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Foreword

This book presents a discussion on the influence of human rights on international law. Why and how, if so, does human rights law influence other parts of international law or the basic structure of international law as a whole? Is there a streamlining effect resulting from human rights law that leads to the constitutionalization of international law?

The book is based on the proceedings of a research workshop held in Tbilisi (Georgia) in September 2012. French, Georgian, and German researchers met, had vivid discussions, and learned from each other on this very important subject.

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Potsdam, Germany — Norman Weiß
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Introduction

International Human Rights Law

Whereas classic international law was divided into the law of peace and the law of war, we witness that international law today covers more issues than these two or, to be more precise, that the law of peace is highly differentiated into very specific areas. This became possible as a growing number of issues were internationalized and became matters of interstate cooperation. Human rights law itself is one of these new areas whose breakthrough started in 1945: in December 1948, the Universal Declaration on Human Rights was proclaimed by the UN-General Assembly.

The first phase of the Cold War postponed that human rights treaties were concluded; this process started with the Convention of the Elimination of All Forms of Discrimination (CERD) in 1966, followed by the two International Covenants on Human Rights in 1965. Today, we have nine major human rights treaties amended by a set of protocols. Additionally, we have the so-called charter-based system of the protection of human rights within the UN. Based on the UDHR, the Commission on Human Rights (1945–2005) and the Human Rights Council (since 2006) developed a number of mechanisms and generated standards in order to protect human rights.

The aim of international human rights law is to protect individuals by preserving their freedoms and by creating opportunities. Human rights as legal rights create an obligation for states to respect, to protect, and to fulfill.

Impact of Human Rights on International Law

In our workshop, we discussed the impact of human rights law on international law: do human rights have the power to change our understanding of international law? In the first line, we had to ask whether international human rights law modifies other fields of international law. Contributors focus on possible spill-

over effects of human rights on international economic law or on international criminal law.

In the second line, we discussed whether international human rights law has a streamlining effect on international law as a whole. This might be identified as a process of constitutionalization. In this reading, human rights can be understood as core principles of the international legal order and thus have an effect on the general law of treaties or on the settlement of disputes.

Results

Although human rights law is a relatively young field of international law, its contents and core values today are of major importance for the interpretation of international law as a whole. As we witness a redefinition of sovereignty as a responsibility of states towards the people and a shift to greater relevance of the individual in international law in general, it is a logical consequence that human rights have an impact on other areas of international law.

This impact may not be the same in each case, and we will not reach full coherence in the near future. This would neither be necessary nor desirable, but streamlining human rights will make international law more apt to perform its major function of today: to serve the interests of human beings.

Norman Weiß
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Part I
Theoretical Approaches and Issues of Fragmentation and Constitutionalisation of International Law by Human Rights Law

Chapter 1
From Law as a Means to Law as an End: About the Influence of International Human Rights Law on the Structure of International Law Rules

Audrey Soussan

1.1 Introduction

The conception of law as a means derives from the distinction between law and politics. Politics is here understood as related to community life, not as a way to govern or to use power. In the French language, we have two different words: *le* politique and *la* politique. The first one is about common good or common interest, whereas the second refers to the use of power, that is to say the world of politicians. The second definition will be excluded from this study.

To define politics is a way to define law and to understand how law becomes integrated into society. But *human rights law* in particular pushes us to rethink of the distinction between law and politics. Human rights law is not just about rights but also about a political project for society. This is true for States and also for the international legal order. For example, the Charter of the United Nations defines the purposes of the organisation. It is "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging respect for human rights and for fundamental freedoms* for all without distinction as to race, sex, language, or religion".[1]

The purposes of an organisation such as the United Nations constitute a project for almost all the States of the world, and according to the above-quoted text of the Charter, the aim of the community life in the international legal order is the respect

[1] Article 1, para. 3, emphasis added; the preamble of the Agreement Establishing the World Trade Organization (WTO) provides that one of the objectives of the Parties to the agreement is "*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment". The agreement here refers to social rights as a part of human rights and as the aim of the WTO.

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of human rights and fundamental freedoms. Then how is it possible to distinguish the legal rules that constitute a means from the legal rules that constitute a purpose, a project, or an aim? To do that, it is necessary to distinguish law from politics as regards human rights law (Sect. 1.2) and then to distinguish legal rules that are means from the ones that are ends (Sect. 1.3).

1.2 Law as a Means and Politics as an End as Regards Human Rights Law

It is necessary to define law in relation to politics, particularly as regards human rights law. Indeed, human rights are not only legal rules but a project too, a *political* project. To understand the nature of human rights and their influence on international law, we have to understand first the distinction between law and politics (Sect. 1.2.1). Second, we shall deal with the articulation between these two concepts (Sect. 1.2.2).

1.2.1 The Distinction Between Law and Politics

The distinction between politics and law can be explained as a temporal distinction. Politics is about the future, about elaborating a project for the community, while law is about the present. As we can say, law is always formulated or written in the present tense—except perhaps in Spanish, in which language the future is used, like in the Ten Commandments. For example, we may read that "[e]veryone has the right to freedom of movement and residence within the borders of each state"[2] and not "everyone shall have the right to freedom of movement" even though rules are even valid for the future.

Therefore, politics as a project constitutes an end, a purpose. In this way, Julien Freund claims: "Le droit est l'ensemble des règles que la politique se donne pour utiliser avec plus d'efficacité la force au service du but du politique."[3] He adds: "le droit n' [est] jamais qu'[un] moyen et n'[a] donc pas de signification par [lui-même], mais uniquement par la fin ou le but que l'homme se propose d'atteindre par l'organisation politique."[4] It means that law is only a means serving the aim determined by politics. Law as a means is then not significant by itself; its meaning is the result of the aim proposed by politics for human beings to reach.

[2] Article 13, para. 1, Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, Resolution 217 (III).

[3] Freund (2004), p. 730.

[4] Freund (2004), p. 730.

Politics as a purpose needs to use means such as law. And to accomplish that purpose, it needs to use means. As Friedrich Hayek sustains: "the chief instrument of deliberate change in modern society is legislation."[5] As we say, one of the most important means at politics' disposal is the law. Indeed, how is it possible to implement a political project apart from adopting rules of law? For instance, a project might be rooting out slavery. One of the means used is the prohibition of slavery, that is to say the adoption of a rule prohibiting slavery. Both law and politics are then defined one by the other. Thus, Hans Kelsen claims about the means–end relation that something is an end only in relation to something else as a means.[6]

From that point of view, politics is always about what is collective, what is common to every part of a society, whereas law, and especially human rights law, offers individual answers.[7] For all these reasons, would there be a contradiction between the collective project and the individual rights? Indeed, the aims stated by the human rights, such as the right to life, the right to freedom of opinion and expression, or the right to work, are almost impossible to reach, particularly by States. Those ones would not be able to control everything everywhere even if they were totalitarian States.[8] Human rights, and perhaps social rights more than political ones, are unreachable.

Yet politics is always about law. The legislator, isn't he a lawmaker? His duty is to adopt legal rules. And human rights remind us the duty, especially of States, to implement public policies in their legal order or in the international one. From that point of view, there is no contradiction between human rights and politics. On the contrary, human rights law needs politics, perhaps even more than the other bodies of law.[9] Then the development of human rights law leads to a rethink of the

[5] Hayek (1983a), p. 65.

[6] Kelsen (1991), p. 12.

[7] "L'éclosion des droits privés censés répondre à la fiction de l'état de nature de l'homme opère une disjonction entre leurs titulaires et le corps social dans son ensemble, entre les bénéficiaires de ces droits et leur expression civique. L'articulation entre appartenance et indépendance semble avoir vécu. C'est ce que résume lapidairement Marc Sadoun selon lequel l'État 'renonce au citoyen pour ne considérer que l'individu'", Bec (2007), p. 192; she quotes Sadoun (2000), p. 10.

[8] Hayek (1983b), p. 104: "It is evident that all these 'rights' are based on the interpretation of society as a deliberately made organization by which everybody is employed. They could not be made universal within a system of rules of just conduct based on the conception of individual responsibility, and so require that the whole society be converted into a single organization, that is, made totalitarian in the fullest sense of the word."

[9] "Dans le domaine de la protection sociale [...], l'intervention de l'État social tend à se réduire à une production de droits 'à la subsistance', 'au logement', 'à la santé', 'au travail', autant de droits distribués au nom de la référence que représentent dès lors les droits de l'homme et *en dehors de tout projet politique collectif*. Alors, la réponse de l'État ne peut être qu'une réponse juridique, prenant en charge les groupes cibles sur fond de délitement du projet collectif, intégrateur promotionnel antérieur. L'État octroie généreusement une série de droits qu'il a quelque difficulté à rendre effectifs", Bec (2007), p. 191, italics in the original.

articulation between law and politics. Law and politics complement each other so that human rights could be effective.

1.2.2 Law as a Means for Politics: About the Effectiveness of Law?

There need to be two concepts so as to define one or the other as a means or as an end. In that conception, law is not totally autonomous as it is integrated in a concrete world. Rudolf von Ihering claims: "Purpose is the creator of the entire law; [. . .] there is no legal rule which does not owe its origin to a purpose, *i.e.*, to a practical motive."[10] One may object that law is often performative, as in the book of John Austin, *How to do things with words*.[11] For example, I can bet you something, by saying that I effectively bet you the thing. The most famous example is probably the one of marriage. If I am empowered, I marry you as I say "I marry you". In that case, law is effective as it is declared. But these situations are really far from human rights law (except perhaps for the right to property). Consequently, a purpose can't be accomplished only as it is desired or formulated. It needs a medium. We can conclude that law is a means for an end, usually defined or which *has to* be defined by politics.

Then the effectiveness of human rights needs to draw a political project. It may be noted that a lot of international texts that provide human rights have no binding force, such as the Universal Declaration of Human Rights.[12] This great influence of soft law in international human rights law is not a surprise. Indeed, these declarations establish a political project perhaps even more than legal rules. For instance, about the Charter of Fundamental Rights of the European Union, Florence Benoît-Rohmer wrote in 2003: "La Charte est ainsi venue *renforcer la politique de l'Union* qui tend aujourd'hui à faire de la reconnaissance des droits économiques et sociaux l'un de ses axes prioritaires."[13]

Furthermore, if bodies of law other than human rights law are always formulated in the present tense—at least in English and in French—human rights law constitutes sometimes an exception. While most human rights and fundamental freedoms are formulated in the present tense, some are not. For example, the right not to be a slave is sometimes formulated in the future tense. The Universal Declaration of Human Rights states that "[n]o one *shall be* held in slavery or servitude; slavery and the slave trade *shall be prohibited* in all their forms".[14] In the same way, the International Covenant on Civil and Political Rights provides that "[n]o one *shall*

[10] Von Ihering (1913), author's preface, p. liv.

[11] Austin (1982).

[12] Adopted by the United Nations General Assembly on 10 December 1948.

[13] Benoît-Rohmer (2003), pp. 171–172, emphasis added.

[14] Article 4, emphasis added.

be held in slavery; slavery and the slave-trade in all their forms *shall be prohibited*".[15] We shall notice that the International Covenant on Civil and Political Rights is not part of soft law but is an international treaty, binding on all States Parties. One might conclude that the prohibition of slavery in the Covenant is part of soft law because it is formulated in the future tense, but it would be a little exaggerated. That may reflect instead the fact that human rights are also, perhaps above all, a project for the future, that is to say a political project. Then it becomes difficult to distinguish politics from law within the context of human rights.

Besides, human rights need a political project, i.e. public policies, and legal rules to become effective. Politics and law are then inseparably linked. Accordingly, Jacques Commaille stated: "l'évaluation des politiques publiques est susceptible d'apparaître indissociable d'une évaluation législative, la recherche de l'efficacité du droit étant liée à celle de l'efficacité des politiques concernées."[16] It means that to assess a public policy, it is necessary to assess the efficiency of law. Indeed, establishing a political project is a matter of politics, then this project needs law to be carried out, and finally legal rules require public policies to be effective. Indeed, Julien Freund sustains: "[l']obligation juridique est hétéronome: elle suppose une autre volonté que celle du juriste. D'ailleurs, une norme ne se définit pas conceptuellement par la volonté, puisqu'elle est règle et non pas fin. La contrainte est donc nécessairement extérieure au droit et ne peut lui venir que du pouvoir politique qui dispose de la force et de la décision. Autrement dit, le droit positif n'est pas générateur de lui-même, il suppose un législateur qui n'est pas le juriste, mais le politique."[17]

As a consequence, we may say that politics needs law as a means, but in the context of human rights, law and politics are tightly interrelated, and it becomes really difficult to distinguish what is the concern of politics or of law.

1.3 Law as a Means and an End: About the Articulation Between Positive Law and Natural Law

Human rights are about legal rules *and* about a political project. It means that at the same time they are an ideal to be achieved—as a project—and have authority to be effective—as legal rules. Nevertheless, human rights and human rights law are two different notions. And if human rights constitute obviously a political project, human rights law is a set of legal rules. It is then necessary first to question the articulation between positive law and natural law, into the context of international human rights law, and to describe how the rules of international human rights law

[15] Article 8, para. 1, International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, Resolution 2200 (XXI), emphasis added.

[16] Commaille (2003), p. 480.

[17] Freund (2004), p. 728.

have become an end (Sect. 1.3.1). Second, we shall turn to the question of how rules as a result have developed in other bodies of international general law (Sect. 1.3.2).

1.3.1 Human Rights Law Rules as an End

International human rights law is growing so that the *rules* became the aim to reach. It means that the objective of human rights law has become the adoption of the rule itself even more than its effectiveness—the effectiveness, even though it is very important, only asserts itself at a second phase. For example, the preamble of the Convention against torture provides: "considering that [. . .] *recognition of* the equal and inalienable *rights* of all members of the human family is the foundation of freedom, justice and peace in the world".[18] The same sentence appears in the preamble of the International Covenant on Civil and Political Rights.[19] Of course, there is also a reference to the effectiveness of these rights, even though it is in an indirect way. The covenant states: "considering the obligation of States [. . .] to promote universal respect for, and *observance* of, human rights and freedoms".[20]

Even where the result is effective (for example, the absence of slavery), the formulation of the interdiction is still considered necessary. "It is a matter of policy." But it may be considered that law is not about principles; it is not about *moral* principles. Law is about the behaviour of its subjects. By placing the rule at the centre, it thus becomes its own end. The rule exists for itself, and the political project only amounts to a project about law, that is to say a project about the establishing of rules. For example, the recognition of violations of human rights becomes as important as—and sometimes even more important than—the absence of violation of human rights. Also, the recognition of former genocides is now a great issue, for instance in Europe,[21] as important as the absence of genocide itself. The political project is then no longer about the concrete community life; it becomes something exclusively abstract. Politics and law as a couple remind us that both are concrete; they are about real life (event if they are ideals), not only about ideas. On the opposite, even political ideals have authority to be effective.

Consequently, in the context of human rights law, the problem is how to define the end of human rights. What defines the aims of these rules? As we have said, the relation from a means to an end is a relation between two different things. If human

[18] Preamble (1), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984, Resolution 39/46, emphasis added.

[19] Preamble (1), International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, Resolution 2200 (XXI).

[20] Preamble (4), International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, Resolution 2200 (XXI), emphasis added.

[21] The recognition of the Armenian genocide is now a great issue linked to Turkey's potential adhesion to the European Union.

rights are considered as the aim of human rights law, it implies that there is something extern that comes into human rights law. Then law has no longer an autonomous foundation but a heteronomous one. It means that the foundation of human rights law is not a political project, it is not the rule itself, it can only be rules that are extern, and this is the definition of natural law.[22] Natural law is always thought of as a *lex ferenda*, the law as it ought to be. By then, human rights law is a means to an end, which is no longer the effectiveness of the rule, that is to say its accomplishment, but the searched end is the adoption in *positive* law of natural rights. It means that the aim of international human rights law is only to convert natural law into positive law. Then law is no more a social concept; it is only a moral one.

That function of human rights expresses a special conception of human rights as preceding any public policy. Human rights become thus a preliminary condition for politics. But the shift from law to politics of human rights cannot be accomplished without establishing a collective project, a project for the community.[23] This balance between politics and law, between what is collective and what is individual, is essential to fulfil some ambitious project, such as the effectiveness of human rights.

1.3.2 Rules of Other Bodies of International General Law as a Result

That use of legal rules as the means *and* the end can also be observed in other bodies of international law. These rules are often formulated directly as results and no longer as a means. In general, the law tends to suggest *procedures*, *techniques*, some kind of *algorithms* that are applied and lead to a result that is not contained in the rule itself. The result is discovered by applying the rule, not vice versa. For example, if I have to determine a boundary, a land border, I look for the legal rule applicable, then I apply it, and only at the end am I able to know the concrete boundary. But international rules are more and more formulated as results to reach and not only as procedures or techniques.

Theses references to a result and not only to a technique seem like obligations of conduct. Indeed, there is a distinction in law between obligation of result and obligation of conduct (or obligation of means). Most legal obligations are obligations of result, but there are more and more obligations of conduct. For instance,

[22] Alain Sériaux defines natural law as "un droit objectif, universel et passablement immuable, auquel toute législation humaine doit se conformer si elle veut être juste", Sériaux (2003), p. 508.

[23] "L'absence de dimension politique et collective ampute [*les droits sociaux*] du pouvoir qui leur était attribué. Ce ne sont pas des droits qui, en compensant les inégalités, en réduisant les écarts, attribuent du pouvoir à ceux qui en manquent; ce sont des droits qui visent le maintien d'un seuil de survie et qui, à ce titre, méritent le qualificatif de 'droits gestionnaires'", Bec (2007), p. 194.

social rights are, for the time being, obligations of conduct because they need the implementation of public policies to be fulfilled. This development of obligation of conduct in international general law is a way to insist on the desired result, i.e. justice or equity. Then the means is no longer significant; only the result matters, that is to say the equitable result.[24] For instance, the Vienna Convention on the Law of Treaties states that separability of treaty provisions is possible, if the "continued performance of the remainder of the treaty would not be *unjust*".[25] In the same way, the Montego Bay Convention lays down several rules for the maritime delimitation, as the territorial sea, by referring to a technique of delimitation that conduces to an equitable result.[26] Thus, article 83 provides, about the delimitation of the continental shelf between States with opposite or adjacent coasts: "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law [. . .] *in order to achieve an equitable solution*."[27] This led the International Court of Justice (ICJ) to state in the *Cameroon/Nigeria* case: "delimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity. The Court's jurisprudence shows that, in disputes relating to maritime delimitation, equity *is not a method of delimitation, but solely an aim* that should be borne in mind in effecting the delimitation."[28] Even if the ICJ claims that achieving an equitable result is very different from delimiting in equity, it is difficult to see in practical terms where the difference is. In both cases, what was looked for was the result, and a fair one.

But these kinds of rules, even if they are mandatory, do not look like legal rules. Besides, the Statute of the ICJ states that the Court's "function is to decide in accordance with international law" but "shall not prejudice the power of the Court to decide a case *ex aequoet bono*, if the parties agree thereto". It means that on one hand there is law and on the other hand there is equity. And we shall assume that equity is not law but justice. Thus, by formulating rules as results, legal rules change automatically into moral rules.

Consequently, by not proposing anymore a way to settle a dispute, but only by proposing a *final* value—perhaps a moral value—these rules generate misunderstandings and a worrying increase of conflicts, each side considering itself legitimate in its own interest. Indeed, what I want is always fair or legitimate to me. And if there is not a means proposed to determine how to comply with the law, if there is no process defined in a legal rule, it becomes much more difficult to find a legal

[24] About equity in international law, see Degan (1999), pp. 89–100.

[25] Article 44, para. 3, c, Vienna Convention on the Law of Treaties, 23 May 1969, emphasis added.

[26] Articles 59, 69, 70, 74, and 83, United Nations Convention on the Law of the Sea, 10 December 1982.

[27] Article 83, para. 1, United Nations Convention on the Law of the Sea, 10 December 1982, emphasis added.

[28] ICJ, Judgement, 10 October 2002, The Land and Maritime Boundary between Cameroon and Nigeria, Cameroon v. Nigeria, Equatorial Guinea intervening, para. 294, emphasis added.

settlement to a dispute. If law suggests only a moral outcome, then an agreement will be hard to find. Therefore, this kind of rules leads to an increase of conflicts. So the law no longer exercises its function—which is to offer a method of disagreement resolution—but it creates the conflict, even though the conflict goes to court. To create disputes is not to avoid a conflict; it is creating conflicts instead of preventing them. It should be added that law intervenes not only *after* a conflict but in every relation between its subjects. Then its function is also and above all to avoid the change of different opinions into conflicts. But the fact is that by the adoption of legal rules, which only refers to a result—as the Montego Bay Convention—it may be observed an increase of maritime delimitation disputes and proceedings.

In the same way, it may be observed an increase of human rights law cases. Indeed, any body of international law, and perhaps of any kind of law, can be linked to human rights law. Any case can give rise to a conflict on human rights. And theses cases are particularly difficult to resolve because human rights themselves are somehow opposed to one another. For instance, freedom is in opposition to equality; the right to own property is in opposition to the right to enjoy the benefits of scientific progress.[29] Furthermore, as human rights are always linked to a value, the consequences are the same as in the other bodies of international law: my interest seems always legitimate to me. Then it becomes much more difficult to find a settlement in a dispute that involves human rights. The consequence is an explosion of human rights law cases and also of the cases of every body of international law.

1.4 Conclusion

In conclusion, we may say that by the impulsion of international human rights law there is a development of international rules as results to reach. This fact implies consequences not only on international rules but also on the articulation between politics and law. As there is no longer a purpose for the rules, these ones could block politics in its proposal for a collective future. Even in States' orders, by the influence of human rights law, politics suggests less and less collective vision or collective project. Finally, it is not really a surprise because human rights are perhaps also a political project, an ideal to reach and not only enforceable rights.

[29] Article 15, para. 1, b, International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966, Resolution 2200 (XXI).

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Chapter 2
Jus Cogens and Human Rights: Interactions Between Two Factors of Harmonization of International Law

Erika Hennequet

2.1 Introduction

George Abi-Saab said that even if *jus cogens* were "an empty box, the category was still useful: for without the box, it cannot be filled."[1]

The quantum physics paradigm of the Schrödinger cat suits well peremptory norms of international law. The Schrödinger's fictitious experiment consists in leaving a cat with poison in a box and locking it. The exterior observer will be unable to say if the cat in the box is dead or alive. Therefore, the cat is alive and dead at the same time. It is only when the box is opened and the contents observed that we can opt for one of the two possibilities. The same seems to go with *jus cogens*. It is known that a *jus cogens* category actually exists, yet observers seem to be unable to clearly decipher what is in the box. This uncertainty leads to a variety of guesses on the contents of the *jus cogens* box.

After *jus cogens* has been defined as a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character,"[2] many have thought on the potential use of *jus cogens* and what type of norms *jus cogens* could encompass.

Indeed, many hopes have been placed on *jus cogens*. Most significantly, the possibility that *jus cogens* will introduce a form of verticalization of international law and will finally give a constitution to the international legal order has been put to the fore. Professor Orakhelashvili defines the constitution as regulating "the issues of basic importance for the relevant community" and as prevailing "over

[1] Abi-Saab (1973), p. 53.

[2] Article 53 of the Vienna Convention on the Law of Treaties, 1969.

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ordinary laws"[3] and asserts that peremptory norms of international law meet the two criteria. A. Peters states that "*(j)us cogens* norms can be said to operate as constitutional law because they establish a normative hierarchy based on material factors." And she adds that they acquire this peremptory character because of "the particular moral values they embody."[4] Thus, for these two authors, an element of the constitution of international law must include at least two features: (1) a rule that is hierarchically superior to international law rules in general and (2) a rule that expresses core values of the international community. But which values are to be qualified as being at the foundation of the international constitution? It is at this point that human rights and *jus cogens* may interact as both would highly rely on values. According to F. Sudre, "international human rights tend towards the statement of an ideology shared by the human kind."[5] Thus, there may be an overlap between human rights and *jus cogens* if both sets of rules rely on the same value allowing, as a consequence, the inclusion of human rights in the *jus cogens* category.

Some authors argue that *jus cogens* and human rights share many similarities.[6] The combination of the two sets of rules would give rise to harmonization of international law and ultimately to unification once the two are fully developed. Hence, *jus cogens* will become the vector of diffusion of human rights in the international field and would give more "bite" to it.[7]

Human rights can be understood as the rights and fundamental liberties inherent in the dignity of human beings.[8] Therefore, they must be indivisible and universal.[9] Human rights' universality seems to hold some similarities with *jus cogens*, as is the fact that some are bound to be non-derogable. Despite their universality, human rights are still governed by international law, and under international law as such they do not bear any specific character that would allow them to weigh more than other rules of international law in general. This *status quo* may have changed with the fact that some human rights rules have acquired a *jus cogens* character.

In order to be recognized as *jus cogens*, a norm needs quasi-universality. Even if the purpose of human rights is to reach universality of recognition and enforcement, sometimes difficulties are encountered on that specific matter. A. Cassese underlines the discrepancies existing between the universalistic doctrine of human rights and the reality faced by a "huge variety of implementation of human rights by the various states."[10] Here, the possibility of interaction between the two is clear. Some

[3] Orakhelashvili (2009), p. 1.

[4] Peters (2012), p. 123.

[5] Sudre (2011), p. 38, translation of the author.

[6] Bianchi (2008), p. 491.

[7] Barnidge (2008), p. 6.

[8] Salmon (2001), p. 396, translation of the author.

[9] Sudre (2011), p. 85.

[10] Cassese (2012), p. 136.

"core human rights"[11] have become customary international law because of their universal application and recognition by the States. This being the case, they are good candidates to be part of the *jus cogens* norms, if the international community of States as a whole recognizes their non-derogable character. Consequently, it is possible for a rule to be a human right and a *jus cogens* norm simultaneously.

More specifically, it means that if peremptory norms of international law were combined with human rights, this would contribute to the enforcement of the latter. This would be the case if both sets of rules had similar contents; then if one set of rules were to fail in its application, the other could take over and allow more chances for an effective enforcement. The reinforcement would be provided by the repetition of the norm, by its duplication. The same norm would appear in two different sets of rules giving to the former a double character: human rights character and *jus cogens* character. Finally, the cloning of the norm in two different sets of rules would lead to mutual enrichment and further and steadier development. It must be specified that we do not mean that a new norm will be created. The only consequence would be that a norm will acquire a *jus cogens* character as well as the human rights character already in existence. This is what is meant by the existence of the same norm in two different sets of rules. In that case, the non-derogable character of *jus cogens* can be seen as a safety net ensuring that no state can breach a human right that is *cogens*. Both could then contribute to a harmonization of international law.

The discovery of *jus cogens* gives rise to several questions relating to the interactions between human rights and *jus cogens*. To what extent could *jus cogens* actually contribute to the promotion of human rights and finally to the harmonization of international law? First, we will analyze the process of harmonization described in the doctrine, and then we will assess if *jus cogens* can fulfill these expectations.

2.2 *Jus Cogens* and Human Rights, Potential Vectors of Harmonization of International Law

Maybe the box of *jus cogens* was empty on the day it was discovered, but, to the eyes of some academics, it became gradually a vector of reinforcement for human rights. This oriented perception of *jus cogens* tends towards a far-reaching assimilation of *jus cogens* and human rights that is seen as "an almost natural intellectual reflex."[12] The circulation of ideas and concepts between the two sets of rules is possible, mainly thanks to the claimed similar values and enforcement mechanisms shared by human rights and *jus cogens*.

[11] Cohen-Jonathan (2008), p. 61.

[12] Bianchi (2008), p. 495.

2.2.1 *The Shared Values of* Jus Cogens *and Human Rights*

Both would have a similar goal, namely the incorporation of values into international law. One of the similarities between human rights and *jus cogens* would be that both express the acknowledgment of the "ethical and political considerations"[13] that exist behind the objectively identifiable rules. *Jus cogens* would be the illustration that norms can be ordered according to "their underlying values."[14] Thereafter, the problem of identification of human rights and *jus cogens* norms is solved, thanks to an intuitive representation based on a widely shared moral intuition.[15] Human rights as well as norms of *jus cogens* are human centered in the sense that they aim to protect the individual against the use of discretionary power of the State. Professor De Londras claims that *jus cogens* is "essentially religious embodying, as it does, the basic protection that represents a consensus between different religions about the basics of human dignity."[16] Supposedly, this is what is at the roots of *jus cogens*. As human rights, *jus cogens* carries an ideology in its heart, and all actions made through *jus cogens* and by *jus cogens* should fulfill this aim. The main aim is to provide an expression for the necessity to have the establishment of a public order.[17] Professor Klein asserts that this would contribute to create "the basis for a legal international community."[18]

Those examples are an illustration of the appreciation of the value of *jus cogens* and its transformation into a religious or magical object or, at least, the embodiment of ethics and values in the international legal system.

Such a value-centered approach of *jus cogens* is not limited to the appreciation of the doctrine but can be found in judgments of the International Criminal Tribunal for ex-Yugoslavia (ICTY) and of the Inter-American Court of Human Rights (IACtHR). It is in the Furundzija case[19] that the prohibition of torture was first recognized as being a *jus cogens* norm by an international tribunal. To assess whether or not the prohibition of torture has acquired a *jus cogens* character, the Tribunal did not use the test apparently laid out in the Vienna Convention on the Law of Treaties of 1969.[20] The Tribunal did not analyze the practice of States or their declarations to find out whether they consider that prohibition of torture is a *jus cogens* norm. Indeed, the Tribunal asserts that "[b]ecause of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty

[13] Bianchi (2008), p. 495.
[14] Bianchi (2008), p. 495.
[15] Bianchi (2008), p. 497.
[16] De Londras (2007), p. 250.
[17] Orakhelashvili (2009), p. 2.
[18] Klein (2008), p. 479.
[19] ICTY, Prosecutor v. Anton Furundzija, 10 December 1998, IT-95-17/1-T.
[20] Article 53 of the Vienna Convention on the Law of Treaties, 1969.

law and even 'ordinary' customary rules."[21] According to the Tribunal, the *jus cogens* character of the prohibition of torture stems from the values it protects. The Inter-American Court of Human Rights took a new approach to identify *jus cogens* in the Goiburú case.[22] The Court asserted that "as may be deduced from the preamble to the aforesaid Inter-American Convention, faced with the particular gravity of such offenses and the nature of the rights harmed, the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*."[23] In this case, it seems that an accumulation of different factors has contributed to the accession of the obligation to the rank of *jus cogens*. Here, the Court does not refer to the values enshrined by the obligation to investigate, nor does it study the behavior of States concerning that rule. Instead, the Court points at the Convention and the behavior of Paraguay and the gravity of the offense. Here, it is the violation of two human rights combined—the prohibition of forced disappearance and the obligation to investigate—that would give rise to a *jus cogens* norm. Even if this manner of assessing the existence of *jus cogens* can be criticized, it is interesting to find out that in this reasoning the Court considers that *jus cogens* stems from human rights while the former reinforces the human rights that contributed to its birth.

