPIECA, 2008) 10.

¹⁶ See, eg, Conference of the Parties, Convention on Biological Diversity, *Report of the Extraordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UN Doc UNEP/CBD/ExCOP/1/3 (20 February 2000) 6.

influential global biotech companies were actively engaged in arguing against the Protocol being overly restrictive of the development of the biotech industry. At the negotiation meetings, biotech industries formed the Global Industry Coalition, a business organization representing 2,200 companies in over 130 countries who spoke with 'one powerful voice.'¹⁷ Similarly, at the 14th Session of the Conference of the Parties to the UNFCCC, the International Chamber of Commerce ('ICC'), a BINGO representing primarily large firms from OECD States, delivered an intervention to request States to adopt the position that carbon capture and storage should be incorporated within the *Kyoto Protocol's* Clean Development Mechanism.¹⁸ With their focus on the challenges associated with global business, the ICC had previously argued that multinationals should be able to participate in the Clean Development Mechanism regardless of whether the State where the parent corporation resides has ratified the *Kyoto Protocol*.¹⁹

Even though the explicit involvement of TNCs in international environmental lawmaking may be limited to their engagement on technical committees and occasional policy interventions,²⁰ this low level of involvement becomes problematic when one examines the correlation between ordinary business decisions and large-scale environmental disruption. Non-State business actors play an essential role in the success and failure of international environmental law because their activities directly or indirectly impact biodiversity, air quality, water quality, and resource management. Daily decisions made by business leaders about where to source goods, or how to deliver services, can have cumulative effects on shared environments such as transboundary watersheds, transboundary airsheds, or the high seas. Few business actors, unless compelled by States through national regulations or under pressure from civil society, will agree publicly to abide by the rules and principles embodied in international environmental law. The UN Global Compact launched in 2000 provided

¹⁷ Clapp, above n 14, 7.

¹⁸ 'ICC contribution on Carbon Capture and Storage' (Report, International Chamber of Commerce, 2009) 1–2 <<http://www.iccwbo.org/uploadedFiles/ICC/policy/Environment/Poznan%20CCS%20Statement.pdf>>.

¹⁹ 'Climate Business and Society: Elements for Success at COP-6' (Report, International Chamber of Commerce, 2000) <<http://iccwbo.org/id444index.html>>.

²⁰ Groups of companies may endeavour to explicitly influence international lawmaking by proposing voluntary regulatory frameworks that they hope will be adopted independently by States. For example the IPIECA has proposed voluntary standards approaches for biodiversity conservation, greenhouse gas reduction, sustainable biofuels, and urban air quality management that it hopes will influence national standard-setting: 'Good Practice Guide' (2010) IPIECA <http://www.ipieca.org/system/files/publications/2010_good_practice_guide.pdf>.

that companies should 'support a precautionary approach to environmental challenges,' 'undertake to promote greater environmental responsibility,' and 'encourage' development of environmentally friendly technology. Of the approximately 82,000 TNCs as of 2010,²¹ only a small portion of these TNCs have signed on to the Global Compact with its 5,551 active business members.²²

Yet, the combination of inertia by TNCs at the international level and obstructionist behaviour by corporate sectors at the national level has resulted in an undermining of existing international environmental laws as well as an inability to make progress on reversing the trends towards global environmental degradation.

III. INTERNATIONAL LEGAL PERSONALITY OF TRANSNATIONAL COMPANIES

Practitioners and scholars of international law have long recognised international law as more than the law of States and have extended international legal theory to include relations among States, intergovernmental organizations, natural persons, and most recently TNCs. As Hersch Lauterpacht observed, international law 'is wide enough, especially having regard to the applicability of general principles of law as one of its sources, to include agreements made by States with persons other than States and not expressly or by implication made subject to the municipal law of such States.'²³

The forces of globalization have wreaked havoc in terms of actual international governance versus the legal theory of public international law. With the emergence of global private governance, international relations scholar Claire Cutler observes that a continuing lack of international personality for corporations 'portends a legitimacy crisis for both law and state.'²⁴ This 'legitimacy crisis' is particularly acute in the context of international environmental law since TNCs are responsible agents for many of the environmental transformations associated with today's globalised

²¹ 'World Investment Report: Investing in a Low-Carbon Economy' (Report, United Nations Commission on Trade and Development, 2010) 17.

²² *Participant Search* (2012) United Nations Global Compact <<http://www.unglobalcompact.org/participants/search>> ('United Nations Global Compact').

²³ Hersch Lauterpacht, 'The Subjects of International Law' in Elihu Lauterpacht (ed), *International Law Being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press, 1970) vol 1, 147.

²⁴ A Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 *Review of International Studies* 133, 147.

world. Even where governments exercise precautionary approaches to resource depletion, transnationals have no such legal obligation.

Yet, the presence of transnationals challenges Westphalian assumptions of territorial sovereign authority and legitimacy, especially in the field of international environmental law where operations and supply chains of the top 3,000 public companies as measured by market capitalization are responsible for one-third of the environmental degradation measured as externalities during one year.²⁵ As international law scholar M Sornarajah observes, 'multinational corporations ... must be seen as distinct bases of power capable of asserting their interests through the law.'²⁶

Private governance within the transnational corporate world is a reality and has been rapidly evolving through the creation of the new global *lex mercatoria* such as standard contracts for multinational operations and international commercial arbitration. Some aspects of the *lex mercatoria* have been translated into international economic legal rights codified in treaties while other aspects are gaining in recognition as customary international law. The emerging *lex mercatoria*, however, contains nothing explicit about the nature of transnational corporate environmental responsibilities.

While States struggle to control corporations for a variety of socio-political reasons, TNCs continue to expand their international sphere of influence. Reflecting upon the power inherent in the creation and distribution of private capital, many of the private and quasi-public governance systems that TNCs participate in are, as political scientist Philip Cerny argues, 'more sovereign than the state.'²⁷ While the import of this statement depends on how you define sovereignty, it is clear that TNCs wield unquestioned de facto authority through their effective economic and political control over both natural and human resources. In keeping with new global realities, international law scholar Robert McCorquodale suggests that 'the international legal system must be conceptualized as inclusive—not exclusive—of non-state actors.'²⁸ He argues for this reimagining of public international law because it 'opens the possibilities of dialogue at an international level not just between governments

²⁵ UNEP, *Universal Ownership*, above n 1, 7.

²⁶ M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010) 5.

²⁷ Philip G Cerny, 'Globalization and the Changing Logic of Collective Action' (1995) 49(4) *International Organization*, 618, 618.

²⁸ Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 *Leiden Journal of International Law* 477, 484.

but also between individuals, communities, and other non-State actors (such as ...transnational corporations) and between them and governments.²⁹ Acknowledging international legal personality of non-State actors furthers the possibilities for dialogue that McCorquodale alludes to in his remarks.

In a growing number of situations especially in relationship to investment, States are beginning to explicitly share powers with private actors due to 'the crisis of the welfare and regulatory state.'³⁰ It follows that de facto sharing of powers could trigger de jure recognition of international corporate personality for those entities that have global reach in their business activities. Yet this has not been the case and TNC responsibility, in practice, has been limited to those obligations required under domestic law. States have not challenged the disconnect between TNC de facto power and de jure lawmaking practices.

States have historically been the gatekeepers of legal personality and yet have been reluctant to yield publicly any de jure authority out of a fear of becoming less relevant in this globalising world, less authoritative in decision-making, and perhaps less responsible to the public at large. The majority of States represent themselves as democratic trustees of a given territory, protecting the interests of individual citizens and communities including long-term conservation of environmental resources. Yet, contemporary history challenges this theory of the State as the sole protector of public goods. The State is neither a value-neutral entity nor an exclusive advocate for public rights, but is often encouraged by economic entities to mediate between local and global economies on behalf of key economic actors (eg, the proliferation of bilateral investment treaties). With business leaders regularly becoming government leaders and vice versa, there is constant permeability between the institutions of private business and public government. If States are no longer the idealised political and moral institutions that political philosophers promote, TNCs should no longer be regarded as exclusively domestic economic creations insulated from the international political, moral, and environmental implications of their business strategies. Just as the relationship between the State and its citizens has changed with the introduction of democratic values, so to is the relationship between the State and TNCs changed as TNC economic power competes with State political power to manage the environment.

²⁹ Ibid 485.

³⁰ Fabrizio Cafaggi, 'Private Law-Making and European Integration: Where do they meet? When do they conflict?' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State* (Oxford University Press, 2010) 202.

If it is true that there is an exchange of influence between business leaders and government leaders as they revolve through the doors of power and that these leaders are the primary environmental decision-makers, then there is a need to publicly recognise both business and government as the institutions capable of making, implementing, and enforcing environmental law and policy. International legal personality exists where a party has the capacity to perform legal acts that have international consequences and is recognised as a participant.³¹ While government leaders are already recognised as legal representatives of the State with capacity to operate in international relations and create international law, business leaders remain absent in spite of the invisible hand of the market leaving behind its visible legacy of toxic pollution, resource over-exploitation, and contamination across the globe. If global business leaders can set sometimes demanding transnational standards in the world of banking and finance to be complied with by each other,³² there would appear to be no reason why they could not participate in setting equally binding and demanding standards in the world of environmental law.

The recognition of TNCs as legitimate subjects of international law benefitting from protections available within international investment law should include a parallel recognition of international environmental legal responsibilities. Otherwise, an inequitable situation emerges whereby corporations receive preferential treatment that is not otherwise available to other international actors such as non-governmental organizations or to the State itself. Because TNCs are able to use international law to protect their interests, there is no surprise that international law might also apply to their activities conducted beyond their place of municipal incorporation. If States refuse to prosecute corporate actors for toxic releases or large-scale deforestation because of politics, and international law to minimise ecological harm does not apply, then TNCs truly have impunity in relation to those communities who depend on the environment—and also the environment itself. International law must therefore assign legal responsibilities to TNCs where States either fail to articulate any legal responsibilities to minimise harm or fail to prosecute parties for pre-existing harms.

³¹ Roland Portmann, *Legal Personality in International Law* (Cambridge University Press, 2010) 210–211.

³² See, eg, Basel Committee on Banking Supervision, 'Basel III: a Global Regulatory Framework for More Resilient Banks and Banking Systems' (Bank for International Settlements, 2010–2011) <<http://www.bis.org/publ/bcbs189.pdf>>. See also activities of private regulators such as the International Account Standards Board who participate collaboratively with governments in the Financial Stability Forum.

When a party accepts rights assigned by international law there must be a subsequent assumption of responsibilities. International lawyer Harold Koh indicates that this is especially true for corporations arguing that '[i]f corporations have rights under international law, by parity of reasoning, they must have duties as well.'³³ The recognition of corporate personality as triggering international legal responsibility for environmental harm is a reasonable legal conclusion against a background where: (1) the regulatory relationship between corporations and States remains opaque to the public; (2) States headquartering TNCs refuse to muster the political will to regulate extraterritorial corporate behaviour that affects other States' public goods; and (3) States receiving TNCs decline to hold these companies accountable for environmental degradation. This approach is in keeping with the suggestion made by the United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Entities, John Ruggie, that there are occasions where TNCs should be bound by international legal norms. In his 2006 report to the Human Rights Commission, Ruggie suggested that binding international obligations may be appropriate where a State is unable or unwilling to regulate the human rights impacts of TNCs.³⁴

By recognising international legal personality of TNCs, States will acknowledge the de facto power of TNCs while simultaneously creating the conditions for TNCs to respond to international environmental problems. Presently, States wait somewhat in vain for voluntary participation of TNCs through the UN Global Compact. With the recognition of international legal personality, TNCs would no longer be able to perpetuate the myth that the free market requires no international legal restraint on the part of TNCs when TNC actions cause harm. Even free-market economist Milton Friedman had raised concerns that external effects caused by corporations should be avoided because of the implications for third parties.³⁵

If we consider the public to be a 'third party', then Friedman's analysis of the free market suggests that corporations must owe substantive duties to the public to prevent environmental externalities. One tool for addressing the global externalities generated by TNC activities is international law.

³³ Harold Hongju Koh, 'Separating Myth from Reality about Corporation Responsibility Litigation' (2004) 7 *International Economic Law* 263, 265.

³⁴ John Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN ESCOR, 62nd sess, UN Doc E/CN.4/2006/97 (22 February 2006) 65.

³⁵ Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962) 31–32.

While TNCs have resisted being bound by public international environmental rules because they claim to be subject only to domestic law and not to public international law, Friedman implicitly suggested that the economic freedom to pursue international market goals also entails responsibilities to mitigate external effects. Where harm was unavoidable, TNCs have responsibility and accountability to global publics.

There are emerging practices suggesting that TNCs are not just holders of rights but bearers of responsibility. In a recent development, States agreed that in principle TNCs should not be immune from international responsibilities. At the 2002 World Summit on Sustainable Development, parties concluded that 'in pursuit of its legitimate activities the private sector, including both large and small companies, has a duty to contribute to the evolution of equitable and sustainable communities and societies',³⁶ as well as 'to enforce corporate accountability'.³⁷ In September 2010, a majority of members of the International Organization for Standardization adopted ISO standard 26000 to guide businesses, especially TNCs, in their corporate responsibility decisions. While the standards are not binding, they articulate certain international responsibilities for corporations, including ethical behaviour, respect for community stakeholder interests, respect for the rule of law, and polluter liability.³⁸

In some limited instances, TNCs have also internally begun to recognise an emerging public duty of environmental responsibility. For example, as international environmental law scholar Natasha Affolder has noted, some transnational mining companies have begun to assume conservation and protection obligations under the *Convention concerning the Protection of the World Cultural and Natural Heritage*.³⁹

International legal scholars, in spite of certain analytical reservations about assigning the classical label of 'international legal personality' to TNCs, have not been adverse to extending rights and obligations to TNCs. The 2010 report of the International Law Association's Committee on Non-State Actors ('ILA') was based on the presumption that where non-State actors assume governance roles previously performed by States, the non-State actors should have both the rights and obligations associated with

³⁶ *Report of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (4 December 2002) para 27.

³⁷ *Ibid* para 29.

³⁸ International Organization for Standardization, 'Guidance on Social Responsibility' (Report 26000, ISO and FDIS, 2010) 172.

³⁹ Natasha Affolder, 'The Private Life of Environmental Treaties' (2009) 103 *American Journal of International Law*, 103, 510, 510.

such governance.⁴⁰ As long as TNCs continue to set internal corporate standards that have legal implications for the protection of environmental public goods such as breathable air and drinkable water, TNCs assume a powerful and potentially dangerous parallel governance role to State regulators.

Not to make transnational corporations subjects of international environmental law is to allow for an unchecked legal pluralism to proliferate as multinational corporations pursue their own ends through private governance schemes. As international lawyer Daniel Thürer has commented in relation to the international legal order, '[n]o accumulation of power should remain unchecked under a system of "rule of law"'.⁴¹ Recognising legal personality for TNCs allows for power to be checked by ensuring that corporations are held independently accountable to the international legal system as trustees of public goods outside of their home state's territory. Relying on States operating in their domestic fora to hold TNCs legally accountable has proven insufficient to protect third-party publics in foreign lands from potential and avoidable harm.

What does it mean for a TNC to be an acknowledged international legal subject? If they have legal personality, TNCs would be subject to the body of customary international law. Translating international norms that were developed for States for application to TNCs may not be possible in many instances but some aspects such as preventing trade in ozone depleting substances, protecting marine resources, or undertaking efforts to reduce emissions may be possible to apply to TNCs. When recognised as subjects of international environmental law, corporations would presumably have the right to participate in future treaty-making processes or in the formation of future customary obligations through soft law negotiations. These outcomes could all be long-term progressions of TNC international legal personality.

A recognition of TNC international legal personality today is more likely to lead to what is described in the following section as a co-regulatory system with States and TNCs engaging in active dialogue to create joint government and industry responses to pressing environmental challenges

⁴⁰ International Law Association Committee on Non-State Actors, 'Non-state Actors in International Law' (First Report of the Committee at the Hague Conference, International Law Association, 2010) 4.

⁴¹ Daniel Thürer, 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State' in Rainer Hofmann (ed), *Non-State Actors and New Subjects of International Law* (Duncker & Humblot, 1999) 58.

rather than the current situation where States and TNCs are largely disengaged from each other.

Contrary to the views of some classical legal thinkers,⁴² extending legal personality to transnational corporations does not require a leap of faith in legal logic. Corporations have already received certain international rights such as access to dispute settlement procedures before international arbitration tribunals.⁴³ These tribunals frequently apply rules of public international law identified as principles of 'international investment law' to contracts between State governments and TNCs.⁴⁴ The same principles should extend to environmental matters—international environmental law should be applied to resolve disputes between States and TNCs that implicate environmental matters. In some cases, there are direct causal relationships between TNC investment activities and environmental degradation. There is no apparent reason why international law should be applied to favour rights obtained by TNCs under investment law and not be applied to ensure TNC responsibility for environmental degradation caused by investment activities. Permitting a double standard to be applied to certain transnational actors, which may be creations of domestic law but which still operate across international borders, undermines the legitimacy of the international legal system as a system where internationally allocated rights are generally balanced by international responsibilities.

Assigning legal personality to TNCs, as proposed by this chapter, is not an idle theoretical proposition. Recognising the international personality of transnational corporations will ensure a more equitable sharing of responsibilities between States and TNCs for designing environmentally sustainable products, protecting fragile environmental values, and safeguarding the right to a healthy environment as embraced by numerous constitutional documents.⁴⁵ A recognition of international

⁴² See, eg. Brownlie, above n 5, 65 ('in principle, corporations of municipal law do not have international legal personality').

⁴³ Prosper Weil, 'The State, the Foreign Investor, and International Law: The No Longer Stormy Menage-à-Trois' in Sabine Schlemmer-Schulte and Ko-Yung Tung (eds), *Liber Amicorum Ibrahim Shihata: International Finance and Development Law* (Kluwer, 2001) 839–856.

⁴⁴ Ole Spiermann, 'Applicable Law' in Peter Muchlinski (ed), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 89.

⁴⁵ About 100 Constitutions mention some variation on a right to a clean or healthy environment: see Dinah Shelton 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognised?' (2007) 35 *Denver Journal of International Law & Policy* 129, 164.

legal personality for TNCs should also further the overarching goals of the international rule of law by ensuring that corporate actors, as subjects, do not exercise their power arbitrarily and interfere with existing State rights, individual rights, or community rights. The following section of this chapter will propose one pragmatic model for engaging TNCs as international subjects responsible for good faith participation in international environmental governance and law-making that protects and sustains resources for this generation and future generations.

IV. ROLES FOR TNCs IN THE IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW

Current engagement of TNCs in implementation of international environmental law principles is an ad hoc proposition. What would it look like if States were to concede that transnational actors were necessary subjects of international environmental law and should participate both in creating future international environmental law and implementing the law?

This part of the chapter proposes a new iterative, cooperative, engaged, and formal negotiating relationship between TNCs and States that would respect the role of sovereign States as public trustees, create opportunities for multinational corporations to exercise their international personality, and ensure public accountability from both TNCs and States. This proposal is based on the premise that what is lacking in the current international environmental governance framework is a body of discrete environmental goals, regulatory plans to achieve those goals, and formal binding legal mechanisms for business and government to address environmental impacts. Where a set of global rules requires private enforcement to be effective—a feature of many environmental legal regimes—then these rules will benefit from TNC engagement in the implementation process. The co-regulation model described below attempts to address these governance gaps.

A. States Need to Adopt International Quantifiable Goals Based on Peer-Reviewed Science that Measurably Protect Environmental Interests

In 2000, United Nations Secretary-General Kofi Annan commissioned the Millennium Ecosystem Assessment to determine scientifically the pressures on global ecosystems and the steps that would need to be taken to ensure clean water, food, forest products, flood control, and natural

resources for future generations. After several years of research and the input of 1,360 ecological experts, the UN released the Millennium Ecosystem Assessment,⁴⁶ which provided a status report on the state of the environment and proposals for future policymaking. While the report served an important baseline function, the assessment did not provide for any quantitative goals or targets for restoration.

Given the extent of scientific uncertainty in many of the transboundary environmental problems, there has been an ongoing reluctance to set targets that may need to be renegotiated. While there are merits to having qualitative goals expressed in terms that allow each State to contextually interpret them according to its resource capacity to meet a goal, qualitative goals fail to create harmonised efforts among States. Discrete quantitative goals have the particular advantage in the context of environmental protection of providing a consensual standard for measurement of progress towards a goal. Quantitative goals ensure that international environmental law remains primarily a technical matter grounded in science. As Peter Sand and Paolo Contini have argued, '[i]nternational environmental protection ... may and should indeed be a highly technical matter' rather than a more abstract ethical and philosophical pursuit.⁴⁷

States need to develop something akin to the quantitative targets for Goals One and Seven of the Millennium Development Goals ('MDGs')⁴⁸ which will apply not just to States' efforts to improve environmental conditions, but also to the efforts of private business, especially the largest transnational corporations. Targets One and Three of MDG Goal One provide quantitative goals under which States commit to halve, between 1990 and 2015, the proportion of people whose income is less than \$1 a day and the number of people who suffer from hunger.⁴⁹ Goal Seven, which is the only goal with an explicit environmental obligation, seeks to ensure long-term environmental sustainability. Of the four targets for this goal, only one has a quantitative measure. Target Three calls on States to halve the proportion of population who do not have access to clean water and

⁴⁶ *Overview of the Millennium Ecosystem Assessment* (2005) Millennium Ecosystem Assessment <<http://www.maweb.org/en/index.aspx>>.

⁴⁷ Paolo Contini and Peter H Sand, 'Methods to Expedite Environmental Protection: International Ecostandards' (1972) 68 *American Journal of International Law* 37, 56.

⁴⁸ Millennium Development Goal One is to 'eradicate extreme poverty and hunger.' Millennium Development Goal Seven is to 'ensure environmental sustainability.' *Millennium Development Goals* (2010) United Nations Development Program <<http://www.undp.org/mdg/basics.shtml>>.

⁴⁹ *Ibid.*

adequate sanitation. The other targets more generically call for 'a significant reduction in the rate of loss' of biodiversity and a "reverse of the loss' of environmental resources but with no further explanation to indicate what constitutes some degree of achievement of this goal.⁵⁰

As necessary subjects of international environmental law with responsibilities to help achieve the goals of international environmental law, TNCs should, in theory, support rather than obstruct State goal-setting efforts. As Ulrich Beck commented in a reflection on the role of globalization in Europe, 'the policy of de-regulating transnational corporations' to improve economic competition should result in the political 're-regulation' of corporations through the introduction of new shared social and environmental standards.⁵¹ While there is an array of international regulatory measures concerning pollution and the discharge of hazardous waste from ships, trade in endangered and threatened species, and use of ozone-depleting substances that have direct implications for TNC activities, there has been little current dialogue regarding whether corporations have international obligations to prevent transboundary or global harms.

Quantitative goals, in contrast to existing qualitative goals, would codify a TNC's environmental obligations in a fashion that promotes predictability for business. With explicit knowledge of what is expected from their environmental performance, TNCs should be able to adjust and adapt their operations. In theory, TNCs have previously approved of proposals for the UN to create environmental, health, and safety standardization across States.⁵² While they have not endorsed international environmental regulations, there has been agreement over the need for international harmonization of national standards.⁵³

For the quantitative standards to be credible, independent scientists will need to identify, on the basis of their best scientific judgment, what ecological standards are necessary to ensure basic environmental protection. The Secretary-General will ideally nominate scientists involved in the process based on merit and not through political channels. Setting meaningful goals can be best done through a peer-review standard which tests and re-tests the scientific assumptions behind standard-setting.

⁵⁰ Ibid.

⁵¹ Ulrich Beck, *What is Globalization?* (Polity Press, 2000) 159.

⁵² 'Environmental Management in Transnational Corporations. Report of the Benchmark Corporate Environmental Survey' (Report, United Nations Department of Economic and Social Development, Sales No E.94.II.A.2, 1993).

⁵³ Robert J Fowler, 'International Environmental Standards for Transnational Corporations' (1995) 25 *Environmental Law* 1, 21.

The scientists' role must be restricted to data evaluation and not to lobbying for one protection standard over another.

This chapter acknowledges that setting meaningful quantitative goals is difficult since for most of the pressing transboundary environmental issues there is incomplete scientific knowledge about how various natural systems interact as well as inherent uncertainties in scientific modeling. Defining basic environmental protection is a Herculean task that will require scientists to make certain reasonable assumptions which may not be scientifically verifiable. For example, scientists may need to work from assumptions that all existing species are important for ecological integrity, even though this assumption cannot be realistically tested. Since natural systems frequently evolve in non-linear fashions, scientists cannot guarantee that a given scientifically reasonable quantitative standard or target would achieve the desired environmental end. Yet, even with these inherent limitations on setting scientifically credible quantitative benchmarks, discrete numerical goals are important for guiding policymaking. Numerical goals provide a needed uniformity to international environmental policymaking which is missing in the current legal system. While the benchmarks for a specific goal may need to be subsequently recalculated to adapt to new discoveries and new understandings, specific quantitative targets provide a needed point of departure for evaluating both State and non-State action and inaction.

From a limited range of scientifically meaningful standards, goals, and targets proposed by scientists, State policymakers could adopt in plenary sessions quantifiable standards, goals or targets for key industry sector including those sectors identified by the UN as major contributors to environmental degradation (eg, oil and gas production, electricity, mining, food production, and construction materials).⁵⁴ Because this is an approach grounded in public international law principles and TNC responsibility to protect public goods, States should focus their goal-setting only on those sectors where State or TNC activities impact public environmental goods. This selective goal-setting should distribute more equitably the overall reduction goals so that more environmentally damaging or polluting industries have the responsibility to meet more ambitious environmental performance goals than less environmentally damaging or polluting industries. The substance of a goal should reflect the reality of a sector's impact on the environment. For example, more

⁵⁴ UNEP, *Universal Ownership*, above n 1, 7.

stringent goals will be proposed for the fishing industry regarding proper habitat management and water pollution than on contributing to air pollution.

One response to this goal-setting proposal may be that it seems like a continuation of international law as usual: States continue to dictate legal standards while TNC personality seems to be of no consequence in this process. Given the argument for personality, why should TNCs not be part of the goal-setting negotiations for the various sectors? The answer lies in the relationship between States, TNCs, and the public. TNCs are not democratic representatives of public interest while democratic States, at least in theory, are historically the party primarily responsible for protecting the public against degradation of public goods. TNC personality does not mean that States must cede their sovereign interest in law-generation to TNCs. Personality does not bring shared governance for all functions traditionally associated with government. Rather, it brings recognition that with international legal rights come international legal responsibilities.

*B. Businesses can Privately Contract to Meet International Goals or
be Individually Regulated by States*

Usually businesses respond to international law only after it has been adopted as domestic law and policy, a process which entails a delay between policymaking and implementation. Here, as subjects of international law, businesses would be expected to respond earlier and in a more proactive fashion to emerging international environmental rules. One means of promoting TNC and State responsibility for meeting State-negotiated environmental targets might be through a private contract mechanism.

1. Private Contracts between TNCs as Subjects of International Law and States

One mechanism for individual companies to meet their international environmental legal obligations might be participation in an international co-regulation process. Under this process, individual TNCs would enter into multilateral private contracts with States requiring the TNCs to legally undertake certain changes in operations over a specific time frame to address their corporate impacts on the environment. In return for TNCs agreeing to be legally bound by the terms of the contract, States where a TNC operates might agree in the private contracts to exempt the

co-regulated TNC from specific domestic regulations. One possible model for international private contracts between States and multinationals is the 'Dutch Covenant' which creates a co-regulatory relationship between the Dutch State and Dutch industries.

Co-regulation is a model of regulation that operates as a hybrid between command and control regulation and self-regulation. It involves the government creation of fixed targets for corporate sectors followed by the creation of self-regulatory frameworks by individual corporate actors to achieve progress towards the government sector target. In the Netherlands, State agencies have the power to enter into binding environmental covenants with certain private economic associations representing specific industries.⁵⁵ Prior to beginning negotiations with these associations, the government sets non-negotiable national performance targets including specific abatement targets for pollutants and quantitative goals for waste reduction.⁵⁶ These targets defined the parameters of the State and industry negotiations.

In the Netherlands, private firms in numerous industry sectors including agriculture, refining, energy, building, and waste disposal have agreed to legally binding environmental covenants with agencies such as the Dutch Ministry of Housing, Land-Use Planning, and the Environment.⁵⁷ Over a hundred industry sector covenants address a wide spectrum of problems including climate change, acidification, eutrophication, toxic pollution, soil contamination, groundwater contamination, and nuisance.⁵⁸ To achieve performance goals, the covenants focus on specific aspects of the problems such as reducing nitrous oxide and carbon dioxide from power plants, reducing ammonia from cattle breeding, cleaning up of contaminated soil underneath gasoline stations, recycling packaging, and phasing out harmful substances.⁵⁹

While the earliest covenants lacked safeguards for implementation, the most recently negotiated covenants have specific monitoring

⁵⁵ Kathryn Harrison, 'Talking with the Donkey: Cooperative Approaches to Environmental Protection' (1996) 2 *Journal of Industrial Ecology* 51, 63.

⁵⁶ Organization for Economic Co-operation and Development, *Voluntary Approaches for Environmental Policy: An Assessment* (OECD Publications, 1999) 20.

⁵⁷ Organization for Economic Co-operation and Development, *Environmental Performance Reviews: Achievements in OECD Countries* (OECD Publications, 2001) 49.

⁵⁸ OECD, *Voluntary Approaches for Environmental Policy: An Assessment*, above n 56, 52, Table 2.

⁵⁹ Eckhard Reh binder, 'Environmental Agreements, A New Instrument of Environmental Policy' (Jean Monnet Chair Paper RSC No 97/45, European University Institute, 1997) 7 <http://www.eui.eu/RSCAS/WP-Texts/JM97_45.html>.

requirements. A joint government-industry 'steering group' reviews the performance of a company in making progress towards meeting its goals under the covenant.⁶⁰ The incentive for private entities participating in these frameworks is that they can help to proactively shape regulation rather than simply respond to externally imposed regulation.

Even though the overall environmental effectiveness of these covenants remains uncertain in the context of certain environmental problems such as reducing nitrous oxide and carbon dioxide emissions, the negotiated covenants have made a measurable impact on changing sector-wide corporate behaviour in other environmental management areas. Cited as an example of a successful co-regulation process, the negotiations over packaging and waste have resulted in corporations reducing their packaging and redesigning their remaining packaging to be fully recyclable.⁶¹ The Dutch government is of the opinion that '[l]ong range covenants (5–10 years) which permit some flexibility over the nature and timing of implementation actions are proving more efficient and effective than direct regulation in many cases.'⁶²

The idea behind developing co-regulation in the Netherlands was to create a culture of 'internalization' where the State would work to build consensus with major industries on the 'relevant policy options and available means.'⁶³ Part of the success of co-regulation at an industry level relies on industry leaders encouraging their peers to perform better for fear of a return to command and control regulation if the industry as a whole fails to meet the previously agreed upon environmental targets. Co-regulation, in contrast to self-regulation, is more likely to sustain long-term collective action within an industry sector because of pressure from fellow industry members.

The proposal in this chapter differs from the co-regulation approach in the Netherlands by eliminating negotiations between States and sector representatives. Instead, negotiations would be directly between affected States (ie, those States where a TNC has operations either as a subsidiary or as a headquarters) and individual TNCs. Under the proposed international environmental quantitative goal-setting described above, States would set non-negotiable targets for key TNC business sectors with impacts on the environment including industries associated with electricity generation, mining, oil and gas production, food production,

⁶⁰ Ibid.

⁶¹ Ibid 65.

⁶² Ibid 64.

⁶³ Ibid 7.

and construction materials.⁶⁴ Each TNC operating within this sector would be expected to calculate its individual contribution to the cumulative environmental impacts of its industry sector and use its contribution as the basis for negotiating an environmental mitigation plan. These calculations would need to be verified by an independent audit organization.

What would this regulatory process look like in practice? For example, scientists using databases may conclude that the global cattle industry is responsible directly and indirectly for 80% of the world's methane emissions—800 units of methane. On the basis of scientifically verifiable models, the scientists predict that the cattle industry will need to reduce its methane emissions as an industry by 50%—400 units of methane—to decrease the certainty of projected climate-induced impacts. States adopt this performance goal without TNC input as an appropriate long-term target for the cattle industry. At the same time States might also agree to a model international regulation⁶⁵ requiring TNCs in the cattle industry to reduce herds over the next 10 years by 50% to mitigate for the methane emissions and replace these lost food sources with non-methane releasing sources. Based on its production levels and its market share, Big Cattle is a TNC responsible for 25% of the world's production of beef and 200 units of methane. Big Cattle does not want to reduce its herds because this means reduced profits under its current business plan. The model regulation provides a sufficient deterrent to Big Cattle to compel the company to enter into negotiations with the States where it operates. Instead of reducing its herds, Big Cattle agrees to meet its company specific reduction goal of 200 units of methane emission by purchasing and employing technology to capture and reprocess methane.

As a simplistic hypothetical of co-regulation, this example provides one possibility for a win-win solution: States set a scientifically necessary target and TNCs identify feasible means of achieving it. In reality, calculating a TNC's direct and indirect contribution to a given transboundary impact is extremely complicated since there may be thousands of TNC actors from different sectors contributing to a single transboundary environmental problem such as nitrogen run-off. While the process of negotiating an individual contribution is technically complicated, the effort, as long as there are uniformly agreed methodologies for calculating individual

⁶⁴ UNEP, *Universal Ownership*, above n 1, 7.

⁶⁵ The model command and control regulation would be negotiated in advance as a regulatory deterrent for non-participation in the co-regulatory process.

contributions to a problem, will be well spent. No TNC will bear a disproportionate responsibility for a given transboundary impact. Likewise, no TNC will be able to free ride on the reduction or mitigation efforts of other TNCs.

One of the inherent challenges of a co-regulation approach is reaching a version of what the insurance industry refers to as 'law of large numbers.' A certain number of independent TNCs must be involved in the co-regulation process in order for it to have meaningful environmental results. While it is true that the overall effectiveness of co-regulation contracts to mitigate transboundary harm would depend on broad corporate participation across a sector, States would still have the power to compel individual TNC participation in environmental mitigation efforts through other legal channels, including domestic adoption of model international regulatory standards. Alternative State-based regulation will be discussed further in section B.

Even if co-regulation as a process fails to initially generate large numbers of TNC participants, the process would provide an important manifestation of TNC legal personality. Co-regulation would acknowledge the rights of TNCs to participate actively as parties in the environmental covenant process while simultaneously articulating TNC responsibilities to mitigate for transboundary impacts. Even if only a handful of leading TNCs choose to participate within their sectors, these TNCs may be able to generate new business norms that will further define emerging international custom regarding corporate responsibility.

2. Domestic Implementation of Internationally Negotiated Model Regulations to Ensure Full Participation in Meeting Targets

For those TNCs that refuse to participate in the co-regulation process and for those that fail to meet their binding targets under their environmental covenants, there needs to be a deterrence mechanism to ensure that individual actors do not undermine efforts to meet environmental targets. In the context of the 'Dutch covenants', Dutch corporate entities that fail to meet the terms of their covenant are subject to less flexible and potentially economically burdensome command and control regulations. The same threat of command and control regulations could be introduced into the international legal framework if States agree to a set of internationally negotiated model regulations.

To address TNC responsibility and avoid allegations that they have failed to fulfill their responsibility to control the activities of TNCs under

their jurisdiction causing transboundary harm, States should adopt national regulations that will define what corporate sectors must do to effectively meet internationally agreed upon environmental targets. Such regulations may include explicit reductions in corporate operations. To serve as a legal deterrent to TNC inaction, the model international regulations would need to be implemented through domestic law.

Critics might argue that a failure of political will to adopt alternative regulations is inevitable where TNCs decline to participate voluntarily in a co-regulatory process. Given the patchy record of some States in agreeing to legal obligations under international environmental treaties, there are legitimate feasibility challenges in achieving uniform adoption of any model regulations. Yet, the idea of trying to negotiate a uniform set of model regulations to ensure there is some sort of compliance mechanism to meet the adopted environmental goals should not be peremptorily dismissed as being unrealistic. There are benefits in simply going through the process of negotiating international regulations. The very exercise of forcing State actors to negotiate specific regulatory language may generate an interactional space to develop new national and international legal norms. Global adoption of model regulations may not be essential to the success of achieving the underlying quantitative goals. As long as States do not adopt measures that would under-regulate the global reach of TNC activity, States which defect from a given international regulatory standard may still independently adopt regulatory standards that would support international efforts to meet quantitative targets.

3. *Monitoring and Enforcement of Compliance with Covenants Under International Law*

Under the negotiated private covenants, States would have the legal responsibility to monitor the covenants of their headquartered companies and its subsidiaries and to report publicly to other States on the progress of private actors in meeting their obligations. To avoid potential complicity between corporate interests and government interests in progress reports, a third-party accounting office could audit the State progress reports and verify the results. The information from all reporting parties could then be used to compile international lists of leaders and laggards⁶⁶ that might generate internal pressure for a company to improve

⁶⁶ Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation* (Greenleaf Publishing, 2002) 189–203.

performance even in the absence of a political regime that enforces its regulations. It is important to ensure that information collected by States can be compared. As Neil Gunningham observed, 'explicitly comparative information dramatically increases the social meaning of environmental information... [and] provides incentives to the best performers to do better and to the worst performers to improve.'⁶⁷ Documented information serves a crucial role to stimulate an internal 'race to the top' among corporations seeking to enhance reputation both inside and outside the corporate community. For example, in the United States, the Toxics Release Inventory generated reports which 'in many cases ... prompted a swift and decisive response, as firms adopted ambitious improvement targets far above the levels required for compliance with regulatory requirements.'⁶⁸ Information that can be easily processed by the public allows for comparisons between corporate actors⁶⁹ and may create compliance pressure points by enabling civil society groups to lobby governments for better oversight of the covenants.

In addition, accurate corporate disclosure provides an evaluative tool for States to understand whether the flexible covenants are effective in achieving global goals or whether regional, national, or local regulations would be as, or more, effective. Negotiated disclosures by corporate leaders might also create a larger evolving norm framework for States to require international disclosure of certain types of environmental performance information by corporations such as domestically based small and medium enterprises who would not participate in international environmental covenants.

As this chapter envisions the future exercise of non-State actor responsibilities in the context of international environmental law, there will remain a gap between the TNCs which self-identify as environmental leaders and have built the capacity to meet environmental performance

⁶⁷ Neil Gunningham, 'Corporate Environmental Responsibility: Law and the Limits of Voluntarism' in Doreen McBarnet, Aurora Voiculescu, and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 495.

⁶⁸ Bradley C Karkkainen, 'Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm' (2001) 89 *Georgetown Law Journal* 257, 297.

⁶⁹ See, eg, Shakeb Afsah and Jeffrey Vincent, 'Putting Pressure on Polluters: Indonesia's PROPER Program' (Paper, Harvard Institute for International Development, 1997). (Describing Indonesian PROPER pollution program that assign colors to enterprises based on their compliance with pollution regulations and allows the public to quickly process the environmental responsibility of a individual company).

goals and the TNCs who continue to operate as entirely revenue-driven entities in relation to non-financial responsibilities that are increasingly becoming normative.⁷⁰ Even though the TNCs who are most likely to engage in covenants will be a small group of companies which want to differentiate their commitment to environmental goals from their competitors, the requirement for States to disclose environmental performance for certain TNCs should become part of a broader legal commitment for States to publicly demonstrate that they are endeavouring to effectively control domestically created entities that may be contributing to transnational environmental problems. Arguably for States to demonstrate effective control over TNCs, they must have some informational basis for how all domestically headquartered TNCs, and not just environmental leaders, are performing in relation to specific transboundary environmental goals.

V. INTERNATIONAL LEGAL PERSONALITY FOR TNCs: LEGITIMACY AND ACCOUNTABILITY

The first part of this chapter argues that TNCs need to be recognised as subjects of international environmental law because of their *de facto* power and their intrinsic role in environmental management. While these are both practical sociological reasons for recognizing TNCs, there are also fundamental legal reasons for recognising TNCs as responsible subjects.

As Lon Fuller recognised, law is not simply about a proliferation of paper treaties and a profusion of soft law documents, but is rather a series of interactions that guide behaviour.⁷¹ Social actors create international law through relationships of reciprocity.⁷² The face-to-face interactions of a wide variety of social actors at the international level has become increasingly important since there are really no government-exclusive environmental problems and a diminishing number of purely regional, national, or local environmental problems. Acknowledging TNCs as international subjects is therefore critical in resolving two recurring problems with effectively implementing existing international environmental law: (1) internal and external legitimacy and (2) public accountability.

⁷⁰ See, eg, Organization for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011); United Nations Global Compact, above n 12.

⁷¹ Lon Fuller, *The Morality of Law* (Yale University Press, 1969) 106.

⁷² Jutta Brunée and Stephen J Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39(1) *Columbia Journal of Transnational Law* 19, 48–51.

A. *Recognizing TNCs as Subjects Enhances Legitimacy of International Environmental Law*

Acknowledging TNCs personality as holders of both rights and obligations addresses directly the legitimacy of the international environmental legal process. The current State-dominated process—with the exception of creating some new relationships through experiments such as the Global Compact—has been largely adversarial. This chapter's proposal to give TNCs a central role in co-regulation process is important to further the legitimacy goals inherent in the 'global community of law.'⁷³ As Daniel Bodansky has argued, legitimacy is an 'emerging problem' since solving collective problems through international environmental law requires 'more expeditious and flexible lawmaking approaches' and has 'significant implications for non- or substate actors ... rather than just for the relations among states.'⁷⁴ States benefit from the participation of TNCs at the negotiation table by these actors 'enhancing decision-making quality, improving management practices, facilitating governance, creating novel legal mechanisms or instruments and producing more operationally efficient programme implementation.'⁷⁵

Recognising that non-State stakeholders have responsibilities in international policymaking and implementation ensures some degree of process legitimacy by supporting the tenets of 'good governance' being touted by State governments at an international level. The United Nations defines good governance as participatory, consensus-oriented, accountable, transparent, responsive, effective and efficient, equitable, and subject to the rule of law.⁷⁶ The ability of TNCs to participate as equal negotiating parties in environmental covenants boosts the internal legitimacy of international environmental policymaking by recognising critical stakeholders⁷⁷ at the negotiating table.

The co-regulatory process also enhances the external legitimacy of intergovernmental negotiating by focusing on the responsibilities of key

⁷³ Anne-Marie Slaughter, 'The Real New World Order' (1997) 76 *Foreign Affairs* 183, 189.

⁷⁴ Daniel M Bodansky, 'Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93(3) *American Journal of International Law* 596, 606.

⁷⁵ Stephen Tully, 'The Opportunities and Challenges of Private Sector Engagement by UN Secretariats' (2006) 3 *International Organizations Law Review* 225, 258.

⁷⁶ *What is Good Governance?* (2010) United Nations Economic and Social Commission for Asia and Pacific <www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp>.

⁷⁷ Bodansky, above n 74, 617.

actors who have influenced explicitly and implicitly the success of international environmental law but who remain largely invisible in the practice of international environmental law. For example, current binding international environmental law makes no explicit mention of the frequent environmental impact of TNC decision-making.

Take two examples: the *United Nations Framework Convention on Climate Change*⁷⁸ and the *Convention on Biological Diversity* ('CBD').⁷⁹ In the preamble of the UNFCCC, the States Parties simply note 'that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries' and that human activities have been substantially increasing the atmospheric concentrations of greenhouse gases. No mention is made that the fossil-fuel dependent energy sector and transportation sector are specifically responsible for generating largest share of emissions in developed countries. The words 'corporation', 'private', and 'business' are not mentioned in the FCCC and the word 'industry' is only mentioned once. In article 4 of the UNFCCC, States are required to '[p]romote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors.'⁸⁰ There is no negotiated obligation for private firms, in particular TNCs, to commit to promote greenhouse gas reducing 'technologies, practices and processes.' Exceptions to complying with even the open-ended commitments of Article 4 are made for States in fossil-fuel dependent economies.⁸¹ The silence in the treaty regarding the role of private actors in managing climate change has translated into 'business as usual' for the oil and gas, mining, construction, and agriculture industries.

⁷⁸ *United Nations Framework Convention on Climate Change*, opened for signature May 9, 1992, 1771 UNTS 107 (entered into force 21 March 1994).

⁷⁹ *Convention on Biological Diversity*, opened for signature June 5, 1992, 1760 UNTS 79 (entered into force 29 December 1993).

⁸⁰ UNFCCC art 4(1)(c).

⁸¹ Ibid art 4(10) 'The Parties shall, in accordance with Article 10, take into consideration in the implementation of the commitments of the Convention the situation of Parties, particularly developing country Parties, with economies that are vulnerable to the adverse effects of the implementation of measures to respond to climate change. This applies notably to Parties with economies that are highly dependent on income generated from the production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products and/or the use of fossil fuels for which such Parties have serious difficulties in switching to alternatives.'

Likewise, in the CBD, there is no explicit mention of business or private industry as contributing to environmental degradation through their ordinary business decisions. In the treaty text, there are only passing references to seeking cooperation with the private sector. The preamble emphasises the importance for cooperation 'among states and intergovernmental organizations and the non-governmental sector.' Article 10 calls on States to '[e]ncourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.' In Article 16, which addresses access to and transfer of technology, States are expected to broker private firm technology transfer by taking 'legislative, administrative or policy measures, as appropriate, with the aim that the private sector facilitates access to joint development and transfer of technology ... for the benefit of both governmental institutions and the private sector of developing countries....'⁸² There is no indication in the treaty of what international repercussions there are for firms that fail to cooperate with their State in jointly developing or transferring technology.

In both of these conventions, the world of policy action and international obligation is populated by States, with only passing references to the role of private actors in environmental management and problem-solving. In the UNFCCC, private actors are mentioned as objects of State efforts to cooperate in emission reductions and technology transfers. In the CBD, private actors are largely objects except for their brief active role as technology facilitators and transferors. Neither convention identifies private firms as international subjects and decision-makers whose day-to-day business choices impact the ability of States to reduce emissions and protect habitat.

While private interests may disingenuously participate in environmental co-regulation negotiations that they have no intention of being bound by, the current intergovernmental governance system faces the very same risk from States. Acknowledging the problem of industry defectors, this proposal focuses on improving the inclusiveness of international environmental law in order to enhance opportunities for reciprocity. The very act of building reciprocal and personal relationships between firm representatives, civil society groups and States has the potential to play an increasingly important role in enhancing practices of corporate environmental

⁸² Technology referred to in this section includes 'technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment.' CBD art 16(1).

responsibility. Recognition of TNC personality contributes to the 'right process' by creating a representative body of decision-makers who have the capacity and authority to create working solutions that address the substance of transboundary environmental impacts by agreeing to institutional behavioural changes.⁸³

States participate in the United Nations process because they are conscious of the importance of building long-term working relationships with other States. Businesses, especially environmental leaders in transnational industries, are likely to participate in co-regulatory processes for the same reason. Fewer adversarial clashes with States should reduce operating costs for firms who could focus on ensuring compliance with covenants rather than spending resources lobbying for preferential industry treatment within domestic regulatory schemes. In the natural resource and energy sector, there is already a heightened sensitivity to complying with 'modern global standards', especially where the industries are 'the most politically vulnerable ones.'⁸⁴

For companies which regularly interface with the public, evolving social and political values such as pro-conservation ethics may encourage companies to take a more constructive approach to negotiations than critics might otherwise expect. Interested in maintaining key financial and market positions, individual consumer-oriented corporations may be willing to collaborate on managing certain types of environmental issues rather than be perceived as policy defectors. Not to collaborate, or at least appear to be collaborating in meeting global targets, is to risk unwanted attention from the public sector in the form of either more stringent domestic regulation or consumer boycotts.

B. *Recognizing TNCs as Subjects Enhances Public Accountability*

Democratising international law by extending the negotiating floor to new voices opens up the exclusive 'State club' that currently defines the parameters of public international law implementation. As long as firms are permitted to maintain the status quo of operating on the fringes of

⁸³ Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1999) 24.

⁸⁴ Thomas Wälde, 'International Standards: A Professional Challenge for Natural Resources and Energy Lawyers' in Elizabeth Bastida, Thomas Wälde and Janeth Warden-Fernandez (eds), *International and Comparative Mineral Law and Policy* (Kluwer International Law, 2005) 221.

international lawmaking, they will continue to be able to influence law-making process without being held accountable for the positions that they promote through their lobbying efforts.

The acknowledgment of public accountability for private actions reflects emerging norms associated with new generations of corporate leadership that recognise that business decisions have varying impacts on the global common. As exhibited by the vote in late 2010 to adopt an ISO Standard for Social Responsibility (ISO 26000), corporations are increasingly self-identifying as social institutions, public good providers, and essential forces for sustainable development. A number of companies are in the process of implementing ISO 26000 standards. For example, in Colombia, Ecopetrol, one of the largest companies in the State, has adopted reporting mechanisms under the ISO 26000.⁸⁵

Where TNCs agree to meet their international environmental responsibilities through the mechanism of environmental covenants, they will expose themselves to a combination of international legal accountability under both the mechanisms of international private law and third-party State and civil society environmental performance monitoring. Co-regulation may also enhance accountability between market actors within a sector. Industry sector participants may sanction, or openly criticise, a firm that refuses to participate in sector efforts to meet environmental targets that are increasingly accepted as emerging environmental norms (eg, less packaging, reduced greenhouse gas emissions). Doing so could provide a competitive edge in terms of reputation enhancement for parties agreeing to co-regulation. Other industry sector participants may 'name and shame' non-cooperative industry members in order to distinguish their products and potentially improve their market share.

Participants from non-regulated sectors can also enhance individual corporate accountability within the co-regulation process. Where a major private firm refuses to cooperate with a goal adopted by other firms in its sector, participants from other industry sectors may refuse to purchase raw materials or services from the non-cooperating firm with the hope of demonstrating accountability in their supply chain and boosting their environmental credibility with the public. This form of supply chain accountability is already present in certain private governance schemes that implement preferential purchasing policies.

⁸⁵ K Toledo, *Latin American Companies Pioneer ISO 26000 Implementation* (2011) International Organization for Standardization <<http://www.iso.org>>.

VI. CONCLUSION

If international environmental law is to be effective as a tool in changing social behaviour and reversing the current sobering trend towards environmental degradation, international lawyers cannot remain content with the existing non-responsive State-centric legal system. Since operational decisions by TNCs contribute unequivocally to international environmental problems, TNCs have to be an active part of any long-range solution for achieving sustainable development. As bodies with recognised rights under international economic law, TNCs also have responsibilities under international environmental law to participate in international processes to protect existing and future public goods from further degradation. Since responsibilities follow rights, both States and TNCs need to cooperate to implement efforts that will further the goals of international environmental law. This requires new approaches to international environmental policymaking that focus on goal-setting with measurable benchmarks of progress coupled with forging new collaborative relationships between States and TNCs as negotiating partners in a co-regulatory process.

Co-regulation creates a fair and equitable process for generating 'repeated interaction with other actors in the transnational legal process.'⁸⁶ Since the creation and implementation of international law relies on social reciprocity and ongoing interactions, consistent participation by all international subjects rather than just States should generate an array of unexplored solutions to chronic environmental problems. From a governance perspective, co-regulation provides opportunities for harmonization among States but differentiations among TNCs. Acknowledging TNCs as responsible subjects of international environmental law is not disruptive of the canons of international law. Rather, acknowledging TNCs as responsible subjects ensures that international law evolves to remain relevant in our globalising world.

⁸⁶ Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599, 2656.

CHAPTER TWELVE

THE PARAMETERS OF VICARIOUS CORPORATE: CRIMINAL LIABILITY FOR GENOCIDE UNDER INTERNATIONAL LAW

MICHAEL J KELLY*

I. INTRODUCTION

Should corporations be held criminally liable for complicity in genocide? As legal (or juridical) persons, corporations should be accountable for their criminal conduct just as natural persons are. Genocide is, after all, the crime of crimes.¹ The world outlawed genocide via treaty in 1948. That treaty holds ‘persons’ accountable for committing genocide—it does not distinguish between natural or legal persons.² Indeed, nothing in the *travaux préparatoires* of the *Genocide Convention* accords corporations impunity in this regard.

But accountability has not been forthcoming. ‘As a practical, if not theoretical matter, corporations have long been immune from prosecution for breaches of international criminal law.’³ While great strides have been taken to imbue legal persons with the same rights as natural persons,⁴ much less has been done to impose upon them similar obligations. And

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¹ John Hagan, ‘Darfur and the Crime of Genocide’ (2009) 20(1) *Researching Law* 2 <http://www.americanbarfoundation.org/uploads/cms/documents/abf_rl_win_09_final.pdf>; Patricia M Wald, ‘Genocide and Crimes Against Humanity’ (2007) 6 *Washington University Global Studies Law Review* 621, 629.

² *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (*‘Genocide Convention’*).

³ W Cory Wanless, ‘Corporate Liability for International Crimes under Canada’s Crimes Against Humanity and War Crimes Act’ (2009) 7 *Journal of International Criminal Justice* 1.

⁴ The US Supreme Court recently recognized the free political speech rights of corporations as but one example: *Citizens United v Federal Election Commission*, 558 US 50 (2010).

while multinational corporations have been complicit in genocides over many years, none has been prosecuted. '[T]he issue of corporate criminal liability for international law violations remains unresolved.'⁵

The *modus operandi* for dealing with corporate involvement in genocide since the days of Nuremberg has been individual criminal liability for corporate officers and civil liability for the corporate entity. The civil liability prong has been exclusively pursued in domestic courts—best exemplified by tort litigation in the United States under the *Alien Tort Statute* ('ATS'), although 'in some 60 cases so far, the plaintiffs have ... won no outright victories'⁶ Even so, courts have begun closing off those civil liability options.⁷ The avenue of criminal liability for the corporate entity, though theoretically possible, has remained inchoate.

Typical corporate complicity in genocide involves supplying the *génocidaire* with the necessary equipment or support to carry out the atrocity.⁸ Think of the foreign companies that supplied Rwanda with machetes to kill Tutsis or Saddam's regime in Iraq with the components of mustard gas to slaughter Kurds.⁹ To the extent corporations participate in genocide, they invariably assume the role of enablers. 'Transnational corporations are ... more often indirectly involved in massive human rights violations amounting to international crimes.'¹⁰

Whether the *génocidaire* would have been able to carry out the atrocity without corporate complicity goes, most likely, to whether the corporation should be held criminally liable for its involvement. For war crimes and crimes against humanity, corporations often take on a more active

⁵ Ronald C Slye, 'Corporations, Veils, and International Criminal Liability' (2008) 33 *Brooklyn Journal of International Law* 955.

⁶ 'Alien Torts: Trial Trails', *The Economist* (London) 9 October 2010, 87.

⁷ See *Kiobel v Royal Dutch Petroleum*, 621 F 3d 111 (2nd Cir, 2010) (holding that 'customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations' 8–9).

⁸ Jonathan Clough, 'Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses' (2008) 33 *Brooklyn Journal of International Law* 899, 905.

⁹ In neither case were corporate defendants ever indicted, although in the Iraq case, Frans van Anraat, a Dutch supplier of chemical weapons, was prosecuted for aiding and abetting genocide under applicable Dutch law. See Marten Zwanenburg and Guido den Dekker, 'International Decisions: Supreme Court of the Netherlands – War Crimes – Lex Certa – Geneva Protocol – Customary International Law' (2010) 104 *American Journal of International Law* 86. Van Anraat was found guilty of complicity in multiple war crimes, but not complicity in genocide.

¹⁰ Florian Jessberger and Julia Genuess, 'Introduction: Transnational Business and Criminal Law' (2010) 8 *Journal of International Criminal Justice* 695.

role.¹¹ Indeed, 'private military companies engaging in direct combat are perhaps the most notorious for committing atrocities.'¹² But despite the more passive role they tend to assume with respect to genocide, never to prosecute companies for genocide erases any incentive for them to act otherwise.

Riding the tide of globalization, corporations have gained dramatically in transnational power, while largely escaping much responsibility.¹³ In fact, 'fifty-one of the one hundred largest economies in the world are corporations, while only forty-nine are countries ...'¹⁴ Although there is increasing recognition that corporations should bear greater responsibility for their actions as their relative economic and political power expands,¹⁵ the law has yet to evolve in this direction. Nor has the legal academy taken up the issue in a serious way.¹⁶ As one commentator puts it, 'while the moral responsibility of legal persons, [multinational corporations] in particular, has ... been gaining recognition, the legal dimension of this responsibility remains in the realm of controversy and speculation.'¹⁷

Naturally, companies do not desire a change in this convenient state of affairs. Due to space constraints, key issues such as the mechanics of showing specific intent to commit genocide are pursued by the author in other publications. This chapter is limited to exploring the parameters of vicarious liability for corporations that are complicit in genocide.

II. APPLICABILITY OF THE GENOCIDE CONVENTION TO CORPORATIONS

Corporations have been held criminally liable in domestic courts for years on theories of vicarious liability. But can such theories be utilised under

¹¹ Wim Huisman and Elise van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity' (2008) 8 *Journal of International Criminal Justice* 803, 816.

¹² Laura A Dickinson, 'Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law' (2005) 47 *William and Mary Law Review* 135, 153.

¹³ David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 *American Journal of International Law* 901, 902.

¹⁴ *Ibid.*

¹⁵ Larissa van den Herik and Jernej Letnar Čerňič, 'Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again' (2010) 8 *Journal of International Criminal Justice* 725, 737.

¹⁶ Jessberger and Geneuss, above n 10.

¹⁷ Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Intersentia, 2010) 95.

international law to hold companies liable for genocide? Before that question is considered, it must first be determined whether companies are excluded from criminal liability for genocide.

Article 6 of the *Genocide Convention* covers individual responsibility: 'Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.'¹⁸ There is no artificial distinction between natural or legal (juridical) in either the reference to 'persons' or 'private individuals', whereas such distinction is specifically made in later international criminal treaties. Thus, corporate liability could therein lurk.

An exploration of what the treaty drafters were thinking does not dampen this prospect. The authoritative interpretive guide to treaties, the *Vienna Convention on the Law of Treaties*, urges one to first look to the plain meaning of the words in the treaty and, should ambiguity remain, then to resort to an examination of the preparatory work to divine the drafters' intent.¹⁹ During the exact period 1946–48 when the *Genocide Convention* was being negotiated, the legal definition of 'person' according to Ballentine was this:

Persons are divided by law into persons natural and persons artificial, and 'person' *prima facie*, at common law and apart from any statutory enactment, includes both natural and artificial persons, and therefore as a general rule includes corporations.²⁰

Moreover, the criminal versus civil nature of the statute was not dispositive as to whether corporations would be included in the term 'person'

¹⁸ *Genocide Convention* art 6.

¹⁹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31–32.

²⁰ James A Ballentine, *The College Law Dictionary* (Lawyer's Cooperative Publishing Company, 2nd ed, 1948) 622. This understanding reflects a long history recognising that both rights and duties devolve onto corporations as legal persons. See Horace L Wilgus, *Cases on the General Principles of the Law of Private Corporations* (Bowen-Merrill Co, 1902) 1–10; *Corporations: Reprinted from Ruling Case Law Volume Seven* (E Thompson Co, 1915) 3: 'The corporation is the real though artificial person substituted for the natural persons who procured its creation ... It must do all corporate acts in its corporate name ... Neither a portion nor all of the natural persons who compose a corporation ... are the corporation itself ...' Corporations were held by courts to constitute 'persons' as that term was used in the 5th and 14th Amendments to the US Constitution and in an 1873 treaty between the US and England prohibiting future confiscations: 8. Corporations should be presumed covered in statutory language: *ibid* 9.

according to the usage of the term well prior to time of the drafting conference:

Corporations are to be deemed and considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute; and prima facie the word 'person' in a statute, though penal, which is intended to inhibit an act, means 'person in law;' that is, an artificial, as well as a natural, person, and therefore includes corporations if they are within the spirit and purpose of the statute.²¹

Reference to corporations or legal persons in the *travaux préparatoires* is meagre. But, as the above commentary makes clear in conjunction with the discussion of who could commit genocide, it was on the minds of several delegates. Specifically, the Soviet delegate emphasised corporate liability in the context of media and press organizations using propaganda to incite to genocide.²² He was also in favour of blanket application of liability, 'stress[ing] the fact that the fundamental idea of article V [liability] of the draft convention was to proclaim that *all those committing genocide, no matter who they were, should be punished.*'²³

Other delegates made oblique references to legal persons in the context of the debate over the term 'constitutionally responsible rulers.' Whether such references reflected an intentional application to the corporate body considered in this paper or to governments in their corporate context remains an open question. They certainly referred to governments and States, as the US delegate reflected on the 96th meeting, 'It had then been decided that corporate bodies such as Governments and States should not be included in the list of those to be held responsible for the commission of genocide.'²⁴ But did these references embrace companies? We simply do not know.

For instance, the Venezuelan delegate was skeptical about bringing legal persons before an international tribunal, noting 'it was easy to picture the difficulty of bringing to judgment the corporate bodies which, as a general rule, were the perpetrators of the crime of genocide.'²⁵

²¹ *Corporations: Reprinted from Ruling Case Law Volume Seven*, above n 20, 9.

²² Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff, 2008) vol 2, 1799–1814. Although the proposal was explained by the Czech delegate to encompass only groups 'such as the Gestapo, the SA and the SS' the US stridently opposed it as an assault on freedom of the press: 1809.

²³ *Ibid* 1591–92 (emphasis added).

²⁴ *Ibid* 1694.

²⁵ *Ibid* 1222. The Venezuelan delegate could have been referring to States and governments by using the term 'corporate bodies.' This is somewhat unclear as reference is made

The Swedish delegate favoured an interpretation limiting liability, due to the fact that 'the Swedish criminal code did not recognise the idea of penal responsibility of legal persons,'²⁶ a position echoed by the delegate from the Dominican Republic.²⁷ The French delegate noted that '[t]he French idea of penal responsibility applied to individuals only, for only individuals could commit crimes; it could not apply to corporate bodies or to abstract communities.'²⁸

However, the delegate from the Philippines declared that 'any individual guilty of genocide should be punished, whoever it might be.'²⁹ And, finally, summing up the debate, the delegate from Luxembourg said, 'The question under consideration was to decide who would be liable to punishment for the crime of genocide. [T]he Committee had decided that *all individuals*, whether they were constitutionally responsible rulers, public officials or private individuals, *would be responsible for the act of genocide*.'³⁰

So inclusion of corporations in the term 'persons' is not foreclosed by a reading of the *travaux*; nor is inclusion of corporations in the term 'private individuals.'³¹ Indeed, the Chinese delegate noted that 'genocide could also be committed by private organizations,'³² and the Swedish delegate specifically included 'private organizations' in his references to 'private individuals' in the debate beating back a French amendment to exclude private individuals from liability altogether:

by other delegates to States and heads of States as chief perpetrators of genocide. See, eg, the statement of the Pakistani delegate: 1595.

²⁶ Ibid 1595.

²⁷ Ibid 1662: '[U]nder the national legislation of his country, legal entities could not be held guilty of committing a crime.'

²⁸ Ibid 1617. He went on to endorse the phrase 'responsible rulers' for inclusion in draft article V.

²⁹ Ibid 1642.

³⁰ Ibid 1655 (emphasis added).

³¹ One of the few exclusionary elucidations on this last point came from the Syrian delegate who said, when considering what to do with de facto heads of State, 'they would not be included in the category of "private individuals" envisaged in article V – since that category referred only to private individuals who were neither officials nor heads of State. ...' 1593–94.

³² Ibid 724. This was in the debate over what to do with political groups. Eventually political groups were specifically taken out as a protected class at the insistence of the Soviets, but were arguably left in as potential perpetrators. The Chinese delegate also 'expressed doubts about the inclusion of both political groups and groups of opinion in the definition. If such groups were included, there was, in fact, no good reason why social, economic and other groups should not be included.'

According to the French amendment, genocide could be committed only by rulers or at least with their connivance or collusion; *acts of genocide committed by private individuals or by private organizations* would not be subject to the terms of the convention ... The Swedish delegation did not think that the force of the convention would be weakened if cases of genocide committed by private individuals or private organizations were included among the acts to which the convention applied. For one thing, it should not be forgotten that such cases might well occur. Furthermore, it should be kept in mind that ... the draft convention ... provided for the punishment of certain offences, such as direct instigation to commit genocide, which preceded the crime and were generally committed by private individuals or private organizations without any participation on the part of the rulers.³³

Again, any indication of inclusion is merely speculative, as it was the Swedish delegate who reminded the drafters that legal persons could not be prosecuted in the discussion about heads of State, but then also coupled private organizations with private individuals. But there is equally no definitive exclusion apparent in the *travaux*. Consequently, one may certainly argue that the use of 'persons' and 'private individuals' does not preclude the inclusion of corporations as legal persons.³⁴

Not surprisingly, there is a split in the legal academic literature on this point. Some scholars, including a former dean of Yale Law School, argue that corporations can aid or abet genocide under Article 4 of the treaty.³⁵ Others have adopted a more restrictive interpretation of the list of possible perpetrators of genocide: 'The language of the Genocide Convention is

³³ Ibid 1462 (emphasis added). In this same vein, the delegate from the Philippines observed in a later debate on incitement, '[E]ven from the political point of view, the prohibition of incitement to genocide by private individuals or groups acting independently of their Governments could only relieve international tension, and not increase it.' 1541.

³⁴ Black's *Law Dictionaries* of the period are no help in resolving this matter. Both the 3rd edition (1933) and the 4th edition (1951) track Ballentine's dichotomy (above), and note:

It has been held that when the word person is used in a legislative act, natural persons will be intended unless something appears in the context to show that it applies to artificial persons (citations to court cases omitted). But as a rule corporations will be considered persons within the statutes unless the intention of the legislature is manifestly to exclude them. (citations to court cases omitted)

See Henry Campbell Black, *Black's Law Dictionary* (West Publishing Company, 3rd ed, 1933) 1355; Henry Campbell Black, *Black's Law Dictionary* 1300 (West Publishing Company, 4th ed 1951) 1300. As the *travaux* neither specifically include nor exclude corporations in the term 'persons', assuming the drafting committee could be analogized to a legislature and the resulting draft treaty to a statute, the question remains unresolved.

³⁵ Harold Hongju Koh, 'Separating Myth from Reality About Corporate Responsibility Litigation,' (2004) 7 *Journal of International Economic Law* 263, 266.

indicative of an intention to confine liability under international law for acts of genocide to natural persons only.³⁶

Nevertheless, in the absence of any indication of intent to carve out an exclusion from prosecution for corporations under the terms of the *Genocide Convention*, the door would appear to have been left open. Moreover, in the wake of the recent opinion by the International Court of Justice (‘ICJ’) that States are capable of committing genocide,³⁷ it seems rather futile to continue arguing that other organizations, such as corporations, are incapable of committing genocide. Even the US statute implementing the *Genocide Convention* ‘suggests that a corporation can be prosecuted for genocide—any doubt on the point arises merely because there has never been a prosecution of anyone under the statute.’³⁸ Nevertheless, the underlying theory of this argument must be explained.

III. VICARIOUS LIABILITY OF CORPORATIONS

Traditionally, under English common law, corporations could not be held criminally liable for the simple reason that the law did not consider them capable, as artificial persons, of committing crimes.³⁹ Companies could not form the *mens rea* necessary for criminal conduct.⁴⁰ This view held sway in the United States up until the Supreme Court’s landmark decision in *New York Central & Hudson Rail Road Co v United States*,⁴¹ an early 20th century graft case.

Most courts in the United States hold corporations criminally liable based on the theory of *respondeat superior*. This theory originated on the civil side of the law but crossed over onto the criminal side with the *New York Central* decision. Derived from the law of agency, the basic rule

³⁶ Johan D van der Vyver, ‘Prosecution and Punishment of the Crime of Genocide’ (1999) 23 *Fordham International Law Journal* 286, 290.

³⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia & Montenegro) (Judgment)* [2007] ICJ Rep 43 (‘Genocide Case’).

³⁸ Jonathan A Bush, ‘The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said’ (2009) 109 *Columbia Law Review* 1094, 1097 (citing *Genocide Convention Implementation Act of 1948*, 18 USC §§ 1091–1093 (2006)).

³⁹ Samuel K Angell and Samuel Ames, *The Law of Private Corporations Aggregate* (The Lawbook Exchange, 11th ed, 1882) 7.

⁴⁰ John S Baker, Jr ‘Reforming Corporations Through Threats of Federal Prosecution’ (2004) 89 *Cornell Law Review* 310, 341 n 195.

⁴¹ *New York Cent & Hudson RR Co v United States*, 212 US 481 (1908).

behind the theory is that a principal is liable for an agent's actions in relation to a third party when certain conditions are present.

Agency is the fiduciary relation that results from the manifestation of consent by one person to another that the other shall act on his behalf subject to his control and consent by the other so to act.

In determining whether an employee was acting within the scope of his employment, courts consider whether the scope of employment is (a) the kind the employee is employed to perform, (b) it occurs substantially within the authorised time and space limits, (c) it is actuated, at least in part, by a purpose to serve the employer, and (d) if force is intentionally used by the employee against another person, the use of force is not unexpected by the employer.⁴²

The basic rules of agency under United States law explained above are similar to the rules of *respondeat superior* when a corporation is held liable for the actions of its employees. Since corporations are not natural persons, courts look to the employees to impute the requisite intent/*mens rea*, as well as the act/*actus reus*, to the corporation.⁴³ The elements necessary to prove corporate criminal liability are:

- (1) The individual must be acting within the scope of his employment;
- (2) The individual must be acting with at least a partial intent to benefit the corporation; and
- (3) The act and intent must be imputed to the corporation.⁴⁴

The current federal standard of *respondeat superior* imposes vicarious liability on a corporation for an agent's crime when the agent acted within his authority for the benefit of the firm.⁴⁵

When the law first began holding corporations criminally liable for the acts of their employees, prosecutors had to show that the employee acted with a full intent to benefit the corporation. However, the second element

⁴² American Law Institute, *Restatement (Third) of the Law of Agency* (2006) § 228.

⁴³ Cynthia E Carrasco, 'Corporate Criminal Liability' (1999) 36 *American Criminal Law Review* 445, 448; *United States v Investment Enter Inc*, 10 F 3d 263, 266 (5th Cir, 1993) (noting that, although corporations cannot possess mental states, they can be held liable for unlawful acts of its agents if their conduct is within scope of their actual or apparent authority).

⁴⁴ Carrasco, above n 43; *United States v Automated Medical Laboratories*, 770 F 2d 399, 406–407 (4th Cir, 1985).

⁴⁵ Geraldine Szott Moohr, 'The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement' (2009) 46 *American Criminal Law Review* 1459; *United States v Automated Medical Laboratories*, 770 F 2d 399, 406–407 (4th Cir, 1985).

now requires only a partial intent to benefit the corporation. Therefore, even if the employee is acting in his own interest but also with a slight intent to benefit the corporation, the corporation can still be held liable. Moreover, the corporation can still be held liable even if the employee is violating an express corporate policy or rule, as long as the act was within the scope of his employment and as long as there was intent to benefit the corporation.⁴⁶

Additionally, courts have held that the act does not have to be the act of an individual employee. The 'collective knowledge' of the corporation can be used to form corporate criminal liability.⁴⁷ That said, nineteen States in the United States use a different standard for imposing criminal liability on corporations that requires the participation of or ratification by a high managerial agent of the firm.⁴⁸ Nonetheless, the majority of the States use *respondeat superior* for imposing criminal liability on corporations.

Corporate criminal liability based on *respondeat superior* is justified by the utilitarian goal of preventing harm.⁴⁹ Another utilitarian viewpoint recognises that if only individuals were held liable, corporations would see their employees as expendable. This, in turn, would encourage unlawful behaviour because the corporation as a whole knows that it would not be liable, and the liability of the employee would fail to deter the illegal corporate activity.⁵⁰ A final set of rationales centres on scope and scale of conduct. First, collective actions cause greater harm than individual actions. Second, individual actions alone may be insufficient to hold anyone liable. Third, effective deterrence of collective actions requires systemic punishment.⁵¹

There is an array of defences a corporation may mount to avoid criminal liability under the *respondeat superior* theory.⁵² First, the independent contractor defence—made out by showing that an independent

⁴⁶ *Vernon v Southern California Edison Co*, 955 F 2d 1361, 1369 (9th Cir, 1992).

⁴⁷ *United States v Bank of New England*, 821 F 2d 844 (1st Cir, 1987).