This shows the close links between the two notions and the permeability, in the practice of the IACtHR, between the two sets of rules. In this context, human rights may be able to reinforce *jus cogens* by adding more peremptory norms of international law from the human rights ranks. But it is highly probable that human rights have more to benefit from *jus cogens* than *jus cogens* from human rights. Indeed, by being recognized as *jus cogens* norms, human rights gain a new status. This asserts again the fact that they are non-derogable. For example, in the La Cantuta case, the Court asserts: "As a result, the duty to investigate and eventually conduct trials and impose sanctions, becomes particularly compelling and important in view of the seriousness of the crimes committed and the nature of the rights wronged; *all the more* since the prohibition against the forced disappearance of people and the corresponding duty to investigate and punish those responsible has become *jus cogens*."[24] It seems that, here, the use of *jus cogens* helps to strengthen and consolidate the human rights. If there is doubt concerning the importance of the human right in question, or if there is a conflict between a human right and another rule, the *jus cogens* character of the human rights would be a decisive criterion. It fortifies the human rights by a repetition of the norm included in the human rights rule by adding another character, the character of *jus cogens*.

If some values are shared between human rights and *jus cogens*, then it means that the two sets of rules have the same finality and should not enter into conflict.

[21] ICTY, Prosecutor v. Anton Furundzija, 10 December 1998, IT-95-17/1-T, para. 153.

[22] IACHR, Goiburú et al. v. Paraguay, Judgment, 22 September 2006.

[23] IACHR, Goiburú et al. v. Paraguay, Judgment, 22 September 2006, para. 84.

[24] IACHR, La Cantuta *v*. Peru, Judgment, 29 November 2006, §157, emphasis on "all the more" added.

But even if they share the same goals, it is necessary to assess the means of enforcement available to seal this cooperation between human rights and *jus cogens*.

2.2.2 *Enforcement Mechanisms to Achieve Harmonization*

The identity between human rights and *jus cogens* is not sufficient enough to fulfill harmonization of international law. The enforcement of *jus cogens* norms must be able to influence the contents of international law in order to overcome the horizontal system of the international legal order. This is where the constitutional potential of *jus cogens* has a role to play. Just like in domestic law where the Constitution represents the top of the pyramid, *jus cogens* would represent the most important norms that have to be complied with, thus conditioning the validity of all other norms as it has been developed earlier.

The creation of a hierarchical order based on *jus cogens* would be part of the normative dimension of international constitutionalization in progress. Anne Peters argues that "although no international constitution in a formal sense exists, fundamental norms in the international legal order do fulfill constitutional functions. Because those norms can reasonably be qualified as having a constitutional quality, they may not be summarily discarded in the event of a conflict with domestic constitutional law."[25] Moreover, "[T]he formal feature of supremacy is present on the international plane: *jus cogens* is a specific, superior body of norms. It trumps conflicting international treaties and customary law."[26] However, *jus cogens* has shown its limits in terms of treaty invalidation. A. Peters recognizes that this is not enough to assert that an international law Constitution has appeared in the formal sense, adding that the hierarchy of norms is "only rudimentary."[27]

Indeed, "so far it [*jus cogens*] has never had the effect proper to the notion, namely: (i) to bring about the nullity of a treaty contrary to a peremptory norm (. . .)." Still, the fact that *jus cogens* has not yet been enforced in the way that was originally anticipated by the Vienna Convention on the Law of Treaties is not in itself a drawback. It may actually be an indicator that the core rules of international law enshrined in the *jus cogens* have been complied with. However, if the notion is limited to treaty invalidation, it is likely not to have a constitutional effect as is expected from the idea of verticalization of international law. Indeed, many have underlined the unlikeness that such a treaty, openly breaching *jus cogens*, would appear. *Jus cogens*' influence has been extended to customary rules,[28] but most importantly, an overflowing character has been identified by some with *jus cogens*

[25] Peters (2006), p. 579.
[26] Peters (2006), p. 598.
[27] Peters (2006), p. 599.
[28] Virally (1966), p. 19.

norms that has been supported by the "unprecedented moral force"[29] of *jus cogens*. Consequently, it is not only the norms in themselves that have to be protected, but States must also ensure that the rights defended by *jus cogens* are protected in practice.

This has given rise to the doctrine of the development of a "procedural leg" to *jus cogens* norms. As *jus cogens* norms are considered as core values in the international legal order, they must be fully enforced, and any other rule that may compromise full and effective enforcement has to be set aside. In short, enforcement of *jus cogens* norms must not be compromised by legal loopholes. This view has been taken by some courts such as the ICTY in the Furundzija case. Once the Tribunal has assessed that the prohibition of torture had acquired a *jus cogens* character, the Tribunal went on to assess the consequences of such a finding and concluded that "[I]t would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption."[30] In the Goiburu and LaCantuta cases,[31] the IACtHR expressly linked the violation of the prohibition of forced disappearance with the duty to investigate, giving to both obligations the same *jus cogens* character. Nevertheless, this positive obligation does necessarily spring from the idea that there should be consequences attached to the application of *jus cogens* norms. Indeed, the duty to investigate is already enshrined in the IACtHR in article 1(1).[32] Thus, it could only be claimed that the *jus cogens* character of the obligations mentioned in the IACtHR merely strengthened the positive obligation but did not create it as such. This idea of a procedural leg also appeared in the *Ferrini* case, in which the Italian Court of Cassation found that "Italian courts had jurisdiction over the claims for compensation brought against Germany by Mr. Luigi Ferrini on the ground that immunity does not apply in circumstances in which the act complained of constitutes an international crime."[33]

This approach stems from the inherent idea that the fact that *jus cogens* norms are non-derogable should lead to a more pregnant verticalization of international law rather than just limiting it to treaty[34] and bringing new consequences regarding the law of responsibility of States and international organizations.[35] Namely, if *jus cogens* is a norm of such importance, it would be unacceptable that it bears no

[29] Bianchi (2008), p. 496.

[30] ICTY, Prosecutor v. Anton Furundzija, 10 December 1998, IT-95-17/1-T, para. 157.

[31] IACHR, Goiburú et al. v. Paraguay, Judgment, 22 September 2006, para. 84; IACHR, La Cantuta v. Peru, Judgment, 29 November 2006, para. 157.

[32] Article 1 of the IACHR.

[33] Ferrini v. Federal Republic of Germany, Decision No. 5044/2004, *in*, ICJ, Jurisdictional immunities of the state (Germany v. Italy: Greece intervening), judgment, 3 February 2012, para. 27.

[34] Articles 53 and 64 of the Vienna Convention on the Law of Treaties, 1969.

[35] Articles 40 and 41 of the ILC Draft articles on Responsibility of States for Internationally Wrongful Acts (2001) and articles 41 and 42 of the ILC Draft articles on the Responsibility of International Organizations.

consequences in practice and that its enforcement can be compromised by procedural rules. Under this conception of *jus cogens*, no hindrance should be accepted. If this view of *jus cogens* is upheld, it would bring a considerable reinforcement of human rights through *jus cogens*, as *jus cogens* would be an open door to apply human rights even more universally than before and would overcome the procedural barriers that were previously opposed to "normal" human rights. This could lead to an effective harmonization of international law based on human rights.

Great expectations are weighing on *jus cogens*, but the effects of *jus cogens* are interlinked with the way *jus cogens* is assessed, applied, and determined. When a part of the doctrine and courts tend to stretch the notion as far as possible, *jus cogens* still has to face its own limits recalled by other courts refusing the thesis of a boundless *jus cogens*.

2.3 The Harmonization of International Law Through *Jus Cogens* Compromised

Although *jus cogens* has evolved quite extensively in some cases, it has also been reminded its own limits. It is also possible to put to the fore the drawbacks of an ever-extending *jus cogens*. Instead of a reinforcement of *jus cogens* and human rights, this could actually lead to weaken both.

2.3.1 Jus Cogens*, Limited in Its Scope*

Not only the number of *jus cogens* rules is uncertain, but the consequences of their application also appear to be less overflowing than some would expect or wish. The main issue at stake is how *jus cogens* rules have been identified. If the rules are determined to be *jus cogens* or not according to the values that are inherent in the norm, it would lead to cast aside the original identification test set in the Vienna Convention on the Law of Treaties and, with it, the limits encompassed in article 53. But if this test is applied, the consequences here would be different and conduct to a much stricter and limited scope of the application of *jus cogens*. For example, in the Guinea-Bissau v. Senegal case, the arbitral tribunal stated that the role of *jus cogens* was confined to turning a treaty void if it was contrary to *jus cogens*.[36] However, this finding must be now put into perspective. Since 1989, *jus cogens* has developed further, particularly *via* the articles on the international responsibility of

[36] "Du point de vue du droit des traités, le *jus cogens* est simplement la caractéristique propre à certaines normes juridiques de ne pas être susceptibles de dérogation par voie conventionnelle." Para. 41, Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal, 31 juillet 1989, Recueil des sentences arbitrales, Volume XX, p. 208.

States for wrongful acts.[37] It is now contended, as was stated previously, that *jus cogens* could also nullify international customary rules. Nevertheless, it is clear that if *jus cogens* is applied according to the articles of 2001 and the Vienna Convention on the Law of Treaties, *jus cogens*' impact would not be as extended as was found by the ICTY and the IACtHR.

As far as the development of a procedural leg of *jus cogens* norms is concerned, it seems that this development has been stopped by courts such as the ECtHR and the International Court of Justice (ICJ). According to G. Cohen-Jonathan, in the Al-Adsani case, when refusing to set aside the principle of immunity of States that hindered the enforcement of a *jus cogens* rule, the ECtHR failed to draw all the implications attached to the finding of a *jus cogens* rule.[38] The ECtHR held: "Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged."[39] Professor Cohen-Jonathan's assessment is closely linked with the idea that *jus cogens* rules have a knock-on effect and impinge upon areas of law linked to the enforcement of *jus cogens*. However, the ICJ has taken a different point of view on the matter that results in a limitation of the potential overflowing effect of *jus cogens*. In the Germany v. Italy case, Italy argued that State immunity hindered the enforcement of the law of armed conflict, which is, in this specific case and according to Italy, part of *jus cogens*. The Court observed that this "argument rests on the premise that there is a conflict between *jus cogens* rules forming part of the law of armed conflict and according immunity to Germany (...)."[40] The Court held that there was no conflict between the two rules. Indeed, to have a conflict, both rules need to have overlapping scopes of application. However, the Court underlined that "the two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful."[41] The Court reaches that conclusion after asserting that "there is no basis

[37] Articles 40 and 41 of the ILC Draft articles on Responsibility of States for Internationally Wrongful Acts (2001) and articles 41 and 42 of the ILC Draft articles on the Responsibility of International Organizations.

[38] Cohen-Jonathan (2008), p. 63.

[39] Al-Adsani v. United Kingdom [GC], Application No. 35763/97, Judgment, 21 November 2001, ECHR Reports 2001-XI, p. 101, para. 61.

[40] ICJ, Jurisdictional immunities of the state (Germany v. Italy: Greece intervening), judgment, 3 February 2012, para. 92.

[41] ICJ, Jurisdictional immunities of the state (Germany v. Italy: Greece intervening), judgment, 3 February 2012, para. 93.

for such a proposition"[42] that if a rule of international customary law hinders the effective enforcement of a *jus cogens* rule, the former can be set aside. Therefore, according to the ICJ, there is no evidence in the practice of States that would hint to the development of an overflowing *jus cogens*. Therefore, *jus cogens* is still subject to the "community of States as a whole,"[43] which will definitely moderate its development.

The ICJ is not the only court that has centered the *jus cogens*' identification to the definition given by the Vienna Convention on the Law of Treaties of 1969. The Court of Justice of the European Union (Court of Justice) corrected the Court of First Instance of the European Union (CFI), which held that it was "empowered to check, indirectly, the lawfulness of the resolutions of the Security council in question with regard to *jus cogens*, understood as a body of higher rules of public international law bonding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible."[44] The Court of Justice stated that the CFI had no jurisdiction over the Security Council.[45] As a consequence, the fact that there may have been a violation of a *jus cogens* rule has no impact on the rules of jurisdiction that apply. This specific issue had also given rise to a ruling of the ICJ stating that "the Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties."[46]

It seems to be clear that the development of the doctrine of the procedural leg of *jus cogens* has been stopped and that *jus cogens* is no longer recognized as being able to modify all spheres of international law that have a link with the effective enforcement of its norms, if it ever had that possibility. The development of peremptory norms of international law has been reestablished as being intrinsically linked to the will or behavior of the community of States as a whole. Consequently, it is only if *jus cogens* and human rights are close to being universally recognized

[42] ICJ, Jurisdictional immunities of the state (Germany v. Italy: Greece intervening), judgment, 3 February 2012, para. 95.

[43] Article 53 of the Vienna Convention on the Law of Treaties, 1969.

[44] Kadi, Case T-315/01, Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities, Judgment of the CFI, 21 September 2005.

[45] "With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with jus cogens." Para. 287, Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities.

[46] ICJ, Case concerning armed activities on the territory of the Congo (New application: 2002) (Democratic Republic of the Congo v. Rwanda), jurisdiction of the Court and admissibility of the application, judgment, 3 February 2006, para. 125.

that they can merge effectively. But here is where the issue precisely lies. If *jus cogens* needs to be nearly universally recognized before existing as such, then it is simply not able to be used as a harmonization vector. Maybe the problem should be analyzed the other way round. *Jus cogens* could be the final step of the evolution of human rights, human rights that need to reach a universal status before being able to become *jus cogens*. Nevertheless, it needs to be reminded that this last step of evolution of human rights is not automatic as universality is not the only character of *jus cogens*. States must also recognize that the rule is not to be derogated from and can nullify treaties contrary to the former. Consequently, it is doubtful that *jus cogens* would be the answer to the true harmonization of international law. Moreover, this harmonization has several drawbacks.

2.3.2 *The Undesired Potential Effects of* Jus Cogens *as Vector of Harmonization of International Law*

Non-derogability makes the States and the international judges very cautious regarding the identification of *jus cogens*. Due to its non-derogability and the difficulties of modifying *jus cogens* rules, it is clear that "one must pay much caution when identifying a *jus cogens* rule."[47]

By contrast, if the *jus cogens* character of the rule is to be assessed through a value-centered test, then, when the rule's inherent value is deemed to be important, it will be considered *jus cogens*. This reasoning appears to be a catch-22 as it is from the *jus cogens* rules that the values are deducted but the norms are identified through moral intuition. In the end, is it appropriate for a judge to rely on moral intuition? As morality does not necessarily lead towards a development of human rights, this criterion will not necessarily lead to a reinforcement of human rights through *jus cogens*. Moreover, it is difficult to assess clearly how a judge would proceed to this finding. In the Furundzija case,[48] the Tribunal did not mention the values that are inherent in the prohibition of torture before classifying it as *jus cogens*. This contributes to obscuring even more the layers of mystery wrapped around *jus cogens*. If *jus cogens* is to be the international law constitution's foundation, then this test would compromise this goal as the lack of legal certainty will render the finding of the basic principles of the international constitution nearly impossible. Finally, how is it possible to decipher what is the value hidden behind the rule that has been analyzed? This leads to another important issue: what value is to prevail over others? It is precisely that point that may have negative effects on human rights. Indeed, if human rights were to be analyzed to find *jus cogens* rules and that one value is deemed to be the most important, it would actually mean that some human rights are less important than others. F. Sudre argues that according to the

[47] Cohen-Jonathan (2008), p. 67, translation of the author.

[48] ICTY, Prosecutor *v.* Anton Furundzija, 10 December 1998, IT-95-17/1-T.

dominant doctrine on human rights, human rights are bound to be indivisible and therefore would not tolerate the establishment of some hierarchy between different human rights.[49]

If La Cantuta and the Germany v. Italy cases are compared, it appears that the ICJ applied a much stricter test of identification and confined *jus cogens* to its limits without developing the notion. Clearly, the value-centered test is less strict than the article 53 test and would lead to proliferation of *jus cogens* rules. As a consequence, if it could lead to a stronger assimilation of *jus cogens* and human rights, it could also water down the importance of *jus cogens*.[50]

2.4 Conclusion

The fact that no one clearly knows what is in the *jus cogens* box raises different issues. First, one might be tempted to find new *jus cogens* norms in order to reinforce human rights. This can give rise to an instrumentalization of *jus cogens* to the benefit of other rules and also to the detriment of *jus cogens* itself. The danger of such an instrumentalization would be to transform *jus cogens* into a meaningless category and drive the *jus cogens* norms farther from what was originally expected. Even if the development of the category was not in itself a danger, the fact that courts and tribunals would use different criteria of identification would lead to a lack of legitimacy and confusion as to what *jus cogens* really is. Is it what the community of States as a whole has recognized? Is it a norm that defends some core values important for the international community? Or is it the result of the accumulation of various human rights that would give rise to a new *jus cogens*?

Moreover, if we stick to the basic concept of treaty interpretation and look at the Vienna Convention on the Law of Treaties as the source of the recognition or finding of *jus cogens*, it appears that there is nothing in this treaty that actually points towards the value judgment that has been systematically attached to it. To depart from this analysis is achievable only if it is feasible to prove that *jus cogens* need not be attached to the Vienna Convention and that it has become something different, a creature of its own. This is what is contended by a part of the doctrine that perceives *jus cogens* as a revolution in international law. Nevertheless, even if it is possible that new concepts change the paradigms of international law, it has not been proved that it exists, and the way international law nowadays functions in practice does not help to decipher this coming revolution in the near future. It is true that this vision of *jus cogens* as a notion still in development is not as enthusiastic or appealing as others, but looking at the facts before attributing a character to a notion, as the ICJ does, leads us to this conclusion. Regarding *jus cogens*, E. Jiménez de Aréchaga pointed out "[I]n supporting the principle, care must be

[49] Sudre (2011), p. 85.

[50] Cohen-Jonathan (2008), p. 69.

taken not to exaggerate its scope, either in a positive direction, by making of it a mystique that would breathe fresh life into international law, or in a negative direction, by seeing in it an element of the destruction of treaties and of anarchy."[51] Thus, by seeing in *jus cogens* the revolution of international law, the perception is modified as is the content of the box. Finally, if each observer applies different criteria, whichever they may be, that distorts what is to be found. It would be impossible to clearly assess what is *jus cogens*, how it interacts with human rights, and finally how it contributes to the development of international law.

Contrary to the human rights that can further develop through specific regional courts and human rights conventions that are considered as "living instruments,"[52] *jus cogens* does not benefit from such independence. Indeed, while the human rights are adapted on a regular basis to the culture and conceptions of the societies concerned by them, the criteria of identification of *jus cogens* make the notion highly dependent on the States that contribute to its identification. Therefore, contrary to human rights where the beneficiaries of the norms have had a clear influence on the development of the norms, *jus cogens* is still depending on States to thrive, States that are not necessarily the beneficiaries of such norms. Thus, while human rights evolve in some regional systems, and while new human rights are developed on an international level, *jus cogens* is subject to stagnation. To encourage assimilation of *jus cogens* and human rights may give the impression that peremptory norms of international law are but a small part of human rights, when they are to be differentiated. *Jus cogens* can be assimilated to a safety net. It is not supposed to extend indefinitely, or more precisely, the criteria of identification render this possibility highly improbable. Consequently, its potential as a possible vector of diffusion of human rights on an international level is limited, limited by the identification criteria and limited by its scope of application. Whether *jus cogens* has the possibility to extend the net and broaden its scope is uncertain even more so without a development of the notion.

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[51] UN Conference on the Law of Treaties, First session (1968), *Official Record*, p. 303, para. 48.

[52] ECtHR, Tyrer v. UK (Appl No. 5856/72), Judgment, 25 April 1978, Series A no 26, §31.

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Chapter 3
Are Human Rights Law Rules "Special"? Study on Interactions Between Human Rights Law Rules and Other International Law Rules

Marianne Lamour

3.1 Introduction

The influence of Human Rights Law rules (HRL rules) on several fields of International Law (such as International Criminal Law, World Trade Organization Law, European Union Law) was scrutinized throughout the previous chapters of this book. This impact has been assessed as regards the influence of the first ones over the content and scope of the seconds.

However, a general study on that influence would not be complete if we did not also focus on the interactions between obligations deriving from Human Rights Law rules and from other International Law rules.

Two solutions can be drawn so as to define the nature of the interactions between two legal rules: priority or primacy. Priority can be established by reference to a treaty provision that expressly designates which of the two rules shall be applied in the occurrence of a contradiction between them (see, for instance, article 103 of the UN Charter, which provides for the Charter's rules to prevail over any other International agreement). Otherwise, it is usually referred to two general rules that apply in such circumstances: the *lex posterior priori derogant* maxim (the latter rule will prevail) and the *lex specialis generalibus derogant* one (the special rule will prevail over the general one). By contrast, primacy does not only encompass the priority of one over another but also imply the invalidity of the inferior rule if it appears to be contradictory to the superior one.

Thus, the question we will have to address in the following study is whether interactions between International Law rules and HRL rules are governed by priority rules or by reference to primacy rules.

In the context of this study, "Human Rights Law rules" will be understood as referring to the instruments devoted to the protection of fundamental rights. HRL

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rules are thus mainly contained in both global treaties for the protection of Human Rights such as the ICCPR, the ICESCR, the Convention on the prohibition of torture, inhuman and degrading treatments, the Convention on the Rights of the Child as well as regional treaty regimes such as the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and People's Rights (the African Charter).

When studying the interactions between HRL rules and other International Law rules, one very quickly notices that what we have designated under the expression of "Human Rights Law" does not constitute in fact a coherent set of rules. Indeed, it rather seems to encompass several special regimes (Sect. 3.2), even if those remain all part of International Law (Sect. 3.3). One shall then assume that interactions between HRL rules and other International Law rules shall be mainly governed thus by rules of priority, but this is not what happens in practice due to the nature of HRL rules (Sect. 3.4).

3.2 Human Rights Law as a Gathering of Special Regimes

Human Rights Law has often been considered as a special field of International Law—the topic chosen for the present book being one of the numerous illustrations of such an assertion. Even the International Law Commission (ILC) study group on fragmentation of International Law, in its 2006 Report, considered that special regimes can cover "whole fields of functional specialization (. . .) such as 'human rights law.'"[1]

It is the International Court of Justice (ICJ) that first relied upon the concept of "special" or "self-contained regime" for the first time in the Teheran case.[2] Professor B. Simma then developed that theory in his famous article on the topic in 1985.[3] Twenty years later, the ILC devoted a long part of its 2006 Report to that concept. According to this Report, the main objective of those special regimes is "to strengthen the law on a particular subject-matter, to provide a more effective protection for certain interests or to create a more context-sensitive (. . .) regulation of a matter than what is offered under the general law."[4]

Three *definitions* of the concept of "special regime" were drawn by the ILC in its Report.

First, the ILC underlined that such a regime could be "in a narrow sense" a special *set of secondary rules under the law of State responsibility* that overrules the general rules codified in the 2001 ILC Articles on State responsibility.[5]

[1] ILC (2006), para. 129.

[2] ICJ, United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 40, para. 86.

[3] Simma (1985), pp. 111–136.

[4] ILC (2006), para. 186.

[5] ILC (2006), para. 128 (emphasis added).

Second, "in a broader sense," "special regime" refers to a *set of primary and secondary rules* that covers some particular issues and differs from the ones applicable under general international law[6] (i.e., rules of customary law and general principles of law[7]). One example of such regime is given in the Report by reference to the S.S. Wimbledon case[8] where the Kiel channel regime drawn in the Treaty of Versailles of 1919 was considered as excluding the application of the general law on internal waterways.[9]

Third, in an even wider sense, "special regime" refers to a *set of primary and secondary rules that covers a whole field of International Law*. According to the ILC indeed, "[s]ometimes whole fields of functional specialization, of diplomatic and academic expertise, are described as self-contained in the sense that special rules and techniques of interpretation and administration are thought to apply. For instance, fields such as 'human rights law'."[10]

On the basis of these alternative approaches, could Human Rights Law be considered as a special regime?

As to the first definition, Human Rights would rather be described as special *regimes*, as the regional instruments of protection of Human Rights all prescribe for special secondary rules on State responsibility differing from the general ones, regarding some specific issues. The ECHR, for instance, provides for a specific remedy under article 41—the "just satisfaction"—which differs from the *restitutio in integrum* provided for by general law on State responsibility,[11] while the ACHR provides for "fair compensation" (art. 63.1).

As to the second and third definitions of a special regime, we shall first notice that the only difference between them is the scope of the particular set of rules differing from general international law. While the second definition indeed is dealing with a set of rules that has a very limited material, personal, or local scope of application—the Kiel Channel example above mentioned illustrates this assertion—the third definition is even broader and seems to rely only on the main objective followed by that special set of rules (i.e., for instance, the regulation of international trade as with WTO Law or of the use of the sea as with International Law of the Sea).

Under this last definition, Human Rights Law as a whole might be considered as a special regime as far as its rules are mainly concerned with the protection of fundamental rights of the individuals. However, two main objections should be made as regards such a conclusion.

First, if universal general rules for the protection of fundamental rights can be identified—for instance, the right to life, the prohibition of torture, the prohibition

[6] *Ibidem* (emphasis added).

[7] ILC (2006), para. 174.

[8] P.C.I.J. Series A, No. 1 (1923), pp. 23–24 (emphasis added).

[9] ILC (2006), para. 127.

[10] ILC (2006), para. 129.

[11] See article 35 of the 2001 ILC Articles on State responsibility.

of slavery, the right to a fair trial—every regional instrument of protection of Human Rights contains specific primary (and secondary) rules, the existence of which can be explained by particular concerns derived from historical, geographical, and even temporal specificities[12] (while the ECHR was adopted in 1950, the African Charter was agreed upon more than 30 years later). As for primary rules, we may refer to the right to judicial personality recognized in the ACHR (art. 3), the right to reply (art. 14), the right to a name (art. 18), or the right to nationality (art. 20). The African Charter sets down the right to receive information (art. 9), the right to national and international peace and security (art. 23). In Europe, the Charter of Fundamental Rights adopted within the European Union acknowledges the existence of the right to protection of personal data (art. 8), freedom of the arts and sciences (art. 13), or the right to good administration (art. 41). As a consequence, we should not speak of one single set of Human Rights rules, or, the other way round, if we only refer to common human rights, we should only deal with a limited part of Human Rights Law.

Second, if we try to define a "special regime" by reference to the objective pursued by a set of rules, we might wonder whether some particular rules relating to the protection of fundamental rights, but included in instruments that are not mainly concerned with that issue, would belong to what we would call the "Human Rights special regime." We might refer, for instance, to the guarantees offered to foreign investors' properties in Bilateral Investment Treaties. If it happens to be so, the "boundaries" of such regime will be difficult to draw—and that theory of limited help to describe accurately the state of positive International Law.

It seems not to be appropriate in any case to define Human Rights Law as *a* special regime. However, we shall conclude instead to the existence of several special *regimes* in Human Rights Law, which differ in distinct ways from general international law. This does not mean, however, that they are completely autonomous from International Law.

3.3 The Absence of Autonomy of Human Rights Regimes from International Law

Even if the autonomy of Human Rights Law has been firmly ascertained by some International lawyers,[13] the organs meant to monitor the enforcement of Human Rights instruments rely on International Law rules. This happens with regard to rules relating to the existence and validity (Sect. 3.3.1) and to the interpretation (Sect. 3.3.2) of HRL instruments, for instance.

[12] See Leben (2001), p. 78.

[13] Cohen-Jonathan (1997), pp. 321–326.

3.3.1 The Relevance of Rules of Entry into Force and Application of Treaties Provided for by International Law

Human Rights courts have been referring very often to International Law rules relating to the entry into force of and compliance with treaty obligations in the course of their reasoning. That can be easily explained as the different Human Rights regimes were created originally by international treaties, i.e., pursuant to International Law. In the Baena Ricardo and others (270 workers) v. Panama case, for instance, the Inter-American Court of Human Rights (IACtHR) referred to the *pacta sunt servanda* rule and to the obligation to apply treaties in good faith, both codified in article 26 of the 1969 Vienna Convention on the Law of Treaties (VC), to remind the defendant State that it could not act contrary to the purpose and object of the instruments of protection of Human Rights that it had signed.[14] The importance of these two principles was reaffirmed in a later advisory opinion.[15] However, the Court did not review the compatibility of the defendant's behavior with these principles, as it only has jurisdiction "to hear about human rights violations (...) where (...) international instrument ratified by the State grants it the competence to hear cases of violation to the rights protected by that same instrument" as stated in the Baena Ricardo.[16] So did the African Commission and, recently, the African Court on Human and People's Rights as to article 27 of the VC, the Court even mentioning the 2001 Articles on State Responsibility.[17]

However, the regional courts often review the compatibility of the defendant's behavior with International Law rules by underlining that they are similar to some rules incorporated within the Human Rights instruments. The IACtHR thus implicitly acknowledged the importance of the rule codified under article 27 of the VC, but only because the *effet utile* principle enshrined in this article was considered as reaffirmed in article 2 of the ACHR.[18] The European Court of Human Rights

[14] Judgment of 2 February 2001, RS Series C, no 72, para. 98. The Court referred in that case to the San Salvador Protocol on economic and cultural rights.

[15] Advisory opinion no 16, The right to information on consular assistance in the framework of the guarantees of the due process of law, 1 October 1999, Series A, no 16, para. 128.

[16] Judgment of 2 February 2001, *ibid*, para. 97.

[17] African Commission on Human and People's Rights, Legal Resources Foundation v. Zambia, 7 May 2001, decision no 211/98, para 59. African Court on Human and People's Rights, Tanganyika Law Society & Legal and Human Rights Centre v. The United Republic of Tanzania, App. Nos 09/2011 and 11/2011, judgment on merits, 14 June 2013, para. 108.

[18] Olmedo Bustos and others v. Chile, judgment of 5 February 2001, RS, Series C, no 73, para. 87: "In international law, customary law establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. (...) This general obligation of the State Party implies that the measures of domestic law must be effective (the principle of *effet utile*). This means that the State must adopt all measures so that the provisions of the Convention are

referred as well on several occasions to both articles 26 and 27 of the VC.[19] In the Verein Gegen Tierfabriken Schweiz v. Switzerland (No 2) case, the Grand Chamber considered that "[i]n this connection, the Court emphasises the obligation on States to perform treaties in good faith, as noted, in particular, in the third paragraph of the preamble, and in Article 26, of the 1969 Vienna Convention on the Law of Treaties."[20] The reference of the Court to the ECHR's preamble first has no other effect than emphasizing the importance of the instruments, as creating a special regime prevailing over rules of general international law.