⁴⁸ Christopher R Green, 'Punishing Corporations: The Food Chain Schizophrenia in Punitive Damages and Criminal Law' (2008) 87 *Nebraska Law Review* 197, 205–206.

⁴⁹ Geraldine Szott Moohr, 'The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement' (2009) 46 *American Criminal Law Review* 1459, 1460.

⁵⁰ Ann Foerschler, 'Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct' (1990) 78 *California Law Review* 1287, 1289.

⁵¹ Ronald D Slye, 'Symposium: Corporate Liability for Grave Breaches of International Law: Corporations, Veils, and International Criminal Liability' (2008) 33 *Brooklyn Journal of International Law* 955, 957–60.

⁵² Meghan K Woodsome, 'Antitrust Violations' (2009) 46 *American Criminal Law Review* 275, 293.

contractor is not subject to the control of the corporation and is competent, and that the activity contracted for is not a nuisance per se and is not inherently dangerous.⁵³ Second, the defence that the employee did not have *any* intent to benefit the corporation with his actions.⁵⁴ Third, the defence that the employee's actions were not within the scope of his employment.⁵⁵ But courts have interpreted the *respondeat superior* elements broadly, so these defences can be hard to establish.

Thus, the argument that companies do not commit crimes—people do, is anachronistic in the present day. While historically true, this is just no longer the case. As the drafters of the Council of Europe *Convention on the Protection of the Environment Through Criminal Law* recognised in 1998:⁵⁶ “The international trend at present seems to support the general recognition of corporate liability in criminal law, even in countries which only a few years ago formally adopted the principle according which corporations cannot commit criminal offences.”⁵⁷

Vicarious liability is a straightforward legal concept. Liability is imputed from one party to another based upon a set of factors like an agency relationship, an employee/employer model, subordinates carrying out orders of superiors, etc. In a strict liability sense, vicarious liability can give rise to State liability for the actions taken by its nationals—but the community of States is not willing to allow this. That is not to say, however, that the tools are not available.

In 2007, the ICJ decided that States could be held liable for committing genocide, although it declined to find Serbia so with respect to the Srebrenica massacre.⁵⁸ Traditionally, States were ultimately responsible for the crimes of their nationals. This theory of vicarious liability rests on the notion that, historically at least, States were the only actors in international law. Thus, when a Canadian smelting operation discharged sulphur dioxide into the atmosphere and prevailing winds caused the emissions to move from British Columbia across the border into Washington and release acid rain, killing miles of trees and damaging farming and grazing

⁵³ *Zirkle v Winkler*, 585 SE 2d 19 (W Va, 2003).

⁵⁴ *Standard Oil Company of Texas v United States*, 307 F 2d 120 (5th Cir, 1962).

⁵⁵ *United States v Beusch*, 596 F 2d 871 (9th Cir, 1979).

⁵⁶ See *Convention on the Protection of the Environment Through Criminal Law*, opened for signature 4 November 1998, ETS 172 (not yet in force), art 9.

⁵⁷ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 248.

⁵⁸ See *Genocide Case* [2007] ICJ Rep 43 (deciding that under Article I of the Genocide Convention, States are obligated not to commit genocide and that under Article IX of the Convention, the ICJ has jurisdiction to decide a State's responsibility for committing genocide in violation of the Convention).

operations, the arbitral tribunal decided that Canada was responsible for the transboundary damage caused by one of its corporations.⁵⁹

States are 'increasingly held to be in breach of their human rights obligations when they fail to prevent abuses by private actors.'⁶⁰ Certainly, if States are liable for the environmental damage of their corporations, they should be liable for their genocidal actions. But States are rarely held liable for genocide despite all this; thus, if proper recourse is to be had and reparations to be made, prosecutors should go after the equally culpable enterprises that sometimes fund or back the atrocities—multinational corporations.

One of the main forms of vicarious liability utilised in international criminal law is 'command responsibility'—a theory that emerged in the post-World War II trials at Nuremberg and Tokyo. Under this theory, commanders of armed forces were held accountable for the conduct of their troops—and any atrocities carried out by those troops either in the gas chambers or the battlefields. The *mens rea* threshold that had to be cleared for commander liability was knowledge—either actual or constructive.

There are three basic elements to prove the superior-subordinate relationship necessary for a superior to be held liable for a subordinate's actions under this theory.⁶¹ These three elements are authority, knowledge, and inaction.⁶²

Several potential defences can be raised to command responsibility liability. First, the superior can claim that he did not have effective control over the people directly responsible for committing the crime.⁶³ Second, the superior can claim that he did not have the 'material ability' to prevent such crimes or to punish the subordinates for committing them. Third, the superior can claim that he did not know or have reason to know that his subordinates were committing, or about to commit, a crime prescribed by statute. But the superior cannot remain wilfully blind to the acts of his subordinates and cannot claim exemption from liability based on his failure to properly supervise his subordinates. Fourth, the superior can

⁵⁹ *Trail Smelter Case (United States v Canada) (Award)* (16 April 1938 & 11 March 1941). 3 *Reports of International Arbitral Awards* 1905.

⁶⁰ International Council on Human Rights Policy, 'Beyond Voluntarism: Human Rights and the Developing Int'l Legal Obligations of Companies' (Report, International Council on Human Rights Policy 2002) 1.

⁶¹ Jared Olanoff, 'Holding a Head of State Liable for War Crimes: Command Responsibility and the Milosevic Trial' (2004) 27 *Suffolk Transnational Law Review* 327, 338; *Ford ex rel Estate of Ford v Garcia*, 289 F 3d 1283, 1288 (11th Cir, 2002) ('Ford').

⁶² Olanoff, above n 61, 338; *Ford*, 289 F 3d 1283, 1288.

⁶³ Olanoff, above n 61, 338–341.

claim that he took necessary and reasonable precautions to prevent the acts. Fifth, the superior can claim that prevention was outside the scope of his powers.⁶⁴

A US military tribunal first held a Japanese general accountable for the conduct of his troops in *Re Yamashita*—a case reviewed and approved by the US Supreme Court.⁶⁵ There, General Yamashita failed to discover the atrocities carried out by his troops in the Philippines during the Japanese occupation. Writing for the majority, Chief Justice Stone encapsulated the command responsibility charge thus:

The question, then, is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result.⁶⁶

Stone then resorted to the *Fourth Hague Convention*⁶⁷ to answer this question in the affirmative.⁶⁸ ‘These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.’⁶⁹

The command responsibility doctrine persisted and was used throughout the trials of Japanese war criminals as well as in the Nuremberg trials of Nazi war criminals. Notably, the doctrine was employed by the tribunals at Nuremberg beyond the military context to include prosecution of individuals in the SS, Gestapo and SA. The military tribunals at Nuremberg also tightened up the *Yamashita* standard. For example, the *Hostage Case*⁷⁰ limited situations in which a commander has a duty to

⁶⁴ Ibid. Additionally, in *Arce v Garcia*, 434 F 3d 1254, 1259 (11th Cir, 2006), a jury held defendants (Salvadoran military commanders) liable under the theory of command responsibility even after they argued that they neither ordered nor participated in the torture carried out by the Salvadoran military.

⁶⁵ *In Re Yamashita*, 327 US1 (1946).

⁶⁶ Ibid 14–15 (emphasis added).

⁶⁷ *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, opened for signature 18 October 1907, 1 Bevans 631 (entered into force 26 January 1910) (*‘Fourth Hague Convention’*).

⁶⁸ *In Re Yamashita*, 327 US 1, 15–16.

⁶⁹ Ibid 16.

⁷⁰ *Trial of Wilhelm List and Others* (1949) 8 *Law Reports of Trials of War Criminals* 35 (*‘Hostage Case’*).

prevent or punish atrocities to those where he has some indication of those actions, and the *High Command Case* tied the knowledge standard to some 'personal dereliction' on the part of the individual commander—the acts of his troops being directly traceable to his failure to properly supervise.⁷¹

Several decisions by the International Criminal Tribunal for the former Yugoslavia ('ICTY') in the aftermath of the Balkan civil wars have provided further elucidation of the doctrine. *Prosecutor v Delalić* held that two knowledge standards existed within the doctrine: 'knew' meant actual knowledge, and 'should have known' required that the commander have some notice of his troops' actions⁷²—hewing more closely to the *Hostage Case* holding. But *Prosecutor v Blaškić* departs on that second prong, holding that the commander has a continuing duty to be 'constantly informed' of his troops' actions; thus, ignorance is not a defence to the 'should have known' standard being applied⁷³—hewing more closely to the *Yamashita* holding. The Appeals Chambers in both cases endorsed the *Delalić* interpretation.⁷⁴ Consequently, some type of notice to the commander is required.

Thus, '[c]ommand responsibility doctrine [has become] a central pillar of international criminal law because it addresses a fundamental dilemma of legal responses to mass atrocity, which is that the atrocities are usually carried out by foot soldiers but it is often the generals and presidents who bear a greater share of moral responsibility.'⁷⁵ So how does this chain of command theory of criminal liability move from the military context to the corporate context—literally from one type of organization to the other? After all, comparing military organizations to corporations does not yield apples and apples, no matter how stringent the corporate environment may be.

⁷¹ *Trial of Wilhelm von Leeb and Thirteen Others* (1949) 12 *Law Reports of Trials of War Criminals* 1 ('*High Command Case*').

⁷² *The Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo (Judgment)* (International Criminal Tribunal for Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 Nov 1998) [387]–[390] ('*Prosecutor v Delalić*').

⁷³ *The Prosecutor v Timohir Blaškić, (Judgment)* (International Criminal Tribunal for Yugoslavia, Trial Chamber I, Case No IT-95-14-T, 3 March 2000) [332].

⁷⁴ *The Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo (Judgment)* (International Criminal Tribunal for Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) ('*Prosecutor v Delalić (Appeal)*'); *The Prosecutor v Timohir Blaškić, (Judgment)* (International Criminal Tribunal for Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004).

⁷⁵ Jenny Martinez, 'Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond' (2007) 5 *Journal of International Criminal Justice* 638, 639.

ICTY jurisprudence is suggestive on this point in the context of applying the command responsibility doctrine in a civilian rather than military context—a necessary first step in the full migration over to the corporate context. In *Delalić*, the Trial Chamber embraced the prosecution's theory 'that individuals in positions of authority, whether civilian or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their de facto as well as de jure positions as superiors.'⁷⁶

Moreover, the Tribunal was not disturbed by the lack of legal authority as a basis for the superior's control. 'The mere absence of formal legal authority to control the actions of subordinates should ... not be understood to preclude the imposition of such responsibility.'⁷⁷ This is an important point because that precisely describes one of the key differences between the military and corporate contexts of hierarchical reporting lines. For the military, the reporting chain is statutory, unlike the case of the company. Nevertheless, the degree of control exercised must be similar: '[T]he doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of the military commanders ...'⁷⁸

Although the ICTY Appeals Chamber in *Delalić* declined to find the locus of the commander's duty to exist in customary law, it left undisturbed the Trial Chamber's assertion that the theory could be applied to civilians.⁷⁹ So if the first hurdle is cleared, applying the doctrine to civilians, what about the next hurdle—applying the doctrine to civilian corporations?

In his 2001 exposition of the responsibility of corporations for human rights abuses, Steven Ratner proposed a four-part legal theory to effectuate such responsibility: '[C]orporate duties are a function of four clusters of issues: the corporation's relationship with the government, its nexus to affected populations, the particular human right at issue, and the place of individuals violating human rights within the corporate structure.'⁸⁰

⁷⁶ *Prosecutor v Delalić* (International Criminal Tribunal for Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 Nov 1998) 354.

⁷⁷ *Ibid.*

⁷⁸ *Ibid* [374].

⁷⁹ *Prosecutor v Delalić (Appeal)* (International Criminal Tribunal for Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [240].

⁸⁰ Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443, 496–497.

Ratner's theory spans the ins and outs of corporate/State connectivity (and rights/duties flowing therefrom), acknowledges remoteness from victim classes, balances interests, and accounts for variance in corporate structures. He deals briefly with the analogy to command responsibility:

The need for care in transposing notions of individual responsibility into the corporate area is demonstrated by a special, significant form of culpability that international law recognizes for acts of omission—the doctrine of superior or command responsibility. It extends the liability of a military commander or civilian superior for acts of subordinates beyond those covered through the notion of accomplice liability to those where the superior plays a more passive role by failing to prevent certain actions of subordinates. The rationale for such responsibility is that, by virtue of a hierarchical relationship between superior and subordinate, the former should be held criminally liable for failure to exercise his duties when the result is the commission of offenses by subordinates ...

NGOs have made claims against corporations based on the corporations' failure to inform themselves of certain conduct by the government. Because all traditional forms of complicity assume knowledge of the illegal activity, the NGO claims stem essentially from a notion of superior responsibility. Inherent in such a claim is the belief that the company is effectively the superior and the state the agent.⁸¹

Ratner then deftly shoehorns this concept into his broader theory of corporate liability stemming from State responsibility in the context of the corporation and State working in tandem to perpetrate human rights abuses:

This starting point flips the traditional doctrine of state responsibility on its head insofar as the law generally works from the presumption that nonstate actors are the agents rather than the principal ... If, for instance, the company utilized governmental forces to maintain security around the perimeter of a mine, and those forces engaged in serious human rights abuses, one can speak of a form of superior responsibility of the company for the acts of the governmental forces. ... [C]ommand responsibility itself seems a justifiable basis for corporate duties in situations where corporations are indeed superiors to governmental actors.⁸²

But why limit the application of this concept strictly to those situations in which a corporation is a principal and government actors may be subordinates? True, States are the chief subjects of international law and bear

⁸¹ Ibid 504–506 (emphasis added).

⁸² Ibid.

primary responsibility for carrying out various duties of care with respect to human rights. But acknowledging corporate liability as superior to State action implicitly recognises that the companies themselves are subjects with similar, though perhaps not co-extensive, duties of care. As stated, Ratner's theory on this point is limited to a conception akin to that of the State actor requirement for proving a case of torture. State action is not required to find that human rights abuses have occurred, much less atrocities.⁸³

The liability trip-wire for command responsibility is imputed knowledge.⁸⁴ In the military context, knowledge imputed to the commander is based on a rigid command structure which may not exist in the corporate context. But the trade-off is that it cuts both ways—ie, it might be easier to accept an imputed knowledge theory in a less rigidly structured corporate context because an individual might not be tried and sentenced to life imprisonment—only corporate financial assets would be at risk.

Even so, there are breaking mechanisms built into knowledge imputation. The knowledge prong and the action prong of command responsibility each have at least two manifestations. The first is the 'knew or should have known' standard. The International Military Tribunal for the Far East ('IMTFE') in *Re Soemu Toyoda* said that the Admiral's liability for the conduct of his troops flowed from the fact that he knew 'or should by the exercise of ordinary diligence have learned' what they were doing.⁸⁵

The British Military Court in the *Zyklon B* case found that knowledge was the appropriate triggering mechanism for aiding and abetting liability.⁸⁶ Even though defence counsel argued that the prosecution had to

⁸³ Clapham, above n 57, 29: 'Although a policy must exist to commit these crimes, it need not be the policy of a state' (quoting *Prosecutor v Tadić (Defence Brief to Support Notice of Interlocutory Appeal)* (International Criminal Tribunal for Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 25 August 1995) and *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 655 ('*Tadić*').

⁸⁴ The knowledge imputed can take several forms, focusing on the commander's temporal and physical proximity to the atrocity (which would weigh in the severity of a commander's sentencing under command responsibility theory). Volker Nerlich, 'Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?' (2007) 5 *Journal of International Criminal Justice* 665.

⁸⁵ Valerie Oosterveld and Alejandra C Flah, 'Holding Leaders Liable for Torture by Others: Command Responsibility and Respondeat Superior as Frameworks for Derivative Civil Liability' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* 440, at 444 (Hart Publishing, 2001) (quoting *United States v Soemu Toyoda*, (International Military Tribunal for the Far East, Official Transcript of Record of Trial, September 1949) 5006.)

⁸⁶ *In re Tesch (The Zyklon B Case)* (1947) 13 *International Law Reports* 250.

prove that the defendant intended that the gas he supplied be used for extermination, the court determined that it was sufficient for the prosecution to show that (1) Allied nationals were gassed with Zyklon B, (2) the defendant supplied it, and (3) the defendant knew that the gas would be used to kill humans.⁸⁷

Similarly, the United States Military Tribunal at Nuremberg employed the knowledge standard in a trio of cases against corporate executives. Although the court did not convict entire corporations, it utilised knowledge as the benchmark for the conviction of individual corporate officers. Indeed, in *US v Krupp*, the Tribunal went out of its way to describe knowledge as a sorting mechanism for determining the guilt of various board members of Krupp enterprises—which utilised slave labour in furtherance of the Nazi industrial war machine:

[W]e hold that guilt must be personal. The mere fact without more that a defendant was a member of the Krupp Directorate ... is not sufficient. The rule which we adopt and apply is stated in an authoritative American text (19 C.J.S. 363–64 (1940)) as follows:

Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company's business may be held criminally liable individually therefor. So, although they are ordinarily not criminally liable for corporate acts performed by other officers or agents, and at least where the crime charged involves guilty knowledge or criminal intent, it is essential to criminal liability on his part that he actually and personally do the acts which constitute the offense or that they be done by his direction or permission. *He is liable where his scienter or authority is established...*⁸⁸

In *US v Flick*, the Tribunal convicted two civilian industrialists for knowingly using their 'influence and money' to further the activities of the SS and increasing their production quotas knowing that slave labor would be needed to meet the new requirements.⁸⁹ But *US v Krauch* (the *IG Farben* case) offers a reverse conclusion. There, pharmaceutical corporate executives were actually acquitted because it could not be shown by the prosecution that they knowingly 'participate[d] in the planning, preparation or initiation of an aggressive war.'⁹⁰ Awareness is an important aspect of knowledge and, perhaps, a required component. In the *IG Farben* case, the executives believed the gas they manufactured was put to the purpose of

⁸⁷ Ibid 252.

⁸⁸ *US v Krupp* (1952) 9 *Trials of War Criminals* 1327, 1448 (emphasis added).

⁸⁹ *US v Flick*, (1952) 6 *Trials of War Criminals* 1198, 1217.

⁹⁰ *US v Krauch* (1952) 8 *Trials of War Criminals* 1117.

delousing prisoners. They were, in fact, unaware of the criminal purposes for which it was being used.⁹¹

These cases convicted individual officers, not corporations. Nevertheless, the knowledge standard appears to contain sufficient elasticity for courts and tribunals to employ it to meet a wide array of fact patterns in often complex corporate liability scenarios.

Which brings this inquiry to the question of why no military has been held liable as an organization for atrocities, and whether that has to happen prior to a successful case being brought against a corporation utilising command responsibility theory. Prosecuting an organization is traditionally fraught with difficulty unless that organization is legally characterized as 'criminal' like the mafia; or, as in the case of Nazi Germany—the Gestapo or SS. In the aftermath of World War II, the Allies were able to prosecute individuals for mere membership in those organizations. Today, the US detains anyone belonging to the Taliban or al Qaeda based on membership alone—some of those detained have been prosecuted in US courts and by military commission. So association with a criminal organization is *ipso facto* prosecutable once that organization is designated criminal. But what about prosecuting the organization itself?

The prospect of prosecuting an entire organization was on Jackson's mind as he prepared for the Nuremberg trials,⁹² but in the end only individuals were prosecuted. Moreover, British Petroleum is not a criminal organization, nor is Talisman Energy. And they are unlikely to be designated as such no matter what atrocities or criminal negligence they have wrought or were complicit in undertaking. Indeed, although Roman Catholic priests have been individually prosecuted in Germany, Canada, the US, Belgium, and France for molesting children, the Roman Catholic Church itself has not been prosecuted.

Prosecuting organizations in the US under common law relied heavily on the transference of the doctrine of *respondeat superior* from the civil to the criminal context. *Respondeat superior* is the conceptual cousin of command responsibility theory and was the issue in *Talisman Energy*. It was traditionally a method of holding an employer civilly liable for the acts of the employee.

⁹¹ Ibid 1168–69.

⁹² Justice Robert H Jackson, 'Report to the President on Atrocities and War Crimes' (Report, 7 June 1945) <http://avalon.law.yale.edu/imt/imt_jacko1.asp>. In part III, s 5, Jackson asks rhetorically, 'What specifically are the crimes with which these individuals and organizations should be charged, and what marks their conduct as criminal?'

As stated above, the US Supreme Court first grafted *respondeat superior* from the civil to the criminal context in *NY Central & Hudson River Railroad v United States*⁹³ at the turn of the twentieth century. Using the agency theory endemic to *respondeat superior*, the Court found that the criminal activity of a railroad employee (bribery) was imputable to the corporation as a whole and found the company criminally liable. The Court noted that since the concept was well-founded in civil tort law, it had every reason in public policy to 'go only a step further' and apply it in criminal law.⁹⁴

Post-*NY Central* cases have blended civil and criminal liability of corporations as organizations. The US Court of Appeals for the 8th Circuit noted in the 1940s that '[t]here is no longer any distinction in essence between the civil and criminal liability of corporations, based upon the element of intent or wrongful purpose.'⁹⁵ But one of the problems with *respondeat superior* (discussed below) is that corporations may raise a due diligence defence based on the existence of corporate compliance manuals and policies.

That defence is not allowed in command responsibility-based prosecutions. Indeed, the commander cannot even delegate his command responsibility. Consider again the *Yamashita* case:

Despite his *de jure* command, Yamashita, who assumed his post only eleven days before the invasion by United States forces, ordered a partial evacuation. He then split the remainder of the Japanese forces into three separate fighting units, ceding full command of two, and commanding the other himself. Contrary to his orders, the evacuation did not occur, and Yamashita was left isolated in a remote mountainous region, apparently lacking communications with his headquarters and the two other commanders.

Yamashita's conviction was upheld for acts of troops beyond his *de facto* control, on the ground that operational command responsibility cannot be ceded for the purposes of the doctrine of command responsibility even though the specific aspects of such command are actually ceded to others. This rule, referred to as the 'delegation principle', is recognized as a general principle of criminal law.⁹⁶

Command responsibility holds the superior's feet to the fire of criminal liability more firmly than *respondeat superior* and, therefore, is the preferable avenue for prosecution. If the theoretical leap from the military to the

⁹³ *New York Central & Hudson Railway Company v United States*, 212 US 481 (1909).

⁹⁴ *Ibid* 495.

⁹⁵ *Egan v United States*, 137 F 2d 369, 379 (8th Cir, 1943).

⁹⁶ Ilias Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93(3) *American Journal of International Law* 573.

corporate context can be made, then a new and vital tool in the fight against impunity for the commission of international crimes can be brought to the fore. Moreover, as both the 'nature as well as the elements of command responsibility can be regarded as well established under customary international law,'⁹⁷ any court may use them.

Conspiracy-based theories of criminal liability are also a favourite of prosecutors as they allow the liability net to be cast wide. Joint conspiracy was used effectively by prosecutors at both the Nuremberg and Tokyo trials to convict war criminals. Joint criminal enterprise ('JCE') is a conspiracy-based theory that corporations have every reason to fear. Thus, they would wish to see it constrained only to prosecuting criminal organizations like the Nazi party, the Gestapo, or the Mafia. For the structure of the doctrine can be easily translated to the corporate context.

JCE is essentially the international version of the crime of conspiracy.⁹⁸ In the *Tadić* case, the ICTY recognised that JCE derives from customary international law and is comparable to conspiracy.⁹⁹ Most international prosecutors today use JCE to target senior military and political leaders.¹⁰⁰

Although scholars agree that JCE is not found explicitly in the ICTY's statute, judges have found that it is implied in Article 7(1) of the statute. Under JCE, 'an individual may be held responsible for all crimes committed pursuant to the existence of a common plan or design which involves the commission of a crime provided for in the Statute if the defendant participates with others in the common design.'¹⁰¹

The Appeals Chamber in *Tadić* defined three types of JCE: Basic, Systemic, and Extended.¹⁰² Basic JCE exists where a person acts as a member of a group with a common plan, design, or purpose to commit a

⁹⁷ Beatrice I Bonafé, 'Finding a Proper Role for Command Responsibility' (2007) 5 *Journal of International Criminal Justice* 599, 601.

⁹⁸ *Shan v China Construction Bank Corporation* (Southern District of New York, WL 2595095, 29 June 2010) slip op 7, quoting *Presbyterian Church of Sudan v Talisman Energy Inc*, 582 F 3d 244, 260 (2nd Cir, 2009).

⁹⁹ *Tadić* (International Criminal Tribunal for Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997); *In re South African Apartheid Litigation*, 617 F Supp 2d 228, 263 (SDNY, 2009).

¹⁰⁰ Allison Marston Danner, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75, 104.

¹⁰¹ *Ibid.*

¹⁰² Raha Wala, 'From Guantanamo to Nuremberg and Back: An Analysis of Conspiracy to Commit War Crimes Under International Humanitarian Law' (2010) 41 *Georgetown Journal of International Law* 683, 706.

war crime where all members have the intention to commit the war crime. To satisfy the intent element, the person must have voluntarily participated in one aspect of the common plan. The aspect that the person voluntarily participated in must have been part of the causal chain that leads to committing the crime. This type of JCE normally occurs when the group commits a specifically agreed upon war crime.¹⁰³

Systemic JCE exists where a person acts as a member of an institution with a common plan, design, or purpose to commit war crimes systemically.¹⁰⁴ The person must know about the plan, design, or purpose, and must also hold a position of authority and act with the intention to further the plan. The knowledge and intent elements can be proven directly or inferred from the person's authority within the institution.¹⁰⁵

Extended JCE exists where a person acts as a member of a group with a common plan, design, or purpose to conduct certain criminal acts, with all members having the shared intention to commit those acts.¹⁰⁶ For this type of JCE, the risk of committing the war crimes would be a natural and foreseeable consequence of those acts, and the person must have acted recklessly with respect to that risk. In order to invoke one of the three types of JCE, a crime must have been committed and the accused must have contributed in some way to the common plan, design, or purpose in relation to it.¹⁰⁷

Beyond the ICTY, the *Rome Statute of the International Criminal Court* provides for JCE, although it does not use that terminology. Article 25(3)(d) states:

A person shall be criminally responsible and liable for punishment ... if that person ... [i]n any other way contributes to the commission or attempted commission of ... a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either ... (i) [b]e made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) [b]e made in the knowledge of the intention of the group to commit the crime.¹⁰⁸

¹⁰³ Ibid 707.

¹⁰⁴ Ibid 706.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid 707.

¹⁰⁷ Ibid.

¹⁰⁸ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 25(3)(d).

As such, JCE represents the primary 'conspiratorial' theory of liability in modern international tribunals.¹⁰⁹ In fact, every modern international tribunal has confirmed the first two forms of joint criminal enterprise liability theory (basic and systemic) as customary international law.¹¹⁰ This is true even though there are countries that do not allow for joint criminal enterprise liability. For example, Germany, the Netherlands, and Switzerland do not include this form of liability in their criminal codes.¹¹¹

Joint criminal enterprise is relevant to prosecutions of corporate actors for international crimes and it has been shown to apply to business activities as well. The contribution of an accused must have a significant contribution to the crime itself but the contribution itself does not have to be criminal and may include acts that might otherwise be considered neutral political, military, or business activity.¹¹² However, a business relationship, by itself, cannot automatically be considered a common criminal plan—which is required for JCE theory to work. So just supplying weapons to a genocidal regime alone is not sufficient.¹¹³

In showing the common criminal plan, a prosecutor must demonstrate that the corporate actor has the direct intent for the crime to be committed.¹¹⁴ Additionally, many situations in which a corporate actor is providing material to the *génocidaire* involve material passing through multiple 'middle men.' The more links in the supply chain, the more difficult it may be to establish the necessary intent on the corporate actor.¹¹⁵ However, even with those problems, an International Commission of Jurists report

¹⁰⁹ Anna Sanders, 'New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability After Sosa' (2010) 28 *Berkeley Journal of International Law* 619.

¹¹⁰ Ibid. With respect to the extended form of JCE, the Extraordinary Chambers in the Courts of Cambodia ('ECCC'), which is a hybrid international/domestic tribunal prosecuting the perpetrators of the Cambodian genocide, held in 2010 that while the basic and systemic forms of JCE are rooted in customary international law, the extended form of JCE is not—or, more precisely, was not in 1975–1979 period during the Cambodian genocide. This was confirmed by the trial chamber in 2011. *Prosecutor v IENG Sary et al (Decision on the Applicability of Joint Criminal Enterprise)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 002, Doc E100/6, 12 September 2011) [22]. However, the International Criminal Court has taken a more expansive view of the extended JCE's applicability: *Prosecutor v Lubanga (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) [984].

¹¹¹ Marston Danner, above n 100, 104.

¹¹² Norman Farrell, 'Attributing Criminal Liability to Corporate Actors' (2010) 8 *Journal of International Criminal Justice* 873, 879.

¹¹³ Julia Geneuss, 'Core Crimes Inc' (2010) 8 *Journal of International Criminal Justice* 957, 969.

¹¹⁴ Farrell, above n 112, 879.

¹¹⁵ Ibid 880.

confirms that a company can be held liable in international law under JCE.¹¹⁶

That theory can certainly be used to prove genocide. As the International Criminal Tribunal for Rwanda ('ICTR') explained:

Joint criminal enterprise does not appear expressly in the Statute nor in the Rules of Procedure and Evidence. This legal concept appeared for the first time in the *Tadic* Appeals Judgment of 15 July 1999. According to established jurisprudence, joint criminal enterprise is considered as a form of participation in a crime coming from the word *committing* contained in Article 7(1) of the Statute of the International Criminal Tribunal for former Yugoslavia and Article 6(1) of this Tribunal's Statute. As the Appeals Chamber recently reiterated, it is clear that there is a basis in customary international law for joint criminal enterprise liability. It is also well established that joint criminal enterprise can apply to the crime of genocide.¹¹⁷

So the parameters of vicarious liability and JCE are broad enough and theoretically sound enough to contemplate the prosecution of corporations for international crimes like genocide. Other stumbling blocks exist, such as the difficulties associated with proving complicity, specific intent, jurisdictional questions and policy considerations are discussed elsewhere. But the underlying framework is stable and has been utilised in other contexts:

Despite some reluctance to apply international criminal law to corporations in the mid-twentieth century, the concept of international corporate crimes is now common ... [S]everal international treaties have expressly included corporate crimes, including the Apartheid Convention, and treaties governing corruption and bribery, hazardous wastes, and other environmental violations.¹¹⁸

If companies can be held criminally liable for environmental pollution or bribery, then why not for genocide—where millions may perish? The arguments against holding corporations criminally liable for complicity in

¹¹⁶ International Commission of Jurists, *Corporate Complicity and Legal Accountability, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes* (ICJ, 2008), vol 1 <icj-usa.org/wp-content/uploads/2009/11/Panel_on_complicity_Vol1.pdf>. See also Justice Ian Binnie, 'Legal Redress for Corporate Participation in International Human Rights Abuses' (2009) 38(4) *The Brief of the American Bar Association* 44, 48.

¹¹⁷ *Prosecutor v Karemera (Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, May 18, 2006) [5].

¹¹⁸ Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45, 77.

genocide under international law do not hold up—especially when set against countervailing justifications for doing so. In the absence of an international tribunal currently imbued with the capacity to prosecute a corporation for genocide, the General Assembly of the United Nations, or one of its constituent bodies, should request an advisory opinion from the International Court of Justice on this question.¹¹⁹

Although a negative response from the ICJ would dampen prospects for international prosecution, if the Court answered the question in the affirmative—that corporations can be held criminally liable for complicity in genocide under international law, a new impetus to amend the statute of the International Criminal Court would be created.

Certainly, an intended by-product of such a finding would be to encourage a greater sense of corporate responsibility on a global scale. Companies are driven by profits and are answerable to their shareholders. As such, there is a public image factor (even for State-owned companies) that cannot be ignored. Criminal indictments of companies by international bodies can potentially damage the corporate image in numerous ways. ‘Criminal liability assumes an advantage over civil law and other less stringent mechanisms in that penal sanctions have stigmatizing side effects. The publicity alone of standing trial in the spotlight for international crimes carries unique censure.’¹²⁰

If the threat of indictment by a court with jurisdiction is enough to cause even one corporation to reconsider shipping the tools of genocide to a particular dictator or general, then the entire effort would have been worth it. It is time to take the promise of Nuremberg to the next level. In moving to hold natural persons (military, government, and corporate leaders) accountable under international law, Justice Robert Jackson was certainly cognisant of the opportunity laid before him:

Any legal position asserted on behalf of the United States will have considerable significance in the future evolution of International Law. In untroubled times, progress toward an effective rule of law in the international community is slow indeed. Inertia rests more heavily upon the society of nations than upon any other society. Now we stand at one of those rare moments

¹¹⁹ Alternatively, a State party to the *Genocide Convention* may bring a contentious case before the ICJ under Article IX: ‘Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.’

¹²⁰ Stoitchkova, above n 17, 190.

when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions rarely come and quickly pass.

We are put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and the destinies of peoples in their power.¹²¹

In the years since 1946, multinational corporations have grown in scope and power to literally frame the architecture upon which the modern global economy is based. The latitude they have been afforded to pursue profit and increase trade is vast. But along with rights come responsibilities. People all over the world have benefited from increased business activity. But darker chapters have also emerged in this larger success story.

Justice demands holding companies accountable when they are complicit parties to genocide. International legal theory provides the tools for doing so even if the jurisdiction is not yet available.

¹²¹ Justice Robert H Jackson, 'Report to the President on Atrocities and War Crimes' (Report, 7 June 1945) <http://avalon.law.yale.edu/imt/imt_jacko1.asp>.

CHAPTER THIRTEEN

BUSINESS CORPORATIONS AS NON-STATE ACTORS IN INTERNATIONAL LAW: A BRAND-NEW INTERNATIONAL LAW- MAKING PROCESS THROUGH INVESTMENT TREATY ARBITRATION

YOSHIHISA HAYAKAWA*

I. INTRODUCTION

This chapter aims to describe and analyse a change of law-making process in one area of international law—international investment law. In particular, it explores the role of one group of non-State actors, namely business corporations, in the making of international investment law. A specific feature of international investment law in the last decade has been the emergence of a major increase in the utilization of investor-State arbitrations under investment treaties.¹ They are generally used between a corporation in a developed country (an investor) and a State itself in a developing country (a host country).² This type of arbitration enables a corporation to avoid defences based solely on the doctrine of sovereign immunity when it brings a suit against a developing country before the courts of that State and to file for arbitration directly against a State itself. Moreover, it enables a corporation to change the existing order of international law in the field of international investment.

This chapter first provides an overview of the rise of a form of international commercial arbitration I describe as ‘investment arbitration’.

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¹ For instance, the total number of the cases by year registered at the International Centre for Settlement of Investment Disputes (‘ICSID’) has significantly increased over the past decade. Up until 1996, the number of cases registered each year was less than 5. From 1997 to 2002, the number of cases registered each year ranged from was more than 9 but less than 20. From 2002 to 2011, the total number by year was always more than 20 and was over 30 in 2003, 2007 and 2011. For more details, see International Centre for Settlement of Investment Disputes (2012) *1 The ICSID Caseload – Statistics* <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>>.

² Strictly speaking, there have recently been many investment treaties between developing countries and ‘developing countries’. However, many of the ‘developing countries’ have been as powerful as developed countries. This type of ‘developing countries’ should be considered as ‘developed countries’ in this chapter.

In these cases a corporation files for arbitration not against a State but against another business corporation; frequently this will involve a corporation in a developed country (an investor) bringing arbitration against another business corporation in a developing country (a local corporation). My argument, set out below, is that this type of arbitration is in its nature different from traditional types of international commercial arbitration. Of course, this investment arbitration takes place not at the level of international law but at the level of national law. Nevertheless, it is important to analyse this phenomenon to better understand the behaviour of business corporations on the level of international law.

The chapter then goes on to explain why the investor-State arbitration model is now of special importance for business corporations. In particular it notes that the investment arbitration model does not work if the other party to a dispute is the host State itself. The discussion also analyses how the 'investor-State arbitration' model of arbitration operates in the contemporary world of international investment law and how it is changing the existing order of international law in a number of respects. Third, this paper describes how business corporations can strategically create a new order of international law through investment treaty arbitration. Finally, the chapter raises issues about the future, including whether this type of law-making process will emerge in other areas, and the range of possible responses to the challenges to which this gives rise.

II. STRATEGIC USE OF ARBITRATION IN INVESTMENT

A. *Business Corporations' Intent to Use Arbitration in Investment*

The scene of international commercial arbitration has changed over the past decade. Precisely speaking, however, the scene of traditional 'international commercial arbitration' has not drastically changed.³ International commercial arbitration still enables business corporations to avoid unnecessary additional disputes on adjudicative jurisdictional matters

³ For instance, the International Court of Arbitration of the International Chamber of Commerce ('ICC') has been one of the most significant arbitration institutions. The Arbitration Rules of the ICC were established in 1998 and have been used worldwide since then. The ICC has recently revised its Arbitration Rules, with the new rules entering into force on 1 January 2012. However, the new rules do not make any major changes compared with the earlier rules. For more details, see, *ICC Rules of Arbitration*, International Chamber of Commerce <<http://iccwbo.org/court/arbitration/index.html?id=42394>>.

and to obtain quick and persuasive decisions made by experienced and knowledgeable arbitrators. It has been widely used as an effective and sophisticated tool for cross-border dispute resolution between business corporations in different countries, especially in different developed countries.⁴

In contrast the landscape of 'investment arbitration'—that is, arbitration between a business corporation based in a developed country (an investor) and another business corporation in a developing country (a local corporation)—has begun to develop significantly over the past decade.⁵ The standard scenario is as follows. An investor tries to insert an arbitration clause into the investment agreement with a local corporation in the host country, out of concern that a local national court in the host country will not be neutral and impartial in disputes between the investor and the local corporation. By this means, the investor seeks to create a dispute resolution body, which is independent from the host country, by inserting an arbitration clause in the investment agreement.

In my experience as a practising lawyer, the investor's motivation for utilising arbitration for dispute resolution in such cases is thus significantly different from the reason why traditional international commercial arbitration is used. In the case of agreements between investors from developed countries, both parties consider it advantageous to use arbitration as a means to avoid unnecessary additional disputes over jurisdictional matters and to obtain prompt decisions made by expert arbitrators. In the case of agreements between investors from developed and developing countries, investors from developed countries prefer arbitration as it provides a way to avoid decisions being made by the local national courts in developing countries where the investor may have concerns about the impartiality of the courts in disputes between locals and foreigners. Utilising arbitration is advantageous not for the local corporation but for

⁴ For instance, a large number of cases have been registered with the ICC in the last decade or so. The number of cases registered each year was more than 500 from 2000 to 2007 and more than 600 from 2008 to 2010. For more details including statistics of other arbitration institutions, see *Statistics of Arbitral Institutions* (2012) Singapore International Arbitration Centre <http://www.siac.org.sg/index.php?option=com_content&view=article&id=339&Itemid=73#international_cases>.

⁵ For instance, in cases conducted under the auspices of the ICC the number of the parties from the Asia and Pacific region (other than Japan) ranged from 277 in 2005 to 411 in 2009. Similarly, the number of the parties in the region of Central and Eastern Europe ranged from 122 in 2005 to 268 in 2009. For more details, see '2005 Statistical Report' (2006) 17(1) *ICC International Court of Arbitration Bulletin* 5; '2009 Statistical Report' (2010) 21(1) *ICC International Court of Arbitration Bulletin* 5.

the investor corporation. For local corporations, the local national court with judges of the same nationality may appear more likely to be more sympathetic to them. As a result, the investor attempts to insert an arbitration clause in their agreement, although the local corporation usually objects to the inclusion of such a provision. In the usual course of events, however, the local corporation reluctantly accepts the arbitration clause in their agreement, for reasons explored in the next section.

B. *Pressures to Use Arbitration in Investment*

In most cases today, a local corporation in a developing country is under considerable pressure to accept an arbitration clause in its agreement with an investor. Sometimes, the local corporation has to accept an arbitration clause because of the imbalance of bargaining power between the investor and itself. If the proposal by the investor is enticing in substance and any other local competitor has an interest in the proposal, the local corporation has no choice but to accept the arbitration clause.

Additionally, many host countries have to establish their own local arbitration systems, not out of desire, but out of necessity, because the host countries themselves are under strong pressure to do so. Many developing countries compete against each other to attract investment from abroad, especially from developed countries. The host countries have to ensure that international commercial arbitration can be carried out in the host jurisdiction.⁶ The existence of a modern and efficient arbitration system is potentially a very important factor to be considered by an investor when deciding where to make investments and whether or not to make an investment in a particular country.⁷ Therefore, each host country has no real option but to establish a local arbitration system.⁸

⁶ There may be another option: to recognise that parties will choose a foreign arbitral forum. Comparing these two options, however, the former option could provide considerable scope for control over a scheme of dispute resolution.

⁷ For instance, the European Bank for Reconstruction and Development ('EBRD') has provided a service to evaluate whether the arbitration legislation of a number of developing countries complies with the best international standards and practices. Developing countries had to accept the assessment in order to attract an investment from foreign markets. For more details, see European Bank for Reconstruction and Development, *Assessments of Judicial Capacity* (12 July 2011) <http://www.ebrd.com/pages/sector/legal/judicial_capacity/assessments.shtml> ('*Assessments of Judicial Capacity*').

⁸ Even a powerful developing country like China has been under this kind of pressure. At the very early stages of the People's Republic of China, there was no arbitration system and investors had to use local national courts in China for their dispute resolution.

Even though countries may in effect be compelled to establish a local arbitration system, they may not wish to do so or to use it in preference to their own courts staffed by local judges. This means that the best tactic for the host country is to establish a system which in appearance is close to arbitration but is substantially different. Once this system is established, the best tactic for the local corporation is to use the locally created arbitration system.⁹

C. Resistance and Counterattack

When a country creates an arbitration system, it usually enacts implementing legislation and establishes an arbitration institute with

After strong pressure from developed countries, China established the Foreign Trade Arbitration Commission under the China Council for the Promotion of International Trade as its arbitration institution in 1956. The institution was renamed as the Foreign Economic and Trade Arbitration Commission in 1980, and then as the China International Economic and Trade Arbitration Commission ('CIETAC') in 1988. For more detail, see Weigong Xu, 'Definition of Arbitration in China' (Fall 2011) 30 *Journal of Law and Commerce* 107; Harry Liu, Yue Qiu, and King & Wood, 'Recent Development in Arbitration Practice in China' (March 2012) 876 *Practicing Law Institute Litigation and Administrative Practice* 71.

⁹ For instance, until the revision in 2012, the CIETAC of China had had two sets of arbitration rules: rules for international cases and rules for domestic cases. It also had two lists of possible arbitrators: a list for international cases and a list for domestic cases. The former list included foreign arbitrators as well as Chinese nationals, but the latter included only Chinese nationals. It was a serious problem for foreign investors in China that they could not use the list for international cases in most investment cases because a case between a local corporation and a subsidiary of the foreign investor in China was characterized as a 'domestic case' in China. This is because the subsidiary was characterized as a Chinese corporation from the legal viewpoint even when the corporation was a 100% subsidiary of the foreign investor. It means that foreign investors in China had to use Chinese nationals exclusively for dispute resolution between Chinese local corporations and their local investment vehicles.

The CIETAC arbitration rules also have a unique provision on the selection of three arbitrators. According to the relevant provision of the other arbitration institutions' rules, the claimant (X) and the respondent (Y) will each appoint one arbitrator (A and B) and then the presiding arbitrator (C) will be jointly appointed by the party-appointed arbitrators (A and B). According to Article 25 of the CIETAC rules, however, the claimant (X) and the respondent (Y) will each appoint one arbitrator (A and B) and then the presiding arbitrator (C) will be jointly appointed by the parties themselves (X and Y). It is usual that the disputing parties (X and Y) cannot agree on the appointment of the presiding arbitrator and then the Chairman of the CIETAC finally appoints the presiding arbitrator. In my experience as a counsel in arbitration cases before CIETAC, the Chairman of the CIETAC usually appoints a Chinese national as the presiding arbitrator. As a consequence, the majority of the arbitral tribunal is usually composed of Chinese nationals (AC or BC), even when the foreign corporation can resort to the arbitration rules and the list of possible arbitrators for 'international cases'. For more details, see *Arbitration Rules* (3 February 2012) China International Economic and Trade Arbitration Commission <<http://www.cietac.org/index.cms>>.

appropriate rules. Arbitration law and arbitration rules can be lengthy and complicated, and the inclusion in domestic legislation of provisions which might work more favourably for the host country or local corporations is, in theory, possible.¹⁰

However, the inclusion of this kind of provision is not easy because of the existence of the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration¹¹ and the UNCITRAL Arbitration Rules.¹² The UNCITRAL Model Law was drafted for the purpose of harmonizing the laws of arbitration around the world and assisting with capacity-building efforts in developing countries; the UNCITRAL Arbitration Rules were formulated to provide assistance in ad hoc arbitration. However, these legal texts may be used as a check sheet to analyse the arbitration laws of a country and the rules of an arbitration institution in that country. An investor can easily find one or more provisions that differ from the 'standard' set of arbitration laws and rules. These different provisions are presumed to work unfavourably to the investor. In other words, it is easy for an investor, with these standard legal texts, to calculate host country risks from the viewpoint of dispute resolution.¹³

Moreover, the existence of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('New York Convention')¹⁴ works as an additional safeguard to help calculate this type of country-risk.¹⁵ Furthermore, the existence of the Model Arbitration Clause in the

¹⁰ See, eg, *ibid.*

¹¹ 1985 *UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006* (2012) United Nations Commission on International Trade Law <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>. For information about countries which have enacted legislation based on the Model Law, see *Status* (2012) United Nations Commission on International Trade Law <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

¹² These were first adopted by UNCITRAL on 28 April 1976, and revised in 2010. The 2010 Rules have been in effect since 15 August 2010: 2010-*UNCITRAL Arbitration Rules (as revised in 2010)* (2012) United Nations Commission on International Trade Law <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.htm>.

¹³ For instance, for the purposes of the assessment carried out by the EBRD, the EBRD uses the UNCITRAL Model Law on International Commercial Arbitration as a set of standard rules to be compared with the national legislation of the observed States. For more details, see *Assessments of Judicial Capacity*, above n 7.

¹⁴ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

¹⁵ As of 31 December 2012, the Convention had 148 States Parties: See *Multilateral Treaties Deposited with the Secretary-General: Chapter XXII* United Nations Treaty Collection <<http://treaties.un.org/Pages/ParticipationStatus.aspx>>. In this situation, the fact that a possible host country is not a member State of the New York Convention would be a serious risk-factor for investment.

UNCITRAL Arbitration Rules prevents a local corporation from inserting any unique arbitration clause which may work unfavourably to the investor.¹⁶ We should not forget the fact that UNCITRAL is officially operated by the Member States of the United Nations (which includes developing countries) but is substantially directed by a number of States in developed countries.

But even if 'standardised' arbitration laws and rules are adopted, forms of resistance are still possible. For example, there are many judicial cases in which national courts of host countries have invalidated—or attempted to invalidate—arbitral awards.¹⁷ The national court sometimes invalidated the award because, from its viewpoint, the arbitration proceedings included one or more serious procedural problems or because the award was contrary to the country's public policy. However, investors sometimes felt that the invalidation by the court was the result of the fact that the award had been unfavourable to the local corporation or the host country.¹⁸

For more details of the convention, see 1958- *Convention on the Recognition and Enforcement of Foreign Arbitral Awards- the 'New York Convention'* (2012) United Nations Commission for International Trade <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>.

¹⁶ The Model Arbitration Clause in the UNCITRAL Arbitration Rules provides:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note – Parties may wish to consider adding: (a) The appointing authority shall be ... (name of institution or person); (b) The number of arbitrators shall be ... (one or three); (c) The place of arbitration shall be ... (town or country); (d) The language(s) to be used in the arbitral proceedings shall be ...

¹⁷ See, eg, the *Chromalloy* and *Bechtel* cases (below n 19, 20). Additionally, there are cases where national courts set aside arbitral awards in cases in which the place of arbitration had not been in the forum State: see, eg, *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* 364 F 3d 274 (5th Cir, 2004); *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* 313 F 3d 70 (2nd Cir, 2002).

¹⁸ The Commission on Arbitration of the ICC established a task force one sub-committee in 2008 to research practice in relation to the recognition and enforcement of arbitral awards among the States Parties to the New York Convention, including clarifying the treatment of arbitral awards in practice by national courts in States Parties, especially developing countries. For more details of the research project and the report finally issued by the sub-committee in 2009, see Task Force of the ICC Commission on Arbitration, 'Guide to National Rules of Procedure for Recognition and Enforcement of Foreign Arbitral Awards pursuant to the New York Convention of 1958, Report from the ICC Commission on Arbitration' (Report, ICC, 2009) <<http://www.iccdri.com>>.

In order to compete against this kind of resistance, in a number of cases parties have sought to enforce invalidated awards in countries other than the host country. The *Chromalloy*¹⁹ and *Bechtel*²⁰ cases are good illustrations of this kind of counterattack. In *Chromalloy Aeroservices Inc v Ministry of Defence of the Republic of Egypt*, a foreign business corporation filed for arbitration against an Egyptian local entity at an arbitration institution in Egypt. The foreign corporation succeeded in the arbitration but the award was invalidated by the Egyptian courts. In response, the foreign corporation brought an action in the United States courts for the enforcement of the invalidated award. The US court finally enforced the invalidated award in the territory of the United States.²¹ Similarly, in *La Direction Générale de l'Aviation Civile de l'Émirat de Dubaï v Société Internationale Bechtel Co*, a foreign business corporation filed for arbitration against a local United Arab Emirates entity at an arbitration institution in Dubai. The foreign corporation succeeded in the arbitration, and enforced the award in France. Subsequently the Dubai Court of Appeal invalidated the award because of the arbitral panel's failure to follow Dubai procedural requirements. Thereupon the defendant sought to appeal against the enforcement order in France on the ground that the award had been invalidated. The Paris Court of Appeal dismissed the appeal.²²

As described above, we can see a pattern of resistance and counterattack between investors and host countries, that is, between developed countries and developing countries, in the phase of how to create an arbitration system and how to operate an arbitration system.²³

¹⁹ *Chromalloy Aeroservices Inc v Ministry of Defence of the Republic of Egypt*, 939 F Supp 907 (DDC, 1996) ('*Chromalloy Aeroservices*').

²⁰ *La Direction Générale de l'Aviation Civile de l'Émirat de Dubaï v Société Internationale Bechtel Co*, Cour d'appel de Paris [Paris Court of Appeal] RG 2004/07635, 29 September 2005 ('*Bechtel*').

²¹ *Chromalloy Aeroservices*, 939 F Supp 907 (DDC, 1996).

²² *Bechtel*, Cour d'appel de Paris [Paris Court of Appeal] RG 2004/07635, 29 September 2005; See discussion in Michael Polkinghorne and Leon Ioannou, 'Recent Decision Confirms France's Readiness to Enforce International Arbitral Awards Annulled at Place of Arbitration' (2006) 11(2) *Arbitration Committee of the Legal Practice Division of the International Bar Association* <http://www.whitecase.com/files/Publication/4ca80751-b790-4ece-8948-03548171b8bd/Presentation/PublicationAttachment/da4db4b0-513b-45a6-ab81-0681ca7egidd/article_Arbitration_Polki_Ioann.pdf>.

²³ Of course, the realities of the resistance and counterattack between the developed countries and the developing countries are much more complicated. This is partly because some developing countries, such as China or India, have become strong economies and have invested largely in other developing countries. They sometimes appear as a host country and sometimes appear as an investor in the world of contemporary investment. There were 46 new investment-treaty-based arbitration cases in 2011, with 11 of these cases

III. STATE AS A PARTY AND INVESTOR-STATE ARBITRATION

A. *State as a Party to an Investment Project*

The above-described pattern of resistance and counterattack does not clearly apply to a relationship between an investor and the State itself in a host country. Today, especially in developing countries, a State itself sometimes appears as a counter-party or one of the parties concerned in an investment project. The State has sovereign immunity unless it is waived. This specific feature of the entity often prevents an investor, that is a private business corporation, from undertaking judicial proceedings on equal footing.²⁴ Moreover, the State usually has a better bargaining position in relation to a local investment project. This specific feature often prevents an investor from inserting an 'equal' dispute resolution clause, for example a provision providing for international arbitration in the third country, in the investment agreement.²⁵

This 'inequality' in dispute resolution is the result of the unequal status of a sovereign State and a private business corporation. However, private business corporations in developed countries have now discovered a way to remove this 'inequality' in dispute resolution. As described below, if the parties are not sovereign entities, they should use an entity which has sovereign attributes as their representative. If the parties do not have a strong bargaining position, then they should use an entity which has a stronger bargaining position as their representative. Business corporations regularly pay significant amounts in taxes to one or more States and lobby them. A democratic mechanism sometimes helps this type of lobbying.²⁶

filed by the investor from developing countries. For more details, see UNCTAD, 'Latest Developments in Investor-State Dispute Settlement' (2012) 1 *IIA Issue Note* 1.

²⁴ The extent of sovereign or State immunity in relation to commercial transactions has increasingly been limited (see in particular the *United Nations Convention on the Jurisdictional Immunities of States and Their Property*, GA Res 59/38, 59th sess, Agenda Item 142, UN Doc A/RES/59/38/A (2 December 2004) Annex. Nonetheless, this immunity continues to be successfully invoked, especially by developing countries, in disputes before the courts of other States. Moreover, in some cases a State may exert its influence, legally and directly, on the proceedings if they are conducted before its own courts.

²⁵ In many investment projects between a private foreign investor and a State agency in the host country, the dispute resolution clauses in the investment agreements ordinarily refer to arbitration in the host country using the rules of the arbitration institution in the host country. See also, above n 8–9.

²⁶ The author previously examined the provisions for the triangular merger in the new Japanese Corporate Law established in 2005 and the pressure brought to bear on the law-making process by foreign business corporations and foreign States which had been lobbied by those foreign business corporations. These provisions enable a foreign corporation

As a result, States in developed countries started to appear on the scene of investment and the idea of investment treaty arbitration emerged.

B. *Investor-State Arbitration as a Developing Legal Weapon*

Investor-State arbitration is a system under which a business entity can file for arbitration directly against a State itself before an independent arbitral body, pursuant to an investment treaty entered into between the host State and the State of nationality of the investor. While individual investors may not have sufficient bargaining power to negotiate an agreement with the host State for disputes to be referred to independent arbitration, they may be able jointly to persuade their home State to negotiate an investment treaty that provides access to independent arbitration by individual investors. A number of developed countries with the advantage of sovereign status and strong bargaining positions, actively negotiated investor-State arbitration treaties or clauses in other treaties with a number of States in the developing world.²⁷ As a result, many bilateral investment treaties now include an investor-State arbitration clause.²⁸

In the scheme of investor-State arbitration, the advantages the State enjoys as a sovereign entity are removed. The State becomes just another party with a status equal to that of the private business corporation.

to make a Japanese corporation into that foreign one's 100% subsidiary much more easily. As an example of resistance, Japanese business corporations also lobbied the Japanese government in the law-making process aiming to limit the operation of the provisions. For more details, see, Yoshihisa Hayakawa, 'Gendai Kigyo no Kokusai Bijinesu Tenkai kara mita Hō to Kokka [Law and Sovereign States from the viewpoint of Global Business Transactions]' (2007) 106 (2) *Kokusaihō Gaikō Zasshi* 52.

²⁷ The author also previously examined, in the paper mentioned above, the activities of foreign business corporations and foreign governments lobbied by those business corporations for investment in Thailand. The *Treaty of Amity and Economic Relations* and the *Thailand-Australia Free Trade Agreement* ('FTA') enable US business corporations and Australian business corporations to establish their networks of subsidiaries much more easily in Thailand. The *Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments* and the FTA between Thailand and Australia include an arbitration clause which provides for dispute resolution between a foreign business corporation and the State of Thailand. For more details, see above n 26.

²⁸ See *Quantitative data on bilateral investment treaties and double taxation treaties* (2002) UNCTAD <<http://archive.unctad.org/templates/webflyer.asp?intItemID=3150&lang=1>> (noting the growth in the number of bilateral investment treaties from 385 in 1989 to 2265 by 2003, encompassing 176 countries); in relation to empirical studies of investment treaties with investor-State dispute settlement clauses, see also Jason Webb Yackee, 'Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties' (2007–2008) 33 *Brooklyn Journal of International Law* 405, 427.

The State can no longer control the arbitral tribunal in its case or at least cannot control an arbitrator appointed by the other party or an arbitrator serving as the chair of the tribunal. The arbitral tribunal (or at least the majority of the tribunal) simply determines the facts of the case and apply the applicable law to the facts. Based on this, they make a decision: for example, if a State breaches the contract, they will decide how much the State has to compensate the investor for the losses it has suffered. In other words, the investment treaty arbitration is a legal weapon to remove the final line of defence for developing countries.

From the viewpoint of foreign investors and developed countries, the removal of advantages of sovereignty and the strong bargaining position of host States is necessary for 'fair' treatment in investment dispute resolution.

C. *The Underlying North-South Problem*

Undoubtedly, there continue to be vast differences in wealth between developed countries and many developing countries. Although the rate of economic growth a number of developing countries is noteworthy, the North-South problem of disparity of wealth persists. A very large number of business corporations in developed countries have used developing countries as manufacturing bases because of their cheap labour and also as markets for their products. Even when a developed country provides Official Development Assistance ('ODA') for the construction of infrastructure in a developing country, business corporations in the developed country sometimes gains large amounts of money from the ODA project.²⁹

Against this background, developing countries may be tempted to use the following tactics in order to speedily catch up with developed economies. One tactic is to attract investment from abroad by initially providing a number of privileges favourable to investors, then changing these after the completion of some important facilities in the investment project and subsequently purchasing the completed facilities at a much lower price from the resigned investor.³⁰ Another tactic is, for example, to make

²⁹ In relation to the ratio of tied aid and untied aid in ODAs, see Edward J Clay, Matthew Geddes and Luisa Natali, *Untying Aid: Is it working? An Evaluation of the Implementation of the Paris Declaration and of the 2001 DAC Recommendation of Untying ODA to the LDCs* (Danish Institute of International Studies, 2009) 8.

³⁰ See, eg, *Siemens v Argentina (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/8, 6 February 2007); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v*

a national court of the host country give favourable consideration only to its local corporations at the phase of dispute resolution.³¹ These tactics become possible with the State's legislative power and/or adjudicative power. Sovereign power, which is provided equally to both developed countries and developing countries in theory, is an important legal weapon for the resistance made by the developing countries.

IV. BUSINESS CORPORATIONS CHANGING INTERNATIONAL LAW

A. *A Conflict of Two Principles in International Law*

When it comes to the theory of public international law, sovereignty is the most important and essential characteristic of a State. All States have equal sovereignty in theory. Developing countries stand on an equal footing to developed countries in this respect.

However, the recent surge in investment treaty arbitration has changed the existing situation of international law. Since bilateral investment treaties including investor-State arbitration clauses have come into effect, the possibilities for States to exert some types of sovereign power have been limited. One principle of existing international law, sovereignty, has been limited by this legal tactic, and the effect is authorised by another principle of the existing international law, the effect of treaties.

To what extent should a specific sovereign power be limited by the treaty the State had previously concluded? For example, consider a case in which a business corporation files for arbitration against a State according to the BIT between that State and a State where the business corporation was incorporated. Assume further that the business corporation is, however, a 100% owned subsidiary of another corporation (the parent corporation) in a third State and the parent corporation controls every aspect of the affairs of the subsidiary. In this case, should the business corporation be considered as a 'national' of the Contracting State of the BIT? According to an influential ICSID decision, a 'formal' approach—namely,

Argentine Republic (Award) (2001) 40 ILM 426; *Saipem v Bangladesh (Jurisdiction)* (2007) 22 ICSID Rev-FILJ 100.

³¹ See *White Industries Australia v India (Award)* (UNCITRAL Rules, 30 November 2011) and *GEA Group Aktiengesellschaft v Ukraine*, (ICSID Arbitral Tribunal, Case No ARB/08/16, 31 March 2011) (although the investor had not been a prevailing party in this case, the main issue was whether the rejection of the enforcement of the arbitral award by the national court constituted the violation of the BIT).

a corporation is a national of the State where it is incorporated, regardless of whether it is a subsidiary of and controlled by a corporation incorporated in a third State—should be supported.³² It means that, if the BIT has an express provision on 'nationality' which departs from that formal approach, the test specified in the provision should be applied.³³ If the BIT lacks an express provision on this matter or any additional provision requiring 'substantial control in the State,' the corporation should be considered as 'national' of the State of incorporation.³⁴

Many of the legal questions which have been discussed in relation to investment treaty arbitration have basically converged on this ultimate question: to what extent should a specific sovereign power be limited by the treaty the State had previously concluded? As an answer to this question, many of the arbitral awards have been in favour of the upholding the agreement embodied in treaties rather than the doctrine of sovereignty.³⁵

³² *Tokios Tokeles v Ukraine* (2005) 20 ICSID Rev-FILJ 205.

³³ A number of BITs, including the UK model BIT, adopt a simple 'incorporation' approach whereby corporations of the State are 'corporations, firms and associations incorporated or constituted under the law in any part of' the State, see *International Investment Instruments: A Compendium/ Volume 3* (1991) UNCTAD <<http://www.unctad.org/sections/dite/ia/docs/Compendium/en/69%20volume%203.pdf>>. On the other hand, a number of BITs require one or more additional tests, including 'carrying out business activities there' in the 2004 US model BIT (*Model BITs*, Investment Treaty Arbitration <<http://italaw.com/documents/USmodelbitnov04.pdf>>) or 'having their seat together with their substantial economic activities in the territory of that same Contracting Party' in the Sri Lankan model BIT (*International Investment Instruments: A Compendium/ Volume 5*, UNCTAD <<http://www.unctad.org/sections/dite/ia/docs/Compendium/en/136%20volume%205.pdf>>).

³⁴ Although Japan and the Czech Republic do not have a BIT, a Japanese corporation was able to file for arbitration against the Czech Republic for this 'formal' approach in *Saluka Investments BV v Czech Republic*. The Japanese corporation (Nomura Securities) established a subsidiary (Saluka Investments BV) in the Netherlands and the subsidiary invested in the Czech Republic. After the dispute arose, the subsidiary could file for arbitration against the Czech Republic under the BIT between the Netherlands and Czech Republic: *Saluka Investments BV v Czech Republic (Award)* (UNCITRAL Rules, 17 March 2006) [229]–[230].

³⁵ The author is engaged in a research project with a number of scholars, practising lawyers and bureaucrats where the members continuously analyse the latest ICSID decisions and the latest related decisions of other arbitration institutes and regularly issue case-reviews of them. In order to make Japanese business corporations and practising lawyers develop an interest in investment treaty arbitration, the case-reviews have been monthly reported to them in Japanese by a legal journal. For more details of the result of the project, see Shotaro Hamamoto, 'Victor Pey Casado and President Allende Foundation v Republic of Chile (ICSID Case No ARB/98/2)' (2009) 56(10) *Journal of the Japan Commercial Arbitration Association* 4; Yasuhiro Okuda, 'Plama Consortium Ltd v Republic of Bulgaria (ICSID Case No. ARB/03/24)' (2009) 56(11) *Journal of the Japan Commercial Arbitration Association* 10; Ichiro Araki, 'Continental Casualty Co v Argentine Republic (ICSID Case No ARB/03/09)' (2009) 56(12) *Journal of the Japan Commercial Arbitration Association* 2; Kazushige Ogawa, 'Occidental Exploration and Production Co v Republic of

B. Change of Decision-Making-Community in International Law

What is the reason for the many arbitral awards in favour of the arrangements agreed in bilateral investment treaties? One possible answer is the change of the nature of the participants in the decision-making body of international law. As a matter of fact, many individuals who have served as an arbitrator in investment treaty arbitrations are professional arbitrators

Ecuador (ICSID Case No ARB/06/11)' (2010) 57(1) *Journal of the Japan Commercial Arbitration Association* 36; Shinpei Yamamoto, '*Dredging International NV v Arab Republic of Egypt* (ICSID Case No ARB/04/13)' (2010) 57(2) *Journal of the Japan Commercial Arbitration Association* 8; Naoki Iguchi, '*Societe General v Dominican Republic* (LCIA Case No UN7927)' (2010) 57(3) *Journal of the Japan Commercial Arbitration Association* 10; Naoki Idei, '*Perenco Ecuador Ltd v Republic of Ecuador* (ICSID Case No ARB/08/6)' 57(3) *Journal of the Japan Commercial Arbitration Association* 19; Yoko Nomiyama, '*Malaysian Historical Salvors Sdn Bhd v Malaysia* (ICSID Case No ARB/05/10)' (2010) 57(4) *Journal of the Japan Commercial Arbitration Association* 26; Yoshihisa Hayakawa, '*Sempre Energy International v Argentine Republic* (ICSID Case No ARB/02/16)' 57(5) *Journal of the Japan Commercial Arbitration Association* 19; Shinichiro Hayakawa, '*LESI SpA & ASTALDI SpA v Algeria* (ICSID Case No ARB/05/3)' (2010) 57(6) *Journal of the Japan Commercial Arbitration Association* 20; Isomi Suzuki, '*Saipem SpA v People's Republic of Bangladesh* (ICSID Case No ARB/05/7)' (2010) 57(7) *Journal of the Japan Commercial Arbitration Association* 18; Koji Nishimoto, '*Renta 4 SVSA, Ahorro Co v Russia* (SCC Case No 24/2007)' (2010) 57(8) *Journal of the Japan Commercial Arbitration Association* 18; Tomoko Ishikawa, '*Bayindir Insaat Turizm Ticaret ve Sanayi AS v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29)' (2010) 57(9) *Journal of the Japan Commercial Arbitration Association* 26; Shimpei Yamamoto, '*Romak SA v Uzbekistan* (PCA Case No AA280)' (2010) 57(10) *Journal of the Japan Commercial Arbitration Association* 16; Shotaro Hamamoto, '*Sempre Energy International v Argentine Republic* (ICSID Case No ARB/02/16)' (2010) 57(10) *Journal of the Japan Commercial Arbitration Association* 25; Isomi Suzuki, '*Giovanna A Beccara and Others v Argentine Republic* (ICSID Case No ARB/07/5)' (2010) 57(11) *Journal of the Japan Commercial Arbitration Association* 20; Ichiro Araki, '*Merrill & Ring Forestry v Canada* (UNCITRAL Case)' (2010) 57(11) *Journal of the Japan Commercial Arbitration Association* 29; Naoki Iguchi, '*Vito G Gallo v Canada* (Permanent Court of Arbitration)' (2010) 57(12) *Journal of the Japan Commercial Arbitration Association* 11; Kazushige Ogawa, '*ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan* (ICSID Case No ARB/08/2)' (2010) 57(12) *Journal of the Japan Commercial Arbitration Association* 18; Yoshihisa Hayakawa, '*Mobil Corporation and Others v Republic of Venezuela* (ICSID Case No ARB/07/27)' (2011) 58(1) *Journal of the Japan Commercial Arbitration Association* 28; Takamichi Inose, '*Europe Cement Investment and Trade SA v Republic of Turkey* (ICSID Case No ARB(AF)/07/2)' 58(2) *Journal of the Japan Commercial Arbitration Association* 18; Kazushige Ogawa, '*Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg and RSM Production Corporation v Grenada* (ICSID Case No ARB/10/6)' (2011) 58(3) *Journal of the Japan Commercial Arbitration Association* 28; Tomoko Ishikawa, '*Chemtura Corporation v Canada* (UNCITRAL Case)' 58(4) *Journal of the Japan Commercial Arbitration Association* 28; Shotaro Hamamoto, '*Malicorp Limited v Republic of Egypt* (CIRDI No ARB/08/18)' (2011) 58(5) *Journal of the Japan Commercial Arbitration Association* 27; Naoki Idei, '*Fraport AG Frankfurt Airport Service Worldwide v Republic of the Philippines* (ICSID Case No ARB/03/25 (Annulment Procedure))' (2011) 58(6) *Journal of the Japan Commercial Arbitration Association* 30; Shimpei Yamamoto, '*Grand River Enterprises Six Nations, Ltd, Jerry Montour, Arthur Montour, Kenneth Hill v United States of America*

who have served as arbitrators in ordinary cross-border business disputes.³⁶ In the private business world, the binding effect of contract terms is the most important dimension of a relationship to be respected. If the arbitrator unconsciously relies on 'common sense' as in private law, the terms of the treaty are likely to be interpreted like a private contract. In other words, the 'common sense' seen in the context of international commercial arbitration has now invaded the existing order of public international law.

But how has this invasion been realised? Why have the arbitrators in international commercial arbitration become influential even in the areas of public international law?

It is not difficult to explain why arbitrators, who have mainly worked in international commercial arbitration, have become influential in this field. In the system of arbitration, a claimant to investment treaty arbitration, that is, a private business corporation, can nominate one arbitrator. They tend to choose an arbitrator who has considerable relevant experience and expertise, especially in international commercial arbitration which the business corporations may regularly use as a tool to resolve ordinary cross-border business disputes.³⁷ It is natural that the business corporation seeks to appoint an arbitrator with the ability to easily

(UNCITRAL Rules)' (2011) 58(7) *Journal of the Japan Commercial Arbitration Association* 32; Ichiro Araki, 'Yury Bogdanov v Republic of Moldova (SCC Arbitration No V (114/2009))' (2011) 58(8) *Journal of the Japan Commercial Arbitration Association* 46; Takamichi Inose, 'Eureko BV v The Slovak Republic (PCA Case No 2008-13)' (2011) 58(9) *Journal of the Japan Commercial Arbitration Association* 32; Isomi Suzuki, 'Joseph Charles Lemire v Ukraine (ICSID Case No ARB/06/18)' (2011) 58(10) *Journal of the Japan Commercial Arbitration Association* 34; Naoki Iguchi, 'GEA Group Aktiengesellschaft v Ukraine (ICSID Case No ARB/08/16)' (2011) 58(11) *Journal of the Japan Commercial Arbitration Association* 40; Takashi Koyama, 'Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Mongolia (UNCITRAL Rules)' (2011) 58(12) *Journal of the Japan Commercial Arbitration Association* 46; Shotaro Hamamoto, 'Italian Republic v Republic of Cuba' (2012) 59(2) *Journal of the Japan Commercial Arbitration Association* 22; Yoshihisa Hayakawa, 'Impregilo SpA v Argentine Republic (ICSID Case No ARB/07/17)' (2012) 59(3) *Journal of the Japan Commercial Arbitration Association* 14; Shinpei Ishido, 'Hochtief AG v The Argentine Republic (ICSID Case No ARB/07/31)' (2012) 59(4) *Journal of the Japan Commercial Arbitration Association* 22.

³⁶ It is not difficult to check who actually served as an arbitrator in each of the disclosed ICSID cases at <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=ViewAllCases>>.

³⁷ From reviewing the details of those who have served as arbitrators in each of the disclosed ICSID cases, it is clear that a number of particular arbitrators have been frequently appointed only by the respondents as a party (respondent) appointed arbitrator. Similarly, claimants, that is a private business corporations, tend to appoint practising lawyers, who have actively worked as arbitrators and/or as a counsel for the party in international commercial arbitration, as a party (claimant) appointed arbitrator. For more details, see database on the website cited above n 36.

understand the factual background of the investment project, the business corporation's real intent in the project and the reason why the dispute has arisen.³⁸

Additionally, the chair of the tribunal has to have skill and experience in the conduct of arbitration proceedings, something which can only be acquired from sitting on arbitration cases. Such human resources can be easily found in the field of international commercial arbitration where a very large number of cases have been decided.

Thus, the behaviour of the disputants in the phase of the appointment of arbitrators, especially that of business corporations, has influenced the composition of the decision-making community of international law. It has also influenced the way of thinking of the decision-making community; in other words, there has been an invasion of the areas of public international law by the perspectives and assumptions of international commercial arbitration.

C. States in Developed Countries also have to Compete with Each Other

Some types of the exercise of sovereign power by the States in developing countries have been limited by the investment treaty arbitration regime, and this type of arbitration is functioning as a tool for the injection of the common sense of private law into the existing order of public international law. Furthermore, even developed countries are under considerable pressure to assist and support private business corporations. In the contemporary global business scene, a business corporation can easily establish its subsidiary in a foreign State as a base or vehicle for the investment if the business corporation considers that the foreign State is much more reliable. If necessary, the business corporation can move its headquarters to the foreign State. In other words, States in developed countries have to worry about the risk of an important taxpayer fleeing and, therefore, are compelled to work for them on many occasions. Against this background, many States in developed countries compete to increase the number of BITs with each other, and are thus engaged in building a brand-new legal order of public international law under the pressure of private business corporations.