By contrast, at the universal level, the Human Rights Committee, which is empowered to monitor the implementation of the ICCPR, did not try to ascertain the existence of the ICCPR regime as a special one. In one of its General Comment, the Committee stated indeed that "[u]nder international law, a failure to act in good faith to take such steps amounts to a violation of the Covenant."[21]

Express references to other International rules into Human Rights instruments can also be found. One illustration of this is related to the particular issue of reservations to treaties. Article 75 of the ACHR expressly relies upon the rules codified on the subject in the VC 1969 indeed, by providing for the right of State parties to make reservations to the Convention but "only in conformity with the provisions of the Vienna Convention on the Law of Treaties."

All of these elements underline the absence of autonomy of these regimes from International Law. This is confirmed as well with regard to rules of interpretation relied upon by courts and tribunals.

3.3.2 The Relevance of Rules of Interpretation Provided for by International Law

As Human Rights Law instruments do not provide for specific interpretation rules,[22] the courts and tribunals rely on rules of interpretation provided for by general international law when interpreting these instruments. The ECtHR indeed initially acknowledged that it would interpret the Convention in compliance with customary rules of interpretation in 1961,[23] before expressly referring for the first

effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires." Reaffirmed in Cantos v. Argentina, judgment of 28 November 2002, RS, Series C, no 97, para. 59.

[19] See, for instance, Anowiec and others v. Russia, decision of 16 April 2012, para. 106.

[20] Judgment of 30 June 2009, Grand Chamber, para. 87.

[21] Human Rights Committee, General comment No. 9, The domestic application of the Covenant, 29 July 1981, para. 3. Reaffirmed in General comment No 31 (80), The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, para. 4.

[22] Articles 17 and 60 of the ECHR, article 29 of the ACHR, article 5 of the ICCPR, which relate to interpretation, only provide for limitations to the interpreting activity. No reference is made at all in the African Charter.

[23] Lawless v. Ireland (No. 3), judgment, 1 July 1961, Series A, No. 3, para. 11.

time in 1975[24] to articles 31–33 of the VC, which codified these customary rules. The Strasbourg court made similar references to the VC on several occasions since then,[25] considering that "the Convention *must* be interpreted in the light of the rules set out in the Vienna Convention 1969."[26]

The IACtHR, as far as it is concerned, systematically has referred to the above-mentioned articles of the VC[27] since its first advisory opinion of 1982.[28] The Human Rights Committee has done so as well.[29]

However, the courts rely not only on the framework set up in the Vienna Convention but also on a wider scope of general international law rules applicable to the interpretation of treaties. Depending on the general circumstances of the case indeed, both regional courts rely upon distinct methods of interpretation, i.e., either on the classical textual method codified in the VC[30] or on the non-codified teleological method.[31]

More specifically, the European and the Inter-American courts applied on several occasions article 31.3.c of the VC, both taking into account other relevant "rules of international law applicable in the relations between the parties." For instance, the ECtHR already refers to the International Labour Organisation's Convention No. 29,[32] on article 6 of the European Social Charter,[33] or on article 48.4 of the Treaty of Rome instituting the European Economic Community.[34] In addition, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" referred to article 31.1.b of the VC is also taken into account by the ECtHR.[35]

[24] Golder v. United Kingdom, judgment, 21 February 1975, Series A, No. 18, para. 29.

[25] See, for instance, Witold Litwa v. Poland, judgment of 4 April 2000, CEDH 2000-III, para. 57; Johnston and Others v. Ireland, judgment, 18 December 1986, Series A, No. 112, para. 51; or more recently, Oleynikov v. Russia, judgment, 14 March 2013, para. 56.

[26] Banković et al. v. Belgium and 16 other States Parties, decision on adminissibility of 12 December 2001, [GC], no. 52207/99, para. 55 (emphasis added).

[27] See, for instance, Hilaire v. Trinidad and Tobago above, para. 84, where the Court explicitly referred to article 31.1 of the VC.

[28] Asunto de Viviana Gallardo and others, advisory opinion of 24 September 1982, Series A, No. 101, para. 20. See also Blake v. Guatemala, judgment of 1st October 1999, Series C, No. 57, para. 21.

[29] J. B., P. D., L. S., T. M., D. P., D. S. v. Canada, decision, 18 July 1986, No. 118/1982, para. 6.3, which referred explicitly to articles 31 and 32 of the VC.

[30] See, for instance, the IACtHR Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Articles 74 and 75) case, above, para. 19.

[31] See, for instance, IACTHR, González and others ("Cotton Field") v. Mexico, Preliminary Objection, 16 November 2009, Series C, No. 205, para. 29; ECtHR, Wemhoff v. Germany, 7 June 1968, Series A, No. 7, para. 8.

[32] See, for instance, Van der Mussele v. Belgium, judgment, 23 November 1983, Series A, No. 70, para. 35.

[33] National Union of Belgian Police v. Belgium, judgment, 27 November 1975, Series A, No. 19, para. 38.

[34] Müller and others v. Switzerland, judgment, 24 May 1988, Series A, No. 133, para. 27.

[35] Cruz Varas and others v. Sweden, judgment, 20 March 1991, Series 1, No. 201, para. 100.

More originally, the regional courts have largely relied upon the evolutive interpretation method, interpreting both conventions as "living instruments," i.e., in light of "the developments and commonly accepted standards in the (. . .) policy of the member States."[36] Contrary to the rule relating to subsequent practice codified at article 31.3.b, it is on the existence of a shared *opinio juris* in favor of such an evolution in the interpretation of the terms of the treaty between the Parties that is looked for when applying that method.[37]

The above developments provide some examples of the interactions that do exist between general international law and HRL rules.

Nevertheless, having defined HRL regimes as special regimes differing from general international law is only of limited help when dealing with interactions that might exist between these Human Rights special regimes and other International Law special regimes. Indeed, if special regimes' rules take precedence over general international law rules—as a result of the *lex specialis generalibus derogant* maxim—the special regime theory does not apply, however, to the relations between rules from different special regimes, such as Human Rights Law rules and WTO Law rules or Humanitarian Law rules.

When dealing with interactions between rules deriving from different International Law special regimes, one would soon realize that International Law does not provide for any systemic rules of articulation between them. Even if some general rules of articulation do exist, such as the *lex specialis* or the *lex posterior* ones, they do not apply in such circumstances indeed, as the rules deriving from separate special regimes do not rely on the same subject matter, so that we cannot define their relations as those between special and general rules or between later rules amending prior ones.

In the absence of such general rules relating to the interactions between International Law rules deriving from special regimes, courts and tribunals have relied upon several techniques so as to deal with such interactions.

[36] See Tyrer v. United Kingdom, judgment of 25 April 1978, Series A, No. 26, para. 31, where the ECtHR first acknowledged that principle. See similarly IACtHR, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of October 1, 1999, Series A, No. 16, para. 114: "human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions"; reaffirmed in Gómez-Paquiyauri Brothers v. Peru, judgment of 8 July 2004, para. 165.

[37] Sorel (2006), p. 1331.

3.4 Practical Solutions Adopted in Order to Deal with Interactions Between Human Rights Law Rules and Other International Law Rules

Usually, it is by relying on their limited scope of jurisdiction that judges avoid to deal with these interactions, i.e., by considering that they were empowered to apply one set of special rules only. But this appears as being a very unpractical solution for States that remain bound by rules deriving from both special regimes and thus might face contradictory obligations. This is moreover an inaccurate solution, as even if International courts and tribunals' jurisdictions are limited, they are entitled to apply in the course of their judgments a broader scope of International Law rules that encompass, among others, rules deriving from other special regimes (Sect. 3.4.1).

That is for sure the reason why judges now rely on *jus cogens* to characterize rules of HRL. By so doing, they ascertain the overall priority of such rules over any other International Law rules, including those deriving from other special regimes (Sect. 3.4.2).

3.4.1 Reliance by Courts and Tribunals on Their Limited Jurisdiction

The issue of interactions between rules deriving from separate special regimes is not a hypothetical one. This happens, for instance, every time a State is meant to enforce a Chapter VII UN Security Council's resolution providing for the duty to freeze the assets of some individuals, while these States must ensure in the meantime the right to private property and the protection against arbitrary interference from State's authorities with the enjoyment of such property. That is precisely what was at stake in the Kadi case, where the ECJ considered that EU regulation no 881/2002 constituted an arbitrary interference with M. Kadi's right to property guaranteed by EU Law. But the regulation was no more than implementing several UN resolutions establishing a sanctions regime against individuals and entities associated with Al-Qaida, Osama bin Laden, and/or the Taliban, among whom is M. Kadi. The ECJ's judgment, relying on its limited jurisdiction, solved an issue by ensuring that the claimant's fundamental rights were properly guaranteed within the EU. But it also raised another one as the EU Member States were then precluded from complying with both European Union and UN Laws.

A similar example can be given with respect to interactions between International Human Rights Law and International Humanitarian Law. In the Las Palmeras case, the Inter-American Commission on Human Rights had argued that Humanitarian Law should be considered as the applicable law in time of armed conflict.

Contrary to that opinion, the Inter-American Court relied on the limited scope of its jurisdiction to exclude reviewing the legality of the facts at stake with Humanitarian Law:

> in order to carry out this examination, the Court interprets the norm in question and analyses it in the light of the provisions of the [American] Convention. The result of this operation will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention. The later has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions.[38]

A like reasoning was adopted within the European system. Even if the ECtHR lowered the threshold of what constitutes an "unlawful deprivation of life" in contravention with article 2 of the ECHR in circumstances of armed conflict, it only stated this way as it was expressly empowered to do so under article 15.2 of the ECHR.[39] In any way, however, the Court took notice that the actions of States might be reviewed by reference to Humanitarian Law standards—even if such actions should have been considered as lawful under the law of armed conflict.

Along with these practical reasons, one might object on legal grounds to these reasoning held by the ECJ, the IACtHR, and the ECtHR. For sure, these courts' jurisdiction can only be established by reference to case dealing with alleged violations of a limited set of rules (e.g., the ECtHR's jurisdiction is limited to alleged violations of the ECHR and its Protocols). But nothing precludes them from applying in the course of their judgments a broader scope of International rules. We have already mentioned examples of application of general international law rules previously, but relying on article 31.3.c. of the Vienna Convention, they are even entitled to take into account "any relevant rules of international law applicable in the relations between the parties."[40] This may include thus rules deriving from other special regimes of International Law (may it be Humanitarian Law, WTO Law for instance). And, in fact, they have already done so in relation to other International Law rules (see above Sect. 3.3.2). With regard to Humanitarian Law, this is moreover precisely what non-specialized courts did, such as the ICJ in the Legality of the Threat or Use of Nuclear Weapons case where the Hague court held that "[t]he test of what is 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

[38] Las Palmeras v. Colombia, judgment (Preliminary Objections), 4 February 2000, para. 33.

[39] See Isayeva v. Russia, judgment of 24 February 2005, para. 191, where, in the course of armed conflict, the Court did not agree to lower article 2's threshold as no request for derogation has been asked for by the defendant State, thus making article 15 non-applicable.

[40] See accordingly Forteau (2011), pp. 150–154; Santulli (2005), pp. 331–332.

deduced from the terms of the Covenant itself."[41] The International Commission of Inquiry on Darfur followed that reasoning.[42]

The limits of the "veil" of jurisdiction being evident, International courts and tribunals have been relying since the last few years on a new technique to articulate the interactions between Human Rights Law and other International Law rules. They now consider indeed that Human Rights rules constitute *jus cogens* norms—thus prevailing over any other rules of International Law.

3.4.2 *Reliance by Courts and Tribunals on* Jus Cogens

If the material scope of Human Rights Law rules recognized as peremptory norms differ from one International court to another, be it rather wide (we may refer particularly to the Inter-American case law[43]) or tight, it is generally accepted in front of all of these courts, be they Human Rights courts or not, that some Human Rights rules are of a peremptory nature.

An early well-known example is the ICTY's judgment in the Furundzija case where the Tribunal held that the prohibition of torture was a *jus cogens* norm.[44] More recently, it is the Court of First Instance (CFI) of the European Communities, in the Kadi case above mentioned, that understood the scope of *jus cogens* norms as encompassing "the standard of universal protection of the fundamental rights of the human person."[45]

It remains, however, that HRL rules of a peremptory character—and alleged violations of such rules to be more precise—still do not constitute a ground for "automatic" jurisdiction for a court or tribunal. For instance, when a jurisdictional immunity precludes the judges or arbitrators to exercise their jurisdiction, the fact that the alleged violations at stake are violations of peremptory norm did not

[41] Legality of the Threat or Use of Nuclear Weapons, advisory opinion, I.C.J. Reports 1996, p. 240, para. 25.

[42] Report to the Secretary General of the UN pursuant to Security Council Resolution 1564 of 18 September 20, 25 January 2005, para. 143 (available on the UN website http://www.un.org).

[43] Among others, the Inter-American court recognized the principle of equality and nondiscrimination (Juridical Condition and Rights of Undocumented Migrants, advisory opinion no 18, 17 September 2003, paras. 97–101 and 110–111) or the right of access to Justice (Goiburú and Others, judgment, 22 September 2006, para. 131).

[44] See, for an early example, Prosecutor v. Anto Furundzija, IT-95-17/1-T, ICTY Trial Chamber II, Judgment of 10 December 1998, paras. 155–156: the Tribunal qualified the prohibition of torture as a peremptory norm.

[45] Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, Judgment of the CFI, 21 September 2005; Case T-315/01, Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities, Judgment of the CFI, 21 September 2005, para. 266.

preclude the jurisdictional immunity from applying.[46] This is consistent with the fact that recourse to *jus cogens* is only meant to deal with interactions between rules. It has no—or not yet—procedural impact.

3.5 Conclusion

In light of the previous developments, it appears that International courts and tribunals have relied not only upon priority of HRL rules over other International Law rules but also, and more recently, on primacy of the first ones over the seconds. This was done through conferring the character of *jus cogens* to a more and more growing number of Human Rights Law rules.

This general move toward the extension of the material scope of Human Rights rules qualifying as *jus cogens* might be interpreted as a sign of "constitutionalization" of International Law.[47] HRL rules would then prevail over any other International Law rules—the "priority of values" attached to the first, having an impact on the hierarchy of norms applicable to the seconds.[48]

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[46] See accordingly Al-Adsani v. United Kingdom [GC], application No. 35763/97, judgment of 21 November 2001, *ECHR Reports* 2001-XI, p. 101, para. 61; ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, I.C.J. Reports 2012, p. 141, para. 95.

[47] See, for instance, Peters (2006), p. 598; Orakhelashvili (2009), pp. 153–180.

[48] Bianchi (2008), p. 494.

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Chapter 4
Human Rights and Interpretation: Limits and Demands of Harmonizing Interpretation of International Law

Julian Udich

4.1 Introduction

The issue of interpretation in public international law (PIL) has in recent years drawn considerable scholarly attention.[1] A particular focus has been to develop interpretative methods to ameliorate the fragmentation of public international law.[2] Therefore, as human rights law and other specialized branches are mostly considered to belong to one overarching system of public international law,[3] interpretation of human rights might be affected by those other branches.

This contribution therefore explores which different demands such methods intended to counter fragmentation of international law impose on the very own rationales of human rights law treaties. Whoever applies the law faces potentially conflicting rules of interpretation and has to assign priority to interpretative objectives. As an example, the interpretation of the European Convention of Human Rights and Fundamental Freedoms (ECHR) by the European Court of Human Rights (ECtHR) is briefly outlined and contrasted with the approach of the International Law Commission (ILC) of "systemic integration" of PIL, to illustrate potential discrepancies. In particular, the idea of harmonizing interpretation and

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[1] See as examples only Linderfalk (2010), Orakhelashvili (2008), and Gardiner (2008).

[2] See, e.g., ILC and Koskenniemi (2006), paras 424 et seq.; Matz-Lück (2006), pp. 45 and 46; Pavoni (2010), pp. 651 et seq.

[3] Even though this position is not universally held, it may safely be considered the most common understanding of PIL; see only ILC and Koskenniemi (2006), paras 192–194.

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the object of human rights law to progressively increase the standard of protection for individuals might prove difficult to reconcile in certain circumstances (see Sect. 4.2).

In order to solve such differences, the theoretical background of interpretation in PIL requires attention: the concept proposed here distinguishes the positive rules of interpretation and those rules formed by "interpretive communities",[4] which might develop diverse rules within particular contexts, e.g., a certain human rights treaty. This concept permits to acknowledge different interpretative demands and emphasizes the responsibility of any applier of law to evaluate and decide on which demands to fulfill (see Sect. 4.3). This contribution thus aims to utilize this special case to illustrate a general point regarding different interpretive regimes and their interaction.

As a consequence, the concept described is applied to the interpretation of the ECHR to demonstrate to what extent the discretion of an applier of law permits him to pursue certain aims and in how far the ECtHR in particular might pursue his own interpretive approach in conformity with demands from general PIL (see Sect. 4.4).

4.2 The ILC's "Systemic Integration" and the ECtHR's Approach to Interpretation

In PIL, the multitude of treaties, customary rules, and law stemming from other sources has increased awareness towards coordination or harmonization of the law. As a result, the ILC has in its 2006 report on fragmentation[5] proposed the concept of "systemic integration", which may be described as one among several approaches like "mutual supportiveness" to harmonize different rules of PIL.[6] Those approaches share a similar rationale: when two norms are applicable at the same time, the interpretation of one norm shall acknowledge the other, its importance and relevance, and thus both norms are interpreted "against each other".[7] In principle, this mutual recognition might cause interdependencies between both norms.[8] The ILC sought this principle enshrined in Art. 31(3)(c) Vienna Convention on the Law of Treaties (VCLT).[9]

At the same time, the ECHR is regarded by the ECtHR as a "living instrument", whose interpretation shall recognize the societal development towards a more

[4] This term has been introduced most prominently to the theory of legal interpretation by Fish (1980), pp. 304 and 305.

[5] ILC and Koskenniemi (2006), paras 410 et seq.

[6] See Matz-Lück (2006), pp. 45–48; Pavoni (2010), pp. 651, 653, and 666–669.

[7] See ILC and Koskenniemi (2006), para 479; Matz-Lück (2006), pp. 47 and 48; Pavoni (2010), p. 678.

[8] See ILC and Koskenniemi (2006), paras 479–480; Pavoni (2010), p. 678.

[9] See only ILC and Koskenniemi (2006), paras 424–460.

comprehensive and higher standard of protection.[10] Drawing from a strong teleological understanding, the court accepts the task to evolutive and progressive development of the Convention's rights.

Without analyzing those two strands to interpretation in greater detail, some examples may be pointed out where discrepancies might arise: firstly, general PIL permits evolutive interpretation only as an exception, not the rule.[11] A dynamic interpretation to the meaning of a treaty was though permissible by the International Court of Justice (ICJ) only if the parties indicated it, e.g., by usage of a "generic term".[12] This relationship between rule and exception is probably inversed by the ECtHR.[13] Secondly, instances might arise where a harmonizing interpretation of the Convention with other branches of PIL might lower instead to increase the standard of protection offered—and consequently either the urge towards a more coherent legal system has to be rejected or the Conventions' innermost purpose restricted.

Those examples shall only serve as illustrations that harmonizing interpretation might not always be implemented without friction. Thus, it should be analyzed in how far any applier of law is legally bound to follow a harmonizing interpretation or may rank it lower than other purposes.

4.3 Methods of Interpretation as Group Specific Rules

The interpretation of law has often been called "an art, not an exact science".[14] However, even though any applier of law might have certain discretion when interpreting the law, certain limits and constraints to the interpretive exercise exist. Due to the limited scope of this contribution, the following analysis limits itself to the interpretation of treaties under PIL.

4.3.1 The Nature of Interpretation and the Interpreter's Role

What is the legal relevance of interpretation? Without attempting an in-depth discussion, the basic positions to this inquiry should be distinguished: the

[10] Originally ECtHR, Tyrer v. UK, No. 5856/72, para 31; in more detail see Rietiker (2010), pp. 260–268; Letsas (2010), pp. 263–266.

[11] See Linderfalk (2011), pp. 148 et seq.; Dawidowicz (2011), pp. 205–208.

[12] ICJ, Judgment of 13.07.2009, Dispute Regarding Certain Navigational Rights (Costa Rica v. Nicaragua), ICJ Reports 2009, p. 213, para 66; for a critical remark, cf. Dawidowicz (2011), pp. 219–222.

[13] Rietiker (2010), pp. 262 and 263.

[14] ILC (1966), p. 218.

traditional position, coherent both with positivist and non-positivist concepts of law, would be that a treaty of PIL consists of a number of norms, which have an objectively determined scope and meaning.[15] Thus, the task of interpretation is one of cognizing the existing meaning of a norm from the material presented, which in a treaty primarily is its text.[16] As a consequence, one could in theory distinguish between "right" and "wrong" interpretations and "correct" or "incorrect" application of the rules of interpretation.

However, the premise that any norm has a pre-determined meaning is basically a fiction that does not hold up against the actual challenges of interpretation[17]: if one really contended that any norm has an objectively predefined meaning, this would require states, when they adopt a treaty, to positively decide on any potential case this treaty might cover in future in detail. Yet this is not how treaties are actually concluded: regularly, ambiguous or vague terms are used to cover actual disagreement.[18] From a more theoretical perspective, it is furthermore submitted that language inherently bears ambiguities and uncertainties.[19] Hence, if a treaty is written in deliberately or necessarily uncertain or ambiguous language, why should one pretend that behind this treaty terms an objectively pre-determined norm remains hidden? As *Kammerhofer* persuasively concludes: "the norm is the text."[20]

Based on this premise, the act of interpretation is no longer one of correctly cognizing the meaning of a norm but of constructing the meaning of a text.[21] Thus, the function of rules and methods of interpretation changes: they no longer serve as guidance on how to identify the correct meaning of a norm but serve to define the discretion and leeway the applier of law has when he interprets the law.

Furthermore, interpretation necessarily becomes in a certain sense more subjective: if a subject of law, whether it is a court, a State, or an international organization, interprets the law, this interpretation can only purport to express *one* possible meaning of the law, not to identify the objective meaning. Consequently, any interpretation is primarily a statement by the utterer on how he understands the law without any binding effect on other subjects. An interpretation only in such cases has binding effect on other subjects, if a rule in the legal system conveys such authority to a certain subject—the most prominent examples are courts and tribunals, which issue binding decisions, yet binding only *inter partes*.[22] There is thus

[15] Cf. the description of Kammerhofer (2011), pp. 88–92.

[16] Orakhelashvili (2008), pp. 285–288; for a contraposition, see Kammerhofer (2011), pp. 104 et seq.

[17] See for an extended reasoning from a Kelsenian perspective Kammerhofer (2011), pp. 106 et seq. and 117 et seq.

[18] ILC and Koskenniemi (2006), para 34.

[19] Kammerhofer (2011), pp. 117–120.

[20] Kammerhofer (2011), p. 112.

[21] Kammerhofer (2011), pp. 105–113.

[22] This is a general feature of international law; see Pellet (2011), paras 35 et seq.; Gardiner (2008), p. 114, and confirmed by the statutes of most courts and tribunals, e.g., Art. 59 Statute of the International Court of Justice.

no formal binding effect of judgments beyond the parties of a dispute, even though, for example, Art. 38 (1)(d) Statute of the International Court of Justice regards them as "subsidiary means for the determination of rules of law."

Nevertheless, even if interpretation has a subjective tendency to it, it is by no means arbitrary or relativistic: any court, any subject of law relies on persuasion of others in order to foster support to the interpretation chosen. A common ground to persuade other subjects of law are the rules and methods of interpretation any applier of law consequently has to adhere to, unless he can, on a political plane, fall back on other factors like individual power. However, generally all subjects of law purport to base their interpretive reasoning on those rules and methods of interpretation PIL provides.

4.3.2 Positive Rules of Interpretation and Interpretive Communities

The rules of interpretation thus exercise an important function to guide and limit the subjective interpretation of any applier of law and provide all subjects of law with common ground to depart from, when interpreting a treaty clause. The more carefully someone follows those rules, the higher are the chances—as a rule of thumb—to convince other subjects of the meaning ascribed to the treaty norm.

This naturally raises the questions how and by whom are the rules of interpretation to be determined? What is their nature, and what consequences result from their violations? A natural starting point should be the positive rules of interpretation enacted in Arts. 31–33 VCLT, which are supposedly accompanied by parallel customary law.[23] It has been doubted in legal theory whether positive law should define rules of interpretation or whether those rules are beyond the reach of positive law.[24] As matter of fact, Arts. 31–33 VCLT are positive law, in form of a treaty. Yet the doubts mentioned above hint at a problem: those rules can per definition not be all rules of interpretation as, for example, the text of Arts. 31–33 requires interpretation itself, which must be guided by certain rules as well.

Accordingly, it is submitted that those positive rules of interpretation are—within the scope of the Vienna Convention and probably beyond as "custom"—proper law, any subject of law is bound to when interpreting treaty law. Therefore, the extensive debates on interpretive methods should be considered not as deduction of more precise rules from those meager articles. On the contrary, a second level of interpretive rules exists, which is not written law, and one might dispute whether it is proper "positive" law at all.

Those rules of interpretation are defined by the legal subjects participating in the application of the law of a certain legal system, in our case, of PIL. This group of all

[23] See only ILC and Koskenniemi (2006), para 427.

[24] See the detailed account from Bernhardt (1967), pp. 492 and 493.

legal subjects may be termed "interpretive community", a term used by *Fish* to describe a group with more or less coherent understandings of language etc.[25] Without going into much detail on this concept, the idea was developed from the fact that language to certain persons is commonly understood in similar fashion, because of shared context, education, and perceptions.[26] Thus, the concept developed by *Fish* would probably require far more coherent participants in PIL than arguably are present. However, the major common feature of all appliers of PIL is that their frame of reference is exactly this system of law—whenever someone interprets, he acts from a perspective *within* this legal system. This self-attachment consequently is the binding factor to the interpretive community of PIL. Having said that, the rules of interpretation compensate the lack of coherent background among the participants, by establishing a common ground of reference. To acknowledge the possibility that such formalized, yet no positivized, rules of interpretation exist permits to broaden the interpretive community, as *Fiss* argues persuasively,[27] whereas *Fish* himself rejected the idea of interpretive rules in favor of more limited, naturally coherent communities.[28] The concept of interpretive communities establishes an understanding of how communication in a legal system might work and assigns to the rules of interpretation a certain function: to be the common frame of reference for all otherwise subjective interpretations to refer to.

One crucial question remains: how are those rules defined, since it was stated before that the rules of interpretation transcend the positive norms of Arts. 31–33 VCLT? It is submitted that the rules of interpretation are one part of the general discourse about law present within any legal system.[29] Thus, any act of interpretation contains on a meta-level a contribution to what the rules of interpretation should be. All subjects participating in the application of a certain legal system, which are the interpretive community of a certain legal system, interact in the form of a legal discourse.[30] The concept of rational discourse, with the legal discourse forming a part of it, is a well-accepted concept in contemporary social sciences and law.[31]

Albeit the current structure of PIL provides no background for a perfect rational discourse,[32] the interaction within the interpretive community may be understood as a discourse of all participants to this community. The methods form one part of

[25] Fish (1980), pp. 303 et seq.; see also Johnstone (1990–1991), p. 378.

[26] Fish (1984), pp. 1343; Johnstone (1990–1991), p. 379.

[27] See the treatise of Fiss (1981–1982), pp. 741–744.

[28] See on the debate between both scholars Fiss (1981–1982), pp. 744–750, and Fish (1984), pp. 1343 et seq.

[29] Alexy (2001), pp. 299–307, establishes this link; cf. also Johnstone (2003), pp. 440–442.

[30] See for the legal discourse Habermas (1998), pp. 151–165 and 272–292; Alexy (2001), pp. 233–254.

[31] See for an overview of different theories Alexy (2001), pp. 53–218 and 221–254, for his own theory.

[32] See for the conditions of the perfect discourse, e.g., Alexy (2001), pp. 141–161 and 233–258; also see Johnstone (2003), pp. 455 and 456, with further references.

the judicial discourse as a whole.[33] Therefore, the community shapes the methods of interpretation applicable in legal argumentation. Whenever a subject of law interprets the law, he will usually have recourse to the accepted principles of interpretation as defined by the interpretive community. Otherwise, that means when the interpretation bases on other methods of interpretation, the applier of law jeopardizes the acceptance of his interpretation by the community. As a discoursive development of rules works, the interpretive community might recognize any deviation, either slight or large. However, the more faithful an applier of law remains to the already established methods, the more certain is the recognition of this interpretation as "lawful" by the community.

Having said that, a last question remains unanswered: what is the relationship between the rules established by an interpretive community and the positive norms of interpretation? Those retain a twofold relevance to the development of interpretive rules by the community. The first aspect is an axiomatic understanding of the interpretive community, because it defines itself in adherence to the legal system of PIL, which is formed by the positive norms belonging to this system. If this weren't the case, the community could analyze any utterance of language, but by definition it would not interpret international law. The community defines itself in relation to the legal system, which is its anchor. Consequently, as a second aspect, the discourse within the community may use the positive norms of interpretation as a rational argument: adherence of the methods shaped in discourse to the positive law would create certain outer limits to the methods used. Yet it should be kept in mind that this reference produces imperfect certainty, since the community may potentially alter the positive rules of interpretation by creating new customary law[34] and the positive rules themselves are undetermined, permitting a wider range of interpretive approaches.

Concluding, the methods of interpretation are mainly determined, within the boundaries of the positive norms covering the subject, by an interpretive community that comprises all appliers of law in PIL.

4.3.3 A Multitude of Interpretive Communities in PIL

So far, the interpretive community of PIL was defined as if it included all subjects of PIL and thus establishes the same methods of interpretation throughout all norms of PIL.

However, the concept's origin, as stated above, intended describes by far smaller communities that define themselves by a common understanding of language and context.[35] This approach hints towards a different perspective: there is no reason

[33] Alexy (2001), pp. 307.

[34] For the lawmaking practice, see Kammerhofer (2011), pp. 135–138.

[35] See only Johnstone (2003), pp. 444 and 445.

solely to recognize one overarching general interpretive community of PIL. On the contrary, an interpretive community on a smaller scale might establish itself, in PIL most likely with reference to a certain treaty regime, e.g., the WTO agreement, the ECHR, or others. Such an interpretive community could form a partial discourse, relying on an independently evolving methodology of interpretation. Why should a community follow such a path? One reason might be to fully realize the "object and purpose" of the respective treaty regime as understood by the community. The law of treaties might be used as a trace towards this approach with its reliance on the "object and purpose" of a treaty as standard to define and limit certain actions in Arts. 18–20, 31, 33, 41, and 58 VCLT.