³⁸ It is a standard part of the work of counsel for a party in international commercial arbitration to research the details of potential arbitrators, including their background and approach to the issues, and to predict their views if appointed as arbitrators. See Yoshihisa Hayakawa, '*Mobil Corporation and Others v Republic of Venezuela*' above n 35.

V. CONCLUSION

One of the remarkable features of the recent activities of the Arbitration Working Group of the UNCITRAL, especially from its 45th to 52nd sessions, was the active involvement in the law-making process by the State of Bahrain. The actual delegate from Bahrain, however, was not a national of Bahrain. He was a senior partner of a large UK law firm that has a worldwide practice representing large private business corporations. Was Bahrain's involvement in the law-making process at the United Nations a real involvement by the State of Bahrain? Or was the State only a vehicle to realize a direct involvement of the private business law firms or the business corporations in the law-making process at the United Nations?³⁹

This example highlights that there have been significant changes in international law around investment treaty arbitration not only in the use of the regime but also in the law-making process. The existing legal order in international law has been challenged by business corporations around investment treaty arbitration.

Should we view this phenomenon as an improvement? Or should we consider this as disorder? Will this type of phenomenon expand in other areas? How should we respond to this type of challenge?

³⁹ The Arbitration Working Group of the UNCITRAL worked on the revision of the UNCITRAL Arbitration Rules from its 45th Session, 11–15 September 2006, to its 52nd Session, 1–5 February 2010. The UNCITRAL Arbitration Rules are an important option as procedural rules for the investment treaty arbitration. The revision of the rules was critical for those involved in the field of investment treaty arbitration: *Working Group II: 2000 to Present: Arbitration and Conciliation* (2012) UNCTAD <http://www.uncitral.org/uncitral/en/commission/working_groups/2/Arbitration.html>.

PART 4

THE EXPOSURE OF STATE SOVEREIGNTY
TO PRIVATE ACTORS AND THE NEED TO PRESERVE
THE REGULATORY POWERS OF STATES

CHAPTER FOURTEEN

THE SIGNIFICANCE OF THE RECENT ENACTMENT OF JAPAN'S SOVEREIGN IMMUNITY ACT IN THE NEW AGE OF GLOBALIZATION

TOMONORI MIZUSHIMA*

I. INTRODUCTION

The new age of globalization means not only an increase in transboundary activity by non-State actors but also an increase in the extraterritorial activities of State actors.¹ Such activities of foreign State actors can give rise to disputes between them and non-State actors in the territorial State. When a non-State actor subsequently brings a claim against a foreign State before a court of the territorial State, an issue of sovereign immunity arises. As a consequence, in the globalising world of today, we have seen an increase in the number of cases in which domestic courts have had to address issues of sovereign immunity. Japan is no exception in this regard.²

Against this background, the adoption of the *United Nations Convention on Jurisdictional Immunities of States and Their Property* ('UN Convention')³ in 2004 may appear timely.⁴ Indeed, Japan signed this Convention on

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¹ Tomonori Mizushima, 'Kokusai Shakai no Gurōbaruka Hendō to Kokusaihō: Ryōiki Gai de no Kuni no Katsudō ni Kansuru Jinken Jōyaku jō no Gimu ni tsuite [International Law in the Age of Globalization: Obligations of States under Human Rights Treaties in Respect of Their Activities Abroad]' (April 2008) *Hōritsu Jihō*, 18, 18.

² See Tomonori Mizushima, 'Foreign State Immunity in Japanese Courts at the Beginning of the Twenty-First Century' (2007) 50 *Japanese Annual of International Law* 99, 99.

³ GA Res 59/38, 59th sess, Agenda Item 142, UN Doc A/RES/59/38/A (2 December 2004) Annex ('UN Convention').

⁴ See also Michael Wood, 'The General Assembly and the International Law Commission: What Happens to the Commission's Work and Why?' in Isabelle Buffard et al (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publishers, 2008) 378.

11 January 2007, and used it as a catalyst for legislation in this field. On the basis of the work of the Study Group on Sovereign Immunity⁵ and then, that of the Committee on a Sovereign Immunity Act established by the Legislative Council,⁶ the Diet (Parliament) passed an Act on the Civil Jurisdiction of Japanese Courts over Foreign States⁷ in April 2009. This Act, which may be called Japan's *Sovereign Immunity Act* ('Japanese SIA'), largely reflects the *UN Convention*. After the Act entered into force on 1 April 2010, Japan accepted the Convention on 11 May 2010.⁸

This chapter examines the significance of the Japanese SIA in the new age of globalization from the perspective of the internal pressure of non-State actors, or private actors, on the sovereignty of States in the context of sovereign immunity. As a comprehensive analysis of the Act is neither possible nor appropriate in this short chapter, I use *Ohara v Georgia (Georgia Ports Authority)*,⁹ which was decided in October 2009 by the Supreme Court of Japan, as an illustration (Part II). I will examine this case as it might be decided under the *UN Convention* (Part III) and the Japanese SIA (Part IV). After a comparison with the sovereign immunity legislation of the United States, Canada, and Australia (Part V), this chapter will conclude with a critical appraisal of the Japanese SIA (Part VI).

⁵ This Study Group was organised by the Ministry of Justice with the cooperation of the Ministry of Foreign Affairs and consisted of around twenty members, including scholars, practitioners and officials of these Ministries. This Group, of which I was a member, had twelve meetings from December 2007 to July 2008. In August 2008, Shuken Menjo Hō Tantōsha Shian [Provisional Draft of a Sovereign Immunity Act] ('Provisional Draft'), as well as Hosoku Setsumeï [Explanatory Report] ('Explanatory Report'), was published for public comment: <<http://search.e-gov.go.jp/servlet/Public?CLASSNAME=PCMMSTDETAIL&id=300080039&Mode=0>>.

⁶ This Committee consisted of more than thirty members, including most of the members of the Study Group. I was also a member of this Committee, which had six meetings from September 2008 to January 2009.

⁷ *Gaikoku tō ni Taisuru Wagakuni no Minji Saibanken ni Kansuru Hōritsu*, Law No 24 of 2009. The translations of provisions of this Act are mine.

⁸ UN Treaty Collection, *Status of Treaties*, (6 July 2012) <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&lang=en>. The Diet had approved the ratification of the UN Convention by Japan in June 2009 and Japan deposited its instrument of acceptance of the Convention on 11 May 2010. The Convention requires thirty ratifications, approvals, acceptances or accessions to enter into force (art 30(1)). As of 10 June 2012 the Convention had not yet entered into force, with only 13 States having acceded to, ratified, accepted or approved it.

⁹ *Ohara v Georgia* [2009] 63 Minshū 1799, translated in (2010) 53 *Japanese Yearbook of International Law* 571 ('*Georgia Ports Authority*').

II. THE *GEORGIA PORTS AUTHORITY* CASE: THE SUPREME COURT'S JUDGMENT OF 16 OCTOBER 2009

The plaintiff was employed by the US State of Georgia in 1995 to work for the Tokyo office of the Georgia Ports Authority. The principal activities of this office were to advertise Georgia's port facilities and promote their use by shipping companies and others. In 2000, the plaintiff was dismissed for alleged financial reasons on the part of Georgia. She claimed that the dismissal was wrongful and brought an action before a Japanese court for a declaratory judgment to the effect that she continued to have rights under the employment contract and for payment of salary since the dismissal. The defendant, Georgia, invoked sovereign immunity.

In an interlocutory judgment of 29 September 2005, the Tokyo District Court recognised the defendant's entitlement to sovereign immunity under customary international law, but denied immunity in this particular case because the employment contract was an act *jure gestionis* (a private act) and the dismissal of the plaintiff was not an act *jure imperii* (a sovereign act) of the defendant.¹⁰ The court's reasoning on the question of whether and to what extent the defendant, a constituent unit of a federal State, is entitled to sovereign immunity under customary international law was problematic.¹¹ However, its decision, which was in accordance with the so-called restrictive immunity theory, was fully acceptable in terms of international law, though at that time, the Japanese Supreme Court had not clearly stated that Japanese courts should adopt the restrictive immunity theory.¹²

The Tokyo District Court then gave a judgment on the merits in favour of the plaintiff except in relation to her claim for payment of a sum by way

¹⁰ *Ohara v Georgia* [2005] 63 Minshū 1823.

¹¹ The court pointed out that the defendant had a system of separation of powers, its own constitution and the right to withdraw from the United States. However, it is not because of these attributes that immunity is granted to a foreign State. See also Mizushima, above n 2, 118–9, n 99.

¹² In *Matsuyama v Republic of China* [1928] 7 Daihan Minshū 1128, translated in 4 *Annual Digest and Reports of Public International Law Cases* 168; Yuji Iwasawa, 'Japan's Interactions with International Law: The Case of State Immunity' in Nisuke Ando (ed), *Japan and International Law: Past, Present and Future* (Kluwer Law International, 1999) 126, the highest court of Japan at that time adopted the absolute immunity theory. In *Yamaguchi v United States* [2002] 56 Minshū 729, the Supreme Court indicated a possible change of position in favour of the restrictive theory, but some ambiguity remained. See Tomonori Mizushima, 'Case Report: *Yamaguchi v United States*' (2003) 97 *American Journal of International Law* 406–11; Mizushima, 'Foreign State Immunity in Japanese Courts,' above n 2, 100–2.

of future lost earnings.¹³ Soon afterwards, in *Tōkyō San'yō Bōeki Co Ltd v Pakistan*,¹⁴ the Japanese Supreme Court in principle accepted the restrictive theory. However, it left open a controversial exception by stating that 'a foreign state is not immune from civil suit in Japan for its private acts *unless special circumstances exist such as those in which the exercise of jurisdiction by Japan could infringe on the foreign state's sovereignty*.'¹⁵ This special circumstances immunity for private acts could have the effect of bringing about the practice of almost absolute immunity despite the Court's ostensible departure from the absolute theory.¹⁶

Indeed, the Tokyo High Court judgment of 4 October 2007 in the *Georgia Ports Authority* case¹⁷ was a typical example of a broad interpretation of the special circumstances immunity. The Tokyo High Court classified the contractual relationship of employment at issue as a private act, because the plaintiff's work concerned the defendant's commercial activities in Japan rather than its sovereign activities.¹⁸ Without denying immunity for this reason, however, the court proceeded to examine whether the case involved special circumstances as a result of which its exercise of jurisdiction could infringe on the foreign State's sovereignty. According to the court, the plaintiff's claim made it necessary for the court to investigate whether the dismissal was fair or not, and in so doing, to touch on the defendant's various policies including its industrial promotion policy.¹⁹ As this would concern the sovereign rights of the foreign State, the court considered that its exercise of jurisdiction could infringe on the foreign State's sovereignty.²⁰ The Tokyo High Court thus reversed the interlocutory judgment of the Tokyo District Court and granted immunity in this case.

On appeal the Supreme Court, in its judgment of 16 October 2009, did not commit itself to such a broad interpretation of the special circumstances immunity. The Supreme Court, as had the Tokyo High Court, recognized Georgia's entitlement to the same immunity as foreign States enjoy and considered the employment relationship and the dismissal to

¹³ *Ohara v Georgia* [2006] 2058 Rōdō Keizai Hanrei Sokuhō 24.

¹⁴ [2006] 60 Minshū 2542, translated in (2006) 49 *Japanese Annual of International Law* 144.

¹⁵ *Ibid* 2545 (emphasis added).

¹⁶ See Mizushima, above n 2, 113.

¹⁷ [2007] 63 Minshū 1831, translated in (2009) 52 *Japanese Yearbook of International Law* 658 ('*Georgia Ports Authority*').

¹⁸ *Ibid* 1843–4.

¹⁹ *Ibid* 1847.

²⁰ *Ibid* 1847–8.

be private acts.²¹ However, the Supreme Court disagreed with the High Court on the issue of the special circumstances immunity. It held that an investigation into various policies of the defendant does not constitute special circumstances in which the exercise of jurisdiction by Japan could infringe on sovereignty.²² The Supreme Court thus reversed the High Court judgment and remanded the case to the same court.

III. THE *GEORGIA PORTS AUTHORITY* CASE UNDER THE *UN CONVENTION*

In this section, I analyse the *Georgia Ports Authority* case in light of the *UN Convention*. Although the Japanese SIA was drafted on the basis of the Convention, there are some minor differences which may affect the outcome of a case like the *Georgia Ports Authority* case. Thus, a separate analysis of the case in light of the Convention is appropriate, also taking into account the International Law Commission's Draft Articles on Jurisdictional Immunities of States and Their Property of 1991 ('ILC Draft Articles').²³ During the evolution of the *UN Convention*, several changes were made to provisions of the Draft Articles which are pertinent to the analysis in this chapter.

A. *The ILC Draft Articles*

Under the ILC Draft Articles, 'constituent units of a federal State' are included in the definition of 'State' without any qualification (Draft Article 2(1)(b)(ii)). It is thus clear that Georgia is entitled to the same immunity as the United States would enjoy. The question is whether a foreign State, including a constituent unit of a federal State, enjoys jurisdictional

²¹ *Georgia Ports Authority* [2009] 63 Minshū 1799, 1805–6.

²² Ibid 1807. On appeal, the plaintiff made reference to my article, Tomonori Mizushima, 'Shuken Menjo: Saikōsai 2006 Nen 7 Gatsu 21 Nichi Hanketsu made to Kore kara [Sovereign Immunity: The Significance of the Japanese Supreme Court Judgment of July 21, 2006]' (2006) 1321 *Jurisuto* 37–44, in advancing the argument that the special circumstances immunity should be interpreted very restrictively. See *Georgia* [2007] 63 Minshū 1808, 1810. My work may have had some influence on the Supreme Court's position in this regard. For my argument in English, see Mizushima, above n 2, 111–4.

²³ *Report of the International Law Commission to the General Assembly on the Work of Its Forty-Third Session*, UN GAOR, 46th sess, Supp No 10, UN Doc A/46/10 (1991) 11–151, reprinted in 'Report of the International Law Commission to the General Assembly on the Work of Its Forty-Third Session (23 April – 1 June and 2 July – 10 August) [1991] II(2) *Yearbook of the International Law Commission* 13 ('Report of the ILC on its 43rd Session').

immunity under the particular circumstances of the *Georgia Ports Authority* case under the Draft Articles.

The relevant provision is Draft Article 11 which concerns contracts of employment. According to Draft Article 11(1):

[A] State cannot invoke immunity from jurisdiction before a court of another State ... in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

At first sight, this provision appears to apply to the *Georgia Ports Authority* case, which is a typical employment case in which the defendant may not invoke sovereign immunity. However, Draft Article 11(2) provides:

Paragraph 1 does not apply if:

- (a) the employee has been recruited to perform functions closely related to the exercise of governmental authority; [or]
- (b) the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual.

As noted above, in the *Georgia Ports Authority* case, the plaintiff sought a declaratory judgment to the effect that she continued to have rights under the employment contract and including the right to payment of salary since her dismissal. Given the nature of the functions performed by the plaintiff,²⁴ this case would not fall within subparagraph (a). On the other hand, we cannot completely rule out the applicability of subparagraph (b). The plaintiff's claim, in substance, may be considered to be a claim for 'reinstatement.'²⁵ If this claim is covered by subparagraph (b), then Draft Article 11(1) does not apply and Georgia could invoke immunity.

In this respect, we should take into consideration the commentary on subparagraph (b), which states as follows:

²⁴ As stated above, the principal activities of the Georgia Ports Authority were to advertise Georgia's port facilities and promote their use by shipping companies and others. Both the lower courts and the Supreme Court admitted that the functions which the plaintiff performed as an employee of the defendant did not involve the exercise of governmental authority.

²⁵ It is generally considered that a right to engage in work is not recognised under Japanese law. See *Takizawa v Yomiuri Shimbunsha Co. Ltd.* [1958] 9 Rōminshū 831, 833; Kazuo Sugeno, *Japanese Employment and Labor Law* (Leo Kanowitz trans, Carolina Academic Press, 2002) 77.

The rule of immunity applies to proceedings for recruitment, renewal of employment and reinstatement of an individual only. It is without prejudice to the possible recourse which may still be available in the State of the forum for compensation or damages for "wrongful dismissal" or for breaches of obligation to recruit or to renew employment. In other words, this subparagraph does not prevent an employee from bringing action against the employer State in the State of the forum to seek redress for damage arising from recruitment, renewal of employment or reinstatement of an individual.²⁶

Thus, under Article 11, a claim for 'compensation or damages for wrongful dismissal' is not barred by sovereign immunity. The question then is whether the plaintiff's claim in the *Georgia Ports Authority* case would be considered to be a claim for 'reinstatement' or a claim for 'compensation or damages for wrongful dismissal.' On the one hand, the claim for the declaratory judgment and payment of an amount by way of lost future salary may appear to come closer to a claim for 'reinstatement,' if anything, rather than a claim for 'compensation or damages for wrongful dismissal.' On the other hand, payment of salary of the period from the date of dismissal up until the date when the judgment becomes final may be considered, in substance, to fall within a category such as 'compensation or damages for wrongful dismissal' mentioned in the commentary. It appears that the *Georgia Ports Authority* case is a borderline case under the ILC Draft Articles.

B. *The UN Convention*

The *Georgia Ports Authority* case is not such a borderline case under the *UN Convention*. The definition of 'State' was modified and includes not all constituent units of a federal State but only those 'which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity.'²⁷ Even if Georgia is entitled to perform acts in the exercise of sovereign authority, it was *not* acting in that capacity when it took the acts which were the subject of the proceedings in the *Georgia Ports Authority* case. As pointed out above, the Japanese Supreme Court considered the relevant acts of Georgia to be private acts rather than sovereign acts. Thus, without examining the scope of the provision concerning employment contracts, ie, Article 11 of the *UN Convention*, Japanese courts could have

²⁶ 'Report of the ILC on its 43rd Session' [1991] II(2) *Yearbook of the International Law Commission* 13, 43.

²⁷ *UN Convention*, art 2(1)(b)(ii) (emphasis added).

denied sovereign immunity under the Convention in such a case at the outset, had the case been considered on this basis.²⁸

Article 11 is nevertheless analysed here for several reasons. First and foremost, as we will see in the next section, under the Japanese SIA, the interpretation of the provision which corresponds to Article 11 is critically important. Second, in the *Georgia Ports Authority* case, the Tokyo High Court and the Supreme Court made reference to Article 11, rather than Article 2.²⁹ Third, it is interesting to consider how the case would have been decided if the plaintiff had been employed by the United States, rather than Georgia. Under the *UN Convention*, 'the State' need not be acting in the exercise of sovereign authority in order to be entitled to jurisdictional immunity (Article 2(1)(b)(i)), while a constituent unit of a State must be in order to enjoy immunity. Thus, had the employer been the United States, a court would have been required to apply Article 11 in order to decide whether or not it should grant sovereign immunity in this case.

The final text of Article 11(1) of the *UN Convention* does not differ from that of Draft Article 11(1); thus a foreign State cannot in principle invoke immunity in employment cases. On the other hand, the draft of what became Article 11(2) was modified, with the final Convention text now providing:

Paragraph 1 does not apply if:

- (a) the employee has been recruited to perform particular functions in the exercise of governmental authority;
- (b) the employee is [a diplomatic agent or the like];
- (c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual; [or]
- (d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State

The most important change is the addition of subparagraph (d), and support for it was expressed by a State.³⁰ Rather than clarifying the situation,

²⁸ See also Mizushima, above n 2, 118–9.

²⁹ The courts took account of Article 11 of the *UN Convention* when considering whether or not to grant the special circumstances immunity. However, if the *Georgia Ports Authority* case were analysed under the *UN Convention*, it is Article 2, rather than Article 11, that is decisive. It is not clear why Article 2 was not mentioned at all by the courts.

³⁰ See the support given by Mr Lauber (Switzerland): UN GAOR, 59th Sess, 6th Comm, 14th mtg, UN Doc A/C.6/59/SR.14 (26 October 2004) 2, para 6 ('Although it might seem cumbersome, the procedure envisaged for cases in which a State argued its "security

however, this change further confuses the application of this provision in circumstances such as those of the *Georgia Ports Authority* case.

First of all, the distinction between subparagraphs (c) and (d) is unclear and artificial. In particular, under the law of some (though not all) States, the subject-matter of 'reinstatement' and that of 'dismissal or termination of employment' are too closely related to be meaningfully separated. The *Georgia Ports Authority* case illustrates this problem. The Tokyo High Court considered the case to fall within 'reinstatement' in paragraph (c).³¹ The Supreme Court, on the other hand, was of the opinion that subparagraph (d), not (c), would be applicable.³²

Second, it is uncertain how a court should deal with a claim for 'compensation or damages for wrongful dismissal' under the *UN Convention*. As noted above, under the ILC Draft Articles, subparagraph (b) (now (c)) does not cover such a claim and a foreign State cannot invoke jurisdictional immunity in accordance with Draft Article 11(1). Now, subparagraph (d), which explicitly mentions 'dismissal,' apparently covers such a claim. Then, a foreign State *can* invoke jurisdictional immunity if 'such a proceeding would interfere with the security interests of that State.' A couple of commentators, however, state that '[t]his provision [ie, subparagraph (c)] does not exclude claims for monetary compensation for wrongful dismissals'³³ and appear to suggest that the *UN Convention* has maintained non-immunity for such a claim despite the addition of subparagraph (d).³⁴

Third, in any event, it is doubtful whether this distinction between subparagraphs (c) and (d) has practical significance. At first sight, it may

interests" (art 11(d)) provided a balanced solution which took into account the interests of the employee and of the employer State').

³¹ *Georgia Ports Authority* [2007] 63 Minshū 1831, 1846–7.

³² *Georgia Ports Authority* [2009] 63 Minshū 1799, 1806–7.

³³ Gerhard Hafner and Ulrike Köhler, 'The United Nations Convention on Jurisdictional Immunities of States and Their Property' (2004) 35 *Netherlands Yearbook of International Law* 3, 30. See also the comments of Mr Hafner, Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property: UN GAOR, 59th Sess, 6th Comm, 13th mtg, UN Doc A/C.6/59/SR.13 (25 October 2004) 6, para 35 ('Generally, it must be borne in mind that the Convention would have to be read in conjunction with the commentary prepared by the International Law Commission, at least insofar as the text submitted by the Commission had remained unchanged'). It is true that the text of subparagraph (c) as such remained virtually unchanged, but the addition of subparagraph (d) substantially changed the text of Article 11(2) as a whole. Thus, the relevance of the commentary on this provision, the text accompanying the Report of the ILC on its 43rd Session, needs to be reconsidered.

³⁴ Indeed, the Japanese SIA was drafted on the basis of such an interpretation of Article 11 of the *UN Convention*. See below n 46.

appear that the additional requirement in subparagraph (d), ie, 'such a proceeding would interfere with the security interests of that State,' makes a difference. It is true that, if this requirement is not satisfied, subparagraph (d) does not come into play and the foreign State cannot invoke immunity in accordance with Article 11(1). However, a couple of considerations ultimately render this requirement meaningless.

A substantive consideration concerns the meaning of 'security interests of that State.' In the annex to the *UN Convention*, 'Understanding with respect to certain provisions of the Convention,'³⁵ it is stated that '[t]he reference ... to the "security interests" of the employer State is intended primarily to address matters of national security and the security of diplomatic missions and consular posts.' As a commentator points out, however, '[t]he "primarily" detracts much of [sic] the legal effect of this provision.'³⁶ Procedurally, the question of who determines possible interference should be taken into consideration. The senior representatives 'of the employer State' would surely determine that the proceeding would interfere with the security interests of the State, if they wish to invoke sovereign immunity.³⁷ It would be unlikely and contrary to the text and spirit of Article 11(2)(d) if a court were not to accept their determination.

As analysed above, the borderline between subparagraphs (c) and (d), their scope, and the significance of their distinction are not clear. Therefore, it is difficult to tell whether the plaintiff's claim in the *Georgia Ports Authority* case falls within either of these subparagraphs and sovereign immunity can accordingly be invoked.

What is clear is that Article 11, in conjunction with Article 2, could cause a problem of discriminatory treatment against employees.³⁸ As in the

³⁵ In accordance with Article 25 of the *UN Convention*, this annex 'forms an integral part of the Convention.'

³⁶ Tullio Treves, 'Some Peculiarities of the UN Convention on Jurisdictional Immunities of States and Their Property: A Footnote on the Codification Technique' in Buffard et al (eds), *International Law between Universalism and Fragmentation*, above n 4, 504; see also Isabelle Pingel, 'Observations sur le [sic] convention du 17 janvier 2005 sur les immunités juridictionnelles des Etats et de leurs biens' (2005) 132 *Journal du droit international* 1045, 1051.

³⁷ See also Hazel Fox, 'State Immunity and the New York Convention,' in Emmanuel Gaillard and Domenico De Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2009) 860 (suggesting difficulties for the private party with regard to section 13(5) of the UK State Immunity Act, which provides that a certificate of the head of a State's diplomatic mission in the United Kingdom to the effect that any property is not in use by the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved).

³⁸ See Mizushima, 'Foreign State Immunity in Japanese Courts,' above n 2, 119.

Georgia Ports Authority case, if the plaintiff is employed by a constituent unit of a federal State which is not acting in the exercise of sovereign authority, there is no question of sovereign immunity being granted. But if the employer is a foreign State itself and the plaintiff's claim is covered by one of the subparagraphs, the claim may be barred by sovereign immunity notwithstanding otherwise similar situations.

In my view the omission of both subparagraphs (c) and (d) would have solved these problems. Even then, subparagraphs (a) and (b) would provide foreign States with sufficient protection for their interests. Is it really necessary, in the new age of globalization, to give States additional protection by subparagraphs (c) and (d) at the expense of the interests of non-State actors?

IV. THE *GEORGIA PORTS AUTHORITY* CASE AS UNDER THE JAPANESE SIA

In this section, I analyse the *Georgia Ports Authority* case in light of the Japanese SIA. This new Act was promulgated on 24 April 2009, but does not apply to cases brought before its entry into force on 1 April 2010.³⁹ Thus, it was not applied in the *Georgia Ports Authority* case, though the Supreme Court made passing reference to it.

A. *The Relationship between the Japanese SIA and the UN Convention*

Before we examine the relevant provisions of the Japanese SIA, it is appropriate to describe the relationship between this Act and the *UN Convention*. As pointed out above, this new Act was modelled on the *UN Convention* and was followed by Japan's acceptance of the Convention. However, the Japanese SIA makes no mention of the *UN Convention* as such, and it applies irrespective of whether the foreign State concerned is a party to the Convention.⁴⁰

Article 3 of the Japanese SIA provides: 'The provisions of this Act are without prejudice to the privileges and immunities enjoyed by a foreign

³⁹ Japanese SIA, Supplementary Provisions, para 2(1).

⁴⁰ See also Tomoyuki Tobisawa (ed), *Chikujō Kaisetsu: Tai Gaikoku Minji Saibanken Hō* [Japan's Sovereign Immunity Act: Article by Article Commentary] (Shōji Hōmu, 2009) 11. This Commentary was written by officials of the Ministry of Justice who were involved in the drafting work of the Japanese SIA.

state under treaties and established international law.⁴¹ In the Japanese legal order, international law prevails over statutes.⁴² Thus, if the *UN Convention* provides for broader immunity than the Japanese SIA, the broader immunity will be granted to any foreign State which is a party to the *UN Convention*. In this sense, the question whether the foreign State at issue is a party to the *UN Convention* is not entirely irrelevant to the scope of jurisdictional immunity to be granted by Japanese courts in the future.

B. *The Entitlement of Constituent Units of a Federal State to Sovereign Immunity under the Japanese SIA*

As pointed out above, the Japanese courts in the *Georgia Ports Authority* case recognised Georgia's entitlement to the same immunity a foreign State itself enjoys. This approach is similar to that adopted by the ILC Draft Articles, but different from that of the *UN Convention*. Rather than meticulously following the Convention in this regard, the Japanese SIA moved back in the direction of the ILC Draft Articles. In the definition of 'foreign State,' the Act includes 'constituent units of a federal state or other like political subdivisions of the state which are entitled to exercise sovereign authority' (Article 2(b)). Notably, the subsequent phrase in Article 2(1)(b)(ii) of the *UN Convention*—'and are acting in that capacity'—is omitted.⁴³

This omission places a constituent unit of a federal State on an almost equal footing with a foreign State itself for the purpose of jurisdictional immunity. Accordingly, the problem of discriminatory treatment of

⁴¹ Article 3 of the *UN Convention* enumerates the privileges and immunities not affected by the Convention, ie, those concerning diplomatic missions, heads of States *ratione personae*, and aircraft or space objects. Although the Provisional Draft, above n 5, 2, took a similar approach, the Committee on a Sovereign Immunity Act decided to change it and adopt a more general provision. It may be noted that the list of such privileges and immunities in the Provisional Draft included those enjoyed by a foreign State under treaties and established international law with respect to activities of its armed forces. These kinds of privileges and immunities are not explicitly mentioned in the *UN Convention*.

⁴² See generally Yuji Iwasawa, *International Law, Human Rights and Japanese Law: The Impact of International Law on Japanese Law* (Clarendon Press, 1998) 95–6. Accordingly, Article 3 of the Japanese SIA is declaratory. See also Tobisawa (ed), above n 40, 16–7.

⁴³ This is not an inadvertent omission. The corresponding phrase existed in the Provisional Draft: above n 5, 1. The phrase was deleted in the penultimate draft which was submitted at the last meeting of the Committee on a Sovereign Immunity Act. Although the rapporteur explained at the meeting that this change was made because a constituent unit of a federal State is like a mini-State, the other members paid no particular attention to this apparently minor change.

employees in the context of the *UN Convention* I pointed out above would not arise under the Japanese SIA. However, this omission, or departure from the *UN Convention*, also means granting constituent units of a federal State broader immunity in Japanese courts than the Convention requires. Such a result is exactly the opposite of my proposal described above,⁴⁴ which seeks to solve the problem by restricting the scope of immunity which a foreign State itself could enjoy under the *UN Convention*.

C. *Sovereign Immunity in Employment Cases under the Japanese SIA*

As pointed out above, determining whether sovereign immunity would be granted to Georgia in the *Georgia Ports Authority* case under the *UN Convention* does not require an examination of the provision concerning employment contracts. The phrase 'and are acting in that capacity' in Article 2 of the Convention obviates that need. The omission of this phrase from the Act means that an analysis of the provision concerning employment contracts is necessary under the Japanese SIA.

Article 9 of the Act, which corresponds to Article 11 of the *UN Convention*, provides:

1. A foreign state is not immune from jurisdiction as respects a proceeding which relates to a contract of employment between the foreign state and an individual for work performed or to be performed, in whole or in part, in the territory of Japan.
2. Paragraph 1 does not apply if:
 - (a) [a subparagraph corresponding to Article 11(2)(b) of the *UN Convention*]
 - (b) [a subparagraph corresponding to Article 11(2)(a) of the *UN Convention*]
 - (c) an action or petition relates to the issue of whether or not the contract of employment or reemployment of an individual has been concluded (excluding one which claims damages); [or]
 - (d) an action or petition relates to the effect of dismissal or termination of the contract of employment (excluding one which claims damages) and, as determined by the head of State, the head of Government or the minister for foreign affairs of the foreign state, the proceeding relating to the action or petition would interfere with the security interests of the foreign state.

As noted above, Article 11 of the *UN Convention* is problematic: the borderline between subparagraphs (c) and (d), their scope, and the significance

⁴⁴ See Part III B above.

of their distinction are all unclear. Let us examine these problems in the context of Article 9 of the Japanese SIA.

First, the difficulty of distinguishing between subparagraphs (c) and (d) still remains,⁴⁵ but it may be considered to have been settled to some extent as a result of some adjustments in drafting. For instance, an action for a declaratory judgment to the effect that the plaintiff, who was wrongfully dismissed, continues to have the status as an employee, would fall within subparagraph (d), rather than (c).⁴⁶

Second, it is appropriate to comment on the phrase in brackets, 'excluding [an action or petition] which claims damages,' because such a phrase does not exist in the *UN Convention*. The insertion of this phrase means that if an action relates to the effect of dismissal, *but involves a claim for damages*, paragraph 1 applies and the foreign State is not immune.⁴⁷ The question is the scope of the phrase 'an action which claims damages.'

In the Provisional Draft, there were two options in this respect.⁴⁸ Option A was to provide:

2. Paragraph 1 does not apply if: ...
 - (c) an action or petition relates to the issue of whether or not the contract of employment or reemployment of an individual has been concluded (excluding one which claims *payment of money*); [or]
 - (d) an action or petition relates to the effect of dismissal or termination of the contract of employment (excluding one which claims *payment of money*).⁴⁹

Under Option A, therefore, a foreign State would not be immune in an action which claims payment of money. 'Payment of money' includes not only payment of money as damages but also that of salary. Accordingly, in the *Georgia Ports Authority* case, where the plaintiff claimed payment of salary since the wrongful dismissal, Georgia would not be immune.

On the other hand, Option B, which was eventually adopted, was to exclude only 'an action or petition which claims damages' from actions in which paragraph 1 does not apply. In other words, under Option B, paragraph 1 does not apply in an action which claims payment of salary,

⁴⁵ Tobisawa (ed), above n 40, 47–8.

⁴⁶ Ibid 46.

⁴⁷ This phrase was inserted on the basis of the interpretation that the *UN Convention* would not require granting sovereign immunity in such a case. See, eg, 'Explanatory Report,' above n 5, 16–7. As noted above, I have some doubts about whether such an interpretation is correct. See above nn 32–3 and accompanying text. At a meeting of the Committee on a Sovereign Immunity Act, I made a brief remark to this effect, but it did not lead to a debate.

⁴⁸ See 'Provisional Draft,' above n 5, 5.

⁴⁹ Emphasis added.

rather than money as damages. In the *Georgia Ports Authority* case, therefore, paragraph 1 would not apply and sovereign immunity may be granted to Georgia under Option B, ie, under the Japanese SIA.⁵⁰

Third, it is true that, as under the *UN Convention*, subparagraph (d) grants immunity only if the proceeding would interfere with the security interests of the foreign State. The same observations as pointed out above apply, however.⁵¹ If a foreign State wants jurisdictional immunity in a particular dismissal case which is covered by subparagraph (d), one of the senior representatives of the foreign State would surely determine that the proceeding would interfere with its security interests. If the foreign State does not oppose the proceeding, it could waive any potentially available immunity.⁵² Although 'the security interests of the foreign state' means only those of the foreign State itself and does not include those of a constituent unit of a federal State,⁵³ this would not make much difference. It seems that the distinction between subparagraphs (c) and (d) does not make sense in practice.⁵⁴

We may thus conclude that under the Japanese SIA sovereign immunity would most likely have been granted in a case on all fours with the *Georgia Ports Authority* case. In other words, insofar as this case is concerned, the Act grants a jurisdictional immunity which the Supreme Court denied under customary international law and which the *UN Convention* also denies.

V. THE *GEORGIA PORTS AUTHORITY* CASE IN COMPARATIVE LAW

In this section, I examine how the *Georgia Ports Authority* case would be decided under the US *Foreign Sovereign Immunities Act*,⁵⁵ the *Canadian*

⁵⁰ See Tobisawa (ed), above n 40, 50, n 9. If a court allows a claim for payment of salary for the period during which the foreign State has refused the plaintiff work, this could have an effect of virtually compelling the foreign State to employ the plaintiff. Option B was adopted out of the consideration that such an exercise of jurisdiction is inappropriate: 45–6.

⁵¹ See text accompanying above nn 34–6.

⁵² Japanese SIA art 5(1); cf *UN Convention* art 7(1).

⁵³ Japanese SIA art 9(2)(a)(iii).

⁵⁴ For this reason, during the work of the Study Group on Sovereign Immunity, I suggested combining these subparagraphs by deleting the additional condition in subparagraph (d). Then, we could have circumvented the thorny problem of distinguishing them. The suggestion was, unfortunately, not taken up. I did not make a proposal to delete both these paragraphs and deny the sovereign immunity available under the *UN Convention*. Such a proposal would have been too bold to be accepted, given the common ground that the enactment of a Sovereign Immunity Act was to be accompanied by the ratification of the *UN Convention*.