Regardless of the self-esteem of a particular interpretive community, two caveats should be made: foremost, any group of states or other legal subject lacks the capacity under international law to create an objectively disconnected legal regime, e.g. a "self-contained" regime, and thus remains bound to PIL in general, at least in its relation to third states.[36] Moreover, even within the sphere of interpretation, the validity of any accepted methods is limited by the membership of the interpretive community: whoever intends to address a particular community might find himself at odds with the methods acknowledged in the general interpretive community. Consequently, unless addressed within their respective discourse and in accordance with the methods agreed upon, the general community could consider an interpretation impermissible.

As a consequence, any applier of a certain treaty might consider a deviation from the accepted standards of interpretation in the general interpretive community in order to further the specific objects of the treaty regime in question. Thereby, a particular interpretive community might arise. At the same time, however, any deviation might be considered illegitimate if it is at odds with the general communities' standards, even though this act of interpretation will partake in the discourse within this broader community as well. The question of acceptance therefore is one of degree and probably time: a particular community might, by persistently and coherently applying their interpretive methods to a certain treaty, succeed to also alter the general discourse.[37] Furthermore, in practice international tribunals might as well interact and take each other's interpretation into account and therefore also tend to harmonize their respective methodologies. Yet, unless coherence is achieved, any particular community risks that its methods are considered unlawful, or at least unpersuasive.

[36] See the persuasive treatise of Simma and Pulkowski (2006), p. 529 (with a thorough analysis pp. 495 et seq.), and ILC and Koskenniemi (2006), para. 152. The ECtHR confirmed this dependence on PIL; see Rietiker (2010), pp. 250 and 251.

[37] Arguably, the ECtHR's practice is already recognized in the general community as effective teleological interpretation; cf. Rietiker (2010), pp. 256–260; Tzevelekos (2009–2010), pp. 685–687.

4.4 Application on the Interpretation of the ECHR

The ECHR is a specialized treaty regime both regarding its geographical scope—even though this might be not too restrictive—and from its purpose as a human rights treaty regime. The ECtHR considers the Convention a "living instrument", in order to pursue a teleological and progressive approach towards the Conventions' interpretation.[38] This approach might at times conflict with the methods accepted by the general interpretive community in PIL. However, the nature of the ECHR easily permits to consider it a particular interpretive community. Therein, because the ECtHR is the ultimate authority to interpret the Convention, it is the most influential actor within this community, which consists of the Court, the Council, and certainly all member states and their officials, NGOs, and respective scientific communities. Thus, the ECtHR apparently decided in favor of a more progressive interpretation than PIL would in other instances permit: it favors an evolutive interpretation and probably discourages harmonizing interpretation if it would reduce the level of protection. The general interpretive community seemingly focuses more strongly on harmonizing interpretation, whereas exceptions require special justification and permit evolutive interpretation primarily if a *generic term* is present. Of course, one may argue that given the indeterminacy of certain articles in the ECHR the standard requiring a *generic term* usually will be fulfilled, in order to enable evolutive interpretation; therefore, the interpretive methods would be reconcilable in this special instance.[39] Yet the ECtHR's approach renders evolutive interpretation the standard without requiring reasons in each individual case.

From the internal perspective of the particular community to the ECHR, this approach is rather well accepted and justified: the particular community, thriving for individual rights and mainly guided by the Court, will mostly acknowledge interpretation based on the object and purpose of the ECHR.

Even if the general interpretive community in PIL might evaluate the relevance of those methods of interpretation differently, the particular community can—and in the present authors' view should—follow this teleologically driven approach. As this particular approach at the same time addresses the general community, its standards might gradually change. Nevertheless, at least the theoretical possibility remains that the general community considers a certain interpretive approach impermissible, potentially creating liability for the member states. It is undisputed that *vis-à-vis* third states they can neither rely on norms agreed upon within (cf. Art. 34 VCLT) nor *a majore ad minus* on the interpretive approach connected to this regime. Albeit such potential accountability from an external perspective, there seem to be no reasons—and this is an openly evaluative answer—not to pursue a teleological approach to increase the standard of protection and consciously accept potential frictions with the greater sphere of PIL and the general community.

[38] See Rietiker (2010), p. 276; Letsas (2010), p. 263.

[39] Tzevelekos (2009–2010), pp. 688 and 689; cf. also pp. 645–679 on how the ECtHR actually employs Art. 31(3)(c) VCLT.

The most obvious example has been illustrated before: at times, recognizing norms of PIL, e.g., under Art. 31(3)(c) VCLT could even reduce the protection offered under the Convention, if the idea of systemic integration finds its application. On the other hand, the ECtHR's progressive teleological interpretation might increase fragmentation, as it would deviate from what PIL otherwise knows.

For the applier of law, in particular the ECtHR, it remains a question of a responsible, ethically driven choice how to develop the ECHR and its standard of protection even in the face of more reluctant development in general PIL. If the Convention's purpose is regarded as important enough, the internal perspective should pursue this object, even if the Convention or its interpretative standards no longer seamlessly fits into the surrounding PIL.[40]

4.5 Conclusions

The ECtHR constantly improves the protection for individuals the Convention demands. At times, it employs a more progressive stance of teleological interpretation than other areas of PIL might accept, and instances could occur where a harmonizing interpretation with other rules of PIL would lower the protection offered, instead of increasing it.

The idea of interpretive communities offered here shall illustrate that a particular treaty regime might always decide to partly separate its interpretation—only *inter se* of course—from the general community. Thus, the communities' partakers decide to focus on their considerations of values and ethics and thereby accept to incur responsibility and "fragment" PIL, because of the object and purpose of their regime.[41] The particular community will regularly also address the general interpretive community, trying to further acceptance for their approach.

In case of human rights treaties, this general acceptance probably is already developing. Yet, in particular, the ECHR might power further improvements—but any improvements sought on an interpretive stage commence with the acceptance of those values, the *telos* stemming from them, and the interpretive methods based thereon. Application of law burdens its actors with choices to be responsibly made and the task to balance different demands. The rules of interpretation are no safeguard against abuse, only the interpreters' point of origin to persuade his peers.

[40] Again, they might in practice partly converge, yet the thoughts remain valid in principle.

[41] A similar stance is taken by Tzevelekos (2009–2010), pp. 689–690.

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Part II
Traditional Concepts of International Law Revisited by Human Rights?

Chapter 5
The Influence of Human Rights on Diplomatic Protection: Reviving an Old Instrument of Public International Law

Sebastian tho Pesch

5.1 Introduction

Public international law has changed under the influence of human rights. This has also affected the law of diplomatic protection, an instrument that is similar to the notion of human rights. This chapter will examine how the rise of individual rights has affected the law of diplomatic protection and how this development has partly continued in municipal law. A special emphasis is put on the discretion of the state when exercising diplomatic protection over its citizens. Furthermore, by comparing the similarities of the two regimes, it is suggested to use diplomatic protection as a means of enforcing human rights.

The concept of protecting individuals against governmental authority is no invention of the post-WWII societies. Something similar existed long before the current human rights system: the law of diplomatic protection. Nowadays, human rights seem to have taken the place of diplomatic protection when it comes to guaranteeing rights of an individual. But is this really true? I will explore the influence of human rights on this old instrument of public international law. And since the current human rights system lacks efficient implementation mechanisms and diplomatic protection has a limited scope of application, I also want to propose ways to make both instruments more efficient.

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5.2 Diplomatic Protection and Human Rights: Their Current Status in Public International Law

5.2.1 Diplomatic Protection

The concept of diplomatic protection dates back to the nineteenth century, when imperialist States were looking for a way to protect their citizens engaged in commercial activities in developing countries.[1] Because individuals were not regarded as subjects of public international law, the individual could not demand reparation on the international plane.[2] This was only possible in the national legal framework. In order to establish a legal title on the international level, the "right" to demand reparation was transferred to the citizen's State. Over time, safeguards such as the genuine link and the local remedies rule were implemented in order to inhibit abuse.[3] Today, diplomatic protection describes a procedure by which a State can demand reparation for an injury suffered by one of its nationals caused by an internationally wrongful act committed by another State.[4]

The central idea behind diplomatic protection is that the State can demand reparation instead of its citizen, because the individual was inhibited from doing so by the constraints of public international law. So one could think that diplomatic protection is just a procedure to secure the indemnification of an individual by enforcing his rights through the State. However, diplomatic protection has developed to be much more than that. Today, it is regarded as a right of the State. This idea was first formulated by the Swiss diplomat de Vattel in the eighteenth century.[5] According to him, every injury of a citizen indirectly injures the State, which must provide for the citizen's protection. This view was later shared by the Permanent Court of International Justice and the International Court of Justice (ICJ).[6] The law of diplomatic protection was laid down in the Draft Articles on Diplomatic Protection of the International Law Commission (ILC),[7] which are largely a codification of customary international law.[8]

The fiction that diplomatic protection guards the state's rights and its exercise is therefore left to political discretion was often criticized.[9] Some commentators call

[1] Dugard (2009), para. 3.

[2] García Amador (1958), p. 471; Draft Articles on Diplomatic Protection 2006, UN Doc. A/61/10, Comment to Art. 1 para. 4.

[3] Dugard (2009), para. 3.

[4] Draft Articles on Diplomatic Protection 2006, UN Doc. A/61/10, Comment to Art. 1 para. 2.

[5] De Vattel (1758), Vol. I, book II, para. 71 (p. 309 in the 1916-reprint).

[6] Dugard (2009), para. 7.

[7] Draft Articles on Diplomatic Protection 2006, UN Doc. A/61/10.

[8] Vermeer-Künzli (2007a), pp. 37–38; Dugard (2009), para. 6. This is in part also confirmed by the ICJ; see Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007, para. 39.

[9] See, i.e., de Visscher (1968), pp. 283–284.

for a "humanization" of diplomatic protection.[10] Indeed, this fiction can lead to bizarre constellations: a State could, i.e., start diplomatic proceedings against the will of the national. Also, if the protecting state receives compensation from the violating state, there is no duty under international law for it to be passed on to the individual since it is reparation for a violation of the states right.[11]

5.2.1.1 Internationally Wrongful Act

Diplomatic protection is a great way of enforcing rights through a set procedure. However, the instrument itself does not guarantee any substantial rights. For it to work, there must be some international rights in the first place. Once a violation has occurred, diplomatic protection comes in and takes over. An internationally wrongful act requires proof that the state has violated a primary rule of international law relating to the treatment of aliens, the so-called minimum standard.[12]

5.2.1.2 Injured Person Must Have the Nationality of the Protecting State

Generally, the injured person must have the nationality of the protecting State. This is a necessary connection because of the fiction that the injury to the individual is an injury to the State. In the famous Nottebohm case, the ICJ decided that more than just the formal status of being a national is necessary for a State to exercise diplomatic protection: the court asked for a "genuine connection" between the State and the individual for the State to claim that the injury is his own.[13] This genuine connection was not codified in the Draft Articles of 2006 since according to the ILC "the Court did not intend to expound a general rule applicable to all States."[14]

5.2.1.3 Exhaustion of Local Remedies

This requirement is well known from other human rights mechanisms, such as the European Convention on Human Rights (Art. 35 para. 1 ECHR) and the Interna-

[10] Pergantis (2006), pp. 251–397; Meron (2006).

[11] Milano (2004), p. 94; Vermeer-Künzli (2007a), p. 61; Pisillo Mazzeschi (2009), p. 211.

[12] More on this under Sect. 5.4.3 below.

[13] Nottebohm case (Liechtenstein v. Guatemala), Judgment (second phase), I.C.J. Reports 1955, p. 23.

[14] Draft Articles on Diplomatic Protection 2006, UN Doc. A/61/10, Comment to Art. 4 para. 5.

tional Covenant on Civil and Political Rights (Art. 2 of the Optional Protocol to the International Covenant on Civil and Political Rights[15]).

5.2.1.4 Exercise of Diplomatic Protection

Today, the exercise of diplomatic protection for the benefit of a national remains at the discretion of the state.[16] This discretion can cause problems for the individual if the home state is unwilling or unable to provide for his protection. However, Art. 19 of the Draft Articles urges states to grant protection despite the discretionary nature.

5.2.2 Human Rights

There is no lack of human rights treaties. In fact, there is a myriad of treaties, some of general scope, others highly specialized on one topic. What the world lacks is a thorough system of implementation and enforcement. It's true, some systems like the ECHR with the European Court of Human Rights (ECtHR) are a prime example of how human rights should be implemented. But the ECHR is of regional character, and it took decades and devastating wars for the European nations to realize the necessity of such a system. Furthermore, one should not forget that the actual impact of the court relies solely on the appellative character of its judgements since it has no enforcement instruments of its own.

On the international plane, we have no "Human Rights Court". Some human rights treaties come with a treaty body that, if the State chooses so, monitors its compliance with the treaty. However, such a treaty body is not compulsory. In most cases, the law governing the treaty body comes in the form of an optional protocol. Again, the ECHR is an exception: the treaty, as amended by protocols 11 and 14, prescribes the compulsory jurisdiction of the ECtHR "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols" (Art. 19 ECHR).

This does not change the general enforcement deficit on the global scale, caused by the lack of self-enforcement of the norms themselves and high enforcement costs for the state.[17] Since no easy solution to this fundamental problem is in sight, one should look for other ways to ensure the observance of those rights. Diplomatic protection could provide a way. But this also raises some questions.

[15] UNTS vol. 999, p. 171.

[16] Draft Articles on Diplomatic Protection 2006, UN Doc. A/61/10, Comment to Art. 2 paras. 2, 3.

[17] Goodman and Jinks (2004), p. 629.

5.3 Diplomatic Protection and Human Rights: Exclusive or Complementary?

Before examining how human rights and diplomatic protection could benefit from each other, one needs to take a closer look at the relationship between those two instruments. At first sight they seem very similar: both require the violation of an individual's rights, therefore making the purpose of both instruments the protection of the individual. This understanding would omit that for the purpose of diplomatic protection the violation is seen as a violation of the state's right; diplomatic protection has consequently led to a pro forma protection of the state's rights. Long before human rights entered the stage of public international law, this fiction was necessary to provide some protection for the individual. Nowadays, it is undisputed that human rights give the individual rights on the international plane, which makes him a subject of international law. One can therefore legitimately ask: do we still need diplomatic protection?

Considering the emergence of human rights, Garcia Amador proposed to end the fiction of diplomatic protection whenever the individual is granted comparable rights on the international plane as early as 1958.[18] Even though a strong influence of human rights on general international law cannot be ignored,[19] this notion ignores that the law of diplomatic protection and the law of human rights remain two distinctive parts of public international law. Their biggest difference is one of personal scope: diplomatic protection only applies to the rights of nationals abroad, whereas human rights apply to every individual.[20]

As to their procedural embedding, diplomatic protection has a huge advantage: because of the fiction that the state suffers an injury, the violation of an individual right turns into a dispute between two states. Consequently, the ICJ has jurisdiction in such a case,[21] something that would not be possible with the direct participation on an individual.[22] The jurisdiction of the ICJ is widely recognized, which makes it an effective way of pursuing justice.

Some human rights instruments, like the 1991 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families[23] in Art. 23 and the 1985 United Nations General Assembly Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live[24] in

[18] García Amador (1958), pp. 437–439.

[19] Sicilianos (2012), pp. 6–11.

[20] Milano (2004), p. 103; Meron (2006), p. 302; García Amador (1958), pp. 438.

[21] Art. 34 para. 1 ICJ-Statute.

[22] Milano (2004), p. 109.

[23] UNTS vol. 2220, p. 3.

[24] UN Doc A/RES/40/144.

Art. 10, confirm the understanding that the existence of individual rights does not oust the possibility to turn to the home state for diplomatic protection.[25]

5.4 The Influence of Human Rights on Diplomatic Protection

The biggest problems of diplomatic protection today are its limited personal scope, the discretionary exercise, and the uncertainty surrounding the substance of protected rights. How the influence of human rights has spurred the evolution of these features will now be addressed in detail.

5.4.1 Limited Scope of Diplomatic Protection

As noted before, a state can exercise diplomatic protection only for its own nationals. It is clear that the instrument should not be used to force another state to care for its citizens (although that might be desirable). But there are people who lack a home state that might protect them on an international level, like stateless persons and refugees. Their status in public international law has dramatically improved over the last decades. The institute of diplomatic protection has adapted to the need of those people. In 1931, the US-Mexican Claims Commission still decided that diplomatic protection cannot be extended over nonnationals, although it recognized that those individuals might be helpless on the international plane because no state could exercise protection.[26] Today, the ILC Draft of 2006 has picked up on the recent development: States may also exercise diplomatic protection over stateless persons and recognized refugees who are lawful and habitual residents of the State, Art. 8 Draft Articles. This prerequisite provides for a connection to the exercising state. However, the State may not exercise diplomatic protection over a refugee against his country of origin. This was implemented to prevent abuse.

Even though diplomatic protection is by the very reason of its existence restricted in the scope, it still offers ways to address human rights violations: as soon as an individual's human rights are harmed abroad, there is the possibility for his home state (or in the case of stateless people or refugees, another state) to address this violation. The problem remains that many states are not willing to go this step. This does not change the fact that it is possible.

[25] First Report on Diplomatic Protection (2000), UN Doc. A/CN.4/506, para. 77; Warbrick (1988), pp. 1003–1004; Meron (2006), p. 302, fn. 285 and p. 304.

[26] Dickson Car Wheel Company (U.S.A.) v. United Mexican States (1931), 4 RIAA, p. 678.

5.4.2 The Discretion of the Home State

The exercise of diplomatic protection remains at the discretion of the home state. However, there are two distinct developments concerning the discretion. First, there have been proposals to improve the situation of the individual on the international plane. The second development takes place in the municipal law: national courts in an increasing number of states deduct a right of the individual to diplomatic protection against the state from national basic rights.

5.4.2.1 International Duty to Exercise Diplomatic Protection

John Dugard, who was appointed Special Rapporteur of the ILC in 1999, included an Art. 4 in his First Report on Diplomatic Protection from 2000, which reads in para. 1:

> Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a jus cogens norm attributable to another State.[27]

He explains that this does not yet reflect common state practice but that numerous nations have already moved towards limiting this discretion.[28] Therefore, it would only be a logical next step for draft articles to pick up on and support this progressive development[29] fuelled by "the advancement of human rights."[30]

However, this move was generally seen as too progressive by the ILC.[31] This is why the provision was crossed out and did not appear in the final version.

5.4.2.2 National Duty to Exercise Diplomatic Protection

Putting diplomatic protection at the discretion of the state just limits the instrument on the international plane, meaning that "it is not possible to describe diplomatic protection as an individual human right."[32] But through national law, in most cases constitutional law, the discretion can melt down to a duty of the state to act.[33]

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[27] First Report on Diplomatic Protection (2000), UN Doc. A/CN.4/506, para. 74.

[28] First Report on Diplomatic Protection (2000), UN Doc. A/CN.4/506, paras. 81–86. The author concedes that "[t]his approach is clearly in conflict with the traditional view," para. 87.

[29] First Report on Diplomatic Protection (2000), UN Doc. A/CN.4/506, para. 88.

[30] First Report on Diplomatic Protection (2000), UN Doc. A/CN.4/506, para. 87.

[31] Milano (2004), p. 95.

[32] First Report on Diplomatic Protection (2000), UN Doc. A/CN.4/506, Para. 77.

[33] For more domestic case law see Pisillo Mazzeschi (2009), p. 221, fn. 39; and Vermeer-Künzli (2007b), pp. 181–204.

5.4.2.2.1 Eastern European Countries

Some central and eastern European countries have constitutional provisions that give every national a right to diplomatic protection against the government. However, national courts have restricted that right to only represent consular protection through case law.[34]

5.4.2.2.2 Germany

In Germany, the constitution does not explicitly include a right to obtain diplomatic protection. In the case of a German national being held by authorities abroad, the basic rights guaranteed by the German constitution provide a basis to request the help of the German authorities. However, this general duty to protect is not limitless. Under the constitutional duty to protect, the actual exercise of diplomatic protection can be limited by also considering interest of the general public and interest of German foreign policy.[35]

5.4.2.2.3 Kaunda (South Africa)

Although the question whether South African citizens had a constitutional right to diplomatic protection had been discussed by legal scholars before,[36] this was the first time that the Constitutional Court of South Africa had to decide on the topic. The majority of the judges concluded that the basic rights under the constitution did not provide for such a claim.[37] However, the majority opinion met a flaming dissent from Justice O'Regan claiming the contrary.[38]

5.4.2.2.4 Abbasi (Great Britain)

A similar case can be made for Great Britain: without going into the circumstances of the case, the British government denied Mr. Abbasi, who was detained by the US military in Guantanamo Bay, diplomatic protection. He challenged this decision before the England and Wales Court of Appeal, which denied his request:

[34] Milano (2004), p. 96, fn. 33.

[35] Kolb et al. (2011), pp. 236–238.

[36] Erasmus and Davidson (2000), pp. 113–130.

[37] Samuel Kaunda and Others v The President of the Republic of South Africa and Others, Case CCT 23/04, 44 ILM (2005), p. 173, para. 144. This view was later shared by the Supreme Court of Appeal of the Republic of South Africa; see Van Zyl v Government of RSA [2007] SCA 109 (RSA) para. 6.

[38] Samuel Kaunda and Others v The President of the Republic of South Africa and Others, Case CCT 23/04, 44 ILM (2005), p. 173, paras. 212–271.

exercising diplomatic protection is "intimately connected with decisions relating to this country's foreign policy,"[39] which is the sole responsibility of the government. Therefore, a general duty to exercise diplomatic protection over British citizens could not be found by the court.

5.4.2.2.5 David Hicks (Australia)

David Hicks was another person detained in Guantanamo Bay. He is Australian by birth and had a right to claim British citizenship under the British Nationality Act 1981.[40] However, the British authorities stripped him from his British citizenship the same day he applied successfully.[41] Although this decision did not hold up in court,[42] there is no individual right to diplomatic protection under British law, as we just learned from the Abbasi case.

The Australian government exercised diplomatic protection only to a very limited extend: they monitored his detention but refused to ask for his release.[43] Consequently, the matter was brought to court. However, it never came to a verdict, since Hicks pled guilty and returned to Australia for his sentence.[44]

5.4.2.2.6 Khadr (Canada)

The case of Mr. Khadr involves yet another Guantanamo detainee. Mr. Khadr was charged with killing a US soldier in Afghanistan and being involved in activities connected with Al-Qaida. He is a Canadian citizen and was 15 years old when the US brought him to Guantanamo.[45] Mr. Khadr asked the Canadian government for diplomatic protection; the government refused. Instead, they helped the US authorities in his interrogations while the boy thought that they talked to him to secure his repatriation. Through judicial review, Mr. Khadr tried to get the government to help

[39] R (Abbasi) v. Foreign Secretary [2002] EWCA Civ 1598, para 106 iv.

[40] Klein and Barry (2007), p. 5.

[41] Klein and Barry (2007), pp. 5–6.

[42] Klein and Barry (2007), pp. 6–7.

[43] Klein and Barry (2007), pp. 17–18.

[44] Klein and Barry (2007), p. 18.

[45] Consequently, UNICEF Executive Director Anthony Lake and the Special Representative for Children and Armed Conflict Radhika Coomaraswamy have stressed his status as a minor and demanded that his special rights and needs should be respected; see "UN Official Calls for Release of Former Child Combatant from Guantanamo," UN News Centre, 5 May 2010, and "Statement by UNICEF Executive Director, Anthony Lake, on the case of Guantanamo Bay detainee, Omar Khadr," UNICEF, 26 May 2010, available at http://www.unicef.org/media/media_53747.html. Accessed 28 July 2014.

him. In the first instance, the court refused his request. The Court of Appeal, however, ordered the government to secure his repatriation.[46]

Now one could think that this is a good decision for the position of human rights in diplomatic protection. For the result this is definitely true. But the way the court reasoned shows that it is not the breakthrough one might have hoped for. The Court granted Mr. Khadr diplomatic protection as remedy for a breach of rights he has under the Canadian Charter of Rights and Freedoms, a breach committed by Canadian authorities through assisting the US military during the interrogation instead of helping him.

5.4.2.3 Conclusion

The limitation of diplomatic protection through its discretionary nature is under attack on the international as well as on the national levels.[47] The exercise of diplomatic protection might just be at the discretion of the State on the international plane. The national level, however, might prescribe something different: strong rights of the individual against the State (basic rights in most cases) can lead up to a duty to exercise diplomatic protection. For those countries, this means one step closer towards a more rigid system of the protection of human rights through diplomatic protection. Should this development continue, it would have great implications on the use of diplomatic protection for exercising human rights, because it would facilitate the application of the instrument and make the outcome more predictable.

The fact that Dugard's Art. 4 was taken out of the final draft articles by the Drafting Committee does not mean that a development towards restricting the state's discretion on the international level is inexistent. The ILC laid down many reasons for their decision. Among them was that it did not consider the existing state practice as sufficiently widespread to amount to an *opinio juris*.[48]

5.4.3 Content of the "Minimum Standard"

Although this minimum standard lacks a precise definition,[49] it includes basic human rights, such as the rights to life and against bodily harm.[50] There is a notion

[46] As to the effectiveness and appropriateness of the declaratory order, see McGregor (2010), pp. 494–502.

[47] Touzé (2007), para. 906.

[48] Report of the International law Commission on the work of its 52nd session (1 May to 9 June and 10 July to 18 August 2000), A/55/10, para. 450.

[49] Dickson (2010), para. 21; García Amador (1958), p. 436.

[50] Dickson (2010), para. 11.

that this minimum standard has, over the course of time, been replaced by universal human rights, such as the ones laid down in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[51] In the Diallo Case, the ICJ established that "[o]wing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights."[52] Consequently, the court directly applied human rights from treaties binding both parties in the judgement.[53]

Since the exact content of what constitutes an internationally wrongful act is defined by customary international law, the content will inevitably continue to change over time. Human rights have played and will continue to play an important role to fill the minimum standard with tangible content.[54]

5.5 Conclusion

There has been a strong influence of human rights on the instrument of diplomatic protection that keeps the instrument relevant in the twenty-first century. However, there is no doubt that the law of human rights and the law of diplomatic protection will remain two separate aspects of international law.[55] The law of diplomatic protection is a proven method of addressing human rights violations.[56] This is where the old instrument can help the younger human rights to be more effective.

Although the influence of human rights on diplomatic protection has transformed the law of diplomatic protection, some relicts of the old state-centric approach, like the requirement of nationality, remain. This will probably not change since it is the only way to justify turning the violation of a human right into a legal dispute between two states.

The days of diplomatic protection are not over.[57] Whenever an alien has no means to address human rights violations abroad, diplomatic protection still serves

[51] In the case of Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Guinea claimed that, among others, those instruments reflect the current minimum standards; see Application Instituting Proceedings, filed in the Registry of the Court on 28 December 1998, 1998 General List No. 103, p. 29.

[52] Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007, para. 39.

[53] Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, paras. 63–89.

[54] Sicilianos (2012), p. 7; Meron (2006), p. 301; Milano (2004), p. 103.

[55] Generally: Sicilianos (2012), p. 1.

[56] Milano (2004), pp. 136–137.

[57] For different ideas on how to change the current system, see Pisillo Mazzeschi (2009), p. 220.

an existential purpose.[58] It is this "instrument of last resort" that makes diplomatic protection an important part of our contemporary international order. As long as deficiencies in the system of human rights protection exist, there will be a raison d'être for diplomatic protection. Another consequence is that diplomatic protection loses relevance whenever a systematic protection of human rights exists. Cases that would have been dealt with in terms of diplomatic protection in the past are today a matter of human rights and international courts and commissions.[59]

Diplomatic protection cannot actually enforce the right itself; it just provides for a means to safeguard a proper compensation. Therefore, it is no preemptive way of securing the observance of human rights. Human rights remain pieces of law that national authorities can observe to avoid a dispute between states. A closer look reveals that this is only partly true since the law of diplomatic protection is dependent on another source of law for an understanding of "minimum standards." As shown, human rights do just that. Therefore, human rights and diplomatic protection are perfectly complementary.

Let me make one thing very clear: having and further establishing diplomatic protection as a means of enforcing human rights can in no way make up for the deficits that exist in today's international human rights regime. But as it is something that is already in place, it can be used instantly.

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[58] Meron (2006), p. 302.

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Chapter 6
The Inter-State Application Under the European Convention on Human Rights: More Than Diplomatic Protection

Isabella Risini

6.1 The Inter-State Application Under the ECHR and Its Overlap with Diplomatic Protection

The International Court of Justice (ICJ), in a lesser known passage of the *Barcelona Traction* judgment, referred to the inter-State application under Article 33 (at the time ex-Article 24) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Convention)[1] in these words:

> . . . on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim.[2]

This contribution describes the inter-State application under the ECHR and contours its similarities and its special, broader characteristics in comparison to diplomatic protection under general international law. For the purposes of this contribution, diplomatic protection is understood as the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that

[1] 005 ETS, 4 November 1950, as amended.

[2] *Case Concerning the Barcelona Traction, Light and Power Company* (*Belgium v Spain*), Judgment, ICJ Reports 1970, 47, para. 91.

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State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.[3]

Given that the inter-State application has not received much scholarly attention[4] over the past six decades, it will be briefly revisited here.

Article 33 ECHR reads:

> Any High Contracting Party may refer to the Court *any alleged breach* of the provisions of the Convention and the Protocols thereto by another High Contracting Party [emphasis added].

The mechanism allows for the protection of individuals in a similar manner as by diplomatic protection. However, the inter-State application differs in certain key aspects from the traditional rules of diplomatic protection. First, the range of potential beneficiaries is not limited to the nationals of the applicant State: member states can use the inter-State application in favor of individuals regardless of their nationality. Individuals can be protected even against their own state of nationality, as for example in the 1963 *Austria v. Italy*[5] case. In addition to the possibility to protect individuals, the inter-State application can be used to address systemic issues in member states of the ECHR.[6]

6.2 The Inter-State Application, Past and Present: Explaining the Difference to Diplomatic Protection Situations

In order to better understand the differences between diplomatic protection and the inter-State application, a glance into the past of the Convention is helpful, also because the inter-State mechanism evolved over the past six decades and continues to do so.