⁵⁵ 28 USC §§ 1602–1611 (1976) ('US FSIA').

State Immunity Act,⁵⁶ and the Australian *Foreign States Immunities Act*.⁵⁷ A comparison with such earlier legislation will clarify the significance, or rather the problem, of the Japanese SIA in the new age of globalization.

A. *The US Foreign Sovereign Immunities Act*

Under the US Act, which could be considered as the first legislation in this field, '[a] "foreign state" ... includes a political subdivision of a foreign state' (section 1603(a)). The House Report explains that '[t]he term "political subdivisions" includes all governmental units beneath the central government, including local governments.'⁵⁸ As no qualification is attached to this term, the US Act treats the foreign State itself and its political subdivisions, including constituent units of a federal State, on the same footing.⁵⁹

The US Act provides for various exceptions to the jurisdictional immunity of a foreign State in sections 1605 and 1605A, but does not contain a specific exception for employment cases like Article 9 of the Japanese SIA. Accordingly, the availability of sovereign immunity in employment cases depends, in principle, on the applicability of the so-called commercial activity exception.⁶⁰ Given the definition of 'commercial activity' for the purpose of this exception⁶¹ and the explanation in the House Report that '[a foreign government's] employment or engagement of laborers, clerical staff or public relations or market agents ... would be among those included within the definition [of "commercial activity"]',⁶² we could

⁵⁶ RSC 1982, c S-18 ('*Canadian State Immunity Act*').

⁵⁷ *Foreign States Immunities Act 1985* (Cth) ('*Foreign States Immunities Act* (Cth)').

⁵⁸ House Report No 94-1487 (1976) 15, reprinted in [1976] USCCAN 6604, 6613.

⁵⁹ See also Joseph W Dellapenna, *Suing Foreign Governments and Their Corporations*, (Transnational Publishers, 2nd ed, 2003) 55. For the sake of argument, let us ignore the fact that Georgia cannot be a political subdivision of a *foreign* State for the purpose of the US Act.

⁶⁰ According to the commercial activity exception, a foreign State is not immune from the jurisdiction of the US courts in any case 'in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.' US *FSIA* § 1605(a)(2).

⁶¹ 'A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.' US *FSIA* § 1603(d).

⁶² *House Report*, 16.

safely conclude that, under the US Act, sovereign immunity would be denied in the *Georgia Ports Authority* case.⁶³

B. *The Canadian State Immunity Act*

Insofar as relevant to deciding the *Georgia Ports Authority* case, the Canadian Act can be considered to take an approach similar to that of the US Act, rather than following the UK Act.⁶⁴ For example, the Canadian Act puts a constituent unit of a federal State on the same footing as the State, and it lacks a specific provision for employment cases.

Under the Canadian Act, 'foreign State' includes 'any political subdivision of the foreign state' without any qualification, and 'political subdivision' means 'a province, state or other like political subdivision of a foreign state that is a federal state' (section 2).⁶⁵ This contrasts with the treatment of such an entity under the UK Act in that Georgia would not be immune from the jurisdiction of the UK courts because the proceeding does not relate to anything done by Georgia 'in the exercise of sovereign authority'.⁶⁶

Given that a constituent unit of a federal State is equated to the State itself and an employment exception provision does not exist under the Canadian Act,⁶⁷ the applicability of the commercial activity exception would be decisive in the *Georgia Ports Authority* case as under the US Act. The Canadian version of the commercial activity exception, section 5, simply provides: 'A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.' Given the similarity between the Canadian Act and the US Act

⁶³ See Dellapenna, above n 59, 383, n 350 for employment cases in which the relevant activities were held to be commercial; see also 28 USC § 1606 ('As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 ... of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances').

⁶⁴ *State Immunity Act 1978* (UK) c 33 ('*UK State Immunity Act*').

⁶⁵ See also HL Molot and ML Jewett, 'The State Immunity Act of Canada' (1982) 20 *Canadian Yearbook of International Law* 79, 110–3.

⁶⁶ Under the *UK State Immunity Act*, a constituent unit of a federal State does not form part of a 'State' and, unless otherwise designated by Order in Council, is equated to a 'separate entity' (§ 14(6)). The first condition for a 'separate entity' to be immune from the jurisdiction of the UK courts is that 'the proceedings relate to anything done by it in the exercise of sovereign authority' (§ 14(2)(a)); see also Andrew Dickinson et al, *State Immunity: Selected Materials and Commentary* (Oxford University Press, 2004) 410–2.

⁶⁷ Cf *UK State Immunity Act* s 4.

concerning the definition of 'commercial activity',⁶⁸ there seems no reason to decide the *Georgia Ports Authority* case differently. A Canadian court would also deny sovereign immunity in this case by applying the commercial activity exception.⁶⁹

C. *The Australian Foreign States Immunities Act*

As regards the entitlement of a constituent unit of a federal State, the Australian Act understandably followed the US and Canadian Acts.⁷⁰ The position of the Australian Law Reform Commission, on whose proposal the Australian Act was based, is clear in this respect: 'In order as far as possible to secure reciprocal treatment for the Australian states, Australian legislation should allow immunity to similar component units of foreign federal States on the same basis as to foreign States themselves.'⁷¹

On the other hand, the Australian Act took the approach of the UK Act, rather than the US and Canadian Acts, in that it provides for a specific employment contract exception. Section 12(1) of the Australian Act provides that '[a] foreign State, as employer, is not immune in a proceeding in so far as the proceeding concerns the employment of a person under a contract of employment that was made in Australia or was to be performed wholly or partly in Australia.' This corresponds to Article 9(1) of the Japanese SIA.

What is interesting for the purpose of this chapter is that the Australian Act, before excluding some categories of proceedings from the scope of application of subsection (1) as under the Japanese SIA, clarifies the meaning of this subsection by providing as follows: 'A reference in subsection (1) to a proceeding *includes* a reference to a proceeding concerning: ... (b) a payment the entitlement to which arises under a contract of employment' (section 12(2), emphasis added). It appears that the *Georgia Ports Authority*

⁶⁸ Compare *Canadian State Immunity Act* § 2 ('[C]ommercial activity' means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character') with US *FSIA* § 1603(d); See also Molot and Jewett, above n 65, 96–7.

⁶⁹ Given that 'no relief by way of ... specific performance ... may be granted against a foreign state:' *Canadian State Immunity Act* § 11. A claim against a foreign State for an order of reinstatement would not be allowed.

⁷⁰ '[A] reference in this Act to a foreign State includes a reference to: (a) a province, state, self-governing territory or other political subdivision (by whatever name known) of a foreign State': *Foreign States Immunities Act* (Cth) s 3(3).

⁷¹ Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) 41, [75].

case fits squarely in this type of proceeding. Then, an Australian court would also deny sovereign immunity in this case.⁷²

VI. CONCLUDING REMARKS

The courts of New Zealand, a country that does not have a sovereign immunity statute, pointed to the need for such a statute when they faced cases concerning sovereign immunity in the early 1980s.⁷³ I would not deny the need for and desirability of having such a statute, especially in light of the increase of sovereign immunity cases today. Given the inherently indeterminate nature of customary international law, which Japanese courts have so far applied in the relevant cases, the recent enactment of the Japanese SIA should certainly be helpful for the courts, themselves a component of the larger State actors.

In the globalising world where the interests of non-State actors are of a growing importance, what is called for is, however, not *any* statute but a statute which duly takes into account the interests of private actors. As noted above, in the *Georgia Ports Authority* case, the Supreme Court of Japan denied sovereign immunity under customary international law, and immunity would be denied also under the *UN Convention*. The outcome would be the same even under the sovereign immunity legislation from an earlier period of globalization, ie, the US, Canadian, and Australian Acts. It is only the Japanese SIA that would grant jurisdictional immunity in this case. It is doubtful whether the enactment of such a statute was appropriate in the new age of globalization.

It is true that the Diet can amend provisions of the Japanese SIA; for example, Australia amended its Act in 2009.⁷⁴ However, given that the enactment of the Japanese legislation was accompanied by the acceptance of the *UN Convention*, we could not expect the Diet to amend it to restrict sovereign immunity in a manner inconsistent with the

⁷² An Australian court 'may not make an order that a foreign State employ a person or re-instate a person in employment': *Foreign States Immunities Act* (Cth) s 29(2).

⁷³ See *Marine Steel Ltd v Government of The Marshall Islands* [1981] 64 ILR 539, 550–1 (Barker J); Letter from Mr Justice Hardie Boys to the Australian Law Reform Commission, April 29 1983, reprinted in JR Crawford, 'A Foreign State Immunities Act for Australia? (1978–1980)' 8 *Australian Year Book of International Law* 71, 105; Australian Law Reform Commission, above n 71, 33, n 23.

⁷⁴ By the addition of section 42A, immunity under the *Foreign State Immunity Act* (Cth) may now be granted for emergency management activities by a foreign State in a proceeding where immunity was unavailable before the amendment.

requirements of the Convention. As suggested above, it is the confusing provisions of the *UN Convention*, ie, subparagraphs (c) and (d) of Article 11(2), that contributed to broader immunity under the Japanese SIA. It is unlikely that a State which has accepted the *UN Convention* would revise or delete such subparagraphs, however desirable such an amendment may be.⁷⁵ In so arguing, I am not necessarily advancing the particular idea of introducing a so-called terrorism exception, which exists in the US Act⁷⁶ and which is proposed in a Bill currently before the Parliament of Canada.⁷⁷ I am, however, of the opinion that there are a number of cases in which sovereign immunity may be denied under customary international law, but must be granted under the *UN Convention* as between States Parties to it.⁷⁸ A forum State should retain, in my view, the possibility of denying sovereign immunity in these cases. For this purpose, the acceptance of the *UN Convention* was not, and is not, a recommended step for a State to take in that that may result in broader sovereign immunity than required by customary international law.

A different situation might obtain if the *UN Convention* obliged a State party to give effect to a judgment against it as under the *European Convention on State Immunity*.⁷⁹ Under the European Convention, in principle, '[a] Contracting State shall give effect to a judgment given against it by a court of another Contracting State' (Article 20(1)). This regime, which was created out of the concern that 'the drawing-up of a catalogue of cases in which the State could not invoke immunity would have represented no advance over the present situation,'⁸⁰ constituted an advance in

⁷⁵ See Part III B, last paragraph.

⁷⁶ US *FSIA* § 1605A.

⁷⁷ An Act to Deter Terrorism and to Amend the State Immunity Act, Bill S-7, 40th Parliament, 3rd Session (2010). The Bill was passed by the Senate in 2010 and introduced in to the House of Commons in early 2011, but as of 4 March 2012 had not proceeded beyond first reading in the lower House.

⁷⁸ See, eg, Tomonori Mizushima, 'Kokusai Kyōkōhōki Ihan Kōi eno Gaikoku Kokka Menjo no Hitei Ron ni tsuite [Denial of Sovereign Immunity for Jus Cogens Violations?]' in Masahiko Asada (ed), *Andō Nisuke Sensei Koki Kinen: 21 Seiki Kokusaihō no Kadai* [Agenda for International Law in the 21st Century: Festschrift in Honour of Professor Nisuke Ando's 70th Birthday] (Yushindo, 2006) 97–122; Tomonori Mizushima, 'Denying Foreign State Immunity on the Grounds of the Unavailability of Alternative Means' (2008) 71 *Modern Law Review* 734–752; Tomonori Mizushima, 'Kokusaihō Kisoku toshite no Shuken Menjo no Tenkai to Menjo Han'i to no Kankei ni tsuite [A Myth of the Restriction of Foreign State Immunity under International Law]' (2008) 107 *Kokusaihō Gaikō Zasshi* 352.

⁷⁹ *European Convention on State Immunity*, opened 16 May 1972, ETS No 074 (entered into force 11 June 1976); see also Mizushima, above n 2, 122–3.

⁸⁰ Council of Europe, *Explanatory Report on the European Convention on State Immunity and the Additional Protocol* (1972) ETS No 074 [9].

international law. In this sense, it is unfortunate that, at an informal meeting of the parties to the European Convention in 2006, '[t]he participants concluded that the most straightforward way to proceed was for each party to the European Convention to denounce that Convention once the [UN] Convention ... had entered into force' and 'they further confirmed that in due course the [UN] Convention regime should supersede that of the European Convention.'⁸¹

Given the above analysis, it is difficult to share the view of an author who argues that '[t]he [UN] Convention ... constitutes an advance in international law' and that '[t]he adoption as a convention of the draft on State immunity establishes it as a rule of law, of international law, and not a variable standard dependent on the decision of any particular forum State or its national court.'⁸² Had the ILC Draft Articles been adopted as a 'Model Law,' rather than as a 'Convention,' the Diet might not have been persuaded to enact a sovereign immunity statute by using it as a model. If we cannot ignore the potential of a treaty to act as a catalyst for enacting or amending domestic legislation, then, Japan's experience of enacting its SIA may suggest that the *UN Convention* should be superseded by a new treaty which is more appropriate in the new age of globalization.

⁸¹ Committee of Legal Advisers on Public International Law, *Report on the 32nd mtg (13–14 September 2006)* (2006) Council of Europe, 43 <www.coe.int/t/dlapil/cahdi/Source/meetings/cahdi_m32_report_en.pdf>.

⁸² Hazel Fox, 'The Merits and Defects of the 2004 UN Convention on State Immunity: Gerhard Hafner's Contribution to Its Adoption by the United Nations' in Buffard et al (eds), above n 4, 416.

CHAPTER FIFTEEN

LOOKING FOR LEGITIMATE CLAIMS: SCOPE OF NAFTA CHAPTER 11 AND LIMITATION OF RESPONSIBILITY OF HOST STATE

CHARLES-EMMANUEL CÔTÉ¹

I. INTRODUCTION

One of the most striking features of international law in the new age of globalization is the proliferation of bilateral investment treaties ('BITs').² The private remedies they offer to foreign investors are critical in the exposure of State sovereignty to new external pressures. The global phenomenon of arbitration between foreign investors and host States has been described in a variety of ways and from multiple standpoints. The expression 'mixed international arbitration'³ has been used prior to the emergence of the current complex web of BITs. It focused most notably on the nature of the parties involved at the International Centre for Settlement of Investment Disputes⁴ ('ICSID') or at the Iran-US International Claims Tribunal.⁵ The expression 'arbitration without privity'⁶ has been coined

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² According to the data published by the United Nations Conference on Trade and Development ('UNCTAD'), there were no less than 2750 signed BITs by the end of 2009. UNCTAD, 'World Investment Report 2010: Investing in a Low-Carbon Economy' (Report, UNCTAD, 2010) 81.

³ Stephen J Toope, *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons* (Grotius, 1990).

⁴ *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, opened for signature 18 March, 1965, 575 UNTS 159 (entered into force 14 October 1966) (establishing the ICSID).

⁵ 'Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran,' (1981) 75(2) *American Journal of International Law* 422 (establishing the Iran-US Claims Tribunal).

⁶ Jan Paulsson, 'Arbitration Without Privity' (1995) 10 *ICSID Review—Foreign Investment Law Journal* 232.

subsequently by Jan Paulsson. It was meant to capture the absence of any direct legal relationship between the parties, contrary to classical international commercial arbitration. In French scholarship, the expression 'unilateral transnational arbitration'⁷ is frequently used to describe the one-way seizure of the dispute settlement mechanisms. Indeed, only foreign investors can trigger the mixed dispute settlement mechanism in BITs. The most defining expression to encapsulate the legal significance of the phenomenon was suggested by the late Thomas Wälde, who emphasised the 'treaty implementation' aspect of the arbitration in international investment law.⁸ By doing so, Wälde rightly shed light on a fundamental dimension of the evolution of the sources of international investment law. This evolution is characterized by matching the prior internationalization of the procedural law for investment dispute settlement with the internationalization of the law applicable to those disputes, with the use of BITs.⁹ As a result, foreign investors were granted a direct right to invoke the host State responsibility for breach of treaty.¹⁰

Turning to public international law in providing legal protection to foreign investors brought two immediate consequences. Firstly, the rules were to be drafted only by States, putting aside the foreign investor as a lawmaker as would be the case in a strictly contractual relationship. Secondly, a whole body of well-established rules of general international law was thus imported, as the underlying legal system giving life and

⁷ Alain Prujiner, 'L'arbitrage unilatéral: un coucou dans le nid de l'arbitrage conventionnel?' [2005] *Revue de l'arbitrage* 63; Walid Ben Hamida, *L'arbitrage transnational unilatéral: réflexions sur une procédure réservée à l'initiative d'une personne privée contre une personne publique* (PhD thesis, University of Panthéon-Assas (Paris II), 2003).

⁸ Thomas Wälde, 'Investment Arbitration Under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation' (1996) 12 *Arbitration International* 429, 437; cf, Emmanuel Gaillard, 'L'arbitrage sur le fondement des traités de protection des investissements' [2003] *Revue de l'arbitrage* 853, 862 (arguing that BIT-based arbitration partakes in reality of a multiplication of the procedural options available to foreign investors).

⁹ Charles-Emmanuel Côté, *La participation des personnes privées au règlement des différends internationaux économiques: l'élargissement du droit de porter plainte à l'OMC* (Bruylant, 2007) 230–237. On the evolution of the sources of international investment law, see generally Charles Leben, 'La théorie du contrat d'État et l'évolution du droit international des investissements' (2003) 302 *Recueil des Cours* 197; Giorgio Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection' (1997) 269 *Recueil des Cours* 251; Patrick Juillard, 'L'évolution des sources du droit des investissements' (1994) 250 *Recueil des Cours* 9.

¹⁰ Côté, above n 9 260–265; Charles Leben, 'La responsabilité internationale de l'État sur le fondement des traités de promotion et de protection des investissements' (2004) 50 *Annuaire français de droit international* 683, 685–686.

breath to BITs. More specifically, the law of treaties and the law of State responsibility were rendered central to the resolution of investment disputes, as *lex generalis*, where BITs have not settled specifically an issue, or where interpretation is needed to understand what exactly is provided for by BITs. As we shall see, those consequences have an impact on the question we propose to study in this chapter.

The use made by foreign investors of their direct right to invoke the international responsibility of host States for breach of BITs has been surprisingly creative and abundant, most notably under Chapter 11 of the *North American Free Trade Agreement*¹¹ ('NAFTA'). Public attention has been drawn to Chapter 11 by a series of cases where foreign investors have claimed large amounts in compensation for damages allegedly caused by measures of general application dealing with public health or environmental concern. In *Ethyl Corp v Canada*, the first case brought under Chapter 11, the claim amounted to \$251 million as compensation for damages allegedly caused by an environmental measure on trade in a fuel additive.¹² Canada eventually settled for \$13 million after the Arbitral Tribunal ruled that it had jurisdiction to hear the case, a decision of the host State that was perceived as being motivated by fear. Since then, a steady stream of claims for compensation for damages allegedly caused by health or environmental measures were brought under Chapter 11.¹³ Civil society was alarmed by the chilling effect that Chapter 11 could have on the

¹¹ *North American Free Trade Agreement*, opened for signature 17 December 1992, 32 ILM 289 (entered into force 1 January 1994); see generally Côté, above n 9, 265–284 (describing problems raised by the use of Chapter 11 by foreign investors in relation to its field of application).

¹² *Ethyl Corp v Canada (Jurisdiction)* (1999) 38 ILM 709, [18].

¹³ See, eg, *Metalclad Corp v Mexico (Award)* (2001) 16 ICSID Review—Foreign Investment Law Journal 168, [131] (\$16.7 million awarded because of the creation of a natural reserve on the location of a dangerous waste disposal site); *SD Myers Inc v Canada (Second Partial Award)* (NAFTA Chapter 11 Arbitral Tribunal, 21 October 2002) [311] (CDN\$6 million awarded because of a prohibition on the export of dangerous waste); *Sun Belt Water v Canada (Notice of Claim and Demand for Arbitration)* (NAFTA Chapter 11 Arbitral Tribunal, 12 October 1999) [24(f)] (\$10.5 billion claimed for refusal to allow export of fresh water; the Arbitral Tribunal was never constituted); *Methanex Corp v United States (Award)* (2005) 44 ILM 1343, pt I, [1], pt VI, [1] (\$970 million claimed for the banning of a fuel additive, dismissed); *Kenex Ltd v United States (Notice of Arbitration)* (NAFTA Chapter 11 Arbitral Tribunal, 2 August 2002) [7] (\$20 million claimed for the ban of hemp products; the Arbitral Tribunal was never constituted); *Baird v United States (Notice of Intent to Submit a Claim to Arbitration)* (NAFTA Chapter 11 Arbitral Tribunal, 15 March 2002) (\$13.58 billion claimed for the prohibition of the disposal of nuclear waste under the seabed; the Arbitral Tribunal was never constituted); *Canadian Cattlemen for Fair Trade v United States (Jurisdiction)* (NAFTA Chapter 11 Arbitral Tribunal, 28 January 2008) [233] (\$235 million claimed by over 100 complainants for the import ban on Canadian beef in relation with diagnosed cases of

regulatory action of governments.¹⁴ Even an unusual observer of foreign direct investment such as the Canadian Conference of Catholic Bishops stepped into the debate. It published a paper expressing concerns about investor-State dispute settlement mechanisms.¹⁵ Host States have, to a lesser extent, also been concerned with the multiplication of unexpected claims against them. This concern is reinforced by the absence of any political or legal filter to prevent foreign investors to exercise their right to invoke the host State responsibility.¹⁶

With the fear of a possibly limitless international responsibility, States have been trying to reshape international investment law in order to allow only what they perceive as legitimate claims by foreign investors. It is true that the qualification of investor-State disputes as public international law disputes helps to better understand their legal nature as well as to frame the discussion thereon. However, while the law of treaties and the law of State responsibility do foresee circumstances in which the legal effects of a treaty may be suspended or the wrongful character of the act of a State may be precluded, it appears so far that these circumstances are of little help for host States.¹⁷

mad cow disease, dismissed); *Dow AgroSciences LLC v Canad (Notice of Arbitration)* (NAFTA Chapter 11 Arbitral Tribunal, 31 March 2009) [60] (\$2 million claimed for the prohibition on the sale and certain lawn uses of pesticides; settlement reached without compensation).

¹⁴ Donald M McRae, 'Trade and Environment: Competition, Cooperation or Confusion?' (2003) 41 *Alberta Law Review* 745, 759; Lucien J Dhooge, 'The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to North American Free Trade Agreement' (2001) 38 *American Business Law Journal* 475, 549–550.

¹⁵ Episcopal Commission for Social Affairs, 'Trading Away the Future: Concerns Arising from the Investor-State Mechanism of the North American Free Trade Agreement and its Extension Throughout the Americas' (Paper presented at the Canadian Conference of Catholic Bishops, Catholic University of America, 28–30 January 2002) <<http://www.cccb.ca/site/Files/TradingFuture.html>>.

¹⁶ For instance, neither the host State nor the State of origin of the foreign investor can prevent him from exercising his rights under Chapter 11 directly at the international level. The rule of exhaustion of local remedies of customary international law has been put aside and the only condition that remains is a waiting period of six months since the events giving rise to the claim: NAFTA, art 1120(1).

¹⁷ None of the causes of suspension or termination of treaties foreseen by international law seem to have been invoked by host States in investment disputes: see *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 332 (entered into force 27 January 1980) art 57, 59–63. Circumstances precluding wrongfulness of an act of the host State would seemingly not be of greater help. The defence of counter-measures under customary international law was invoked unsuccessfully by Mexico to exclude the unlawfulness of an internal tax applied on soft drinks and syrups in the context of a broader United States-Mexico sweetener dispute: see *Archer Daniels Midland Co v Mexico (Award)* (NAFTA Chapter 11 Arbitral Tribunal, ICSID Case No ARB(AF)/04/05, 21 November 2007) [110]–[160]; *Cargill Inc v Mexico (Award)* (NAFTA Chapter 11 Arbitral Tribunal, ICSID Case No

Therefore, host States have also been trying to limit their responsibility to what they perceive as legitimate claims by foreign investors with the proper interpretation of the provisions on the field of application of the treaties they have agreed to. In this respect, the scope of the notion of 'investment' is being increasingly debated both before arbitral tribunals and in legal scholarship.¹⁸ Other attempts to use the provisions on the field of application of investment treaties have been far less studied. This chapter will examine these overlooked attempts to use provisions on the scope of treaties in the quest for legitimate claims in international investment law.

Disputes brought under Chapter 11 of NAFTA have been instrumental in the development of international investment law. It continues to be one of the most widely used avenues for private redress by foreign investors. In early NAFTA cases, host States attempted to limit their responsibility by developing arguments based on the field of application of Chapter 11. Arguments were essentially based on Article 1101 circumscribing the field of application of Chapter 11 to 'measures relating to foreign investors or their investment'. A first argument was that NAFTA chapters were mutually exclusive and that one measure could not be qualified as a trade measure and as an investment measure at the same time. This argument was eventually rejected by arbitral tribunals. A second argument had more success in *Methanex Corp v United States*¹⁹ where the legal meaning of the

ARB(AF)/05/2, 15 January 2008) [420]–[430]; *Archer Daniels Midland Co v Mexico* (Award) (NAFTA Chapter 11 Arbitral Tribunal, ICSID Case No ARB(AF)/04/05, 21 November 2007) [82]–[85] (Arthur W Rovine). The doctrine of necessity was also invoked unsuccessfully by Argentina in the context of the severe economic, social and political crisis it had experienced in the early 2000s, in order to reject a series of claims brought on the basis of BITs: see generally Matthew Parish, 'On Necessity' (2010) 11 *Journal of World Investment & Trade* 169; August Reinisch, 'Necessity in International Investment Arbitration—An Unnecessary Split of Opinions in Recent ICSID Cases?' (2007) 8 *Journal of World Investment & Trade* 191.

¹⁸ See, eg, Pierre-Emmanuel Dupont, 'The Notion of ICSID Investment: Ongoing "Confusion" or "Emerging Synthesis?"' (2011) 12 *Journal of World Investment & Trade* 245; Emmanuel Gaillard, 'Reconnaître ou définir? Réflexions sur l'évolution de la notion d'investissement dans la jurisprudence CIRDI' in Jean-Marc Sorel (ed), *Le droit international public à l'aube du XXI^e siècle. En hommage aux professeurs Dominique Carreau et Patrick Juillard* (Pedone, 2009) 17; Sébastien Manciaux, 'The Notion of Investment: New Controversies', (2008) 9 *Journal of World Investment & Trade* 443; Walid Ben Hamida, 'Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control', (2007) 24 *Journal of International Arbitration* 287; Bruno Poulain, 'L'investissement international: définition ou définitions?' in Philippe Kahn and Thomas W Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff, 2007) 23.

¹⁹ *Methanex Corp v United States* (First Partial Award) (NAFTA Chapter 11 Arbitral Tribunal, 7 August 2002).

concept of 'measure relating to foreign investors or their investments' was clarified. Article 1101 would curtail the legal protection of foreign investors and consequently the obligations of host States vis-à-vis them, thus contributing to limit the international responsibility of host States.

II. THE QUESTION OF MUTUAL EXCLUSIVENESS OF NAFTA CHAPTERS

The argument of the mutual exclusiveness of NAFTA chapters is based on the idea that legal consequences follow from the unique morphology of NAFTA Chapter 11, that is, an investment treaty embedded in a free trade agreement ('FTA'). If a measure were to be qualified as a trade measure, the argument runs, it ought to be regulated only by the NAFTA chapters on trade. Thus, it could not be considered as an investment measure and therefore would fall outside the field of application of Chapter 11. This issue is distinct from the question of the legal relationship between BITs and international obligations deriving from other sources.²⁰ While arbitral tribunals quickly ruled that NAFTA chapters were not automatically mutually exclusive, doubts remain beyond this point.

A. *Rejection of Automatic Mutual Exclusiveness of NAFTA Chapters*

In the first investment disputes brought under NAFTA Chapter 11, host States sought to dispose of them on the basis of the alleged mutual exclusiveness of NAFTA chapters. This argument was constructed in very general terms and found little support in the text of the treaty, except for vague references to Article 1101. Article 1101 provides that Chapter 11 disciplines apply to 'measures relating to foreign investors or their investments'. The initial version of the general argument of mutual exclusiveness of NAFTA chapters was not dissociated from a more specific argument based on Article 1101 that was to be later developed by host States.

This 'undissociated' argument was put forward in the very first Chapter 11 case of *Ethyl Corp v Canada*.²¹ Canada alleged that the challenged

²⁰ See Moshe Hirsch, 'Interactions Between Investment and Non-Investment Obligations' in Peter Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 154 (exploring the question of overlapping between BITs and other international obligations of host States).

²¹ *Ethyl Corp v Canada* (Statement of Defence of Canada) (NAFTA Chapter 11 Arbitral Tribunal, 27 November 1997) [27]; see *Ethyl Corp v Canada* (Submission of Mexico)

federal law restricting the trade in some fuel additives was not a measure relating to foreign investment because it was a trade measure. The Arbitral Tribunal refused to address this issue at the jurisdictional stage and reserved it for consideration with the merits of the case.²² Nevertheless, it mentioned that the argument of Canada was unsubstantiated in its pleadings. Since a settlement was reached by the disputing parties the Arbitral Tribunal never ruled on this issue.

The general argument of mutual exclusiveness of NAFTA chapters was gradually dissociated from a more specific argument based on Article 1101, to which I return later. In *Pope & Talbot Inc v Canada*, the Arbitral Tribunal plainly rejected any automatic mutual exclusiveness of NAFTA chapters.²³ It refused to adopt an interpretation of Chapter 11 that would treat investment and trade as 'wholly divorced from each other'.²⁴ It simply considered that if a violation of Chapter 11 is alleged by a foreign investor, the dispute then becomes an investment dispute.

This rejection of the dissociated argument of mutual exclusiveness of NAFTA chapters was followed by the Arbitral Tribunal in *S D Myers Inc v Canada*, but with a better reasoned analysis. Canada tried once again to dispose of the investor claim on the basis of the 'undissociated' form of the argument.²⁵ Canada argued that the challenged federal law that had prohibited the exportation of dangerous waste was not an investment measure but was to be considered as a trade measure, and therefore fell outside of the scope of Chapter 11. On the basis of the award in *Pope & Talbot Inc v Canada*, the foreign investor convinced the Arbitral Tribunal to deal with the general issue of mutual exclusiveness of NAFTA chapters separately from the specific issue of Article 1101.²⁶

2 (NAFTA Chapter 11 Arbitral Tribunal, 24 February 1998) (supporting the argument of mutual exclusiveness of NAFTA Chapters).

²² *Ethyl Corp v Canada (Jurisdiction)* (1999) 38 ILM 709, [63]–[64].

²³ *Pope & Talbot Inc v Canada (Award in Relation to Preliminary Motion by Government of Canada)* (NAFTA Chapter 11 Arbitral Tribunal, 26 January 2000) [25].

²⁴ *Ibid* [26].

²⁵ *S D Myers Inc v Canada (Government of Canada's Reply to Supplemental Memorial)* (NAFTA Chapter 11 Arbitral Tribunal, 24 January 2000) [17]; *S D Myers Inc v Canada (Statement of Defence of Canada)* (NAFTA Chapter 11 Arbitral Tribunal, 18 October 1999) [38].

²⁶ *S D Myers Inc v Canada (Investor's Reply to the Submission of the United Mexican States)* (NAFTA Chapter 11 Arbitral Tribunal, 28 January 2000) [6]; *S D Myers Inc v Canada (Memorial of the Investor)* (NAFTA Chapter 11 Arbitral Tribunal, 20 July 1999) [31].

The Arbitral Tribunal ruled again that no *automatic* mutual exclusiveness of NAFTA chapters can be derived from the text of the treaty.²⁷ The mere fact that a measure can qualify as a trade measure under NAFTA did not preclude the same measure from qualifying as an investment measure under Chapter 11 as well. The sole provision that could have substantiated the argument is Article 1112, which gives primacy to provisions of other chapters 'in the event of any inconsistency' between Chapter 11 and another Chapter. To accept the argument of automatic mutual exclusiveness would have meant to presume the existence of such a conflict. There is no automatic rejection of an investment claim on the basis that the same measure at stake could also raise a trade dispute. Thus NAFTA chapters are 'cumulative except in cases of conflicts'.²⁸ According to the Arbitral Tribunal, the pivotal concept under Chapter 11 is that of 'measures relating to foreign investors or their investments' as prescribed by Article 1101.

This reasoning was applied approvingly in *Cargill Inc.*, where the Arbitral Tribunal initially noted that '[t]he interrelationship between the chapters of the NAFTA dealing with investment disputes and those dealing with trade is a complex matter which has not been fully explored by other tribunals'.²⁹ It concluded that overlap between trade and investment chapters is allowed and that 'the primacy of the non-investment Chapters only applies in the event of an inconsistency and an overlap is not necessarily an inconsistency'.³⁰

If accepted, the argument of mutual exclusiveness of NAFTA chapters would significantly limit the legal protection of foreign investors and, consequently, limit the responsibility of host States. The incorporation of investment protection in a FTA would have had the paradoxical result of reducing the legal protection of foreign investors. The rejection of the automatic mutual exclusiveness of NAFTA chapters brought Article 1101 to the forefront of the debate on limitation of host State responsibility by provisions on the scope of a treaty. Nevertheless some doubts remain about the argument when no automaticity is involved.

²⁷ *SD Myers Inc v Canada (Partial Award)* (2001) 40 ILM 1408, [292]–[295]; cf *Canadian Cattlemen for Fair Trade v United States (Jurisdiction)* (NAFTA Chapter 11 Arbitral Tribunal, 28 January 2008) [193], n 22 (recognising that other Chapter 11 tribunals ruled that NAFTA Chapters are normally cumulative, but that this point is not the issue in this case).

²⁸ *SD Myers Inc v Canada (Partial Award)* (2001) 40 ILM 1408 [294].

²⁹ *Cargill Inc v Mexico (Award)* (NAFTA Chapter 11 Arbitral Tribunal, ICSID Case No ARB(AF)/05/2, 15 January 2008) [145].

³⁰ *Ibid* [148].

B. *Remaining Doubts*

Arbitral tribunals have thus rejected *automatic* mutual exclusiveness of NAFTA chapters. This leaves open the possibility that if a conflict were to be raised between a provision of Chapter 11 and a provision of another chapter in a specific case, Article 1112 could limit the responsibility of the host State. However, the precise legal scope and consequences of Article 1112 are hard to assess *in abstracto* and it seems that no such inconsistencies have yet been found by an arbitral tribunal in an investment dispute.³¹

Article 1112 was considered in detail in *Canfor Corp v United States*, where the Arbitral Tribunal did not see an inconsistency between Chapter 11 and Chapter 19 as regards the possibility of using both dispute settlement mechanisms in antidumping or countervailing duties disputes.³² The Tribunal found that a proper interpretation of Chapter 11 did not allow foreign investors to use it for such disputes, and therefore no problem of inconsistency was raised. Nevertheless, it observed that Article 1112 plays the role of a 'safety-valve' in NAFTA and that it should only operate when an actual textual conflict exists between different chapters and not only potential diverging findings of facts or law.³³

In contrast with the rather narrow view taken in *Canfor Corp*, the Arbitral Tribunal in *S D Myers Inc* had addressed the issue of Article 1112 more broadly by looking at the exceptions of NAFTA Chapter XXI.³⁴ Article 2101 incorporates into NAFTA the general exceptions of Article XX of the *General Agreement on Tariffs and Trade* of 1994³⁵ ('GATT 1994')

³¹ Meg N Kinnear et al, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International, 2006) 1101–6, 1101–7.

³² *Canfor Corp v United States (Decision on Preliminary Question)* (NAFTA Chapter 11 Arbitral Tribunal, 6 June 2006) [273].

³³ *Ibid* [227]–[228]: 'Article 1112(1) appears to constitute a form of "override clause." It seems that the drafters of the NAFTA wished to have a safety-valve for overreaching interpretations of other Chapters of the NAFTA in relation to the investment provisions in Chapter Eleven. In that respect, Article 1112(1) is an important guidance in interpretation of the NAFTA.'

³⁴ *SD Myers Inc v Canada (Partial Award)* (2001) 40 ILM 1408 [298]; see *SD Myers Inc v Canada, (Partial Award)* (2001) 40 ILM 1447 [74]–[118] (Dr Bryan Schwartz) (discussing in broad terms the interplay between Article XX of GATT 1994 and NAFTA Chapter 11).