The right to bring inter-State applications before the European Commission on Human Rights flowed directly from membership; no further declaration was necessary, ex-Article 24 ECHR. The inter-State application was intended as mechanism of compliance control of the obligations undertaken in the ECHR. It was not conceived as a dispute settlement mechanism.[7]

The individual application under ex-Article 25 ECHR was an optional remedy, which was contingent upon an additional declaration of the member states. The right to seize the European Court of Human Rights (both in individual and in inter-State cases) was subject to further acceptance pursuant to ex-Article 46 ECHR.

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[3] Article 1 of the Draft Articles on Diplomatic Protection with Commentaries, YB Int'l L Comm., 2006, vol. II, Part Two.

[4] E.g., Hold von Zürich (1976); Leckie (1987–1988), pp. 249 and 271; Villiger (1999), mn. 182; Risini (2014), pp. 18–36; Risini (2014) II, pp. 602–611.

[5] *Austria v. Italy*, no. 788/60, Yb 4, 116, report of the Commission of 30 March 1963, Yb 6, 742.

[6] See below, Chap. 3 on collective enforcement.

[7] Cf. Villiger (2010), p. 79.

Under the inter-State mechanism, the Commission could draw up a nonbinding report. The case of *Ireland v. United Kingdom*[8] was the only one to reach the Court before Protocol Nr. 11 entered into force in 1998, which established a single Court.

Overall, less than 20 inter-State applications have been lodged in the roughly 60 years of the European Convention on Human Rights. In comparison, the International Covenant for Civil and Political Rights (ICCPR)[9] has a similar inter-State mechanism in its Article 41. To date, no inter-State application has been lodged under the ICCPR. It is worth mentioning that the right of individual petition under the First Optional Protocol to the ICCPR is much more popular among member states than the *optional* right of inter-State complaint under Article 41 ICCPR. The latter has been accepted by only about 30 % of the States Parties.[10]

The changes the Convention witnessed over the last six decades are best illustrated by looking at the very first and the most recent cases.

In the 1950s, the Convention's scope of application included 42 British territories, some of which were located in Africa.[11] The first inter-State case was brought by Greece against the United Kingdom as the colonial power in Cyprus.[12]

The conflict in Ukraine was taken to Strasbourg in March 2014. The Court issued a request for interim measures.[13] In this context, the marked lack of enthusiasm of States for addressing (alleged) human rights violations by offending states in terms of formal legal claims under the inter-State mechanism becomes apparent.[14]

In situations where the application might have been appropriate, and was even recommended by the Parliamentary Assembly of the Council of Europe, the mechanism was not set in motion at all. A prominent example is the situation concerning Chechnya.[15]

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[8] *Ireland v. United Kingdom (I)*, no. 5310/71, Yb 15, 92 et seq.; Series A 25 (1978).

[9] 999 UNTS, 171, 16 December 1966.

[10] See Nowak (2005), Article 41, mn. 5.

[11] Simpson (2001), p. 839.

[12] *Greece v. United Kingdom (I)*, no. 176/56, admissibility decision of 2 June 1956 in Yb 2, 182 et seq.; the report of the Commission of 26 September 1958 was confidential until 1997 and was rendered public at the request of the United Kingdom by the Committee of Ministers on 17 September 1997, full text in 18 HRLJ 348–467 (1997).

[13] *Ukraine v. Russia*, no. 20958/14; interim measure of 13 March 2014.

[14] Cf. Kamminga (1992), p. 127.

[15] Recommendation 1456 (2000), Assembly debate on 6 April 2000, Conflict in the Chechen Republic, para. 18. "The Assembly considers that substantial grounds for concern exist, (...) that the European Convention on Human Rights is being violated by the Russian authorities in the Chechen Republic both gravely and in a systematic manner. The Assembly thus appeals to the member states of the Council of Europe, as high contracting parties to the Convention, to make use of Article 33 as a matter of urgency and to refer to the European Court of Human Rights alleged breaches by the Russian Federation of the provisions of the Convention and its Protocols." Available at http://www.assembly.coe.int//Main.asp?link=http://www.assembly.coe.int/Documents/AdoptedText/ta00/erec1456.htm#1 (visited 20 October 2014).

In 2014, the Court awarded 90 million euros in just satisfaction in the case of *Cyprus v. Turkey (IV)*.[16] The Court also issued a judgment on the merits in the case of *Georgia v. Russia (I)*.[17] The way the Court deals with overlapping individual and inter-State proceedings still has to be spelled out.

6.3 Collective Enforcement

The preamble of the ECHR speaks about "the *collective enforcement* of certain of the rights stated in the Universal Declaration." As briefly mentioned above, the inter-State application is not limited to the protection of individuals. The mechanism can be used to address systemic failures in member states. These cases can be characterized as *actiones populares*[18] because no concrete individual interests of the applicant state(s) or individuals are at stake. These cases are structurally different from diplomatic protection and not amenable to a comparison with situations of diplomatic protection.

The collective interest in upholding human rights in the member states of the Convention was taken up twice via inter-State applications.

The first instance was the case of *Denmark, Norway, Sweden and the Netherlands v. Greece (I)*[19] of 1967. The application was brought in the context of the military regime, which had been established in Greece. The case was put to rest once the military regime in Greece came to an end.

A second instance was the case of *Denmark, France, Norway, Sweden and the Netherlands v. Turkey*[20] concerning the situation in Turkey in the early 1980s following the dissolution of the Turkish Parliament. The case was put to rest by a friendly settlement.

[16] *Cyprus v. Turkey IV* (just satisfaction) [GC], no. 25781/94, 12 May 2014; see Risini (2014).

[17] *Georgia v. Russia (I)* [GC] case, no. 13255/07, 3 July 2014.

[18] See, for the definition of actio popularis, Voeffray (2004), pp. 3 et seq.

[19] *Denmark, Norway, Sweden and the Netherlands v. Greece (I),* nos. 3321/67, 3322/67, 3323/67, 3344/67, Yb 11, 691 et seq., report in Yb 12 II, "The Greek Case".

[20] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey,* nos. 9940-44/82 (friendly settlement regarding applications introduced in July 1982, report of the Commission of 7 December 1985), DR 44, 31 et seq. = 6 HRLJ 331 (1985).

6.4 The Inter-State Application and the Requirement of the Exhaustion of Domestic Remedies

Given broad entitlement to bring inter-State applications, the requirement of the exhaustion of domestic remedies and the 6-month rule are the only limitations for the admissibility of an inter-State application. Other admissibility requirements as contained in Article 35 (2) and (3) ECHR do not apply to inter-State cases.

For the comparison of diplomatic protection and the inter-State application, the domestic remedies rule is relevant.

The exhaustion of domestic remedies is not required in cases where collective interests are at stake as mentioned in Chap. 3. The rule does, however, apply to those inter-State applications, which deal with individual interests similar to cases of diplomatic protection.

Article 35 (1) ECHR reads:

> The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

At first glance, this provision looks like a reference to the law of diplomatic protection. The exact scope of this reference was open at the time the ECHR was drafted.

The degree to which the scope of application of the exhaustion of domestic remedies rule was left to the discretion of the organs of the ECHR is best illustrated by an observation[21]: Eustathiades, who served as a member of the European Commission and heard, *inter alia*, the first two inter-State cases between Greece and the United Kingdom, argued in favor of the exhaustion of domestic remedies rule[22] but then turned against it.[23]

In the first inter-State case, the issue of exhaustion of domestic remedies was avoided: Greece withdrew all complaints concerning individual cases. Thus, the complaint was rendered independent or "abstract"[24] of an individual violation or victim. The Commission declared the application admissible because the exhaustion of domestic remedies rule does not apply where the compatibility of legislative measures and administrative practices with the Convention is at issue.[25]

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[21] Trindade (1978), pp. 139 and 142.

[22] Eustathiades (1953–1955), p. 354.

[23] Eustathiades (1957), pp. 111 and 127.

[24] van Dijk and van Hoof (1998), p. 129.

[25] *Greece v. United Kingdom (I),* no. 176/56, admissibility decision of 2 June 1956 in Yb 2, 182 et seq.; the report of the Commission of 26 September 1958 was confidential until 1997 and was rendered public at the request of the United Kingdom by the Committee of Ministers on 17 September 1997, full text in 18 HRLJ 348–467 (1997).

The second application between the same parties concerned 49 individual cases. Unlike in the first case, the admissibility decision took several months. Twenty cases were held inadmissible for failure to exhaust domestic remedies.[26]

6.4.1 Legislative Measures and Administrative Practices

These first inter-State cases foreshadowed the most important exceptions to the domestic remedies rule: the rule is dispensed with when legislative measures or administrative practices are at issue.[27] Administrative practice means a repetition of acts and official tolerance. It is an accumulation of identical or analogous breaches that are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but also to a pattern or system.[28]

A comparison to the law of diplomatic protection must take into consideration that the Court is, in an inter-State context, not required to give a ruling on individual violations of rights guaranteed by the Convention. Rather, the individual cases brought to its attention can be seen as evidence of a possible practice.[29] The rationale for this exception in general international law would be the ineffectiveness of domestic remedies.

Whether or not the ECHR burden of proof is less strict or should be handled with less strictness was debated in the past.[30] In the recent judgment of Georgia v. Russia, the Court had to deal with a respondent State, which was not fully cooperative within the meaning of Article 38 ECHR.

6.4.2 Subsidiarity as Opposed to the Doctrine of Direct Injury

The exhaustion of domestic remedies requirement is not dispensed with by the direct injury doctrine.[31] The concept of direct injury implies that the litigating State is protecting its own interests.[32] In contrast to the law of diplomatic protection, under Article 33 ECHR, standing derives from the promise to grant certain human

[26] *Greece v. United Kingdom (II)*, no. 299/57, admissibility decision of 12 October 1957, Yb 2, 186 et seq.; the report of the Commission of 8 July 1959 was declassified by the Committee of Ministers upon the request of the United Kingdom on 5 April 2006, Resolution DH(2006)24; the 28-page report is available on HUDOC.

[27] Harris et al. (2014), p. 46.

[28] *Ireland v. United Kingdom (I)*, no. 5310/71, Yb 15, 92 et seq.; Series A 25 (1978), § 159.

[29] *Georgia v. Russia (I)* [GC] case, no. 13255/07, 3 July 2014, § 128.

[30] Vasak (1974), pp. 379 and 380.

[31] Amerasinghe (2004), p. 305.

[32] *Id.*, at 146.

rights, not from the legal fiction of damage to the home State.[33] The idea behind the exhaustion of domestic remedies rule is the principle of subsidiarity, which is a structural element of the ECHR.[34] With Protocol 15 to the ECHR, the principle will also be anchored in the preamble of the ECHR.[35]

In the *Austria v. Italy* case, Austria argued that the exhaustion of domestic remedies was not necessary because the ECHR rested on the idea of a collective guarantee for human rights.[36] However, the collective interest in securing human rights within the ambit of the ECHR does not absolve a party from the necessity of the exhaustion of domestic remedies.

In the constellation of the *Austria v. Italy* case, the applicant endorsed the cases of nationals of the respondent State (Italian citizens of a German-speaking minority). The Commission construed the reference to general international law with a view to the exhaustion of domestic remedies as an inherently limited reference. In cases where an inter-State application is brought in favor of an alien (from the perspective of the applicant State), the requirement of exhaustion of domestic remedies cannot be derived from the law of diplomatic protection because the constellation of protection of a nonnational simply does not exist in the law of diplomatic protection.[37] In order to apply the rule, great weight was placed on the idea of the subsidiary nature of the ECHR. The fact that the inter-State application under Article 33 ECHR is not narrowed by the nationality requirement does not give the applicant automatic standing. The underlying basis of the exhaustion of domestic remedies rule is to give the respondent State the possibility to redress the allegation of a human rights violation with its own means and within the framework of its own judicial system. The rule does not work against the protected individuals but aims at the implementation of international obligations on the national level. An individual who is not an alien, thus a citizen of a respondent State, has an even greater interest in seeing the effective operation of domestic remedies than an individual who is an alien, given that human rights protection is ideally implemented before national courts.[38]

[33] Simma (1981), pp. 635 and 644.

[34] See, e.g., Brighton Declaration, 19/20 April 2012, High Level Conference on the Future of the European Court of Human Rights, para. 3.

[35] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, 123rd Session of the Committee of Ministers, CM (2012) 166 rev. The Protocol will be opened for signature on 16 June 2013; the text is available at https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2012)166&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 (visited 20 October 2014).

[36] *Austria v. Italy*, no. 788/60, Yb 4, 116, report of the Commission of 30 March 1963, Yb 6, 742.

[37] *Id.*, 44.

[38] Amerasinghe (2004), p. 72.

6.4.3 *Conclusion: Domestic Remedies Must Be Exhausted as Long as Subsidiarity Rationale Applies*

The preservation of the subsidiary nature of the ECHR through the exhaustion of domestic remedies rule has its limits. The aim of the rule is difficult to meet where territorial jurisdiction within the meaning of Article 1 ECHR is in question.[39] One example in this context is the 2001 judgment in Cyprus v. Turkey (IV). The requirement of the exhaustion of domestic remedies in the northern part of Cyprus was upheld despite the fact that the Turkish Republic of Northern Cyprus is not recognized as a state and Turkey was held liable under Article 1 ECHR. The European Court of Human Rights relied on the ICJ's Namibia rationale.[40] The Namibia rationale requires the exhaustion of domestic remedies even if the entity in question is not recognized as a state. From the perspective of an individual who lives in the affected territory, it is essential to have effective domestic remedies available, especially in circumstances of prolonged occupation.

6.5 The Law of Diplomatic Protection and Inter-State Cases: Fruitful Interaction

Assessing the reciprocal influence of the law of diplomatic protection and the inter-State case law of the ECHR must be cautioned by the fact that the law of diplomatic protection is not limited to human rights issues. These differences in mind, the process of fruitful interaction between general international law in the field of diplomatic protection and the way the Court interprets the Convention is certainly not at the end. Of interest are, for example, the legal consequences of breaches of rights of individuals and their compensation in the context of large-scale human rights violations. Noteworthy in this respect is that the Court, in its Cyprus v. Turkey judgment of May 2014, explicitly referred to the ILC Draft Articles on Diplomatic Protection.[41]

[39] Cf. Amerasinghe (2004), p. 311.

[40] *Cyprus v. Turkey IV (merits)*, §§ 93–97 = 22 HRLJ 228 (2001), with a reference to the advisory opinion concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* ICJ Reports, 56 (1971).

[41] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, 12 May 2014, at § 46.

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Chapter 7
The "Responsibility While Protecting": A Recent Twist in the Evolution of the "Responsibility to Protect"

Andreas S. Kolb

7.1 Introduction

The "responsibility to protect" (R2P) offers an opportunity to follow in real time the making of a new framework on human protection. Yet the current status of this process and its future prospects remain the subjects of debate. Its potential outcomes range from a mere consensus on abstract moral precepts via the establishment of political guidelines to the emergence of legally binding norms or a new interpretation of existing law. The evolution of R2P has been facilitated by what has been identified as "concerted norm entrepreneurship by a variety of actors."[1] In 2011, Brazil appeared as a new actor on this stage when it proposed the "responsibility while protecting" (RwP), a concept that had the potential both to foster and to undermine the existing consensus on R2P. The purpose of the present contribution is to assess the direction that the debate on R2P has taken following the RwP initiative and to indicate which impact it may have on international law, including international human rights law.

7.2 The "Responsibility to Protect (R2P)" as a New Framework for a Formerly Divisive Issue

The notion of the "responsibility to protect" emerged under the impression of the mass atrocities that had been committed in Rwanda, Srebrenica, and Kosovo during the 1990s. Rwanda reminds the international community of its inaction in the face

[1] Brunnée and Toope (2010), p. 197.

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of a genocide that claimed an estimated 800,000 lives.[2] The intervention of the North Atlantic Treaty Organization (NATO) to prevent ethnic cleansing in Kosovo without authorization from the Security Council, by contrast, raised major controversies over the legitimacy and lawfulness of military intervention for humanitarian purposes in a sovereign state.[3] This dilemma has traditionally been captured by the notion of the so-called humanitarian intervention, which, in a narrow sense, refers to the use of armed force by one or more states in another state without the consent of its authorities and with the purpose of protecting people from gross and systematic human rights violations.[4]

7.2.1 The Legal Debate on Humanitarian Intervention

The lawfulness of humanitarian intervention was controversial already in times in which international law was still perceived a matter of natural law.[5] In the era of the United Nations, it raises hard questions with a view to the principles of state sovereignty and non-intervention, as well as to the prohibition of the use of force in international relations.[6] At the same time, the United Nations were created not only for the maintenance of international peace and security but also to encourage respect for human rights.[7]

In approaching the "humanitarian intervention dilemma" from a legal perspective, important distinctions must be made. To begin with, humanitarian intervention may be undertaken with a mandate from the UN Security Council, as "collective humanitarian intervention," or without such prior approval, as "unilateral humanitarian intervention."[8] The proposition that the Security Council had the power under the UN Charter to authorize military intervention for the prevention of massive human rights violations had already received strong support during the 1990s.[9] The lawfulness of unilateral humanitarian intervention, by contrast, remained contested.[10]

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[2] *Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda*, UN Doc. S/1999/1257, p. 3.

[3] On this "intervention dilemma," see ICISS (2001), paras 1.1–1.4 (referring to Rwanda, Kosovo, Bosnia and Herzegovina, as well as Somalia). On the need to prevent future "Rwandas" and "Kosovos," see Welsh (2007), pp. 364 and 365; Bellamy (2006), pp. 145 and 146.

[4] Cf. Roberts (2000), p. 5; Lowe and Tzanakopoulos (2012), para 3.

[5] For a review of the history of humanitarian intervention under natural law, see Nardin (2002), pp. 58–63.

[6] Article 2(1), (4) and (7) UN Charter.

[7] Article 1(1) and (3) UN Charter.

[8] See only Lowe and Tzanakopoulos (2012), paras 7, 8, and 15.

[9] See only Tesón (1996) (with further references); see also Lowe and Tzanakopoulos (2012), para 15, but see for a more limited reading of the Security Council's powers Krisch (2012a), Article 39, paras 25–27.

[10] E.g., Lowe and Tzanakopoulos (2012), paras 10–14 and 38, but see for the lawfulness of humanitarian intervention in appropriate cases Tesón (2005), pp. 418 and 419.

Another distinction pertains to the permissive or prescriptive effect of the relevant international norms.[11] Traditionally, the protection of populations from mass atrocity crimes had primarily been discussed as a question of whether international law established a "right of humanitarian intervention," i.e., whether it permitted outside military intervention. Only rarely had it been suggested that third states not only held rights but even bore duties to address mass atrocity crimes beyond their own jurisdiction.[12]

7.2.2 *The "Responsibility to Protect (R2P)" and the Creation of a New Framework*

Following the Kosovo conflict, several actors undertook to tackle the lack of consensus on the idea of humanitarian intervention. UN Secretary-General Kofi Annan provided the impetus when he asked how the international community should respond to situations such as in Rwanda or Srebrenica if humanitarian intervention was indeed "an unacceptable assault on sovereignty," like its critics claimed.[13] The Government of Canada responded by establishing the International Commission on Intervention and State Sovereignty (ICISS) to facilitate an international consensus on the question. In its final report, the ICISS coined the notion of the "responsibility to protect" and proposed the contents that it could embody.[14]

R2P made several important contributions to overcoming the divisiveness of the debate. To begin with, it shifted the perspective, focusing on the needs of imperilled populations rather than on rights of states.[15] A "responsibility to protect" was hence said to lie primarily with the state concerned but as a fallback responsibility also with the international community.[16] Importantly, it described a continuum of responsibilities encompassing prevention, reaction, and rebuilding.[17] Within this broader framework, military intervention was to be the last resort only, subject to additional precautionary principles demanding that it be a proportional means, primarily motivated by the purpose of averting human suffering, and had a reasonable chance of success.[18] The right authority to legitimate military intervention for human protection purposes was primarily attributed to the Security Council, although the ICISS also mentioned the possibilities of the General Assembly

[11] Bellamy (2006), p. 145.

[12] But see Sandoz (1992), pp. 228 and 229.

[13] *We the peoples: the role of the United Nations in the twenty-first century: Report of the Secretary-General*, UN Doc. A/54/2000, para 217.

[14] ICISS (2001).

[15] ICISS (2001), para 2.29.

[16] ICISS (2001), paras 2.29–2.31.

[17] ICISS (2001), paras 2.29 and 2.32.

[18] ICISS (2001), paras 4.32–4.43.

considering a situation under the "Uniting for Peace" procedure or regional organizations taking action within their jurisdiction.[19]

In 2005, a carefully nuanced "responsibility to protect" framework was endorsed by the heads of state and government at the UN World Summit.[20] According to the model proposed by Secretary-General Ban, R2P as agreed at the World Summit rests on three pillars: the protection responsibilities of states for their own populations (Pillar I), the commitment of the international community to assist states in meeting these obligations (Pillar II), and the responsibility of UN member states "to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection" (Pillar III).[21] The collective responsibility under Pillar III includes primarily a responsibility to use peaceful means through the United Nations. At the same time, the UN members also expressed their preparedness to take timely and decisive action through the Security Council, including under Chapter VII of the UN Charter, "on a case-by-case basis" if peaceful means were inadequate and the domestic authorities were "manifestly failing" to protect their populations from genocide, war crimes, crimes against humanity, and ethnic cleansing.[22] No mention was made, however, of the precautionary principles on the use of force that had been proposed by the ICISS.

Over the following years, R2P was further consolidated in the form that it had been given at the World Summit. The Security Council referred on numerous occasions directly or indirectly to the responsibility to protect,[23] the General Assembly held a formal debate on the topic,[24] and yearly reports by Secretary-General Ban[25] as well as subsequent informal interactive dialogues of the General Assembly[26] addressed different aspects of R2P.

[19] ICISS (2001), paras 6.13–6.15 and 6.28–6.35.

[20] A/RES/60/1 of 16 September 2005, paras 138–140.

[21] *Implementing the responsibility to protect: Report of the Secretary-General*, UN Doc. A/63/677 of 12 January 2009.

[22] A/RES/60/1 of 16 September 2005, para 139.

[23] The first and ground-breaking resolutions in this regard were S/RES/1674 of 28 April 2006 and S/RES/1706 of 31 August 2006.

[24] UN Doc. A/63/PV.97 to A/63/PV.101, A/63/PV.105 and A/RES/63/308 of 14 September 2009.

[25] UN Doc. A/63/677 of 12 January 2009; A/64/864 of 14 July 2010; A/65/877-S/2011/393 of 27 June 2011; A/66/874-S/2012/578 of 25 July 2012.

[26] For reports on the interactive dialogues and for transcripts of statements delivered, see International Coalition for the Responsibility to Protect, www.responsibilitytoprotect.org/index.php/about-rtop/the-un-and-rtop#dialogues. Accessed 28 July 2014.

7.3 R2P at a Crossroads and the Brazilian Initiative on the "Responsibility While Protecting"

In 2011, the evolution of R2P reached a crossroads. In March, the Security Council mentioned the concept in resolutions that authorized military action for the protection of civilians in Libya[27] and Côte d'Ivoire.[28] Initially, both cases could have served as examples of swift collective action to protect civilian populations, yet especially the NATO air campaign in Libya drew heavy criticism by some states for the manner in which it implemented the Security Council's mandate. At the same time, the Security Council proved unable to reach consensus on measures even below the threshold of military intervention, while Syria slowly descended into civil war.

At this crucial moment for R2P, the Brazilian government emerged as a new norm entrepreneur. At the opening of the general debate of the UN General Assembly's 66th session, on 21 September 2011, Brazil's President Dilma Rousseff expressed the sentiment that while much was being said about the responsibility to protect, little was said about "responsibility in protecting."[29] On the occasion of the Security Council's next debate on the protection of civilians, on 9 November 2011, Brazil followed up on this statement[30] and circulated a concept note that proposed various elements for the development and promotion of a concept now labelled the "responsibility while protecting."[31]

The concept note stressed the primacy of prevention and suggested a number of principles to constrain recourse to coercive measures and, in particular, to armed force. It reiterated the last resort character of military intervention and the principle of proportionality.[32] More specifically, and importantly, it read into R2P a "chronological sequence" between its three pillars and demanded that all peaceful means had to be exhausted before armed force could be applied.[33] Brazil further suggested that distinctions had to be made between the protection of civilians and regime change as well as between the collective responsibility to protect and collective security.[34] The concept note laid emphasis on the role of the Security Council, which not only had the primary authority to legitimate intervention but also defined

[27] S/RES/1973 of 17 March 2011, preambular para 4 (reiterating the primary responsibility to protect of the Libyan authorities) and op. para 4.

[28] S/RES/1975 of 30 March 2011, preambular para 9 and op. para 6.

[29] Brazil, Statement at the Opening of the General Debate of the 66th Session of the UN General Assembly, 21 September 2011, http://gadebate.un.org/sites/default/files/gastatements/66/BR_en_0.pdf. Accessed 28 July 2014.

[30] UN Doc. S/PV.6650, pp. 15–17.

[31] *Responsibility while protecting: elements for the development and promotion of a concept*, 9 November 2011, UN Doc. A/66/551-S/2011/701, Annex.

[32] Ibid., paras 7, 11(f).

[33] Ibid., paras 5 and 6.

[34] Ibid., paras 6, 10.

and thereby limited the objectives for which it was to be undertaken.[35] Intervention was to be carried out strictly in accordance with the mandate given by the Security Council and with international law.[36] Enhanced monitoring and assessment procedures were to ensure that the Security Council had continuing oversight of the manner in which its use of force mandates were interpreted and implemented.[37] In exceptional circumstances, the concept note recognized that the UN General Assembly, acting pursuant to the "Uniting for peace" resolution 377 (V), could legitimate intervention.[38]

7.4 The Impact of the RwP Initiative on the R2P Discourse

For R2P, the RwP initiative with its focus on military intervention could have dangerously shifted the parameters of the international debate. While some elements of the concept note could have complemented the R2P framework that had been agreed at the World Summit, others, such as the idea of a chronological sequencing between the different pillars and of a mandatory exhaustion of all peaceful means, had the potential to reopen the consensus that had been reached on R2P.[39] Recent debates in the United Nations suggest, however, that the commitment of the UN membership to R2P is firm, while RwP is being refined so as to complement rather than renegotiate the agreed R2P framework.

7.4.1 The Informal Debate on RwP in February 2012: Mixed Reactions to the Concept Paper

To foster discussion on the RwP initiative, the Brazilian government initiated an informal debate at UN headquarters in New York on 21 February 2011. The echo that its concept paper received at the debate was multifaceted.[40] While the initiative as such and its underlying principles received significant support, the debate revealed an overwhelming concern for preserving the consensus on R2P that had been reached at the 2005 World Summit.[41]

[35] Ibid., paras 11(c), (d), (f).

[36] Ibid., para 11(d).

[37] Ibid., para 11(h).

[38] Ibid., para 11(c).

[39] For an appraisal of the original contents of the RwP initiative and of the initial reaction of the international community, see Kolb (2012).

[40] See on the following Kolb (2012), pp. 19–21.

[41] Kolb (2012), p. 19.

The only proposition that appears to have generated agreement was the emphasis on prevention as the best policy of protection. Much support emerged also for the proposed guidelines on the use of force in principle, including the need to balance the consequences of military action, the required proportionality of intervention, and especially its last resort character.[42] Yet, while these principles as such were not questioned, Denmark cautioned that establishing a set of criteria for the use of force was not the right focus at the time.[43]

Opposition arose specifically to those elements of the proposed RwP concept that would have conflicted with the R2P framework. In particular, the notion of a strict chronological sequencing of the three pillars and the proposition that all peaceful means had to be exhausted before forceful measures could be taken were explicitly rejected by some states.[44] Others, more sympathetic to the Brazilian initiative, attempted to rephrase the proposed sequencing in a way to avoid conflict with the agreed R2P framework.[45]

The proposed distinction between collective responsibility and collective security received little attention while being explicitly refuted by the Netherlands. Lukewarm at best was the response to the proposed enhanced role of the Security Council in monitoring military operations. While South Africa and Australia noted that additional military briefings or regular updates of the Security Council could improve Security Council oversight of the way in which its mandates were implemented, Australia and the Netherlands objected at the same time to "micro-management" of military operations by the Security Council, which could reduce the willingness of member states to commit themselves to the implementation of its mandates.[46]

7.4.2 *The General Assembly's Informal Interactive Dialogue on the Third Pillar: Towards Reconciliation Between RwP and R2P*

The interactive dialogue on the Secretary-General's report on the third pillar of R2P, which was held by the General Assembly on 5 September 2012, confirmed these trends.[47] Many delegations referred to the RwP initiative either

[42] Kolb (2012), p. 20.

[43] For transcripts of statements delivered during the informal debate on RwP on 21 February 2012, see International Coalition for the Responsibility to Protect, www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/4002-informal-discussion-on-brazils-concept-of-responsibility-while-protecting. Accessed 28 July 2014.

[44] Australia, Costa Rica, Germany, United States.

[45] Kolb (2012), p. 21 (with reference specifically to Ghana and Guatemala).

[46] Kolb (2012).

[47] For transcripts of statements delivered during the dialogue, see Global Centre for the Responsibility to Protect, www.globalr2p.org/resources/278. Accessed 28 July 2014.

explicitly[48] or by addressing some of the principles proposed in the Brazilian concept paper.[49] On its face, the reception of RwP was again positive, and yet support for its substantive propositions grew scarcer the more specific they became.

While many statements commended the Brazilian initiative, most of them addressed RwP in a very abstract manner and in essence acknowledged the importance of the debate that it had prompted.[50] It was also clear that RwP was not to revise the compromise that had been agreed at the 2005 World Summit but only to complement it.[51] Many statements moreover revealed an attempt to deflect the spotlight that RwP had placed on the coercive and especially the military component of R2P, underlining instead that the concept and also specifically its third pillar comprised a broad range of tools.[52]

Beyond dispute were again the importance of prevention as the best policy[53] and the last resort character of coercive measures and especially of military action.[54] An interesting feature of the debate was, however, that many speakers echoed Secretary-General Ban's observation that prevention and response merged and could not clearly be separated.[55] Several delegations affirmed that all three pillars, including notably timely and decisive response under pillar three, had a preventive aspect[56] or that prevention and response were closely connected and the three pillars hence "mutually reinforcing."[57] The effect, if not the objective, of these statements would seem to be preventing the primacy of prevention from being used as a principle that could delay a necessary collective response under Pillar III.

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[48] Argentina, Brazil, China, Egypt, Ghana, Guatemala, India, Ireland, Japan, Liechtenstein, Luxembourg, Malaysia, Mexico, Morocco, New Zealand, Portugal, Qatar, Russian Federation, Rwanda, Singapore, South Africa, Spain, as well as the delegation of the European Union, with whose statement ten EU member states aligned themselves when they spoke in their national capacity, namely, Belgium, the Czech Republic, Denmark, Estonia, Germany, Hungary, Ireland, Italy, Luxembourg, and Spain.

[49] France, Germany, the United States, Uruguay.

[50] Especially Liechtenstein (welcoming the RwP discussion and expressing agreement with some of its underlying principles while explicitly rejecting some of the proposed criteria); for rather unspecific references to the RwP initiative, cf. e.g. Argentina, Ireland, Japan, Luxembourg, Morocco, Portugal, Qatar, Rwanda, Singapore, Spain, Russian Federation.

[51] Explicitly South Africa, also Argentina.

[52] Germany, Guatemala, Liechtenstein, Mexico, South Africa, Spain, the United Kingdom, the United States, Uruguay, and the European Union.

[53] See only Ghana, Germany, Ireland, Liechtenstein, Luxembourg, Morocco, Portugal, Qatar, Russian Federation.

[54] See only Argentina, Egypt, Germany, Liechtenstein, Morocco, Qatar, South Africa.

[55] *Responsibility to protect: timely and decisive response: Report of the Secretary-General: Report of the Secretary-General*, UN Doc. A/66/874–S/2012/578 25 July 2012, paras 11 and 12.

[56] Ireland, Liechtenstein, Mexico, Qatar, Portugal, South Africa.

[57] The United Kingdom, the United States; cf. also Uruguay.

Only individual states subscribed to the proposition of a strict chronological sequencing.[58] Conversely, several delegations explicitly opposed the notion of a chronological sequence between the different pillars or within the third pillar.[59] Similarly, the proposition that peaceful means had to be exhausted before forceful measures could be taken was advocated only by individual speakers[60] but strongly opposed by, namely, Western delegations.[61] Of particular importance was, however, that Brazil itself backtracked on the proposition that the three pillars of R2P were chronologically sequenced. Rather, it specified that the proposed sequence "should be logical, based on political prudence."[62]

The Brazilian government generally used the occasion to reconcile potential tensions between RwP and R2P. It made very clear that RwP was to be integrated within the R2P framework and that it was based on the consensus of the 2005 World Summit. Quoting Gareth Evans, it specified that the major substantive elements to be added to the R2P framework were, first, the set of criteria or guidelines to be taken into account by the Security Council when deciding on military action and, second, enhanced monitoring and review processes during the implementation of such mandates. The need for better Security Council oversight and monitoring mechanisms indeed was a matter of concern also for several other delegations.[63] The idea of developing guidelines for the use of force equally enjoyed some support,[64] but opposition appears to be forming up especially in Europe, where it is feared that a set of predefined criteria could serve to unduly constrain international action.[65]

[58] Malaysia. India rebutted Secretary-General Ban's proposition that the three pillars could not be sequenced by asserting that they could not be mixed. The Russian Federation noted the continuing existence of serious differences of opinion concerning the relationship between the different pillars of R2P.

[59] France, Germany, Ireland, Liechtenstein, Qatar, Rwanda, the United States, as well as the European Union.

[60] China, India.

[61] Explicitly France, Germany, the United States; cf. also the European Union (advocating recourse to a mix of tools tailored to the specific circumstances of each situation and conditioning coercive measures only on peaceful means being inadequate).

[62] Brazil.

[63] China, Egypt, Ghana, India, South Africa; cf. also Malaysia and Mexico (referring to the need for accountability and transparency when the international community exercises its responsibility to protect).

[64] Egypt, Guatemala, Malaysia, Uruguay.

[65] France, the European Union.

7.5 The Evolution of R2P in Light of RwP: The International Law Perspective

But what do these debates mean for international law? To begin with, it may be doubtful that the relevant norm entrepreneurs of R2P intended to establish legal norms and not just a political framework.[66] Yet unwritten international law may be a by-product of a practice that comes to be accepted as being required as a matter of law.[67] Also, the debates on R2P and RwP may exhibit a shared understanding of existing treaty regimes, which is to be taken into account in their interpretation according to Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties.[68] Indeed, many UN members have emphasized that R2P is rooted in existing legal concepts.[69] The stronger the consensus on R2P grows, the more likely is hence the emergence of a new or clearer understanding of these norms.

The debates outlined above lend some support, for instance, for a broad interpretation of the notion of a "threat to the peace" in Article 39 of the UN Charter as including massive human rights violations. This understanding of Article 39 allows the Security Council to resort to coercive measures under Chapter VII in exercising its collective responsibility to protect. The distinction between collective security in the sense of Chapter VII and the collective responsibility to protect, which had been proposed in the original Brazilian concept note on RwP and which would contradict this reading, appears to be off the table. This latest turn in the debates on R2P and RwP may ultimately strengthen international human rights law. It confirms that the whole range of tools that the Security Council has under the UN Charter to maintain and restore international peace and security can, if not must, also be used to address massive violations of human rights. To the extent that RwP proposes guidelines on the use of military force, it revives an essential component of the original R2P concept. Yet the informal debates on RwP and on the third pillar suggest little progress on this matter, especially inasmuch as there is again a growing reluctance to agree on a set of criteria. This does not mean, however, that no such criteria may already exist in international law. Article 42 of the UN Charter, for instance, enshrines the "last resort" principle as it stipulates that the Security Council must consider peaceful means as inadequate before it may authorize the use of military force. While Article 42 UN Charter thereby establishes the primacy of nonmilitary means, it allows for the use of force already when the Security Council considers, on the basis of a prognosis, that measures not involving the use of armed force

[66] Doubts were raised, for instance, by Stahn (2007), pp. 117 and 118.

[67] On the two elements of custom, cf. only Pellet (2006), paras 212–215. The paradox that is created by the element of "opinio juris" has repeatedly been raised in doctrine; see, e.g., Lepard (2002), p. 101; Lepard (2010), pp. 9, 22, 23, and 112–121 (with further references); Kolb (2011), pp. 52, 53, 61, and 62.

[68] 1155 U.N.T.S. 331.

[69] See only Global Centre for the Responsibility to Protect (2009), p. 5.

would be insufficient.[70] The logical rather than chronological sequencing that is now being advocated under the label of RwP is in line with this provision.

As regards the implementation of Security Council mandates on the use of force, RwP rightly points to the need for respect of international humanitarian law. So far, it basically confirms that international humanitarian law applies to all sides to an armed conflict regardless of the legality or illegality of their recourse to the use of force, including to forces acting with a Security Council mandate.[71] Neither forces under UN command nor member states authorized by the Security Council to take military action through forces remaining under their own control are exempt from international humanitarian law.[72] RwP thus underlines the need for all sides to respect those principles of international law that are designed to uphold respect for human life and dignity specifically in times of armed conflict. At the same time, by emphasizing that priority should be given to prevention, both R2P and RwP seek to reduce the likelihood of conflict and to ensure that conditions prevail in which the broader standards of human rights law can be brought to full fruition.

On the other hand, RwP with its spotlight on constraining the use of force addresses again the permissive rather than the prescriptive dimension of R2P. Yet, as the inadequate international response to the ongoing civil war in Syria painfully documents, more consideration still needs to be given to the idea that the international community has not just a right but a responsibility to act in the face of genocide, war crimes, crimes against humanity, and ethnic cleansing.

7.6 Outlook

In conclusion, it appears rather unlikely now that RwP will become a "foe" of R2P in the sense that it could undermine the consensus that has already been reached at the World Summit. Over the course of the informal debates on RwP and on the third pillar of R2P, it has become increasingly clear that those elements of the initial RwP concept that had the major potential to impede timely and decisive response in line with the collective responsibility to protect enjoyed least support among the UN membership, while the commitment to the existing R2P framework remained strong. From the perspective of international law, however, it is also doubtful whether RwP will prompt any tangible developments. In order to avoid controversies such as those that arose in the wake of the intervention in Libya, it may be necessary and helpful to continue debate on the principles to be followed in the implementation of R2P in practice, which are partly already grounded in the international *lex lata*, and on procedures to ensure Security Council oversight of its mandates. This presupposes, however, that the discourse on the RwP initiative or

[70] Article 42 UN Charter; see also Krisch (2012b), Article 42, para 19.

[71] Greenwood (2008), para 101.

[72] Cf. Bothe (2012), para 28; Krisch (2012b), Article 42 paras 25–27.

at least on parts of its substance is continued. Yet in her statement at the opening of the General Assembly's general debate, on 25 September 2012, Brazil's President Dilma Rousseff addressed RwP in only one sentence, mentioning it as a "necessary complement" to R2P in the context of the need for the use of force being authorized by the Security Council.[73] She did not use the opportunity to further specify and promote the concept.[74] Yet the history of R2P up to the 2005 World Summit demonstrates the importance of continued norm entrepreneurship. Time will tell if RwP has the stamina and the political support to leave a lasting imprint on the R2P debate.

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[74] Cf. Benner (2012), p. 256 (noting also that no Brazilian representative had participated in the informal consultations on RwP that were held alongside the General Assembly debate).

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Chapter 8
Human Rights Protection and the Notion of Responsibility: Some Considerations About the European Case Law on State's Activities Under U.N. Charter

Marjorie Beulay

8.1 Introduction

The notion of "responsibility" is a major topic of legal analysis and studies. The word comes from the Latin verb *respondere*, which means to vouch for further actions.[1] In international law, it means "that a particular internationally wrongful act may be the source of new legal relations, not only between the guilty State and injured State, but also, between the former State and other States or, especially, between the former State and organizations of States".[2] Responsibility is then a network of relationships between various subjects of international law. Actually, responsibility appears as the stereotype of law, a "necessary corollary of law",[3] a concept "at the heart of international law".[4] Indeed, the law seems effective when the State or International Organisation responsible for a violation can be found: "the existence of an international legal order postulates that the subjects on whom duties are imposed should equally be responsible in case of a failure to perform these duties."[5] The responsibility arises "historically from the moral sense of obligation recognized by mankind everywhere; it is a necessary principle of social

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[1] Villey (1977), p. 46.

[2] Yearbook of the International Law Commission, 1970, vol. II, p. 184, §22. For further explanations see: Guggenheim (1954), pp. 99 and following; Eustathiades (1955), p. 433; Tunkin (1965), pp. 191, 220 and following.

[3] Pellet (2010), p. 3.

[4] Reuter (1991), p. 390.

[5] Anzilotti (1929 new edition 1999), p. 467.

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cooperation, and as such it has become embodied in all legal systems".[6] This importance of the responsibility mechanism relies in fact on two elements: on one hand, the responsibility itself, which is a purely legal institution, and, on the other hand, its practical consequences, which pertain to the peaceful settlement of disputes mechanisms.[7] This contribution will focus on the first element and not on the mechanisms of the legal accountability, not because of the irrelevance of the latter but because of the more eloquent aspect regarding the influence of Human Rights Law of the former.

Nowadays responsibility is one of the crucial aspects of the contemporary analysis of issues related to Human Rights. Indeed, with the multiplication of subjects of International Law, the question of responsibility comes in a variety of forms because of the mechanical diversification of the entities that may be responsible.[8] A lot of recent case law deals with this topic in particular in the field of Human Rights protection. It is principally based on the definition of the internationally wrongful act, which is split into two elements: attribution and lawfulness.[9] In order to be challenged in international law, the responsibility is sufficiently established with the conjunction of these two elements,[10] in this particular order.[11] The objectivisation of the notion of responsibility results from the disappearance of the damage as a precondition for the establishment of the responsibility—considering the responsibility "independently from its effects".[12] As a result, the aim is to think of the responsibility as a neutral mechanism in order to expose the mechanism in a larger way. A parallelism with Human Rights law can also be found with regard to this particular characteristic. Indeed, the rules protected by this branch of law are as objective as the rules of the law of responsibility. The implementation of Human Rights law does not depend on a nationality; it deals with the aim of a stronger protection for a larger number of people. In both cases, it seems that the international community is looking for an international public order by looking for the general interest with the responsibility as a guaranty.

At the same time, the international community is going deeper in the globalisation of some legal aspects. This means that, among other phenomena, some legal fields are gradually transferred from the competences of the States to the competences of International Organisations, which do not have to rely wholly on their member States. Indeed, International Organisations have a lot of power and a legal

[6] Eagleton (1950), p. 323.

[7] *Reparation for injuries suffered in the service of the United Nations*, Advisory opinion of 11th April 1949, ICJ Reports 1949, p. 177.

[8] Pellet (2010), pp. 6–8.

[9] See Article 2 on the Responsibility of States for Internationally Wrongful Acts and Article 4 on Responsibility of International Organizations.

[10] Stern (2010), pp. 200 and 201.

[11] *United States Diplomatic and Consular Staff in Tehran*, Judgment of 24 May 1980, ICJ Reports 1980, p. 3.

[12] Pellet (1996), p. 287.

personality, the corollary of which is the responsibility.[13] Some examples can be found in matters of international security regarding the fight against terrorism in the U.N., in matters of criminal policy regarding the international criminal tribunals of the U.N., or also in economic matters with the exponential powers of the European Union. There are many fields in which the action of International Organisations will have an impact on individuals with a potential risk of Human Rights violations.[14] But if International Organisations enjoy a legal personality, they rarely have the executive means of their powers and therefore have to act through their member States to implement their decisions or to act on behalf of the Organisation,[15] as every subject of international law needs individuals to act.[16] This point is the starting point of all the analysis about the attribution of an act to a State in case of an International Organisation involvement, the beginning of a saga without an end yet. Actually, the structure of the International Organisation itself is the basis of these reflexions about the definition of the internationally wrongful act,[17] which is the starting point of the responsibility. Indeed, constitutional instruments—*i.e.*, treaties establishing International Organisations—have a dual nature as they are at the same time a classical international treaty, which contains the obligations of the member States, and the constitution of a new subject of international law with a proper legal personality.[18] This observation leads to the parallel existence of the global entity and its components acting at the same time upon the same situations with a complex repartition of activities between them. In other words, the determination of the first step of the responsibility requires a particular analysis in each case but even more in case of the involvement of an International Organisation.

The link between this evolution of international law and the question of responsibility consists of the internationally wrongful act. Indeed, the question of attribution and the question of international wrongfulness are more complex and need more precision in the analysis. If the notion of responsibility is above all based on case law,[19] this particular international situation is the most emblematic example of the large power of judges. Case law is particularly vast because of the lack of centralised solutions about this topic in international law. The case law in Human Rights, in particular in the European system, is an important basis for reflection about this topic, which leads to rethink the qualification of the internationally wrongful act in the light of the pluralism of subjects and of legal rules. The attribution process (Sect. 8.2) as well as the qualification of wrongfulness process

[13] Scobbie (1998), p. 886; Bastid (1968–1969), p. 240; Dominicé (1997), pp. 70–72; Eagleton (1950), pp. 324 and 325; Higgins (1995), p. 252; Rodriguez Carrion (1994), p. 317; Zacklin (1991), p. 91.

[14] See for example: von Bogdandy and Steinbrück Platise (2012), pp. 67–76.

[15] Stern (1996), p. 589.

[16] Condorelli and Kress (2010), p. 221.

[17] Caicedo (2005), p. 8. See also Wellens (2002), pp. 22 and 44.

[18] Monaco (1974), p. 154; Ahlborn (2011), pp. 4–12; Beulay (2012), pp. 99–101.

[19] Pellet (2012), p. 321.

(Sect. 8.3) are concerned with the influence of Human Rights protection, in which one can try to find a solution where there is no global one (Conclusion section).

8.2 The Complex Question of the Attribution: The Inevitable Case Based Nature?

The first step in the identification of the international wrongful act deals with the complex notion of attribution. Without dealing with any of the technical aspects of the repartition,[20] some issues can be raised. The use of this terminology is the first identified problem, as it raises questions on the meaning of the notion of attribution and it can lead to confusion with other concepts. In Human Rights law, it is not a really common notion because of the preeminence of the notion of jurisdiction, which appears as an all-embracing concept. A clarification is therefore necessary before continuing further and deeper (Sect. 8.2.1). The second point deals with the process of attribution itself when the legislation of an International Organisation, in particular of the U.N., interferes in member States' activities. The case law shows a complex network of actions without general rules to control it. European judges forced by the necessity of Human Rights law established a progressive list of criteria with the aim of guarantying the largest protection (Sect. 8.2.2).

8.2.1 A Question of Terminology: Jurisdiction or Attribution?

The first step of the responsibility process is individualisation. This means that the responsibility has to be established individually on the basis of the behaviour of the international law subject. Attribution is both a process and the result of it: it "is the term used to denote the legal operation having as its function to establish whether given conduct of a physical person, whether consisting of a positive action or omission, is to be characterized, from the point of view of international law, as an 'act of State' (or the act of any other entity possessing international legal personality)".[21] It has appeared as a plural term with a lot of implications, which can raise confusions and misunderstandings. Many expressions can be used to refer to this concept, such as imputation or imputability,[22] but the complexity of its explanation is above all emphasised by the variety of realities included in this process and its result. Indeed, the question of responsibility is obviously given particular attention during the trial, *i.e.*, during the judicial proceedings of a practical case. The notion

[20] Klein (2010), pp. 297–329.

[21] Condorelli and Kress (2010), p. 221.

[22] Yearbook of the International Law Commission, 1973, vol. II, p. 184, §14.

of jurisdiction is then at the centre of the analysis.[23] In this situation, the Court, in particular in Human Rights protection case law, has to deal with three particular points that are linked by the question of attribution: the attribution itself, the notion of the State's jurisdiction, and the Court's proper jurisdiction.

The link between these three points is obvious but can lead to confusions because of the difficulty to consider each one individually.[24] As stated by A. Orakhelashvili, "the general concept of jurisdiction in international law is a criterion for the lawfulness of certain acts and conducts of States [...] [whereas] jurisdiction under Article 1 [of the European Convention] is a tool for identifying whether alleged violations of the Convention may be imputable to one or another contracting State."[25] In reality, it appears as a problem of perspective. Firstly, the question of attribution itself is traditionally focused on the State to define which behaviour can be considered as its own. Secondly, the jurisdiction of the State is based on the analysis of the authority under which the individual is. In other words, in order to know the control or power under which the individual is, one has to focus on the individual's perspective. As Lord Roger pointed out in the U.K. House of Lords judgment *Al-Skeini*: "[i]t is important therefore to recognize that, when considering the question of jurisdiction under the Convention, the focus has shifted to the victim or, more precisely, to the link between the victim and the contracting State."[26] Finally, the question of the Court's jurisdiction is based on the *ratione personae* limitation of the European Court, which means its own perspective.

The three above-mentioned points are linked, in particular in Human Rights case law, because of the limited jurisdiction of the Court and because of the indifferent use of the word jurisdiction to name each particular point. This last issue can be explained by the incompatibility between an objective material—Human Rights law—and a potential limited application. As a result, the notion of jurisdiction is central in the European Convention system. Writers chose to use the word "jurisdiction" and not territory in the text version to give the broader application possible to the treaty.[27] Furthermore, as Human Rights need an objective implementation,[28] the Court uses the expression in a broader sense.[29] If State jurisdiction is principally

[23] *Al-Skeini and others v. The United Kingdom*, Grand Chamber of the European Court of Human Rights, Judgement of 7 July 2012, Application no 55721/07, § 130. See also *Ilascu and others v. Moldova and Russia*, Grand Chamber of the European Court of Human Rights, Judgement of the 8 July 2004, § 311. About the particular notion of State jurisdiction, see Milanovic (2008), p. 446.

[24] See De Schutter (2005), pp. 7–10; Loucaides (2006), pp. 394 and 395.

[25] Orakhelashvili (2003), p. 540.

[26] *Al-Skeini and others v. Secretary of State for Defence*, House of Lords, Judgement of the 13 June 2007, [2007] UKHL 26, §64.

[27] Collected edition of the "travaux préparatoires" of the European Convention on Human Rights IV, p. 927.

[28] De Schutter (2010), pp. 94–96.

[29] Costa (2004), pp. 483–500.

'territorial',[30] it is not the only approach angle of this matter, and others could be more convenient as far as the ultimate aim is to obtain the broader possible application of the Convention. In this way, the question of attribution is widely included in the question of State jurisdiction, which can be established under the condition of the *ratione personae* jurisdiction of the Court. This confusion may lead to make this topic more obscure than it already is, but the particularity of the topic can explain this particularity in the Human Rights field. Actually, this singular use is also the way for the Court to extend its own jurisdiction in interpreting the jurisdiction of member States in a larger way. The case law on the notion of State and International Organisations' "control" is an example of this willingness.

8.2.2 *A Complex Network of Actions: A Progressive Control Through the Judges' Dialog*

If the issue of terminology is almost formal and can be solved with some teaching skills, the operation of attribution seems to remain a sticking point in case of the formal, material, direct, or indirect involvement of an International Organisation in a State behaviour. Indirectly, this operation has consequences on the Human Rights implementation and on the Court's jurisdiction. The issue of the situation of control between the State and the International Organisation is the basis of a large part of the reflection in the law of international responsibility. As expressed by L. Condorelli and C. Kress "[i]nevitably, that situation gives rise to extremely delicate problems in relation to the identification of the subject(s) of international law responsible for any given conduct, but also may give rise to the possibility of cumulative responsibility (of both organisation and its member States), in particular due to the phenomenon of 'double attribution'".[31] Actually, the main problem resides in the existence of complex situations where both International Organisations and member States are involved. The growing complexity of the international society leads to pluralistic situations where the issue of attribution appears more difficult. A lot of international situations are managed at the same time by an International Organisation and a State, which leads to a potential double attribution. Nevertheless, as the above-mentioned development showed (see Sect. 8.2.1), the issue of attribution is dealing with more than the mere connection of a fact to an international legal subject in the case of Human Rights protection. The link between the attribution to the State of a wrongful act and the jurisdiction of the Court is so close that any attribution to the U.N. renders difficult the practical implementation of Human Rights conventions such as the European one. Indeed, on one hand, the European Court has no jurisdiction over the U.N., and as a result it cannot assess its

[30] *Bankovic and others v. Belgium and others*, Grand Chamber of the European Court of Human Rights, Decision of 12 May 2002, Application no 52207/99, §59.

[31] Condorelli and Kress (2010), p. 222.

resolutions in the light of the European Convention. On the other hand, the Court has to deal with situations where States have to implement U.N. resolutions to fulfil their obligations, and the Court cannot condemn them without putting them in a difficult situation in which one State will eventually breach the law, either the law of the U.N. or European law. Actually, European judges have to keep in mind the global situation and to deal with some external legal rules.

The development and the strengthening of international law through International Organisations lead to new situations, which are the sources of new solutions but without uniformity because of the case-based nature of these solutions. P. Daillier already pointed out this particular point and its consequences on the Courts' work when he stated that "les ordres juridiques universels (le droit international général) et les ordres juridiques intégrés (le droit communautaire puis le droit de l'Union européenne) sont à la fois assez souples et assez cohérents pour trouver des solutions à tous les incidents de la vie internationale. [...] [On constate] un embarras de chaque institution mise en cause ou sollicitée de réagir lorsqu'il s'agit de trouver dans son propre ordre juridique [...] les éléments nécessaires et suffisants à une réponse complète aux situations inédites en cause."[32] In other words, without global solutions, an outcome is to be found *de facto* in case law, which is expected to deliver practical solutions. However, this situation leads to a divided argumentation with some differences between the reasoning of the Courts, which represents a risk for the legal security. But one can notice that the evolution of these lines is progressively going in the same direction, *i.e.*, to aim for a better protection of Human Rights. The credibility of the system of protection is involved: European Courts have to protect their high-level protection of Human Rights, but at the same time they need to keep a good relationship with the U.N. so that they don't lead their member States to a deadlock.

The European case law about the implementation by member States of U.N. sanctions focused on counterterrorism or about their actions authorised by U.N. resolutions provides particularly striking examples of this process and illustrates this point. The reflection about this particular topic built itself as the case law grew. All the debates about this particular topic focused on the act at the origin of a potential violation[33] and on the control that results from it. The European Court case law has opened two ways: on one hand, the "*Behrami* position",[34] *i.e.*, a particular treatment provided to U.N. system that involves the attribution to the Organisation itself of every act accomplished by the member State on behalf of the Organisation. This articulation leads to the incompetence *ratione personae* of the Court. On the other hand is the "*Bosphorus* position",[35] *i.e.*, the attribution of the act

[32] Daillier (2012), pp. 155 and 156.

[33] Tavernier (2013), p. 105.

[34] *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, Grand Chamber of the European Court of Human Rights, Decisions of 2nd May 2007, Applications no 71412/01 and 78166/01.

[35] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Irland*, Grand Chamber of the European Court of Human Rights, Judgement of 30 June 2005, Application no 45036/98.

to member States in case of the implementation of binding acts from secondary legislation of an International Organisation (in this case the E.U.). As already expressed by the doctrine, the point of view is not the same in the two cases: in the first one, the emphasis is put on the international dimension of the law and in the second case, on the internal dimension of the applicable law.[36] The following case law will be built on this divided basis on which the grounds of the States and of the applicants are focused. They will use this division when presenting their arguments in order to tip the scales in favour of one or the other solution. But nowadays the importance of the protection of Human Rights leads the Court to focus on a better solution.

The Court is also pushed by the European Court of Justice, which in the *Kadi* case[37] gave the priority to the internal vision over the international one. The goal is to find a way to protect individuals' rights, as a constitutional court,[38] and not to erode all the work already accomplished until then. Facing this situation, the European Court on Human Rights—the European emblematic protector of rights—seemed outdated by its European colleagues and this position leads to think about the existence of a difference in analysing the secondary law of the U. N.[39] As a result, the outburst occurred in 2011 when in the *Al-Jedda* case[40] the European Court decided not to attribute the contested act to the Organisation because of its lack of control or authority. The Court clarifies its position[41] in this case and later in the *Al-Skeini* case.[42] Change is still on its way as demonstrated in the last important case about this topic, where the European Court on Human Rights confirmed this approach in using the imprecision of the *Behrami* case to reinforce the definition of the notion of control that is useful for the attribution process.[43] The Court underlines the positive action of the State to implement the U.N. sanction and

[36] Tavernier (2013), p. 106.

[37] *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and European Commission*, Grand Chamber of the Court of Justice of European Communities, Judgement of 3rd September 2008, Applications C-402/05P and C-415/05P, Reports 2008, I-06351.

[38] See: Opinion of Advocate General Poiares Maduro in *Yassin Abdullah Kadi v. Council of the European Union and European Commission*, C-402/05P; *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and European Commission*, Grand Chamber of the Court of Justice of European Communities, Judgement of 3rd September 2008, Applications C-402/05P and C-415/05P, Reports 2008, I-06351, §316; *Loizidou v. Turkey*, Grand Chamber of the European Court of Human Rights, Judgement of 23 March 1995, Application no 15318/89, §75.

[39] Jacqué (2009), p. 171.

[40] *Al-Jedda v. The United Kingdom*, Grand Chamber of the European Court of Human Rights, Judgement of 7 July 2011, Application no 27021/08, §80.

[41] Panoussis (2012), pp. 659 and 660.

[42] *Al-Skeini and others v. The United Kingdom*, Grand Chamber of the European Court of Human Rights, Judgement of 7 July 2012, Application no 55721/07, §149.

[43] *Youssef Mustapha Nada v. Switzerland*, Grand Chamber of the European Court of Human Rights, Judgement of 12 September 2012, Application no 10593/08, § 120–121.

focuses only on the internal act, which is attributed to States. The *Nada* case is emblematic of the modification of the European case law in the matter of attribution between States and International Organisation through the issue of the control over the particular situation under examination. As pointed out by G. Gaja, "ce qui est considéré comme décisif aux fins de l'attribution, c'est de savoir qui est l'auteur en fait du comportement illicite, et non pas de l'existence éventuelle pour l'auteur d'une obligation de le tenir, qu'elle découle d'un traité ou de l'acte d'une organisation internationale".[44]

Despite the many issues that remain to be clarified and the current debate on the subsidiarity of the mechanism,[45] it is now possible to assert that the main goal of the European system of Human Rights protection is focused on its effectiveness even if the restrictive interpretation of the Court's jurisdiction *ratione personae* is based on the attribution of the internationally wrongful fact. But this first stage of the responsibility needs to be followed by a second one focused on the internationally wrongful character of the attributed act or fact.

8.3 The Wrongfulness in International Law: How to Manage the Diversity of Obligations

The second step of the establishment of the internationally wrongful act is precisely the question of the wrongfulness of the fact attributed to the international legal subject. This process is based on international legal norms binding such entity. The questions of the globalisation and of the strengthening of the international society also have some repercussions on this model. Indeed, the multiplication of International Organisations and the diversification of the sources of the legal norms lead to a very dense and non-streamlined network of obligations. Sometimes incompatibilities arise, and the courts have to deal with these incompatibilities. The international legal order appears with the seal of pluralism, and some choices have to be made (Sect. 8.3.1). Human Rights appear as a material basis for prioritising some rules over others in order to lead to a deeper protection (Sect. 8.3.2).

[44] Gaja (2009), p. 97.

[45] See on this topic Protocol no 15 adopted on 26 April 2013 amending the European Convention on Human Rights, which introduces a reference to the principle of subsidiarity and the doctrine of the margin of appreciation.

8.3.1 *Dealing with Various Obligations: A Distinctive Example of the Pluralism*

The issue of the applicable law is the second phase of the establishment of an internationally wrongful act. After attributing an act, it is necessary to qualify it, *i.e.*, to identify the infringed rule and its international character.[46] This step implies to find the appropriate rule binding the State in order to hold its responsibility. With the development and the strengthening of international law, this stage appears more and more complex and leads to difficulties not to produce a legal deadlock for the State and for the applicant. That is the direct consequence of a non-coordinated legal order. This solution results not from a lack of applicable rules but rather from too numerous applicable rules. This is a typical example of what is called "the internationalization of law".[47] And if a choice is needed, it implies a certain amount of subjectivity because of the indirect hierarchy between the rules of different systems.

These questions lead also to the issue of the extent of Court control. Actually, if the Court has a limited jurisdiction *ratione personae*, it is also subject to a limitation of its jurisdiction *ratione materiae*. Indeed, the European Court of Human Rights is only competent to deal with applications in relation to the European Convention.[48] But in the case of a U.N. authorisation or obligation at the basis of the member State action, the Court should also deal with Article 103 of the U.N. Charter. This rule implies that U.N. obligations prevail over other obligations of the member States. Contrary to the European Court of Justice,[49] the European Court of Human Rights chose an interpretation in conformity with the European Convention instead of a conflict of obligations. This is clearly exposed in the *Al-Jedda* case when the Court considered that "against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of Human Rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for Human rights, it is to be expected that clear and explicit language would be used where the Security Council intends the States to take

[46] Stern (2010), pp. 210 and 211.

[47] See, for example, Delmas-Marty and Izorche (2000), pp. 753–780.