³⁵ *General Agreement on Tariffs and Trade of 1994, Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995) Annex 1A ('GATT'). Article 1(a) of GATT 1994 provides that it incorporates as amended the *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948).

relating to, for example, morality, health or environment protection. Article 2102 establishes a national security exception, while Article 2106 foresees a cultural exception. Those exceptions allow a host State to apply a trade measure that would otherwise be prohibited by NAFTA in order to pursue a legitimate non-trade policy objective. All arbitrators, including Arbitrator Schwartz in his lengthy separate opinion, were ready to accept that a trade measure justified by an exception could be shielded against Chapter 11 claims on the basis of Article 1112. Such a situation would amount to an inconsistency between Chapter 11 and another Chapter. This would mean for instance that an export ban on a product that is justified by a health or environmental protection exception in the trade chapters could not be a compensable investment measure.

However attractive this view of the Arbitral Tribunal is, it might have overlooked the interplay between the trade chapters and Chapter 11, because it failed to take fully into account Article 2101. This provision seems to exclude investment disputes from the scope of the general exceptions by providing that they apply for the purpose of 'Part Two (Trade in Goods), except to the extent that a provision of that Part applies to [...] investment.'³⁶ The line of reasoning suggested in *SD Myers Inc* could nevertheless have a significant impact on cases where foreign investors challenge sanitary or environmental measures. For the moment, host States seem not to have used this defence against foreign investor claims and there is no case law on the matter.

This possible application of the general exceptions of international trade law in the field of investment is due to the unique legal morphology of Chapter 11. BITs are usually not embedded in a FTA and therefore this question cannot be raised. This first expression of the idea of transplanting the classical exceptions of trade law in investment law announces new types of provisions that are now introduced in BITs to limit responsibility of host States. This current trend constitutes another important aspect of the quest for legitimate claims in international investment law.³⁷

³⁶ NAFTA art 2101(1)(a).

³⁷ While the provision of national security exceptions is an older practice in BITs, the inclusion of general exceptions on morality, health, environment or culture is a newer phenomenon: See, eg, *Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and the Protection of Investments*, signed 28 June 2009 (entered into force 14 December 2009) art 10 ('Canada-Jordan BIT'); *Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments*, signed 14 November 2006, [2007] CTS 10 (entered into force 20 June 2007) art 10 ('Canada-Peru BIT'); Foreign Affairs and International Trade Canada, *Canada 2004 Model BIT* (2003) Government of Canada art 10

III. THE PIVOTAL CONCEPT OF 'MEASURES RELATING TO FOREIGN INVESTORS AND THEIR INVESTMENTS' IN NAFTA ARTICLE 1101

With the dissociation of the general argument of mutual exclusiveness of NAFTA chapters from Article 1101, the specific legal meaning of that provision needed to be clarified. After tentative interpretations in a series of early cases, the pivotal nature of Article 1101 and of the concept of 'measures relating to foreign investors and their investments' was consecrated by the landmark case of *Methanex Corp v United States*. However, the thrust of the *Methanex* doctrine on Article 1101 needs to be further examined in order to measure its true contribution to the limitation of host State responsibility in international investment law.

A. *Pre-Methanex Attempts at Clarifying Article 1101*

The specific thrust of Article 1101 had to be clarified as the general argument of mutual exclusiveness of NAFTA chapters was being dissociated from that provision. Host States attempted to have foreign investors' claims dismissed on the basis of Article 1101. Arbitral tribunals were confronted with widely diverging potential interpretations of what constitutes a 'measure relating to foreign investors and their investments'. It is worth quoting the relevant paragraph of Article 1101:

Article 1101: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party *relating to*:
 - (a) investors of another Party;
 - (b) investments of investors of another Party in the territory of the Party; and
 - (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.³⁸

The crucial question is to understand what exactly Article 1101(1) purports to do in the scheme of Chapter 11. On the one hand, host States sought to use this provision to get rid of illegitimate claims at the jurisdictional stage. A strict legal definition of what constitutes a 'measure relating to

<<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf>>.

³⁸ NAFTA art 1101(1) (emphasis added).

foreign investors or their investments' would furnish an efficient tool to limit host State responsibility. On the other hand, foreign investors tried either to downplay Article 1101(1) or to give it the broadest scope possible in order to make it an easy hurdle to overcome. Until the issue was fully examined by the Arbitral Tribunal in *Methanex Corp v United States*, four alternative routes had been inconclusively explored.

1. *The Absence of any Legal Test*

One attempt at interpreting Article 1101(1) was to downplay its legal significance, by suggesting that the provision did not serve any jurisdictional function and it was not intended to set out a legal test. This position was developed by Arbitrator Schwartz in his separate opinion in *SD Myers Inc v Canada* on the issue of Article 1101(1). While he agreed with the majority of the Arbitral Tribunal that the test of Article 1101(1) was easily met in this case, he noted that the issue had been thoroughly mooted by the disputing parties and therefore he wrote a more detailed opinion on the matter.³⁹ Arbitrator Schwartz argued convincingly that Article 1101(1) fulfills a purely definitional purpose and that it is legally insignificant regarding the scope of Chapter 11.

Arbitrator Schwartz based his view on a series of considerations. Firstly, Article 1101(1) should not be used to exclude *ab initio* a measure from the purview of Chapter 11 because of the difficulty of detaching the provision from other substantive provisions such as Article 1110 on indirect expropriation.⁴⁰ A measure should not be excluded at the jurisdictional stage on the basis of Article 1101(1) since the violation of substantive provisions could not be assessed. The problem would be especially critical with unintentional indirect expropriation. According to Schwartz, a comparative look at Chapter 11 would show that BITs generally do not contain provisions similar to Article 1101(1), while they do contain provisions similar to its substantive provisions such as Article 1110.⁴¹ He found it difficult to reduce the legal protection of North American foreign investors on the sole basis of Article 1101(1). He also based his analysis on the 1994 *Canadian Statement on Implementation of NAFTA* to support the meaninglessness of

³⁹ *SD Myers Inc v Canada (Partial Award)* (2001) 40 ILM 1447 (Dr Bryan Schwartz) [48]–[49].

⁴⁰ *Ibid* [55].

⁴¹ *Ibid* [58]–[59] (no data was referred to by Arbitrator Schwartz in support of the assertion about the general inexistence of provisions similar to Article 1101(1) in BITs).

Article 1101(1) regarding the legal scope of Chapter 11.⁴² The fact that this governmental document referred to measures 'affecting' foreign investors or their investments as an equivalent to measures 'relating to' them indicated in his view that no strict legal test should be read into Article 1101(1).

Finally and most convincingly, Arbitrator Schwartz proposed an alternative reading of Article 1101(1). The provision should not be read to reduce the scope of Chapter 11 but rather to specify the relative territorial scope of the words 'investors' and 'investments', depending on whether they refer generally to those originating inside North America or exceptionally to those originating also outside North America for the purpose of Article 1106 (on trade-related investment measures).⁴³ Therefore Article 1101(1) would fulfil a purely definitional role due to the peculiar territorial scope of some provisions of Chapter 11. Nothing more should be read into it.

2. *The Weak 'Mere Effect' Test*

Another attempt at interpreting Article 1101(1) was to reduce its significance by reading into it a legal test which can be easily met by foreign investors. It would mean that every measure of a Party which simply 'affects' foreign investors or their investments is a measure 'relating to' them. Article 1101(1) would not fulfil any serious jurisdictional function and host States could hardly have a case dismissed on this basis. Any *bona fide* health or environmental measure could face a claim provided that the breach of a substantive provision of Chapter 11 is later established.

This interpretation took support from the aforementioned 1994 *Canadian Statement on Implementation*. The words 'measures ... relating to' foreign investors or their investments were equated with 'measures ... affecting' them in the English version of the document.⁴⁴ This 'mere effect' test was developed by the foreign investor in *S D Myers Inc v Canada* in response to the defence raised by the host State that the export ban at

⁴² Ibid [62].

⁴³ Ibid [63]. Article 1114 on environmental measures is also referred to by Article 1101(1) in order to specify that it has a broader territorial scope, but Arbitrator Schwartz did not mention it.

⁴⁴ Canada, Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation* (Queen's Printer for Canada, 1994) 148. This document says that 'Article 1101 states that section A covers measures by a Party (ie, any level of government in Canada) that affect: investors of another Party ... ; investments of investors of another Party ... ; and for purposes of the provisions on performance requirements and environmental measures, all investments'. The official French version of this document also uses a different wording than Article 1101 ('mesure agissant' instead of 'mesure concernante').

stake did not constitute a measure ‘relating to’ foreign investors or their investments.⁴⁵ The foreign investor recalled the 1994 statement of Canada and added that Article 1101(1) should be interpreted in the light of NAFTA objective of substantially enhancing investment opportunities as stated in Article 102(c).⁴⁶ According to him, the ordinary meaning of the words of Article 1101(1) would prevent any restrictive reading of the provision. Any economic impact of a measure on a foreign investor or its investment would suffice to satisfy the legal test of Article 1101(1).

The legal value under international law of its 1994 statement was denied by Canada.⁴⁷ The host State, supported on this point by Mexico, rejected this weak ‘mere effect’ test and argued that a more direct link than merely affecting foreign investors or their investments was needed; a sufficient nexus with the measure at stake was necessary.⁴⁸ Canada and Mexico enumerated NAFTA provisions using the words ‘affecting’, in support of the argument that the omission to use those words in Article 1101(1) was significant. In addition to this textual argument, Canada stressed that such a weak test would give to Chapter 11 a coverage that was never contemplated by the Contracting Parties.⁴⁹

The Arbitral Tribunal in *S D Myers Inc v Canada* did not rule on the ‘mere effect’ test, or for that matter on any other applicable test to be met under Article 1101(1). It found on the basis of the evidence that the measure at stake had specifically targeted the foreign investor since its inception and that the legal test—whatever it may be—was clearly met.⁵⁰ It did not examine the issue in any more detail.

3. *The Stringent ‘Primarily Aimed at’ Test*

A radically different interpretation of Article 1101(1) was suggested by host States. They put forward a restrictive reading of the provision based on World Trade Organization (‘WTO’) law, which would serve to halt

⁴⁵ *SD Myers Inc v Canada (Memorial of the Investor)* (NAFTA Chapter 11 Arbitral Tribunal, 20 July 1999) [27].

⁴⁶ *SD Myers Inc v Canada (Investor’s Supplemental Memorial)* (NAFTA Chapter 11 Arbitral Tribunal, 15 December 1999) [68], [72]–[76].

⁴⁷ *SD Myers Inc v Canada (Government of Canada’s Reply to SD Myers Inc Supplemental Memorial)* (NAFTA Chapter 11 Arbitral Tribunal, 24 January 2000) [14].

⁴⁸ *Ibid* [15]; *SD Myers Inc v Canada (Submission of the United Mexican States)* (NAFTA Chapter 11 Arbitral Tribunal, 14 January 2000) [15]; *SD Myers Inc v Canada (Government of Canada Counter Memorial)* (NAFTA Chapter 11 Arbitral Tribunal, 5 October 1999) [207].

⁴⁹ *SD Myers Inc v Canada (Government of Canada Counter Memorial)* (NAFTA Chapter 11 Arbitral Tribunal, 5 October 1999) [209]–[210].

⁵⁰ *SD Myers Inc v Canada (Partial Award)* (2001) 40 ILM 1408, [234]–[235].

illegitimate claims from foreign investors. This interpretation is based on the similarity of the wording of Article 1101(1) to that of Article XX(g) of GATT 1994 (which provides for an environmental exception in international trade law). The English version of both provisions uses the words 'measures relating to' and the WTO case law interpreted the exception in Article XX(g) restrictively, as referring only to 'measures primarily aimed at'.⁵¹ Host States tried to import into Article 1101(1) the legal test of the environmental exception of Article XX(g) of GATT 1994; only measures 'primarily aimed at' foreign investors or their investments would be subjected to the disciplines of Chapter 11. Under such a stringent legal test, fewer claims could be brought by foreign investors than under the 'mere effect' legal test.

This proposed interpretation was most fully debated in *Pope & Talbot Inc v Canada* but rejected by the Arbitral Tribunal. Canada sought to have Article 1101(1) recognised as a provision curtailing the scope of Chapter 11 and helping to define what an investment dispute is. It submitted a preliminary motion to dismiss the foreign investor claim on the basis that it failed to meet the requirements of Article 1101(1) because the measure at stake was not primarily aimed at foreign investors and thus fell outside of the scope of Chapter 11.⁵² Mexico intervened once again in support of Canada to suggest that a stricter legal test than the 'mere effect' test was needed under Article 1101(1).⁵³ A measure merely affecting a foreign investor is not necessarily a measure relating to him or his investment, the argument ran; otherwise, trade claims could be disguised as investment claims. Canada fleshed out its argument by relying extensively on the legal test of Article XX(g) of GATT 1994. Measures other than those 'primarily aimed

⁵¹ Article XX(g) of GATT 1994 refers to measures 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'. It must be noted that the equally official French version of the GATT 1994 does not include the same wording as NAFTA, as Article XX(g) uses the words '*se rapportant à*' and not '*concernant*': see Appellate Body, 'United States—Standards for Reformulated and Conventional Gasoline' (Report, WT/DS2/AB/R, WTO, 29 April 1996) 17–18 (finding that a measure must be 'primarily aimed at' the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g) of GATT 1994).

⁵² *Pope & Talbot Inc v Canada (Reply to Investor's Response to Canada's Preliminary Motions)* (NAFTA Chapter 11 Arbitral Tribunal, 7 December 1999) [8]–[10]. See *Pope & Talbot Inc v Canada (Preliminary Motion by Government of Canada)* (NAFTA Chapter 11 Arbitral Tribunal, 11 November 1999) (the text of this motion is unavailable to the public but is referred to in the other written pleadings in this case).

⁵³ *Pope & Talbot Inc v Canada (Submission of the United Mexican States)* (NAFTA Chapter 11 Arbitral Tribunal, 2 December 1999) [10]–[11].

at' foreign investors or their investments could not be challenged by a private party under Chapter 11, but only under NAFTA general interstate dispute settlement mechanism of Chapter 20.⁵⁴

The Arbitral Tribunal rejected the legal test proposed by Canada in its award on the preliminary motion. Although it found that the challenged measure in this case directly applied to the foreign investor, it underscored that 'the fact that a measure may primarily be concerned with trade in goods does not necessarily mean that it does not also relate to investment and investors'.⁵⁵ In sum, the Arbitral Tribunal concluded that a measure 'relating to' foreign investors or their investments is not necessarily a measure 'primarily aimed at' them. While the stringent 'primarily aimed at' test was rejected in *Pope & Talbot Inc v Canada*, the exact legal meaning of Article 1101(1) was thus left open.

4. A 'Somewhere In-Between' Test?

Lastly, the legal meaning of Article 1101(1) could lie somewhere between the stringent and the weak legal test examined above. A measure relating to foreign investors or their investments would be more than one that simply affects them, but, at the same time, it would not need to be a measure primarily aimed at them. This interpretation is a logical deduction from the previous ones, but it was not explored until *Methanex Corp v United States*.

Both arbitral tribunals in *S D Myers Inc* and *Pope & Talbot Inc* allowed the foreign investor claim to proceed because they considered that the jurisdictional threshold of Article 1101(1) had clearly been met. However, they provided no further guidance as to what exactly was the legal test to be satisfied in order to meet this jurisdictional threshold. The case law was still inconclusive when the issue was raised again in *Methanex Corp v United States*. The door was open to any of the above-mentioned interpretations, with the exception of the WTO-imported stringent 'primarily aimed at' legal test.

B. The Methanex Doctrine on Article 1101 and its Aftermath

The landmark case of *Methanex Corp v United States* involved the Californian ban on methyl tert-butyl ether ('MTBE'), a fuel additive,

⁵⁴ *Pope & Talbot Inc v Canada* (Reply to Investor's Response to Canada's Preliminary Motions) (NAFTA Chapter 11 Arbitral Tribunal, 7 December 1999) [31].

⁵⁵ *Pope & Talbot Inc v Canada* (Award in Relation to Preliminary Motion by Government of Canada) (NAFTA Chapter 11 Arbitral Tribunal, 26 January 2000) [33].

because of the water contamination risks it posed in the event of leaking underground fuel reservoirs. A foreign investor which produced and supplied in the United States methanol, one of the components of the banned product, challenged the measure before a Chapter 11 arbitral tribunal claiming astronomical compensation of nearly one billion US dollars. The case attracted a lot of public attention for various reasons. In addition to the extraordinary amount of the claim, the allegation of regulatory expropriation by an environmental measure and a breakthrough ruling on *amicus curiae* briefs in investment disputes considerably raised the profile of the case.⁵⁶ However, one of the most interesting aspects of the case is often overlooked: the analysis of the legal test purported by Article 1101(1).⁵⁷

⁵⁶ See, eg, *Glamis Gold Ltd v United States (Award)* (2009) 48 ILM 1035, [629] (applying the reasoning of *Methanex* on Article 1105 and the minimal standard of treatment of aliens about protection of legitimate expectations); *Saluka Investments BV v Czech Republic (Partial Award)* (Czech-Netherlands BIT Arbitral Tribunal, 17 March 2006) [262] (applying the reasoning of *Methanex* on regulatory expropriation); *Methanex Corp v United States (Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae')* (NAFTA Chapter 11 Arbitral Tribunal, 15 January 2001) [53] (ruling that it has power to receive *amicus curiae* briefs under UNCITRAL Arbitration Rules); J Anthony VanDuzer, 'Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation' (2007) 52 *McGill Law Journal* 681, 710–717 (analysing the contribution of *Methanex* to the improvement of transparency in investment arbitration); Kara Dougherty, 'Methanex v United States: The Realignment of NAFTA Chapter 11 with Environmental Measures' (2007) 27 *Northwestern Journal of International Law & Business* 735 (arguing that the analysis of Article 1110 in *Methanex* realigns Chapter 11 with its intended purpose on expropriation); Jessica C Lawrence, 'Chicken Little Revisited: NAFTA Regulatory Expropriations After *Methanex*' (2006) 41 *Georgia Law Review* 261 (focusing on the analysis of Article 1110 in *Methanex* and arguing that it is too early to see if it will be NAFTA's final word on regulatory expropriation); Barton Legum, 'Introductory Note to *Methanex Corporation v. United States of America*' (2005) 44 ILM 1343, 1343 (observing that *Methanex* attracted public attention in an unusual way for international tribunals); Marisa Yee, 'The Future of Environmental Regulation After Article 1110 of NAFTA: A Look at the *Methanex* and *Metalclad* Cases' (2002) 9 *Hastings West-Northwest Journal of Environmental Law & Policy* 85 (focusing on the analysis of Article 1110 in *Methanex*); Courtney C Kirkman, 'Fair and Equitable Treatment: *Methanex v United States* and the Narrowing Scope of NAFTA Article 1105' (2002) 34 *Law & Policy of International Business* 343 (focusing on the pleadings on the proper interpretation of Article 1105 on fair and equitable treatment during the legal proceedings in *Methanex*); Brigitte Stern, 'L'entrée de la société civile dans l'arbitrage entre État et investisseur' [2002] *Revue de l'arbitrage* 329, 335–340 (discussing the admission of *amicus curiae* briefs in *Methanex*).

⁵⁷ See Sanford E Gaines, 'International Decisions. *Methanex Corp v United States*' (2006) 100 *American Journal of International Law* 683, 686 (considering that the findings on Article 1101 are the most original contribution of the case); Todd Weiler, '*Methanex Corp v USA*—Turning the Page on NAFTA Chapter Eleven?' (2005) 6 *Journal of World Investment & Trade* 903, 921 (concluding that the findings on Article 1101 will remain the primary legacy of the case); T Leign Anenson, 'Defining State Responsibility under NAFTA Chapter 11: Measures 'Relating to' Foreign Investor' (2005) 45 *Virginia Journal of International Law* 675, 681 (observing that the findings on Articles 1101 may have the most profound impact in limiting the scope of State responsibility in arbitral cases).

1. *The 'Legally Significant Connection' Test*

The United States had not yet intervened in previous cases where the question of the legal meaning of Article 1101(1) was raised. In its first contribution to the debate, the United States took advantage of the inconclusiveness of the case law to suggest a 'somewhere in-between' test. The essential defence of the host State was that a measure of general application that affects a large spectrum of investors—such as the supplier of manufacturers of a banned product—does not relate to all investors.⁵⁸ It was argued that suppliers indirectly affected by a measure could not make a legitimate claim under Chapter 11. Therefore, the United States argued that the applicable test under Article 1101(1) was that a 'legally significant connection' needed to exist between the foreign investor and the challenged measure. Such a connection would not exist in cases 'where ... the subject measures do not regulate the claimant or its investment or affect them in any other legally significant way.'⁵⁹

This new legal test was contested by the foreign investor on the basis that it was based neither on the text of NAFTA, nor on any practice under the agreement.⁶⁰ No sources supported the 'legally significant connection' test and, according to the foreign investor, the ordinary meaning of Article 1101(1) implied that only a weak legal test was foreseen. It was feared that the acceptance of the proposed legal test would dangerously diminish the legal protection offered by the substantive provisions of Chapter 11 and would lead to a dismissal of claims at the jurisdictional stage solely on the basis of Article 1101(1). This was particularly the case when looking at Article 1110 and its protection against indirect expropriation which would

⁵⁸ *Methanex Corp v United States (Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment)* (NAFTA Chapter 11 Arbitral Tribunal, 12 April 2001) 42–45; *Methanex Corp v United States (Memorial on Jurisdiction and Admissibility of Respondent United States of America)* (NAFTA Chapter 11 Arbitral Tribunal, 13 November 2000) 48–50; *Methanex Corp v United States (Statement of Defence of Respondent United States of America)* (NAFTA Chapter 11 Arbitral Tribunal, 10 August 2000) [114].

⁵⁹ *Methanex Corp v United States (Rejoinder Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment)* (NAFTA Chapter 11 Arbitral Tribunal, 27 June 2001) 45.

⁶⁰ *Methanex Corp v United States (Claimant Methanex Corporation's Rejoinder to United States' Reply Memorial on Jurisdiction, Admissibility and the Proposed Amendment)* (NAFTA Chapter 11 Arbitral Tribunal, 25 May 2001) 66–69; *Methanex Corp v United States (Claimant Methanex Corporation's Counter-Memorial on Jurisdiction)* (NAFTA Chapter 11 Arbitral Tribunal, 12 February 2001) 47–51; *Methanex Corp v United States (Claimant's Reply to the Statement of Defence)* (NAFTA Chapter 11 Arbitral Tribunal, 28 August 2000) [53]–[55].

become meaningless with this new test.⁶¹ The foreign investor supported the 'mere effect' test as the only sound interpretation of Article 1101(1).

Canada and Mexico intervened in strong support of the position taken by the United States. Once again, both countries rejected any weak legal test in Article 1101(1) and shared the view that a 'measure relating to foreign investors or their investments' involves a 'significant connection' or a 'more direct nexus'.⁶² This view was considered by the United States and Mexico as constituting the subsequent practice of the Contracting Parties in the application of NAFTA to which the Arbitral Tribunal would have to abide under the law of treaties.⁶³ Such an argument offers a vivid illustration of the radical consequences of the evolution of the sources of international investment law, where the foreign investor is no longer a lawmaker. The law is what the host States claim it to be.

The 'legally significant connection' test was fully endorsed by the Arbitral Tribunal. The ordinary meaning of Article 1101(1), placed within its particular context and in the light of the particular object and purpose of Chapter 11, is 'something more than the mere effect of a measure on an investor or an investment and ... requires a legally significant connection between them'.⁶⁴ The Arbitral Tribunal thus agreed with the host States that this provision means that a jurisdictional threshold must be met in order for a foreign investor to be allowed to submit a claim under Chapter 11; it is the 'gateway leading to the dispute resolution provisions of Chapter 11'.⁶⁵ Article 1101(1) operates to allow only legitimate claims and to exclude illegitimate ones. Given the potentially limitless responsibility of host

⁶¹ *Methanex Corp v United States (Claimant's Reply to the Statement of Defence)* (NAFTA Chapter 11 Arbitral Tribunal, 28 August 2000) [53].

⁶² *Methanex Corp v United States (Second Submission of Canada Pursuant to NAFTA Article 1128)* (NAFTA Chapter 11 Arbitral Tribunal, 30 April 2001) [23]; *Methanex Corp v United States (Letter to the Arbitration Tribunal by Mexico)* (NAFTA Chapter 11 Arbitral Tribunal, 15 May 2001) [7]–[8].

⁶³ *Methanex Corp v United States (Letter to the Arbitration Tribunal by Mexico)* (NAFTA Chapter 11 Arbitral Tribunal, 15 May 2001) [1]–[3]; *Methanex Corp v United States (Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment)* (NAFTA Chapter 11 Arbitral Tribunal, 12 April 2001) 24; *Methanex Corp v United States (Memorial on Jurisdiction and Admissibility of Respondent United States of America)* (NAFTA Chapter 11 Arbitral Tribunal, 13 November 2000) 13. See *Vienna Convention on the Law of Treaties* art 31(3)(c) (foreseeing the general rule of treaty interpretation according to which any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation shall be taken into account together with the context of the terms of the treaty).

⁶⁴ *Methanex Corp v United States (First Partial Award)* (NAFTA Chapter 11 Arbitral Tribunal, 7 August 2002) [147].

⁶⁵ *Ibid* [106] (emphasis added).

States by virtue of the series of economic repercussions created by general environmental measures, the Arbitral Tribunal ruled that a line must be drawn between legitimate and illegitimate claims and that this line is drawn by the pivotal concept of 'measure relating to foreign investors or their investments.'⁶⁶ Only measures that have a 'legally significant connection' with foreign investors or their investments can pass the hurdle of Article 1101(1).

Because it was only a supplier of one component (methanol) of the banned product (MTBE), the foreign investor lost its case at this stage in *Methanex Corp v United States*.⁶⁷ Thus, suppliers of one ingredient of a banned product fail to satisfy the legal test of Article 1101(1). Conversely, it seems that producers of a banned product could bring a legitimate claim against the measure under Chapter 11. In the case at hand, the Arbitral Tribunal considered that if allegations of intent to harm foreign suppliers of methanol had been substantiated, a legally significant connection would have been established between the measure and the foreign investor.⁶⁸ The Arbitral Tribunal therefore allowed the foreign investor to make a fresh pleading on these allegations. Such intent would have moved the claim within the boundaries of legitimacy under Chapter 11.

In order to satisfy the newly found legal test of Article 1101(1), the foreign investor asked the Arbitral Tribunal to clarify the exact scope of the 'legally significant connection' test.⁶⁹ While the Arbitral Tribunal declined to respond to the request, it ruled that the legal requirements were clear regarding the particular claim of the foreign investor, even if 'there may be some difficulties in defining for all cases the exact dividing line between a legally significant and insignificant connection.'⁷⁰

At the very least, it seems clear that the new legal test is situated somewhere between the weak 'mere effect' test and the stringent 'primarily aimed at' test. Nevertheless, the Arbitral Tribunal seemed uncomfortable with its own legal test when examining whether it was met by the new allegation of intent to harm the foreign investor. The legal reasoning of the Arbitral Tribunal is questionable because it examined in great detail the compatibility of the challenged measure with the substantive provisions

⁶⁶ Ibid 135–139.

⁶⁷ Ibid 150.

⁶⁸ Ibid 169.

⁶⁹ *Methanex Corp v United States (Request for Interpretation)* (NAFTA Chapter 11 Arbitral Tribunal, 28 August 2002) [1].

⁷⁰ *Methanex Corp v United States (Response to the Request for Interpretation)* (NAFTA Chapter 11 Arbitral Tribunal, 25 September 2002) [3], [8].

of Chapter 11 in order to assess whether the jurisdictional hurdle of Article 1101(1) had been overcome.⁷¹ The reasoning of the Arbitral Tribunal is that if the measure at stake violates the substantive provisions, then it may conclude that there exists a legally significant connection with the foreign investors or their investment. This resulted in a paradoxical denial of the very aim of the purported legal test of Article 1101(1), which is to clear the legitimacy of a claim at the jurisdictional stage before allowing it to proceed on the merits.⁷² Jurisdiction of arbitral tribunals would depend on the infringement of Chapter 11.

One explanation for the uneasiness of the Arbitral Tribunal with its own doctrine could perhaps lie in a refinement not openly articulated in *Methanex*. It would only require foreign investors to satisfy *prima facie* the 'legally significant connection' test of Article 1101(1) in order to give jurisdiction to the Arbitral Tribunal. The claim could then proceed to adjudication on the merits of the case. This scheme could explain the legal reasoning in *Methanex*, where the foreign investor would have met the threshold of Article 1101(1) *prima facie* with its fresh pleading about the intent to harm foreign suppliers of methanol. That would explain why the Arbitral Tribunal completed the examination of the complaint on the merits. The absence of any violation of Chapter 11 eventually showed no intention to harm the foreign investor and therefore the *prima facie* satisfaction of the legal test of Article 1101(1) was not confirmed.

In the end, no legally significant connection was found between the foreign investor and the ban on MTBE, because the allegation of intent to harm was not proven.⁷³ However, the logical weakness in the application of its own test by the Arbitral Tribunal could undermine the persuasive authority of the *Methanex* doctrine both inside and outside NAFTA.

2. Application of the Methanex Doctrine in NAFTA Disputes...

To date, no other case exists in which the claim of a foreign investor was rejected at the jurisdictional stage because it attacked a measure that was not 'relating to' the investor in the same way as in *Methanex*. Does the rarity of application of the *Methanex* doctrine mean that it has not

⁷¹ *Methanex Corp v United States (Final Award on Jurisdiction and Merits)* [2005] IIC 167, pt IV, ch A, [4], pt IV, ch B, [1], pt IV ch C, [1], pt IV, ch D, [1].

⁷² Charles-Emmanuel Côté, 'Chronique de droit international économique en 2005. Investissement' (2006) 44 *Canadian Yearbook of International Law* 534, 552–556; Weiler, 'Turning the Page', above n 57, 911–912.

⁷³ *Methanex Corp v United States (Final Award)* [2005] IIC 167 pt IV, ch E, [22].

influenced the development of international investment law? Does it imply that it does not limit host State responsibility in practice? Has the questionable legal reasoning of the Arbitral Tribunal in *Methanex* diminished the persuasive authority of the doctrine? Can one proclaim the death of the *Methanex* doctrine? It is probably too early to make such assertions with certainty. While the doctrine has been criticized by legal academics and by another arbitral tribunal outside NAFTA, some aspects have also been referred to approvingly in two cases.

In *Bayview Irrigation District v Mexico*, a large group of US nationals claimed compensation for the diversion by Mexico of trans-border waters allegedly belonging to them while located in Mexico. Mexico challenged the jurisdiction of the Arbitral Tribunal because the claim fell outside the scope of Chapter 11. Quoting the *Methanex* doctrine, the main argument of Mexico was that Article 1101(1) limits access to Chapter 11 only to foreign investors. The United States intervened in support of Mexico claiming that *Methanex* had settled that Article 1101 acted as a 'gateway' to the dispute settlement provision of Chapter 11. The Arbitral Tribunal shared this view and ruled that the role of Article 1101 was to circumscribe the scope of both the substantive protection of investors and of the right to submit a dispute to arbitration under Chapter 11.⁷⁴ On the basis of Article 1101 it was clear for the Tribunal that Chapter 11 concerned foreign investment only, even though no other express reference to 'foreignness' was made in Chapter 11.⁷⁵ In looking at the 'foreignness' of the investment, the Arbitral Tribunal applied the *Methanex* doctrine to rule that 'it is necessary that the measures of which complaint is made should affect an investment that has a 'legally significant connection' with the State creating and applying those measures'.⁷⁶

This application of the *Methanex* doctrine by the Arbitral Tribunal was challenged by the losing investors before the Ontario Superior Court of Justice. It was argued that it was contrary to fundamental legal principles to dismiss a case on the basis of Article 1101(1) at the jurisdictional stage.⁷⁷ The Court, however, refused to review the award and deferred to the application of the doctrine made by the Arbitral Tribunal, based on

⁷⁴ *Bayview Irrigation District v Mexico (Award)* (NAFTA Chapter 11 Arbitral Tribunal, ICSID Case No ARB(AF)/05/1, 19 June 2007) [85].

⁷⁵ *Ibid* [96].

⁷⁶ *Ibid* [101].

⁷⁷ *Bayview Irrigation District v Mexico* (2008) CarswellOnt 2682, ¶ 43 (Ontario Supreme Court) [43].

the high degree of deference required by the laws of Ontario in such cases.⁷⁸

A similar consideration of the *Methanex* doctrine is found in *Canadian Cattlemen for Fair Trade v United States*. In this case the Arbitral Tribunal confirmed the 'critical role' of Article 1101(1) in the definition of the scope and coverage of Chapter 11 that was recognised in *Methanex*.⁷⁹ However, the 'legally significant connection' test was not applied because the connection of the measure at stake with the complainants was undisputed. Similar to *Bayview Irrigation District v Mexico*, Article 1101(1) was applied to assess the 'foreignness' of the complainants and their investments.⁸⁰

A last case of application—or non-application—of the *Methane* doctrine in a NAFTA dispute is to be found in *Cargill Inc*. One crucial point in this case was whether the up-stream damages suffered by the American investor in the United States were compensable under Chapter 11. While these facts were to some extent reminiscent of those in *Methanex*, the Arbitral Tribunal was easily satisfied that the legal test of Article 1101 was met, without really applying the *Methanex* doctrine. It expressed doubts about the restrictiveness of the doctrine and concluded that '[r]egardless of whether or not the test espoused in *Methanex* is too restrictive, it is satisfied in this case.'⁸¹ However, one of the measures at stake was an internal tax on soft drink beverages containing high fructose corn syrup ('HFCS'). Thus one could say that the measure did not aim directly at HFCS but rather at soft drinks. According to the *Methanex* doctrine, the Arbitral Tribunal would have had to assess whether the measure aimed to harm foreign producers of HFCS, who were suppliers of one ingredient of soft drinks. It is likely that the Arbitral Tribunal would have concluded that the tax did intend to harm foreign producers of HFCS. This failure to apply the *Methanex* doctrine cast doubts on its persuasive authority for arbitral tribunals. One is left to speculate whether the proper application of the legal test could have changed the final result in the award since the HFCS was not produced in the host State. Mexico failed in its attempt to have the award set aside on the ground that compensation for damages suffered in the State of nationality of the foreign investor was outside the jurisdiction

⁷⁸ Ibid [76]–[77].

⁷⁹ *Canadian Cattlemen for Fair Trade v United States (Jurisdiction)* (NAFTA Chapter 11 Arbitral Tribunal, 28 January 2008) [118].

⁸⁰ Ibid 127.

⁸¹ *Cargill Inc v Mexico (Award)* (NAFTA Chapter 11 Arbitral Tribunal, ICSID Case No ARB(AF)/05/2, 15 January 2008) [175].

of the Arbitral Tribunal.⁸² The Court found no excess of jurisdiction in the finding that the business income of the parent-company in Mexico was part of the definition of investment (instead of an element to consider in the assessment of damages) or that the damages suffered in the United States were sufficiently proximate to be compensated.

The 'legally significant connection' test of the *Methanex* doctrine has thus not been directly applied in other NAFTA disputes. It has, however, been referred to with approval in one case and the jurisdictional function of Article 1101(1) as the 'gateway' to Chapter 11 is confirmed by the case law, where it has been used twice to assess the foreignness of investors and their investments.

3. ...and Beyond

The *Methanex* doctrine is closely knitted in the fabric of NAFTA Article 1101(1) which provides that only claims concerning 'measures relating to foreign investors or their investments' are legitimate under Chapter 11. To what extent can this NAFTA-based rule be generalised in international investment law? The lack of similar provisions in BITs would seem to render difficult the application of the doctrine in those treaties. Indeed, Arbitrator Schwartz, in *S D Myers Inc v Canada*, observed that BITs would generally not contain provisions similar to Article 1101(1).⁸³

A quick look at the conventional practice of States suggests, however, that provisions similar to Article 1101(1)—that is, limiting the scope of the treaty to 'measures relating to foreign investors or their investments'—regularly appear in investment chapters embedded in FTAs. This is the case in agreements concluded by Australia,⁸⁴ Canada,⁸⁵ Japan⁸⁶ and the

⁸² *Mexico v Cargill Inc* (2010) ONSC 4656 (Ontario Supreme Court) [56]–[73].

⁸³ See above n 41 and accompanying text.

⁸⁴ *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010) art 1; *Australia-Chile Free Trade Agreement*, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009) art 10(2); *Australia-Thailand Free Trade Agreement*, signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005) art 903.

⁸⁵ *Free Trade Agreement Between Canada and the Republic of Panama*, signed 14 May 2010 (not yet in force) art 9(2); *Free Trade Agreement Between Canada and the Republic of Colombia*, signed 21 November 2008 (not yet in force) art 801; *Free Trade Agreement Between Canada and the Republic of Peru*, signed 29 May 2008, (entered into force 1 August 2009) art 801; *Free Trade Agreement Between the Government of Canada and the Government of Chile*, signed 5 December 1996, [1997] CTS 50 (entered into force 5 July 1997) art G-01.

⁸⁶ *Agreement on Free Trade and Economic Partnership Between Japan and the Swiss Confederation*, signed 19 February 2009, (entered into force 1 September 2009) art 84

United States.⁸⁷ The existence of provisions similar to Article 1101(1) makes these agreements potentially more receptive to the *Methanex* doctrine.

The picture is less clear with BITs. Older treaties seem not to contain provisions similar to Article 1101(1) when defining their scope of

<<http://www.mofa.go.jp/region/europe/switzerland/epao902/agreement.pdf>>; *Agreement Between Japan and the Republic of Indonesia for an Economic Partnership*, signed 20 August 2007 (entered into force 1 July 2008) art 57 <<http://www.mofa.go.jp/region/asia-pacio/indonesia/epao708/agreement.pdf>>; *Agreement Between Japan and Brunei Darussalam for an Economic Partnership*, signed 18 June 2007 (entered into force 31 July 2008) art 55 <<http://www.mofa.go.jp/region/asia-paci/brunei/epao706/agreement.pdf>>; *Agreement Between Japan and the Kingdom of Thailand for an Economic Partnership*, signed 3 April 2007 (entered into force 1 November 2007) art 90 <<http://www.mofa.go.jp/region/asia-paci/thailand/epao704/agreement.pdf>>; *Agreement Between Japan and Chile for a Strategic Economic Partnership*, signed 27 March 2007 (entered into force 3 September 2007) art 72 <<http://www.mofa.go.jp/region/latin/chile/jointo703/agreement.pdf>>; *Agreement Between Japan and the Republic of the Philippines for an Economic Partnership*, signed 9 September 2006, (entered into force 11 December 2008) art 87 <<http://www.mofa.go.jp/region/asia-paci/philippine/epao609/main.pdf>>; *Agreement Between the Government of Japan and the Government of Malaysia for an Economic Partnership*, signed 13 December 2005 (entered into force 13 July 2006) art 73 <<http://www.mofa.go.jp/region/asia-paci/malaysia/epa/content.pdf>>; *Agreement Between Japan and the United Mexican States for the Strengthening of the Economic Partnership*, signed 17 September 2004 (entered into force 1 April 2005) art 57 <<http://www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf>>; *Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership*, signed 13 January 2002 (entered into force 30 November 2002) art 71 <<http://www.mofa.go.jp/region/asia-paci/singapore/jsepa-1.pdf>>.

⁸⁷ *Free Trade Agreement Between the United States of America and the Republic of Korea*, signed 30 June 2007 (not yet in force) art 11(1) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>>; *United States-Panama Trade Promotion Agreement*, signed 28 June 2007 (not yet in force) art 10(1) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>>; *United States-Colombia Free Trade Agreement*, signed 22 November 2006 (not yet in force) art 10(1) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>>; *United States-Peru Trade Promotion Agreement*, signed 12 April 2006, (entered into force 1 February 2009) art 10(1) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>>; *Agreement Between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area*, signed 19 January 2006 (entered into force 1 January 2009) art 10(1) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text>>; *Dominican Republic-Central America-United States Free Trade Agreement*, signed 5 August 2004 (entered into force 1 March 2006) Art. 10(1) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text>>; *United States-Morocco Free Trade Agreement*, signed 15 June 2004, (entered into force 1 January 2006) art 10(1) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text>>; *United States-Australia Free Trade Agreement*, signed 18 May 2004,) 43 ILM 1248 (entered into force 1 January 2005) art 11(1) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text>>; *United States-Chile Free Trade Agreement*, signed 6 June 2003, 42 ILM 1026 (entered into force 1 January 2004) art 10(1) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>>; *United States-Singapore Free Trade Agreement*, signed 6 May 2003, 42 ILM 1026 (entered into force 1 January 2004) art 15(2) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text>>.

application. BITs used not to refer to the scope and coverage of the treaty in a specific provision, except to specify that it applies to all investments made by investors of the other Contracting Party. The classical wording usually was that the host State shall offer to foreign investors a treatment in accordance with the substantive provision of the treaty. The contemporary practice of most States, as reflected in model BITs, seems to be to the same effect.⁸⁸ However, recent conventional practice of a few States indicate that provisions similar to Article 1101(1) have begun to appear, most notably in the latest Canadian,⁸⁹ US⁹⁰ and Norwegian⁹¹ model BITs and in treaties concluded on their basis. That would mean that recent developments would make international investment law more amenable to the *Methanex* doctrine of limitation of host State responsibility.

An attempt to apply the *Methanex* doctrine outside of NAFTA was made in one case by a host State claiming a lack of jurisdiction of the Arbitral Tribunal. In *BG Group Plc v Argentina*, the host State argued that the investment claim had to be dismissed because it fell outside the field of application of the 1991 Argentina-United Kingdom BIT. The Arbitral Tribunal noted that the BIT contained no provision similar to

⁸⁸ Eg, Federal Ministry for Economics and Technology, *German 2008 Model BIT* (2008) Investment Treaty Arbitration <<http://ita.law.uvic.ca/documents/2008-GermanModelBIT.doc>>; Columbia, *Colombia 2007 Model BIT* (2007) Investment Treaty Arbitration <http://ita.law.uvic.ca/documents/inv_model_bit_colombia.pdf>; France, *France 2006 Model BIT* (2006) Investment Treaty Arbitration <<http://ita.law.uvic.ca/documents/ModelTreatyFrance2006.pdf>>; India, *India Model Text of BIPA* (2003) Investment Treaty Arbitration <<http://ita.law.uvic.ca/Indiamodelbit.htm>>.

⁸⁹ *Canada-Jordan BIT* art 2; *Canada-Peru BIT* art 2; Foreign Affairs and International Trade Canada, *Canada 2004 Model BIT*, above n 37, art 2.

⁹⁰ *Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda on the Encouragement and the Reciprocal Protection of Investments*, signed 19 February 2008, (2008) S Treaty Doc No 110-23 (not yet in force) art 2 <http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file743_14523.pdf>; *Agreement Between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investments*, signed 4 November 2005, (2006) S Treaty Doc No 109-09 (entered into force 1 November 2006) art 2 <http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file748_9005.pdf>; Office of the United States Trade Representative and Department of State, *2004 U.S. Model Bilateral Investment Treaty (BIT)* (2004) United States, art 2 <http://ustraderep.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf>.

⁹¹ Norway, *Norway 2007 Draft Model BIT* (2007) Investment Treaty Arbitration, art 1 <<http://ita.law.uvic.ca/documents/NorwayModel2007.doc>>. After extensive consultation, Norway abandoned its draft model BIT in 2009 because of the largely critical input of the public: Damon Vis-Dunbar, *Norway Shelves its Draft Model Bilateral Investment Treaty* (8 June 2009) Investment Treaty News <<http://www.investmenttreatynews.org/cms/news/archive/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty.aspx>>.

Article 1101(1) of NAFTA.⁹² It considered, nevertheless, that the *Methanex* doctrine was inapplicable in this case because of the difference in the configuration of the private interests at stake.⁹³ The doctrine would be irrelevant for foreign shareholders injured by measures that also injure local companies.

More fundamentally, the Arbitral Tribunal, in *BG Group Plc v Argentina*, refused any generalization of the *Methanex* doctrine in international investment law on the basis that it would constitute an incorrect interpretation of NAFTA.⁹⁴ It considered that the doctrine had turned 'Article 1101 into a provision that makes scope and coverage of Chapter 11 vary according to who is the complaining party, *an interpretation at odds with the text and context of Article 1101 and the NAFTA*.'⁹⁵ Firstly, the Arbitral Tribunal observed that the context of the provision as well as the object and purpose of NAFTA demonstrate that it could not possibly envision a 'legally significant connection' test because several other NAFTA provisions would otherwise be unnecessary.⁹⁶ For instance, it considered that under the *Methanex* doctrine Article 1101(4), which preserves the right of the State to perform basic social services like social security, public education or healthcare, would be 'pointless' since the exercise of these functions would not 'relate to' foreign investors or their investments. This argument is unconvincing since this provision adds that these functions can only be performed 'in a manner that is not inconsistent with [Chapter 11]'. These otherwise 'pointless' provisions could perhaps also be explained by an excess of caution in order to achieve greater legal certainty. Secondly, the Arbitral Tribunal considered that the *Methanex* doctrine would 'discharge [the host State] of its BIT obligations simply because its measures do not, on their face, target any investor.'⁹⁷ Thirdly, it considered that the *Methanex* doctrine largely nullifies the protection against indirect expropriation, an argument that had already been advanced by the foreign investor in *Methanex*.⁹⁸ These last two arguments might exaggerate the power of the *Methanex* doctrine, since *Methanex* left open the possibility of engaging

⁹² *BG Group Plc v Argentina (Final Award)* [2007] IIC 321, [223].

⁹³ *Ibid* [226].

⁹⁴ *Ibid* [227], [233].

⁹⁵ *Ibid* [228] (emphasis added).

⁹⁶ *Ibid* [230] (ie, arts 1101(4), 1109(4) and (5), Mexico's energy reservation in Annex III and other exceptions in Annexes VI and VII, the reservations listed in Annexes V and VI, 1401(3), 1405(5), (6) and (7), 1411 and the reservations in Annex VII).

⁹⁷ *Ibid* [231].

⁹⁸ *Ibid* [232].

jurisdiction by proving that an apparently general measure has been taken with an intention to harm foreign investors.

There does not seem to be any other case to date where the *Methanex* doctrine was so closely considered in an investment dispute outside of NAFTA. All these elements make it possible to globally assess its contribution to international investment law.

4. *An Assessment of the Methanex Doctrine*

Before looking at the contribution of the *Methanex* doctrine to the limitation of host State responsibility, it appears that the jurisdictional function of NAFTA Article 1101(1) is now indisputable.⁹⁹ It is the 'gateway' to Chapter 11 and it clearly serves to circumscribe its field of application only to foreign investment disputes, following *Bayview Irrigation District* and *Canadian Cattlemen for Fair Trade*. Beyond this definitional purpose, the question that remains is whether, and to what extent, Article 1101(1) purports an additional legal test aimed at dismissing illegitimate claims.

The *Methanex* doctrine leaves two possible answers to this question. One is to take a maximalist view of its potential scope and to consider that it allows arbitral tribunals to dismiss, at the jurisdictional stage, any claim based on a measure of general application that is not designed to specifically harm a foreign investor. The other is to take a minimalist view of its potential scope and to consider that it allows arbitral tribunals to dismiss a claim at the jurisdictional stage only when it is brought by a foreign supplier of the ingredients of another product that is subjected to a measure of general application, unless he can demonstrate that the measure was designed to harm him.

The maximalist application of the *Methanex* doctrine did not seem to be excluded by the award, even though the particular facts of the case did not lend themselves to such a broad understanding.¹⁰⁰ As a supplier of the ingredient (methanol) of a product banned by California laws ('MTBE'), the foreign investor in *Methanex* was not at the head of the chain of economic repercussions caused by the measure of general application. Does the case bar the claim of the producer of a product directly targeted by such a measure? Take, for instance, the facts in *Ethyl Corp v Canada*, where a measure directly banned the extra-provincial trade in a product manufactured by the foreign investor in Canada. Was this a 'legally significant

⁹⁹ Kinnear et al, above n 31, 1101–10.

¹⁰⁰ Côté, above n 9, 270–275.

connection' sufficient to meet the threshold of Article 1101(1)?¹⁰¹ Consider the facts in the case of *Dow AgroSciences LLC v Canada*, where the Quebec ban on the sale and certain lawn uses of pesticides harmful for the environment triggered a complaint under Chapter 11 by a foreign manufacturer of pesticides.¹⁰² Was there a 'legally significant connection' between the foreign investor and the ban of the product, assuming that Quebec never intended to specifically harm the complainant? If not, the Arbitral Tribunal—had the case not been settled before proceeding to that stage—could have immediately dismissed the claim at the jurisdictional stage without examining the merits of the case. The Arbitral Tribunal, in *BG Group Plc v Argentina*, was convinced that this maximalist view was the thrust of the *Methanex* doctrine. That is the reason why it attempted to demolish the doctrine because of these far-reaching implications on the responsibility of host States.¹⁰³

Under the maximalist view of *Methanex* doctrine Article 1101(1) could serve to legitimise only individualised investment disputes. It would perform an important function in the privatization of public international law disputes which is typical of the contemporary phenomenon of arbitration between foreign investors and host States. Borrowing from Lon Fuller's concept of 'polycentric disputes',¹⁰⁴ Article 1101(1) would make sure that complex disputes involving a multiplicity of nexuses of interests would not fall under Chapter 11, but could only be challenged under the interstate dispute settlement mechanism of Chapter 20. At the same time, disputes involving measures targeting openly or covertly a foreign investor would be legitimate and fall under Chapter 11. Absent an element of particularization of a measure of general application that would individualise the dispute, foreign investors' claims would fall outside the jurisdiction of any Chapter 11 arbitral tribunal. This maximalist application of the

¹⁰¹ The Arbitral Tribunal in *Ethyl* never ruled on the issue of Article 1101(1) because the disputing parties reached a settlement. See above n 22 and accompanying text.

¹⁰² *Dow AgroSciences LLC v Canada (Notice of Arbitration)* (NAFTA Chapter 11 Arbitral Tribunal, 31 March 2009). The parties in this case reached a settlement in which the measure at stake was maintained and no compensation was granted to the foreign investor: *Dow AgroSciences LLC v Canada (Settlement Agreement)* (NAFTA Chapter 11 Arbitral Tribunal, 25 May 2011).

¹⁰³ See above n 94 and accompanying text.

¹⁰⁴ Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, 394–404; see Lon L Fuller, 'Adjudication and the Rule of Law' (1960) 54 *American Society of International Law Proceedings* 1 (developing the concept of polycentric disputes in a broader discussion over the suitability of adjudication to public international law); Côté, above n 9, 88–90, 544–550 (discussing the inadequacy of 'privatised' judicial remedies for polycentric international trade disputes).

Methanex doctrine has, however, so far not been embraced in a NAFTA investment dispute.

This maximalist view of the *Methanex* doctrine appears sound in terms of a policy of limitation of international responsibility of host States. But it is unclear whether such far-reaching effects were envisioned by Article 1101(1). The fact that many BITs—if not the majority—still do not contain a provision similar to Article 1101(1) would suggest prudence in its interpretation in such a way. In order to achieve the stated goals of ensuring ‘a predictable commercial framework for business planning and investment’ and increasing ‘substantially investment opportunities in the territories of the Parties’ a delicate equilibrium must be maintained between the limitation of host State responsibility and predictability of the legal protection of foreign investors in North America.¹⁰⁵ Furthermore, the preparatory works of NAFTA show that this broad interpretation of Article 1101(1) was never openly discussed in the negotiations. The words ‘measures affecting’ foreign investors or their investments were used in several negotiating documents before being replaced by ‘measures relating to’ without any explanation.¹⁰⁶ The Arbitral Tribunal in *BG Group Plc* pushed the argument too far against the *Methanex* doctrine when it spoke about the ineffectiveness of the substantive protection afforded to foreign investors, if a narrow requirement of connection were required. Even under the maximalist view of the doctrine, the intent to harm foreign investors hidden behind a measure of general application opens the door of Chapter 11. Despite its sound underlying rationale, it is, however, probably unwarranted to pursue this maximalist view too far without a clearer wording or a clarification by the Contracting Parties through interpretative notes.¹⁰⁷

The minimalist application of the *Methanex* doctrine would be that Article 1101(1) allows arbitral tribunals to dismiss claims when the foreign investor is situated further down in the chain of economic repercussions caused by a measure of general application, for example, when it is only the supplier of the ingredient of a banned product, provided that it could be shown that the measure was designed to harm the distant foreign investor. This minimalist view of the doctrine is exactly how it was applied in *Methanex* and most commentators understand this view as being the sole meaning of the doctrine.¹⁰⁸ Hence, contrary to the maximalist view,

¹⁰⁵ NAFTA, preamble, [6], art 102(1)(c).

¹⁰⁶ Kinnear et al, above n 31, 1101–2.

¹⁰⁷ See NAFTA art 1131(2) (empowering the Free Trade Commission to adopt an authoritative interpretation of NAFTA provisions).

¹⁰⁸ Weiler, above n 57, 906; Anenson, above n 57, 687–688, 693–694.

foreign investors manufacturing a product banned by a measure of general application would always satisfy the 'legally significant connection' test and their claim would be legitimate under Article 1101(1).¹⁰⁹

Again, this minimalist view of the *Methanex* doctrine reflects a sound policy of limitation of the international responsibility of the host State. Unlike the maximalist view of the doctrine, the minimalist version has been applied to dismiss the foreign investor claim in *Methanex*. The persuasive authority of the case remains to be seen, and we have already noted that it was directly attacked outside NAFTA by the Arbitral Tribunal in *BG Group Plc*. However sound the minimalist view of the *Methanex* doctrine may be from a policy standpoint, the question that needs to be answered is to what extent it is well-grounded from a legal point of view. At the outset, it is far from clear that the wording of Article 1101(1) supports even the minimalist view of the doctrine, without a clarification by the Contracting Parties in interpretative notes.

The *Methanex* doctrine has been described by Leigh Anenson in her insightful article on the issue as an adaptation to Chapter 11 of the tort of interference imported from US tort law.¹¹⁰ In US law, the interference tort creates a cause of action for intentional interference by a third party in a contractual relationship. The Arbitral Tribunal itself referred generally to Canadian and US tort law in *Methanex*, in support of its newly found doctrine on Article 1101(1).¹¹¹ Another observer noted that the minimalist view of the doctrine showed a test of proximate cause in Article 1101(1).¹¹² In tort law, the proximate cause is one that is 'legally sufficient to result in liability', or that 'directly produces an event and without which the event

¹⁰⁹ Weiler, above n 57, 906.

¹¹⁰ Anenson, above n 57, 703–707. Professor Anenson argues that what I call the minimalist view of the *Methanex* doctrine also finds support in international law. She proffers that refusal to allow a claim for unintentional interference with economic relations by a government ban 'may be best understood as an existing general principle of international law.' 707.

¹¹¹ *Methanex Corp v United States (First Partial Award)* (NAFTA Chapter 11 Arbitral Tribunal, 7 August 2002) [138] ('in the law of torts, there must be a reasonable connection between the defendant, the complainant, the defendant's conduct and the harm suffered by the complainant; and limits are imposed by legal rules on duty, causation and the harm suffered by the complainant; and limits are imposed by legal rules on duty, causation and remoteness of damage well-known in the laws of both the United States and Canada. Likewise, in the law of contract, the contract-breaker is not generally liable for all the consequences of its breach even towards the innocent party, still less to persons not privy to that contract').

¹¹² Weiler, above n 57, 905–906 ('Claims ... were dismissed because of a lack of proximate cause between the breaches alleged and the damages claimed').

would not have occurred'.¹¹³ But was Article 1101(1) the right place for this legal import? More fundamentally, one major flaw of this reference to national tort law is that it totally fails to engage with the international law of State responsibility. Important insights can definitely be derived from national laws, but this cannot be done at the expense of international law, the body of law to which a treaty belongs.

When looking at the law of State responsibility, it seems that the policy objective of keeping illegitimate claims out of Chapter 11 arbitration could have been achieved on a firmer legal basis by relying on the concept of 'causal link' (*'lien de causalité'*).¹¹⁴ It refers to the necessary link between the alleged damages and the international wrongful act.¹¹⁵ The term 'proximate cause' is a variant name for the same concept but the generic term of 'causal link' was preferred by the International Law Commission in its codification of the law of State responsibility.¹¹⁶ The causal link signifies that 'the subject matter of reparation is, globally, the injury *resulting from and ascribable* to the wrongful act, *rather than any and all consequences flowing from* an internationally wrongful act'.¹¹⁷ The specific content of the requirement 'causal link' may vary from one set of primary obligations to another.¹¹⁸ The law of State responsibility, as a general legal framework, would therefore offer sufficient flexibility to welcome the specific legal test drawn by the *Methanex* doctrine in the requirements of the 'causal link' under Chapter 11. Moreover, Chapter 11 seems not to derogate from

¹¹³ Bryan A Garner (ed), *Black's Law Dictionary* (Thomson West, 3rd pocket ed, 2006) 91.

¹¹⁴ See Anenson, above n 57, 727–731 (suggesting to look at the principle of proximate cause as an alternative solution instead of importing the interference tort in Article 1101 because it is still in formative stage in US law, notably as regards the assessment of the intent). See also Weiler, above n 57, 905–906 (considering that the *Methanex* doctrine is an application of the principle of proximate cause in Article 1101).

¹¹⁵ '1. The responsible State is under an obligation to make full reparation for the injury *caused by* the internationally wrongful act. 2. Injury includes any damages, whether material or moral, *caused by* the internationally wrongful act of a State' (emphasis added): *Draft Articles on Responsibility of States for Internationally Wrongful Acts: Report of the International Law Commission*, UN GAOR, 53rd sess, Supp No 10, UN Doc A/56/10 (24 October 2001) art 31. The UN General Assembly took note of the Articles of the International Law Commission ('ILC') on the codification and progressive development of the law of international responsibility of States and brought them to the attention of UN Members: GA Res 56/83, UN GAOR, 56th sess, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002). They are largely considered to be an accurate reflection of customary international law on State responsibility.

¹¹⁶ United Nations, International Law Commission, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, compiled by James Crawford (Cambridge University Press, 2002) 92, [10].

¹¹⁷ *Ibid* 92, [9] (emphasis added).

¹¹⁸ *Ibid* 93, [10].

the general law of State responsibility on the requirement of a 'causal link', since it prescribes that foreign investors may only submit a claim to arbitration if they have 'incurred loss or damage *by reason of, or arising out of*, [the] breach [of a substantive provision].'¹¹⁹

Thus, the legal condition of the existence of a 'causal link' fulfils a function similar to the *Methanex* doctrine, but they arise for consideration at different stages of the legal analysis. While the lack of a 'legally significant connection' prescribed by the *Methanex* doctrine allows the dismissal of a claim at the *jurisdictional* stage, the absence of a 'causal link' allows the dismissal of the claim on the *merits* of the case, once the violation of an international obligation has already been ascertained. The two concepts are therefore not identical, since relying on the 'causal link' to dismiss claims involves that the case must proceed on the merits with the lengthy delays and higher costs that this involves.¹²⁰ Apart from this difference, relying on the 'causal link' of the theory of State responsibility instead of the 'legally significant connection' jurisdictional test of the *Methanex* doctrine would achieve the same policy goal, but on a more solid legal basis.

If the additional time and resources necessitated by adoption of the 'causal link' approach is a concern, one way to deter illegitimate claims could be the award of costs against the unsuccessful complainant. Indeed, this was the main practical consequence for the foreign investor in *Methanex* since it was ordered to pay to the host State the significant sum of \$4 million for legal and arbitration costs.¹²¹ Another way to prevent abuses of Chapter 11 could perhaps be to make a *prima facie* assessment of the causal link at the jurisdictional stage in order to dismiss cases that are obviously unfounded.¹²²

¹¹⁹ NAFTA art 1116–1117 (emphasis added); Anenson, above n 57, 731; cf, Todd Weiler and Luis Miguel Diaz, 'Causation and Damages in NAFTA Investor-State Arbitration' in Todd Weiler (ed), *Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Transnational, 2004) 179 (observing that the questions of causation and damages are two aspects of Chapter 11 which remain rather undiscovered). In *Archer Daniels Midlands Co*, the Arbitral Tribunal entirely based its assessment of damages on principles of customary international law: *Archer Daniels Midlands Co v Mexico (Award)* [275]–[286].

¹²⁰ Cf, Anenson, above n 57, 731 (arguing that the *Methanex* doctrine is unnecessary if one relies on the proximate cause under Chapter 11).

¹²¹ *Methanex Corp v United States (Final Award)* [2005] IIC 167, pt V, [13]; see Weiler, above n 57, 921 (considering that this aspect of the final award in *Methanex* could be the most consequential for future use of Chapter 11 by foreign investors).

¹²² See Audley Sheppard, 'The Jurisdictional Threshold of a Prima-Facie Case' in Muchlinski, above n 20, 961 (observing that some States want to encourage arbitral tribunals to be more robust in dismissing claims at an early stage in international investment law).

All and all, it would be desirable that the *Methanex* doctrine be recast in the theory of State responsibility at the stage of the 'causal link'. This would diminish the importance of relying on the uncertain meaning of the terms of Article 1101(1)—in the absence of a clarification by the Contracting Parties in interpretation notes—while achieving the same policy objective of dismissing illegitimate claims. In addition, recourse to the law of State responsibility would help to unify international investment law rather than fragmenting it on the basis of the existence or not of a provision similar to Article 1101(1) in BITs or FTAs. Otherwise the responsibility of host States could be greater under treaties that do not foresee such a provision, or at least claims could not be dismissed at the jurisdictional stage.

IV. CONCLUSION

Private actors put State sovereignty under stress in investment disputes. Responding to these external pressures, host States experiment with various techniques to limit their international responsibility in a quest to limit claims in international investment law to those they consider legitimate. The lack of a political or legal filter for investor claims makes it necessary for host States to look at new means to dismiss frivolous or illegitimate claims. No solution to this problem is readily offered by the law of treaties or the law of State responsibility. Nevertheless, public international law does frame the discussion on the limitation of host State responsibility. Attempts have been made to use the provisions on the field of application of NAFTA to achieve this objective. This chapter has shown that these efforts have been twofold.

A first attempt was made to consider NAFTA chapters on investment and other issues as mutually exclusive. However, this approach has not found favour. The automatic mutual exclusiveness of NAFTA chapters has been rejected by arbitral tribunals in all the cases where it has been argued. However, some doubts remain about the scope of the exclusivity of the chapters in case of conflict between them, most notably if a trade measure is justified by an exception.

A second attempt, by using the concept of 'measures relating to foreign investors or their investments' in NAFTA Article 1110, has been more successful. In *Methanex Corp v United States*, a new jurisdictional threshold was introduced requiring that a 'legally significant connection' exist between foreign investors or their investments and the measure at stake,

in order for a matter to proceed to the merits. This chapter has shown that in spite of the soundness of its policy objectives, this *Methanex* doctrine raises important doubts regarding both its scope and legal basis. Two possible interpretations of the doctrine can be made and it is desirable that the NAFTA Contracting Parties clarify the meaning of Article 1101 with interpretative notes. More fundamentally, the *Methanex* doctrine should be recast in the 'causal link' of the theory of State responsibility, especially if no notes of interpretation were to be adopted.

As these attempts to resort to provisions on scope of treaty to limit host State responsibility carry some legal uncertainty, other ways are being explored to achieve the goal. New types of provisions are also being introduced in BITs, such as general exceptions imported from international trade law. These legal innovations need further research on their potential contribution to the quest for legitimate claims in international investment law.

CONCLUSION

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Globalization has caused much excitement and concern among international lawyers. Unprecedented challenges and changes visible in many important fields of international law do not easily fit into the traditional perspectives of international law. New perspectives are needed, both to describe accurately what is happening in our globalized world, and to promote the positive effects of globalization further. The challenges posed by globalization to the traditional system of international law have been ones of legitimacy. They have called into question the dominance of the State and State-sponsored organisations in the processes of lawmaking and law application and the invocation of State sovereignty to frustrate the realisation of the rights and interests of their peoples. At the same time, globalization has seen an unprecedented increase of power and influence of certain non-State actors which, at times, circumvent or subvert the policy choices of democratically elected governments. While sovereign States unquestionably continue to hold their unique position in the doctrine of the subjects of international law, with international organizations as offspring of their consent, globalization has also highlighted other heavily influential actors. Their actions cannot simply be discarded as irrelevant to international law: investors sue host States on an equal footing in international proceedings, as do individuals. Private persons may be placed under obligations vis-à-vis other private persons by international human rights law; some non-governmental organizations are powerful enough to move States to conclude treaties. These phenomena have both supporters and critics.

Also challenged by globalization is the scope of international law: what international law purports to cover, and how. Despite the name, *public* international law is still not sufficiently 'public' in many aspects. Globalization led to the acceptance of the idea that the international legal system protects not only reciprocal interests of States but also community interests or 'public' interests such as human rights, environmental protection, and public health. However, the system does not always offer the means to realize such interests effectively. One response to this deficit in the system is seen in the growing amount of 'transnational' litigation: if

there is no world court to realize and protect certain human rights, for example, national or regional courts have to do the job, be it a war compensation issue or the punishment of torturers and war criminals. Another response is accelerated rule-making and institution-creating in areas where hitherto no international rule or framework existed: if the international legal system does not have rules relating to safety in respect of genetically modified foods or climate change, then such rules have to be worked out. These responses are two sides of the same coin, globalization, designed to remedy the international legal system so that it can cope with its challenges. They both require new perspectives on international law for their proper evaluation.

The chapters contained in this collection have explored a number of aspects of the relationship between international law and globalization. International law and international lawyers appear in this context in a number of ways. As Frédéric Mégret has pointed out, globalization has forced the recognition that the subjects of, and participants in international law—those involved in the making, interpretation and implementation of international law—can no longer be confined to States.¹ Individuals, international organizations, and corporations have all been afforded formal and informal roles as subjects or participants in the construction of the international legal order.² The discussions by Anastasia Telesetsky of the need to recognize the role of transnational corporations in the implementation of international environmental law, and by Robin Hansen of the need to recognize under international law the particular status of multinational enterprises, illustrate this, as does the exploration by Michael Kelly of the reasons for extending criminal responsibility under international law to corporations. Christopher Michaelson's chapter on Security Council sanctions targeting private individuals is testament to the fact that the increasing role of non-State actors in the field of peace and security provides complex challenges to the State-centric approach of collective security as framed by the United Nations Charter.

Globalization has also expanded the objects of international law, moving it well beyond a focus on traditional inter-State interactions to a range of different phenomena that cross national borders or assume international importance—from non-international armed conflicts to international terrorism to human rights. Mégret argues in this context that

¹ Frédéric Mégret, 'Globalization', *Encyclopedia of Public International Law*, www.mpepil.com (February 2009).

² See also Stephan Hobe, 'The Era of Globalization as a Challenge to International Law' (2002) 40 *Duquesne Law Review* 655, 660.

globalization 'has changed the conditions of production of international law', bringing a range of non-State actors into the process of international law-making,³ accelerating the rate of development of international norms and increasing the diversity of types of norms that form part of modern international law. Dwight Newman's discussion of the evolution of the norms relating to prior consultation with indigenous peoples illustrates a change in the cast of actors that contribute to the formation of international law. The need to move to protection of community interests and the challenge that more traditional bilateral or reciprocal inter-State relations pose for this is illustrated by Yoshiyuki Lee-Iwamoto's discussion of the role of provisional measures in the ICJ as well as by Mika Hayashi's examination of the utility of moving beyond bilateral models in the context of the removal of explosive remnants of war. Anna Spain's argument that a much more variegated and sophisticated system of dispute resolution is needed at the international level also underlines the need to move beyond traditional forms of resolving or avoiding conflict. Indeed, what all four chapters in Part I have in common is that they illustrate the need to adapt classic international legal tools to regulate and adjudicate community interests and conflicts in order to be able to deal with phenomena of the current era of globalization.

The proliferation of norms and regimes stimulated by globalization has generated a new need for identifying the relative status of competing norms and the relationship between regimes—manifested, for example, in the academic discussion over the fragmentation *vel non* of international law, and efforts to bring environmental and human rights norms into the more powerful institutional contexts of international trade and investment law. The four chapters in Part II respond to this challenge which was also identified by the International Law Commission's 2006 report regarding consequences of globalization, in general, and fragmentation of international law, in particular.⁴ They do so by examining the practice of its different sub-systems (such as international criminal law, international humanitarian and human rights law to international trade law and international environmental law) and actors (such as States, regional blocs, international courts and arbitral tribunals, international commissions, and secretariats). Institutional cooperation, coordination, interoperability and management are terms used by Webb, McCosker, Biuković and Scott

³ Mégret, above n 1, [33].

⁴ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006).

to emphasize that the process of deepening and widening of international law is inevitable, and that the focus should be on finding ways to achieve the harmonious co-existence of sub-systems and their institutions rather than on attempts to unify them.

A further striking feature of a globalizing world is the increased engagement, formal and informal, of multiple actors other than States in rule-making and governance. The chapters that make up Part III have addressed the growing role of non-State actors in international law and have provided distinct perspectives on their impact on international law. The growing prominence and influence in international policy-making of actors including multinational corporations, arbitral tribunals, indigenous groups, and even secessionist groups may suggest a legal shift from international law as an exclusive enterprise of States to some new and yet to be fully defined model of interaction between States and non-State actors. A key challenge, however, will be how to grasp this new model of interaction in a meaningful way. Telesetsky, Hansen and Newman have all provided explanations as to why it has been difficult to involve various non-State actors in international law. They have also demonstrated why it may be necessary to legally recognize non-State actors as key contributors to international policy-making in areas that touch upon community interests, and further, what limitations may be necessary to ensure that non-State actors do not impair the legitimacy of the international legal process.

The issues arising from multiple actors can be also looked at as a possible transformation of power for States. The exposure of States to private actors has a significant impact on the classic assumptions about State authority. Together with the multiplication of actors, global economic integration also challenges the power of States to monopolize policy direction. There is no denying that States' *domaine réservé* is affected by this intensification of international relations. The question is to what extent. These issues were tackled by the authors of the chapters in Part IV of the book. The discussions by Yoshihisa Hayakawa and Charles-Emmanuel Côté illustrate the ways in which the frameworks for international investment protection bolstered by international law pose a challenge to the ability of the nation State to regulate events within its own territory and a field of contest and interpretation where States seek to resist the erosion of their sovereign decision-making. Tomonori Mizushima's analysis of recent Japanese legislation on State immunity in the light of international standards and practice in other States illustrates not just the continuing relevance of this area given the involvement of State entities in

commercial activities, but also the way in which these rules of international law facilitate international trade.

For Frédéric Mégret, 'one of the lessons to be learnt from globalization historically is the remarkably plastic and adaptable nature of international law, as a law less wedded to certain objectives than it is a supple system of regulation designed to make the most of any epoch's priorities.'⁵ This might suggest that international law is essentially instrumental or super-structural, providing justification and legitimacy for a normative and regulatory system, rather than as a system that embodies certain values such as human rights that should not be compartmentalised by applied through the whole of international law and its institutions.⁶ Yet as he recognizes there are roles that international law is being called on to play in the current era 'to seek [to] tame some of the excesses of globalization, by standing for a certain form of global distributive justice.'⁷ International law can thus be seen as providing for greater participation by ensuring that a wider range of voices are heard; international law also has the ability 'to locate power and ascribe authority and its corollary, accountability'.⁸

At the same time, international law may also act as a form of restraint, as a resource for resistance to globalization, for example efforts by States to develop international law norms that protect their own cultural assets against an ever encroaching globalized (US or Western) culture.⁹ As the chapters in this volume have illustrated, globalization has many faces and the role that international law plays varies considerably—a constitutive role, facilitation, or a site and means of resistance or moderation. What is clear is that the process of globalization will continue (as will forms of resisting and harnessing it to national and local needs), and that international law and international lawyers will continue to grapple with the phenomenon in its various forms in the foreseeable future.

⁵ Mégret, above n 1, [45].

⁶ See Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 3 *European Journal of International Law* 435, 447.

⁷ Mégret, above n 1, [45]; Robert McCorquodale and Richard Fairbrother, 'Globalization and Human Rights' (1991) 21 *Human Rights Quarterly* 735, 763–766.

⁸ Mégret, above n 1, [46].

⁹ Mégret, above n 1, [44]; Armin von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law' (2004) 15(5) *European Journal of International Law* 885, 891–892.

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