[48] Article 32 of the European Convention on Human Rights.

[49] *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and European Commission*, Grand Chamber of the Court of Justice of European Communities, Judgement of 3rd September 2008, Applications C-402/05P and C-415/05P, Reports 2008, I-06351.

particular measures which would conflict with their obligations under international Human Rights law."[50] This is confirmed in the *Nada* case when the Court underlines: "When creating new international obligations, States are assumed not to derogate from their previous obligations. Where a number of apparently contradictory instruments are simultaneously applicable, international case law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law."[51]

It seems rather a diplomatic solution, or conciliation,[52] than a clear challenge to the supremacy of Article 103 of the U.N. Charter because of the importance of the aim of Human Rights protection. Nevertheless, the interpretation of the Court clearly highlights the margin of appreciation of the State in charge of the implementation of U.N. resolutions and its potential consequences. Indirectly, the position of the Court leads to make the European Convention prevail over the U.N. resolutions. Even if the argumentation is not really solid and can include flaws, the objective is to protect Human Rights the better possible way in an international and pluralistic world where there is no rationalisation between the systems. As pointed out by J. Tavernier,[53] the fact that the Court does not use the principle of the equivalence of protection as it has done in regard to the European Union underlines the continuing lack of Human Rights protection in the U.N. sanctions system. This last case law seems to confirm the search of a larger and deeper protection of Human Rights regardless of the geographical coordinates[54] as expressed in the *obiter dictum* of the Court, which highlights "the Convention's special character as a treaty for the collective enforcement of human rights and fundamental freedoms".[55]

[50] *Al-Jedda v. The United Kingdom*, Grand Chamber of the European Court of Human Rights, Judgement of 7 July 2011, Application no 27021/08, §102.

[51] *Youssef Mustapha Nada v. Switzerland*, Grand Chamber of the European Court of Human Rights, Judgement of 12 September 2012, Application no 10593/08, §170.

[52] Tavernier (2013), p. 110.

[53] Tavernier (2013), pp. 111 and 112.

[54] Concurring opinion of Judge Bonello under *Al-Skeini and others v. The United Kingdom*, Grand Chamber of the European Court of Human Rights, Judgement of 7 July 2012, Application no 55721/07, §18.

[55] *Youssef Mustapha Nada v. Switzerland*, Grand Chamber of the European Court of Human Rights, Judgement of 12 September 2012, Application no 10593/08, §196.

8.3.2 A Way to the Constitutionalisation of International Law?

De facto, the position of the European Court leads to a material gradation of obligations. Indeed, in case of a combination of member States' different obligations from different origins, the choice has been made in favour of a prevalence of material goals. By doing so, the aim of the European Court is to protect Human Rights and to reaffirm its position as the cutting edge of the Human Rights protection in Europe and also in the international case law. The analysis of the Court, focused on the margin of appreciation of States, leads to assess the activities of member States in the light of Human Rights even when the alleged wrongful act has been adopted to comply with an obligation imposed by another International Organisation. In the *Nada* case, the Court proceeded to a detailed analysis of this margin of appreciation[56] to highlight that States are bound not by an obligation of means but by an obligation of result.[57] This particular conclusion is based on the interpretation of the U.N. resolution, which leads the Court to conclude on the possibility for the member State to articulate its different obligations. In relation to this analysis, it can be asserted that the European Convention on Human Rights is not only a legal European text but also and maybe above all an objective instrument of Human Rights protection. From this perspective, the analysis of the Court is close to the one of the U.N. Committee on Human Rights in the *Sayadi and Vinck* case[58] and leads to develop the Human Rights obligations of the State to an exponential extent. One can see an attempt to constitutionalise international law, even if the European Court avoids this question[59] but rather seems to deal with another structural problem.

Indeed, as underlined at the beginning of this contribution, for the last 15 years the international society has been changing and International Organisations are called upon to be in charge of deeper and vaster competences. For that purpose, they have at their disposal more means to fulfil their goals, which means that they detain more power. And this is the term at the heart of the notion of State jurisdiction: "anyone within the power or effective control of that State party, even if not situated within the territory of the State party".[60] Like States, International Organisations

[56] *Youssef Mustapha Nada v. Switzerland*, Grand Chamber of the European Court of Human Rights, Judgement of 12 September 2012, Application no 10593/08, §§ 176–197.

[57] See Economides (2010), pp. 371–382.

[58] *Sayadi and Vinck v. Belgium*, Decision of the U.N. Committee on Human Rights of the 9 December 2008, Communication no 1472/2006.

[59] *Youssef Mustapha Nada v. Switzerland*, Grand Chamber of the European Court of Human Rights, Judgement of 12 September 2012, Application no 10593/08, §197.

[60] *General Comment no 31: The Nature if the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004 by the U.N. Human Rights Committee. In: Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, May 2004, HRI/GEN/1/Rev.7, § 10.

have some prerogatives of protection such as immunities[61] in order to exercise their powers. Even if these are functional immunities—*i.e.*, limited to their aim and not as extended as the ones of the member States—these do not prevent the impunity of these entities. If this is a traditional procedure of international law linked to States, it used to be mitigated by the internal remedies, the equivalent of which cannot be found in the mechanisms of International Organisations. Actually, instead of the remedies for civil service[62] and in the particular case of the European Union, there are few mechanisms opened to individuals and before which they can challenge International Organisations' responsibility. This situation is the cause of this new and dense case law. Indeed, if the immunities of International Organisations are the clues of their power, at the same time, they should also be the factor of the application of Human Rights to International Organisations in order to protect individuals from similar power as the one of States. Immunities, in particular from legal proceedings, can be justified if another court is competent[63] and if the limitation of the access to justice is legitimated and proportionate.[64] These conditions of substitution and limitation are not really concretely implemented, and their control is minimalist.[65] This situation leads to the non-justiciability of International Organisations because of the legal personality veil.[66] The access to the Court in case of direct or indirect activities of International Organisations is not granted, and the balance between individual rights and the prerogatives of protection is distorted, therefore opening the door to a potential denial of justice.[67]

Furthermore, for now there are only few Courts or Panels that open the possibility for individuals to challenge the responsibility of International Organisations, which explains the exponential case law before the European Court and also internal tribunals.[68] Indeed, at the same time, powers of International Organisations and interactions with individuals and risks of Human Rights violations from these

[61] Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on 13 February 1946.

[62] On this particular issue, see Reinisch (2008), pp. 285–306.

[63] *Waite and Kennedy v. Germany*, Grand Chamber of the European court of Human Rights, Judgement of 18 February 1999, Application no 26083/94, §68; *Beer and Reagan v. Germany*, Grand Chamber of the European Court of Human Rights, Judgement of 18 February 1999, Application no 28934/95, §68.

[64] *Waite and Kennedy v. Germany*, Grand Chamber of the European court of Human Rights, Judgement of 18 February 1999, Application no 26083/94, §59; *Richard Chapman v. Belgium*, Fifth Section of the European Court on Human Rights, Decision of the 5 March 2013, Application no 39619/06, §§ 47–53.

[65] Flauss (2009), p. 84.

[66] Geslin (2005), p. 543. See also, Murray (2011), pp. 291–347.

[67] See, for example, Tigroudja (2000), pp. 83–106; Lloyd-Jones (2003), pp. 463–472; Pingel (2004); Angelet and Weerts (2007), pp. 1–26; Reinisch and Weber (2004), pp. 59–110.

[68] See, for example, *Mothers of Srebrenica and al. v. The Netherlands*, Court of Appeals of the Netherlands, Judgement adopted the 30 March 2010, Case 00.022.151/01; *Janet E. Atkinson v. The Inter-American Development Bank and alii*, U.S. Court of Appeals of the District of Columbia Circuit, Judgement of the 9 October 1998, 156 F. 3d 1335; *Banque africaine de développement*

subjects are growing up. So, in cases of disputes, individuals are looking for means of settlement and try to challenge International Organisations' responsibility before national and European Courts and tribunals.[69] But some dispute settlement mechanisms already exist. For an example of these accountability mechanisms,[70] the unfortunately unknown panel linked to the U.N. in Kosovo, the Human Advisory Panel,[71] examines complaints of alleged Human Rights violations committed by or attributable to the United Nations Interim Administration Mission in Kosovo (UNMIK). In case of admissible complaints, the Panel will then render an opinion on whether UNMIK is responsible for a violation of one of the various human rights instruments in force in Kosovo and will make recommendations to the Special Representative of the Secretary-General (SRSG) in Kosovo when appropriate. Since 2007, the Panel has realised a great amount of work with great seriousness, thanks to its members who have a large experience in the field of Human Rights. The most efficient and original characteristic of this Panel activity is its jurisdiction *ratione materiae*, which is based on several Human Rights protection instruments, including the European Convention on Human Rights, and on a way to enforce Human Rights within the U.N. system. It is the particularity of this system where the European Convention on Human Rights is directly applicable to U.N. activities, whereas the indirect application is the traditional basis of the reflexion on this subject.[72] This kind of solution has its flaws, but it opens a window to a larger implementation of Human Rights. Also, domestic tribunals are sometimes more daring than the European Court when they decide to pierce the veil of International Organisations.[73] But for now, one can conclude that this growing complexity of the international society leads to the limitation of Human Rights obligations and of the standard of protection despite the broad interpretation of the European Court and the attempts to bring about change.

8.4 Conclusion

The evolution of the European case law regarding State action under U.N. authorisations or obligations is a never-ending saga for now. As a case-law-based reflexion, it is a field where the dialog between States and International Organisations, on one hand, and between Organisations themselves, on the other, is the basis of the construction of the law. With the last developments in the

v. *Degboe*, French Cour de Cassation, Social Chamber, Judgement of the 25 January 2005, *Bull*. 2005 V, no 16, p. 13.

[69] About this particular topic, see Reinisch (2010), 302 p and Reinisch (2013), 400 p.

[70] For another example, see the World Bank Inspection Panel Orakhelashvili (2005), pp. 57–102.

[71] For a brief analysis of this topic, see Chinkin (2012) and Beulay (2013a,b).

[72] Kolb et al. (2005), pp. 241 and 242.

[73] *Hasan Nuhanovic v*. *The Netherlands*, Supreme Court of the Netherlands, Judgement adopted the 6 September 2013, Case 12/03324.

European system, the message to the member States seems clear: if they adopt a domestic legislation to implement a U.N. obligation, they have to take into account their other obligations, in particular the ones arising from the Council of Europe. Therefore, the obligations arising from the European Convention seem to prevail on U.N. obligations. Escaping from a system dilemma,[74] the enforcement of Human Rights protection within the U.N. system seems to be the crucial step for member States. The solidification of the case law around the aim of Human Rights protection through State activities should be satisfying for a time, but the fragile equilibrium reached on the issue of the degree of control cannot be an ultimate solution. The *Kadi* case before the European Court of Justice in 2008 had the consequence to change some aspects of the sanctions process, for example with the creation of the focal point,[75] and the other episodes of the saga still participate to the evolution of this process.[76] The alignment of the European Court on the possibility to engage the responsibility of a member State for its activities under the U.N. Charter will reinforce this movement and lead to other improvements in Human Rights protection. However, until the creation of an internal U.N. mechanism to concretely protect the Human Rights of individuals from U.N. activities, this will remain just an episode of a legal series.

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[74] Szymczak and Touzé (2011), p. 618.

[75] Resolution 1730 (2006) of the Security Council of the United Nations adopted the 19 December 2006, S/RES/1730(2006). See on this topic: Miron (2009), pp. 363 and 364.

[76] See the last case law where the European Court of Justice is evaluating the quality of the proof: *Yassin Abdullah Kadi*, Grand Chamber of the European Court of Justice, Judgement of the 18 July 2013, Joint applications no C-584/10 P, C-593/10 P, C-595/10 P.

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Part III
Impact of Human Rights on International Security, Armed Conflicts, and International Criminal Law

Chapter 9
International Economic Sanctions and Fundamental Rights: Friend or Foe?

Jean-Marc Thouvenin

9.1 Introduction

After a short presentation of what is generally meant by "economic sanctions" (Sect. 9.2), this paper will focus on a single question, which is to know if, and to what extent, fundamental human rights (which, in this paper, will be considered as including human rights law and humanitarian law) affect the recourse to, and the practice of, economic sanctions in international relations. Upon analysis, it will be explained that the violation of fundamental rights can be a trigger for the adoption of "smart" economic sanctions (Sect. 9.3) but on the reverse that the protection of fundamental rights is also a strong argument to deny the legality of such sanctions (Sect. 9.4). Finally, it will be concluded that if international human rights and humanitarian law does influence the practice of international economic sanctions, this is still to a (too) limited extent (section "Conclusion").

9.2 The Growing Enthusiasm for Economic Sanctions

9.2.1 Economic Sanctions as a Common Tool of International Policy

Broadly speaking, economic sanctions are peaceful "economic weapons" used by States, or international organizations, to put pressure on a State, or on another entity, in order to bring this State or entity to adopt or refrain to adopt certain

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behavior. The targets may also be private persons—which is particularly the case in the context of the fight against terrorism—but they are States in most of the cases.

This practice has always existed, but as interesting as it is, it does not seem appropriate here to dwell with the international economic sanctions reported in the History books. Indeed, one could discuss the decree adopted by Pericles in 432 BC limiting imports from Megara on the markets of Athens, the continental blockade of England imposed by Napoleon in the very beginning of the nineteenth century, U.S. embargoes in force between 1807 and 1813, blocking foreign trade with the U.S. (Embargo Act, 1807; Non-Intercourse Act, 1809; Non-importation Act, 1811), and Article 16 of the Covenant of the League of Nations, which requests Member States to adopt economic sanctions against States in breach of certain of their obligations.[1] But these events are not really significant compared to the number and density of economic sanctions that have been and are still implemented on the international plane since the end of the Second World War.

The Security Council of the United Nations is a legitimate actor in this regard, since the UN Charter expressly recognizes its power to decide economic sanctions in case of a threat to peace or international security.[2] But this tool was rarely used before 1990. Until this date, only Southern Rhodesia and South Africa could be sanctioned under article 41: of the UN Charter, due to the political difficulties encountered by the Security Council to make use of this tool. The South African case is a good illustration thereof: if it was in a position in 1977 to *decide* an arms embargo,[3] in 1985 it could merely *recommend*—not decide—to enlarge the spectrum of the sanctions to enhance the pressure on the South African government.[4] By contrast, since 1990, inflicting economic sanctions became an almost daily action of the UN organ in charge of the collective security. This activity became so common that the 1990s have been rightly depicted as the "Sanctions Decade."[5] The list is truly impressive: during the last 25 years, the Security Council has imposed—not

[1] "Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not." The League used its power to adopt economic sanctions only against Italy after its invasion of Etiopia; the sanctions consisted of an arms embargo, a prohibition of loans and bank credits to the Italian government, a ban on the import of Italian goods and products, and a ban on the export of any kind of goods that could be used for military purposes. These sanctions were lifted in 1936. See D'Hollander, *Economic sanctions as a means to enforce human rights*, *Thesis*, McGil University, National Library of Canada, Montréal, 1995, 124 p, p. 5.

[2] Among the measures not involving armed force that the Council may adopt, Article 41 of the Charter mentions "complete or partial interruption of economic relations."

[3] Resolutions 418 (1977).

[4] Resolution 569 (1985).

[5] Cortright and Lopez (2000).

only recommended—sanctions against Iraq (invasion of Kuwait),[6] Yugoslavia (serious violations of humanitarian law),[7] Somalia (internal conflict and humanitarian issues),[8] Libya (international terrorism),[9] Angola (the embargo targeted specifically UNITA opposed to the Angolan government),[10] Haiti (coup),[11] Rwanda (genocide),[12] Sierra Leone (coup),[13]Afghanistan (Taliban's regime),[14] the DRC (internal conflict),[15] Liberia (internal conflict),[16] Sudan (internal conflict),[17] Lebanon (political assassination),[18] North Korea (nuclear proliferation),[19] Eritrea (threatening international security and support for terrorism),[20] and Iran (nuclear proliferation). [21]

But this list is not complete as the practice of economic sanctions is certainly not under a monopoly of the UN Security Council. States or regional organizations have recourse to unilateral sanctions abundantly since the end of the Second World War, so much that Louis Dubouis could describe in 1967 the "countless embargo decisions that had occurred over the last twenty years."[22]

The United States is rightly considered as the main user of this tool. A 2001 report written by a French Member of the Parliament observes that "[t]he United States has very often resorted to the weapon of sanctions over the past decade. Countries subject to U.S. sanctions are numerous: 75 out of 193 countries in the world are affected by unilateral sanctions, either federal or enacted by States. The reasons that led to the imposition of sanctions are very diverse, ranging from disputes over food imports to serious breach of human rights and drug trafficking."[23] Cuba under U.S. sanctions since 1962 is the most famous example, followed by Nicaragua, which was under US economic sanctions at the time of the Sandinistas, as reflected in the International Court of Justice's decision in the *Nicaragua* case. No less famous is the much-disputed D'Amato-Kennedy Act (Iran and Libya Sanctions Act, 1996), whose purpose is to implement extraterritorially and outside

[6] Resolution 661 (1990).
[7] Resolution 713 (1991).
[8] Resolution 733 (1992).
[9] Resolution 748 (1992).
[10] Resolution 864 (1993).
[11] Resolution 873 (1993).
[12] Resolution 1918 (1994).
[13] Resolution 1132 (1997).
[14] Resolution 1267 (1999).
[15] Resolution 1493 (2003).
[16] Resolution 1521 (2003).
[17] Resolution 1591 (2005).
[18] Resolution 1636 (2005).
[19] Resolution 1718 (2006).
[20] Resolution 1907 (2009).
[21] Resolution 1737 (2006).
[22] Dubouis (1967), p. 105.
[23] Mangin (2001), p. 16.

any multilateral framework a U.S. sanctions regime against Libya and Iran. Other international actors have recourse to the same type of actions. The Arab countries have joined together to perform a boycott against Israel since the 1950s, and the European Union has also progressively increased its practice of sanctioning economically different persons and entities, so much that its records are now quite close to those of the U.S.A.[24]

9.2.2 A Classification

The density of the practice of international economic sanctions, decided or authorized by the Security Council, or outside the UN, is striking. But, and this is obviously not a surprise, all economic sanctions are not equal. Truly, their common feature is that they are all peaceful and supposed to have an "economic" character. This does not mean that they have an economic purpose—this can nevertheless be the case, for example, when a member of the WTO implements trade retaliation against another member who has not met its own trade obligations. Rather, it means that they are intended to weaken the economy of their target in order to obtain something from it.

It is possible to qualify and classify economic sanctions under three categories.

Under the first one, sanctions are distinguished on the basis of the economic field targeted, which can be either trade or financial relations. As to trade, the most classical measure is the embargo, which prohibits exports from national traders to the territory of the targeted State and forbids the selling of products/services to nationals or companies of this State. Another tool is the boycott, a ban on imports from the targeted country. The blockade is the more damaging trade measure. It can be compared, with respect to a State, to the siege of a city. This is the final step of a strategy the object of which is to economically asphyxiate a State. It normally requires the use of "physical" coercion, specifically military, and therefore cannot be regarded as an *economic* sanction. For their part, "financial" sanctions include decisions freezing the assets that a targeted government holds abroad, restricting its access to capital markets, prohibiting the grant of loans and credits, blocking international transfers and the sale of real estate or property transactions. Should also be mentioned the suspension or cancellation of a promised financial aid. There are also, increasingly, measures adopted to freeze funds of individuals or companies. Financial sanctions can also now include a prohibition to provide insurance products to the targeted individuals and entities. Furthermore, but this is

[24] The first case in which the European Community has adopted, through its Member States, economic sanctions was in the South Rhodesia case. The first case in which it economically sanctioned a State despite the absence of a decision to this effect by the UN Security Council immediately followed the US hostages crisis in Teheran in 1979, and targeted Iran; see Dewost (1982), p. 219. Since then, the EU has frequently had recourse to this policy.

uncommon, they may seek to render the currency of the target State inconvertible (this new type of "monetary" sanction has been adopted in 2012 against Iran).

Under the second category, a distinction is made between economic sanctions based on whether they *affect rights* or merely *restrict opportunities*, bearing in mind that this is primarily when they affect rights that economic sanctions generate legal problems. Sanctions taking shape in the suspension or cancellation of development assistance clearly belong to the category of lost opportunities for the State that finally does not benefit of it, unless the assistance was provided for under a binding treaty, which is not common. It may be different in the case of an embargo or a boycott since the rules of international trade, including the WTO, generally provide for freedom of trade. Similarly, financial sanctions may affect rights under bilateral investment treaties, especially when they have the effect of freezing the funds of investors.

Under the last category, economic sanctions can be distinguished according to the fact that they are "targeted"—in other words, "smart"—or not. This distinction will be developed at Sect. 9.3.2 below.

Enthusiasm for economic sanctions during the last decades is thus salient. But at the same time, their object and content have progressively been enlarged and reshaped, in particular as a direct consequence of the growing concern for fundamental rights.

9.3 The Protection of Fundamental Rights as Cause and Condition for Legitimate International Economic Sanctions

The influence of fundamental rights on the renewal of economic sanctions is twofold. On one hand, the practice reveals that domestic violations of fundamental rights frequently trigger the adoption of international economic sanctions (Sect. 9.3.1). On the other hand, modern economic sanctions must in principle be "smart," which means that they must avoid adverse effects on innocents (Sect. 9.3.2).

9.3.1 Domestic Violations of Fundamental Rights as a Trigger for the Adoption of Economic Sanctions

Economic sanctions can be adopted for different purposes. It can be the response to a threat like terrorism, nuclear proliferation, armed attack, etc. Another of these purposes is to protest against domestic violations of human rights. In practice, there is a growing recourse to such policy, particularly by the USA and the EU and, to a lesser extent, by the UN Security Council.

9.3.1.1 UN Security Council's Practice

Chapter VII of the UN Charter, under which the Security Council is recognized as having the power to adopt binding decisions, including economic sanctions, states that this power is limited to respond to specific situations, with no express reference to situations of violation of human rights or humanitarian law. According to art. 39: "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." Certainly, the notion of "threat to peace" is anything but precise, and it is therefore possible to consider the systematic violation of human rights or humanitarian law by a government over its own population as such a threat. But even if the Security Council has a discretionary power to actually decide what is a threat to peace, it has generally adopted a cautious approach, at least until recently, as there exists a long-standing resistance against such an interpretation. In effect, it has been constantly argued by a number of UN Members that domestic questions should not be dealt with by the UN or any third State as they pertain to the reserved domain of sovereign States.

Thus the Security Council has frequently refrained from overtly stating that the domestic violation of human rights or humanitarian law is a threat to peace, safe in paroxysmal circumstances like apartheid and genocide. In three decisions adopted in the 1960s against South Africa, the Council considered that the racial conflict created by the apartheid policy of the government of South Africa was in itself a threat to peace.[25] In 1992, in the context of the genocide in Bosnia, Resolution 808 (1992) determines that "widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuance of the practice of 'ethnic cleansing' ... constitutes a threat to international peace and security." The Council confirmed a similar approach in the context of the genocide in Rwanda in Resolution 955 (1994). By

[25] Resolutions 181 and 182 (1963), 191(1964). By contrast, Resolution 282(1970) explains that the threat to peace is not so much the apartheid policy as such but the situation resulting from it, characterized by "the measures being taken by the Government of South Africa to enforce and extend those policies beyond its borders," "the constant build-up of the South African military and police forces," "the extensive arms build-up of the military forces of South Africa [which] poses a real threat to the security and sovereignty of independent African States opposed to the racial policies of the Government of South Africa, in particular the neighbouring States." In Resolution 311(1972), the Council said that the situation in South Africa seriously disturbs international peace and security "in southern Africa." This suggests that it is the regional consequences of the policy of apartheid that have been seen as a threat to peace, not the domestic situation of human rights in South Africa. Resolution 477(1976) states clearly that the threat to peace is based on the conviction of the Council that "the violence and repression by the South African racist régime have greatly aggravated the situation in South Africa and will certainly lead to violent conflict and racial conflagration with serious international repercussions." Resolution 418(1977) also puts that the situation in South Africa "will certainly lead to violent conflict and racial conflagration with serious international repercussions."

contrast, earlier Resolutions adopted during the crisis in Rwanda are more cautious. Resolution 918 (1994) states that the Council is "Deeply disturbed by the magnitude of the human suffering caused by the conflict and concerned that the continuation of the situation in Rwanda constitutes a threat to peace and security *in the region*." On the same subject, Resolution 929 (1994) also finds that "the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security *in the region*." These wordings are cautious as they suggest that it is not the humanitarian situation as such that is a threat but its magnitude and its consecutive destabilizing effects "in the region." This approach is also to be seen in Resolution 688 (1991) concerning Iraq, sometimes mistakenly described as a case in which the domestic violation of human rights is qualified as a threat to peace[26] while it is on the contrary a good example of self-restraint. A careful reading of this Resolution shows that the Council mentioned "the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, *the consequences of which threaten international peace and security in the region*."[27]

It appears more generally that safe in paroxysmal situations, in case of human rights or humanitarian domestic disasters, the practice of the Council is to qualify explicitly or implicitly the *consequence on the international plane* of this domestic situation as a threat to peace. Thereby, in Resolution 733 (1992) concerning Somalia, the Council said it was "[g]ravely alarmed at the rapid deterioration of the situation in Somalia and the heavy loss of human life and widespread material damage resulting from the conflict in the country and aware of *its consequences on the stability and peace in the region*."[28] In the same vein, Resolution 1484 (2003) concerning the DRC determines "that the situation in the Ituri region and in Bunia in particular constitutes a threat to the peace process in the Democratic Republic of the Congo and to *the peace and security in the Great Lakes region*."[29]

By contrast, Resolution 1556 (2005) concerning Sudan is another case in which the "ongoing humanitarian crisis and widespread human rights violations, including continued attacks on civilians that are placing the lives of hundreds of thousands at risk" is seen as a threat to international peace as such. The Council considers in this text that "the situation in Sudan constitutes a *threat to international peace and*

[26] Ruez (1992), p. 610, note 216.

[27] Para. 1, emphasis added. For an analysis of this resolution, see Carpentier (1992) and Pellet (2012).

[28] Emphasis added. The same kind of wording is to be found in subsequent resolutions on Somalia. In Resolution 794 (1992), the Counsel determined that "the magnitude of the human tragedy caused by the conflict in Somalia (. . .) constitutes a threat to international peace and security." The "human tragedy" is a notion far more comprehensive than the notion of violation of human rights. *Contra*, see Kerbrat (1995), p. 12.

[29] Emphasis added. In the same vein, Resolution 2053(2012) determines that "the situation in the Democratic Republic of the Congo [which was characterized notably by the "humanitarian situation and the persistent high levels of violence and human rights abuses and violations against civilians"] continues to pose a threat to international peace and security *in the region*" (emphasis added).

security and to stability in the region." This suggests that, on one hand, the situation, in itself, is a threat to international peace and security, while, on the other hand, its consequences threatens stability in the region. The difference between this formulation and the more cautious quoted above strengthens the doctrinal movement towards a progressive acknowledgment that at a certain paroxysmal point massive domestic violations of human rights or humanitarian law become a threat to international peace or security. Resolution 1973 (2011) adopted in the Libya case 6 years later confirms this evolution. Here, the UN Security Council expressly states that the violations of human rights by the Libyan government, despite its responsibility to protect its own population, is a threat to peace, and decides to impose sanctions, including economic sanctions (arms embargo and freezing of assets).

This last resolution could well be seen as reflecting the accomplishment of a slow but irrepressible doctrinal movement in the UN, favored by the invention in 2001 of the now famous concept of "responsibility to protect," and its further adoption by the UN in 2005,[30] the object of which has been precisely to open the door for a better international protection of people from mass violations of human rights.[31] But it could also reflect the failure of the growing humanist approach of the Security Council. In effect, the manner in which Resolution 1973 has been implemented by some UN Members, notably France, but more generally by NATO Members, proclaiming that a "regime change"—and not only "protecting the civilians"—was their real goal, has been highly criticized, so much that an observer sentenced that the "responsibility to protect" concept was dead in Libya. [32] The failure of the UN Security Council to take any decision in the context of the Syrian crisis seems to confirm that the evolution presented above is very fragile and that qualifications by the UN of domestic violations of human rights as threats to peace will stay exceptional.

9.3.1.2 Others

Due to their economic prominence, the main international actors that are used to resort to economic sanctions besides the UN Security Council are the United States of America and the European Union.

The USA does not hesitate to adopt economic sanctions against persons considered responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, or to have participated in, the commission of human rights abuses. The current legal basis of such sanctions lies in the *International Emergency Economic Powers Act* (*IEEPA*), codified in the United States Code. Para.

[30] See the Final Document of the 2005 World Summit (the 2005 Outcome), paras. 138 and 139, UNGA, A/60/L.1.

[31] On the Responsibility to Protect, see, among many others, Chaumette and Thouvenin (2013).

[32] See http://www.iofc.org/fr/node/56537. Accessed 28 July 2014.

1701, a), which states that the President is empowered to take economic sanctions "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." Precisely, violations of human rights abroad have been declared extraordinary threats in many cases. Among other examples, in the case of Syria, Executive Order 13572 of April 29, 2011, finds that "the Government of Syria's human rights abuses, including those related to the repression of the people of Syria, manifested most recently by the use of violence and torture against, and arbitrary arrest and detentions of, peaceful protestors by police, security forces, and other entities that have engaged in human rights abuses, constitute an usual and extraordinary threat to the national security, foreign policy, and economy of the United States." On this assumption, a number of persons are submitted to the blocking of their properties.[33]

The European Union follows the same trend. In its "Basic Principles on the Use of Restrictive Measures (Sanctions)" adopted in 2004, the Council of the European Union puts that "[i]f necessary, the Council will impose autonomous EU sanctions in support of efforts to fight terrorism and the proliferation of weapons of mass destruction and as a restrictive measure to uphold respect for human rights, democracy, the rule of law and good governance. We will do this in accordance with our common foreign and security policy, as set out in Article 11 TEU, and in full conformity with our obligations under international law."[34] The legal bases in European Law for the adoption of economic sanctions are articles 3, paras. 5, 21 al. 2 b), and 29 of the Treaty on the European Union and article 215 of the Treaty on the Functioning of the European Union. On March 2010, four States were under EU economic sanctions due to violations of human rights (Belarus, Guinea, Myanmar, and Zimbabwe). Iran, Libya, and Syria have been added to this evolving list since then.

Whatever are the reasons for which they are implemented—and, in many cases, there are not one but several reasons—the current international standard of economic sanctions requires that they cause no harm to the population but rather target the persons whose behavior is blamed.

[33] See, for another example, the Executive Order 13566, February 25, 2011, declaring a national emergency to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States posed by the extreme measures Colonel Muammar Qadhafi, his government, and close associates have taken against the people of Libya, including using weapons of war, mercenaries, and wanton violence against unarmed civilians, all of which have caused a deterioration in the security of Libya and pose a serious risk to its stability. For other examples, see, e.g., Malloy (2013).

[34] 7 June 2004, doc. 10198/1/04 REV 1 PESC 450.

9.3.2 *Modern Economic Sanctions Should Do No Harm to Innocent People*

Traditional economic sanctions were not concerned with their adverse consequences on innocent people. On the contrary, they were designed to put pressure on an entire population, on the assumption that this population would put a pressure on its government to change its policy. Woodrow Wilson considered in 1919 that "A nation that is boycotted is a nation that is in sight of surrender."[35] The Security Council initially adopted this trend. But its enthusiasm for this traditional approach has been refrained by the Iraq Disaster. At a certain point after the imposition of a harsh embargo on Iraq by Resolution 661 (1990), the International Community began to understand that it was not Saddam's regime but the people who were dramatically hit. In the mid-1990s, the consequences of "blind" economic sanctions on the humanitarian situation of innocent people were therefore denounced in multiple forums,[36] putting a huge pressure on the Security Council, which finally had to revise its approach. It decided to launch the "food for oil" program. Under Resolution 986 (1995), at least some humanitarian goods and food could be distributed to the population, paid with the revenue of the selling of oil. Nevertheless, according to the UN Secretary-General, the mechanism proved insufficient to really satisfy the population's needs, [37] and it is now widely recognized that despite this program "the sanctions upon Iraq have produced a humanitarian disaster comparable to the worst catastrophes of the past decades."[38] Drawing general conclusions from this experience, a 1998 Report of international experts underlines that "concerns have been raised mainly about the effects of comprehensive sanctions which—through shortages in food and medication—tend to bring suffering to children, the elderly and the poor."[39] In the same vein, the UN Secretary-General stated in his millennium report that "When robust and comprehensive economic sanctions are directed against authoritarian regimes, a different problem is encountered. Then it is usually the people who suffer, not the political elites whose behavior triggered the sanctions in the first place. Indeed, those in power, perversely, often benefit from such sanctions by their ability to control and profit from

[35] Quoted in Padover (1942), p. 108.

[36] See Gordon (2011), pp. 317–317, also quoted by Browne (2011).

[37] Press release SG/SM/7338 (24 March 2000), quoted by Bossuyt, "The Adverse Consequences of Economic Sanctions, Economic and Social Council," E/CN.4/Sub.2/2000/33, June 21, 2000, footnote 39.

[38] Bossuyt, *op. cit*., para. 63.

[39] Rapport du premier séminaire d'experts sur les sanctions financières ciblées, 17–19 mars 1998 (Interlaken I), p. 14, at http://www.un.org/french/sc/committees/groupes/sanctions.shtml. Accessed 28 July 2014. See also UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights, 12 December 1997, E/C.12/1997/8, available at http://www.refworld.org/docid/47a7079e0.html. Accessed 28 July 2014.

black market activity, and by exploiting them as a pretext for eliminating domestic sources of political opposition."[40]

From there, the new challenge for the International Community was to find out how to render economic sanctions "smarter." It appeared that the solution was to elaborate them as targeting directly those responsible for the acts triggering the sanctions while sparing innocent people. Here began a "Smart Sanction Movement,"[41] which proved quite successful as it obtained the apparent abandonment of the old methods. The new UN economic sanctions are now supposed to be "smarter" as they systematically focus on specific targets. "Modern" sanctions are designed to have a limited effect, *rationae materiae* or *rationae personae* and also *rationae temporis*. To this effect, in many cases, only an arms embargo will be decided, in order to reduce the level of violence in the country concerned.[42] A "smart" ban may also be limited to certain products the trade of which is particularly useful for people targeted by the sanction: diamonds, wood, or oil, for example.[43] It has also become common ground for the Security Council as well as for other actors to tailor sanctions that affect only the members of a government and their supporters or persons supposed to be terrorists or their supports.[44] In any case, to select the relevant targets, and follow up the sanctions, the Council "professionalised" the administration of the regimes it establishes. It monitors them under the supervision of permanent committees of sanctions devoted to propose the persons and entities to be listed, assisted by groups of experts.

The European Union also claims it complies with this "smart" doctrine and has developed to this effect its own "Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy." Adopted by the Council of the EU on 2 December 2005, it states that "Measures taken should target those responsible for the policies or actions that have prompted the EU's decision to impose restrictive measures. Deciding that a person or entity should be subject to restrictive measures requires clear criteria, tailored to each specific case, for determining which persons and entities may be

[40] Millennium Report of the Secretary-General of the United Nations, "We the Peoples": The Role of the United Nations in the twenty-first Century, United Nations Department of Public Information, New York, 2000, p. 50.

[41] This is taken from Gordon (2011), p. 318.

[42] If "smart," this policy is not necessarily wise in the case of internal conflict since it reinforces the party that has already a good access to the arms located in the territory. In the Syrian case, one might think that arms embargo reinforces the regime rather than anything else.

[43] There again, if the main source of revenue of the country comes from the exportations of those products, as targeted as it is, the sanction could cause collateral damages.

[44] This kind of regime, applied in particular to respond to violations of human rights, has no clear results and is often completed with stronger sanctions. According to Malloy (2013), p. 82, "empirical analysis of the immediate and discrete instrumental effects of sanctions suggests that the design and content of foreign policy-based and national security-based programs often lead to more significant effects on a target group or state, at least in the short run, than has been true with human rights-based programs."

listed, which should also be applied for the purpose of removal from the list."[45] The concrete consequences of this policy can be illustrated by the EU Council decision 2010/413/CFSP concerning restrictive measures against Iran. This decision establishes import and export restrictions, including the financial sector, and the freezing of assets of a list of persons and entities. But in order to limit the adverse humanitarian consequences of this regime, article 3 provides for exceptions concerning import of food and agricultural, medical, or other humanitarian goods and services, and art. 10, para. 3, authorizes fund transactions regarding foodstuffs, healthcare, and medical equipment or for humanitarian purposes. Article 20, para. 3, provides that funds and economic resources that are necessary to satisfy basic needs, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, will not be subject to freezing. The United States follows the same kind of approach.[46]

Upholding human rights has become for some States and international organizations a "just cause" that triggers the adoption of economic weapons in international relations. At the same time, under the constant pressure of human rights advocates, economic sanctions are now designed to be "smart," in the sense that they are theoretically shaped to hurt political and economic elites considered as wrongdoers rather than the general population.

But strikingly, the effect of such policy on the improvement of human rights in the target States are not publicly assessed. An observer concludes about EU sanctions that they "shoot in the dark," as no one knows if and to what extent they help achieve the goal for which they have been decided for.[47] It is all the more troubling than one could think that economic sanctions are in principle unlikely to foster human rights, for "no regime will commit suicide in order to get sanctions lifted. There are certain behaviours, like massive political repression of credible political threats to a regime's survival, which, while morally and politically reprehensible, are simply not very amenable to modification through economic sanctions."[48] More embarrassingly, academic studies argue that far from upholding human rights in the target countries, economic sanctions produce exactly the opposite effect, as they lead targeted governments to increase repression. For example, Julie Browne has found "that the imposition of economic sanctions not only increases the likelihood that a country will escalate its political repression, but

[45] 6749/05 PESC 159, para. 16.

[46] See, e.g., Iranian Transactions Regulations, 31 C.F.R. Part. 560, and the Iranian Assets Control Regulations, 31 C.F.R. Part. 535.

[47] Gebert (2013). To be noted is that the interesting study of Shagabutdinova and Berejikian (2007) is not conclusive concerning the efficiency of economic sanctions regarding the protection of human rights. They find that smart sanctions are more efficient and less damaging for the population than traditional sanctions but acknowledge the universal consensus that economic sanctions "even when used for humanitarian purposes, often unintentionally impose significant hardship on innocent population," p. 61.

[48] Gebert (2013), p. 8.

also that sanctions decrease the likelihood that a country will step-down political repression."[49]

In this context, one could at least expect from those who claim their attachment to fundamental rights not to be themselves in breach of human rights law when they enforce individual economic sanctions. But the European Court of justice case law reveals that a lot of progress must still be made in this regard by the UN Security Council as well as by the EU.

9.4 Human Rights Law as an Impairment of the Economic Sanctions' Efficiency

The very famous *Kadi* judgments of the European Court of Justice have revealed the legal weakness of the listing and delisting procedures in the UN and in the EU. Recently, in its 18 July 2013 judgment,[50] the European Court of Justice deplored the persistent absence of any judicial review at the UN level, despite the improvements of the UN delisting procedures since its first *Kadi* Judgment dated 3 September 2008, due to the creation of an ombudsperson with the power to recommend to delist a person or entity. It is interesting to note that these improvements were considered sufficient by the Advocate General Yves Bot in his opinion under the *Kadi II* case. According to him, "it is indisputable that the United Nations has embarked on a process of improvement in the listing and delisting procedures in terms of equity and respect for the rights of the defence (...) This process reflects a realisation within the United Nations that, despite confidentiality requirements, the listing and delisting procedures must now be implemented on the basis of a sufficient level of information, that the communication of that information to the person concerned must be encouraged, and that the statement of reasons must be adequately substantiated. The Ombudsperson, who performs her functions in complete independence and impartiality, plays a significant role in this regard."[51] In the same vein, the 14th Report of the Analytical Support and Sanctions Monitoring Team, which supports the work of the Al-Qaida Sanctions Committee, expressed early satisfaction as to this opinion that was seen as improving the legal position of the UN sanctions regime, on the assumption that the Court would adopt the same view.[52] But the Court rightly held that "despite the improvements added (...) the procedure for delisting and *ex officio* re-examination at UN level do not provide to the person whose name is listed (...) the guarantee of effective judicial protection,

[49] Browne (2011), p. 21.

[50] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, para. 33.

[51] Opinion of Advocate general Yves Bot, pt. 81–82.

[52] Fourteenth report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2083 (2012) concerning Al-Qaida and associated individuals and entities, S/2013/467, para. 30.

as the European Court of Human Rights, endorsing the assessment of the Federal Supreme Court of Switzerland, has recently stated in paragraph 211 of its judgment of 12 September 2012, *Nada v. Switzerland* (No 10593/08, not yet published in the Reports of Judgments and Decisions)."[53] This case demonstrates the inherent difficulties encountered by the UN political bodies to respect spontaneously human rights: if the Security Council has progressively made efforts to reform its practice,[54] it did so under the pressure exerted on it by the civil society and the judiciary. And the result is still not in line with the basic human rights requirements, as held by European judges in the *Nada* and *Kadi* cases mentioned above. Consequently, the UN sanctions still lack the complete legitimacy they should deserve.

The same holds true with the European Union. In numerous cases, the EU decisions to include such or such person (including moral persons) on a black list of persons sanctioned have been annulled by the European Court of Justice because they were not respecting the right of defence and effective judicial review, due to their insufficient motivation. This obligation to state reasons is enshrined in Article 296 TFEU and requires the Council of the European Union to disclose in a clear and unequivocal manner its reasons for adopting a measure against a person or entity, in a way that enables those affected to ascertain the reasons for the measure and to assess whether and how to challenge its legality, and to enable the Court to exercise its powers of review.[55] Reasons must "relate not only to the legal conditions of application of the said act, but also to the specific and concrete reasons why the Council considers, in the exercising of its discretionary power of assessment, that the party in question should be subjected to such *measures*."[56] This obligation is clearly an essential principle of European Union law,[57] but the Council has frequently been unable to respect it, simply because the only reasons it could state are those reported to it by Member States, which are often obscure. In a number of other cases, the sanctions have been based on allegations of facts for which no proofs could be disclosed or even exist, and held null for this reason.

Among others, the *Tay Za*,[58] *Fulmen*,[59] and *Bank Mellat*[60] cases offer interesting illustrations of these wrong practices.

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[53] See, e.g., Thouvenin (2009, 2012).

[54] On these reforms, see, e.g., Gordon (2011), pp. 328 ff.; Thouvenin (2012).

[55] Case T-228/02 Organisation des Modjahedines du peuple d'*Iran v Council* ("OMPI I"), pt. 141; Case C-417/11P *Council v Bamba* ("Bamba"), pt. 50.

[56] Joined Cases T-439/10 and T-440/10 Fulmen v Council (21 March 2012) ("Fulmen"), pt. 49; Case T-509/10 Kala Naft, pt. 73; Case T-15/11 Sina Bank v Council ("Sina Bank"), pt. 67–69.

[57] Fulmen, pt. 48; Case T-562/10 HTTS Hanseatic Trade Trust & Shipping GmbH v Council ("HTTS"), pt. 32, Kala Naft, pt. 72; Case T-53/12 CF Sharp Shipping Agencies Ptd Ltd v Council ("CF Sharp"), pt. 35–36; Case T-421/11 Qualitest FZE v Council ("Qualitest"), pt. 32–33; Sina Bank, pt. 56–57.

[58] Case C-376/10 P, Tay Za.

[59] Joined Cases T-439/10 and T-440/10, Fulmen v. Council.

[60] Case T-496/10.

The *Tay Za* case occurred in the context of the economic sanctions adopted against Myanmar. They were supposedly "smart," taking the form of a freezing of the assets of some persons only, namely the members of the Government, directors of businesses close to the Government, and also members of their families. One of the latter, M. Tay Za, contested the measure before the European Court of Justice. The Court observed that the plaintiff was under sanction only because he had a direct family link with a person associated with the policy of the Government but not because of its own personal conduct. In its judgment, the Court held at para. 66 that "the application of such measures to natural persons on the sole ground of their family connection with persons associated with the leaders of the third country concerned, irrespective of the personal conduct of such natural persons, is at variance with the Court's case law on Articles 60 EC and 301 EC" and at para. 70 that a "measure to freeze funds and economic resources belonging to the appellant could have been adopted (...) only in reliance upon precise, concrete evidence which would have enabled it to be established that the appellant benefits from the economic policies of the leaders of the Republic of the Union of Myanmar." Certainly, the reasoning of the Court was a technical one, notably based on an interpretation of articles 60 and 301 of the EC Treaty. But beyond its technical aspects, this case strongly suggests that it would have been contrary to the sense of justice—which is at the heart of human rights, especially the right of defence—to allow this sanction.

The *Fulmen* case concerns the economic sanctions adopted against Iran. The Council offered the following reasons to justify sanctions against Fulmen, an enterprise based in Iran: "Fulmen was involved in the installation of electrical equipment on the Qom/Fordoo [Iran] site before its existence had been revealed." The accuracy of these accusations was contested in Court. The Judge held: "the judicial review of the lawfulness of a measure whereby restrictive measures are imposed on an entity extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based. In the event of challenge, it is for the Council to present that evidence for review by courts of the European Union." In this regard, it is insufficient for the Council to rely on "mere unsubstantiated allegations."[61] Even if the restrictive measures were adopted on the proposal of a Member State, these measures are measures taken by the Council, which must, therefore, ensure that their adoption is justified.[62] It is now common ground that a listing decision must be based on "serious and credible evidence"[63] and "precise information or material in the relevant file."[64] Unfortunately, it is clear that the Council does not hesitate to adopt decisions with no serious evidence in hand or on the basis of alleged facts it is totally unable to check or even to precise. In the Bank *Mellat* case, which

[61] *Fulmen*, pt. 102.

[62] Pt. 99; see also T-496/10, Bank *Mellat*, pt. 100.

[63] *OMPI I*, pt. 131.

[64] *OMPI I*, pt. 131.

concerned an Iranian bank, the Tribunal deplored at para. 101 that "there is nothing in the Court file to suggest that the Council checked the relevance and the validity of the evidence concerning the applicant submitted to it."

This case law shows that in a number of cases the sanctions are everything but "smart." Certainly, they do discriminate as smart sanctions should do, but they are not adopted on the basis of sound reasons and evidence. In this context, the control exerted by the judiciary on European "smart" sanctions is increasingly "smart" itself and checks whether the sanctions actually hit people involved in the facts they are accused of.

9.5 Conclusion

Finally, fundamental rights concerns have correctly reoriented the practice of economic sanctions, which are supposedly shaped in order to cope with human rights and humanitarian law concerns, and are increasingly a means of action to protest against domestic human rights abuses. The influence of international human rights and humanitarian law on the practice of economic sanctions is thus undisputable. But the combination of fundamental rights and economic sanctions remains problematic.

Firstly, as it seems inherently complicated for political bodies in charge of economic sanctions to fully respect human rights, a judicial review of all economic sanction decisions having an adverse effect on persons must be considered "indispensable."[65] Any "double standard" as regards human rights concerns weakens the legitimacy of the sanctions and impairs their efficiency. The UN, and particularly the Security Council, has still an effort to make in this regard. It would be well inspired to elaborate a judicial review mechanism comparable to the one in place in the European Union.

Secondly, some of the now classical so-called smart sanctions have actually indiscriminate effects, contrary to what they are supposed to do. As rightly noted by Joy Gordon, "Sanctions targeting a nation's financial system, or critical industries or exports, disrupt the economy as a whole, much like traditional trade sanctions."[66] Then the "smartness" of an alleged "smart" sanction should not be presumed but systematically assessed on a case-by-case basis.

Thirdly and finally, some actors have a tendency to go back to old methods when they conclude that targeted sanctions proved inefficient. This is visibly the case with Iran. The economic sanctions administered to this country, principally by the USA and the EU, are now comparable to an economic blockade of the country. The economy of Iran is asphyxiated by an addition of sanctions: an embargo on oil, the freezing of virtually all the financial assets of the main Iranian economic actors

[65] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi* (18 July 2013), pt. 131.

[66] Gordon (2011), p. 332.

(banks, exporting industries), the blocking of a great part of the international trade to and from Iran. The USA has also taken actions in international economic organization (IMF, World Bank, WTO) to block any initiative in favor of Iran and succeeded in rendering Iran's currency not convertible. Finally, this regime has become progressively as harsh as the one suffered by Iraq's population in the 1990s. This illustrates the limits of the real influence of human rights concerns—let alone the human rights discourse—on international policy, and the improvement that still remains to be achieved.

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Chapter 10
Provisional Release in International Criminal Proceedings: The Limits of the Influence of Human Rights Law

Anne-Laure Vaurs-Chaumette

10.1 Introduction

Obviously, there is a strong connection between the appearance in 1945 of Human Rights Law and International Criminal Law on the international scene. It is no coincidence that, in 1948, the UN General Assembly adopted the Convention on Genocide[1] on the 9th of December and the International Bill of Human Rights[2] on the 10th of December. These two sets of rules have been developing side by side and constitute two branches of International Law now.[3] Following the development of both Human Rights Law and International Criminal Law since the mid-twentieth century, the place of the individual has been growing. Individuals have now rights, through Human Rights Law, and obligations, through International Criminal Law.

In judicial proceedings involving private persons, the rules of what used to be called procedural fairness was fully integrated into the category of Human Rights under the general heading of the right to a fair trial.[4] As International Criminal Law involves private persons, those procedural Human Rights should apply in the

[1] Resolution 260 (III), Prevention and punishment of the crime of genocide, 9 December 1948 [A/RES/260(III)].

[2] Resolution 217 (III), International Bill of Human Rights, 10 December 1948 [A/RES/217(III)].

[3] Yet, if we adopt a functional definition, Human Rights are the expression of the model of universal human society, in contrast with the Westphalian model of sovereign States. In this light, Human Rights appeared not only as a "branch" of international law but as an alternative basis of international law. See de Frouville (2013).

[4] See Articles 5 & 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 7 & 8 of the American Convention on Human Rights, Articles 6 & 7 of the African Charter on Human and Peoples' Rights, Articles 9 & 14 of the International Covenant on Civil and Political Rights.

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proceedings. But the study of the provisional release regime before the International Criminal Tribunals and the International Criminal Court (hereinafter ICC) reveals the limits of the influence of Human Rights on the international criminal proceedings.

Provisional release is the counterpart of pretrial detention. Before his trial, an accused is granted either provisional release or remains in custody. For the European Court of Human Rights (hereinafter ECtHR), pretrial detention must remain the exception. Since a defendant is presumed innocent, the detention should not begin before he is convicted. Provisional release is the principle, pretrial detention the exception. However, provisional release may be denied to the accused in certain circumstances when it is proved to be reasonable and necessary.[5] For the Court, the pretrial detention *is legal* if both of those conditions are fulfilled. First, according to Article 5 (3), pretrial detention must be reasonable, that is to say "the provisional detention of accused persons (. . .) must not (. . .) be prolonged beyond a reasonable time."[6] The appreciation of the reasonable time is done on a case-by-case basis. Second, according to Article 5 (1) (c), temporary custody is an exceptional measure that can only be relied upon when proved to be strictly necessary. This criterion of necessity requires that the competent authorities consider whether there is no alternative to the continued detention. Pretrial detention should be seen as the ultimate solution only when all other options available are insufficient.[7] In the Khodorkovskiy case, the Judges found that "[t]he domestic courts ought to have considered whether other, less intrusive, preventive measures could have been applied, and whether they were capable of reducing or removing completely the risks of fleeing, re-offending or obstructing justice."[8]

Whereas the European Court clearly stated that a system of mandatory detention is contrary to Article 5 (3),[9] in international criminal proceedings, pretrial detention is the principle, provisional release the exception. Rule 65 (A) of the Rules of Procedure and Evidence (hereinafter RPE) of the *ad hoc* Tribunals[10] provides that "[o]nce detained, an accused may not be released except upon an order of a Chamber." The judges must consider all options available to them before ordering the release of the accused. In other words, if there is an alternative to releasing the accused, this alternative should be preferred.

In international criminal proceedings, pretrial detention amounts to detaining the accused in The Hague's Scheveningen prison before and during his trial. In 1997,

[5] E.g., Tinner v. Switzerland, no. 59301/08 & 8439/09, Judgment, ECtHR, 26 April 2011, para. 48.

[6] Wemhoff v. Allemagne, no. 2122/64, Judgment, ECtHR, 27 June 1968.

[7] In addition, the Court "must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings", Bykov v. Russia, no. 4378/02, Judgment, ECtHR, 19 March 2009, para. 64.

[8] Khodorkovskiy v. Russie, no. 5829/04, Judgment, ECtHR, 31 May 2011, para. 197.

[9] Ilijkov v. Bulgaria, no. 33977/96, Judgment, ECtHR, 26 July 2001, para. 84: "Any system of mandatory detention on remand is per se incompatible with Article 5 para 3 of the Convention." See also Letellier v. France, Series A no. 207, Judgment, ECtHR, 26 June 1991, paras. 35–53.

[10] This Article is common to the Rules of Procedure and Evidence of both International Tribunals.

the question was raised as to whether the pretrial detention may include the custody within a State before the accused is transferred to the International Tribunal. This issue was discussed in the Barayagwiza case before the International Criminal Tribunal for Rwanda (hereinafter ICTR). In that case, the accused had been arrested in Cameroon in 1996 at the request of the Rwandan authorities. At that time, the prosecutor of the ICTR had no charges against Barayagwiza. On 21 February 1997, a Cameroonian court rejected the extradition request from Rwanda, and on the same day the ICTR Prosecutor requested the accused to remain in custody. On the 3rd of March 1997, the Prosecutor asked for the transfer of Barayagwiza to the International Tribunal, which occurred on 19 November 1997. Before the ICTR, the accused challenged the legality of both its detention—especially the period between 21 February and 3 March—and its transfer.[11] The Trial Chamber rejected Barayagwiza's request considering that "international custody begins not from the order of remand, but from the day after the transfer of the suspect to the Tribunal."[12] Thus, any potential violation of the rights of the accused during his incarceration in Cameroun is neutralized. This is, at first glance, a classical dualistic approach between International Law and domestic law: the violation of Human Rights Law is irrelevant from the standpoint of International Law as long as no international obligation has been violated. But the reasoning of the ICTR goes a little further: the obligation of the State to cooperate with the Tribunal (to transfer the accused) seems to take precedence over its obligation to respect Human Rights (relating to the pretrial custody of the accused). In other words, the influence of Human Rights within the international criminal proceedings reached its limit.

The study of the pretrial detention regime before the International Criminal Tribunals and Court confirms this first assessment: international criminal proceedings do not follow the requirements of Human Rights Law *vis-à-vis* pretrial custody. Why? What can explain or justify that exception? How can these two branches of International Law, which are both concerned with the individual, have such a different approach? Does the explanation lie on the nature of the violation? International Criminal Law only refers to crimes under International Law (and not offenses), i.e., violations of fundamental values of the international community. Besides, in 2002, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) listed the different factors that should be taken into account before granting provisional release. The first criterion is "the fact that the applicants are charged with serious criminal offences."[13] The fact that this factor has to be taken into account for decisions on interim release has been

[11] Prosecutor/Barayagwiza, n°ICTR-97-19-I, Décision sur la requête en extrême urgence de la défense aux fins de ordonnances prescrivant le réexamen et/ou l'annulation de l'arrestation et de la détention provisoire du suspect, Trial Chamber I, ICTR, 17 November 1998.

[12] *Ibid*., p. 5.

[13] Prosecutor/Sainovic, Ojdanic, IT-99-37-AR65, Decision on Provisional Release, Appeals Chamber, ICTY, 30 October 2002, para. 6.

confirmed by the ICC.[14] However, according to the ECtHR, although "the persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention,"[15] "the gravity of the charges cannot by itself justify long periods of detention on remand."[16] Does it have an impact on the international criminal proceedings? In International Criminal Law there is no additional penalty or remission depending on whether the accused was present at his trial or not. Thus, he is not encouraged to respect the terms of any provisional release. Does it lie on mere practical considerations? If the accused is to be provisionally released, should it be in its national country or in the host State of the Tribunal? Such issue does not arise under domestic law as the judicial and executive powers work together. However, in International Criminal Law, the tribunal must rely on the State to control the accused and ensure that he will come back for the trial. This issue could explain then why international criminal judges are reluctant to grant provisional release to an accused.

Be that as it may, a jurist is less interested in the reason why there is such a different approach than on the extent of the difference. How far do the international criminal proceedings diverge from the Human Rights Law requirements regarding pretrial detention and provisional release? This paper will deal with this issue, first, through a presentation of the regime of provisional release before the international criminal tribunals (Sect. 10.2) and, second, through a study of the different possible cases of provisional release granted by the international criminal judges (Sect. 10.3).

10.2 The Regime of Provisional Release in International Criminal Proceedings, a Regime That Does Not Comply with Human Rights Requirements

When an accused requests for provisional release, two questions arise: what are the release requirements (Sect. 10.2.1), and what are the duties and rights of an accused during his provisional release (Sect. 10.2.2)? The analysis of both issues reveals that

[14] Prosecutor/Mbarushimana, ICC-01/04-01/10-283, Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release'", Appeals Chamber, ICC, 14 December 2011, para. 21; Prosecutor/Gbagbo, ICC-02/11-01/11 OA, Judgment on the appeal of Mr. Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", Appeals Chamber, ICC, 26 October 2012, para. 54.

[15] *Ibidem*.

[16] Piechowicz v. Poland, no. 20071/07, Judgment, ECtHR, 17 April 2012, para. 195. In this case, the crimes in question were drug trafficking and robbery. See also, Tomasi v. France, no. 12850/87, Judgment, ECtHR, 27 August 1992, Series A241-A.

the regimes of provisional release before the ICTY[17] and the ICC may be in contradiction with the Human Rights Law requirements.

10.2.1 Some Questionable Provisional Release Requirements

The requirements for granting provisional release are different before the ICTY and the ICC.

According to Rule 65 (B) of the RPE of the ICTY, "Release may be ordered (...) only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person. The existence of sufficiently compelling humanitarian grounds may be considered in granting such release." Thus, before the ICTY, release *may* be granted if three conditions are satisfied: (1) guarantees of the host State (i.e., whether this State is willing to cooperate with the Tribunal?), (2) guarantees of the accused (to attend his trial and not to jeopardize the victims or the witnesses), and (3) humanitarian considerations. These conditions are cumulative.

While the two first conditions do not need further explanation, one word must be said about the third condition (humanitarian grounds). That condition is brand new: the Judges added it on October 2011 as they decided to modify the RPE. According to Article 15 of the ICTY Statute, the Judges are able to revise their RPE. But why did they add it?

This amendment originates from various Decisions of the Trial Chamber III in the Prlic case in 2008.[18] In that case, the ICTY had to decide on a Rule 98*bis* request. Rule 98bis[19] refers to a situation where, in the opinion of the Chamber, the incriminating evidence—assuming that it is trustworthy—is insufficient for any judge to infer that guilt has been established beyond reasonable doubt. The question is not whether the judge would sentence the accused beyond any reasonable doubt

[17] This paper will focus on the ICTY and the ICC. The ICTR has never granted any provisional release since its creation.

[18] Prosecutor/Prlic et al., IT-04-74-T, five Decisions on the motion for provisional release, Trial Chamber III, ICTY, 19 February 2008; Decision on the motion of the accused Petkovic for provisional release, Trial Chamber III, ICTY, 31 March 2008; Decision on the accused Praliak's motion for provisional release, Trial Chamber III, ICTY, 1 April 2008; Decision on the motion for provisional release of the accused Prlic, Trial Chamber III, ICTY, 7 April 2008; Decision on the request for provisional release of the accused Coric, Trial Chamber III, ICTY, 8 April 2008; Decision on second motion for provisional release of the accused Stojic, Trial Chamber III, ICTY, 8 April 2008. See also Prosecutor/Prlic et al., IT-04-74-AR65.7, Decision on "Prosecution's appeal from Décision relative à la demande de remise en liberté provisoire de l'accusé Petkovic dated 31 March 2008", Appeals Chamber, ICTY, 21 April 2008.

[19] Article 98*bis* reads as follows: "At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction."

but if he could. For the Judges, "the 98*bis* Ruling constituted a significant change in circumstances, which warranted a renewed and thorough evaluation of the risk of flight of each of the co-Accused in this case. The Trial Chamber expressly considered that, in order to satisfy itself that the Accused still met the requirements of Rule 65 (. . .) it was required to consider whether the Accused had offered sufficient guarantees to offset that risk of flight. In such circumstances, even if the Trial Chamber was satisfied that sufficient guarantees were offered, it should not exercise its discretion in favour of a grant of provisional release unless compelling *humanitarian grounds* were present which caused to tip the balance in favour of allowing provisional release."[20] In the same decision, the Appeals Chamber insisted on the fact that the Defence itself raised humanitarian grounds in support of the motions for provisional release under Rule 98*bis*.[21]

Then the ICTY Judges have begun to require progressively for the Defence to demonstrate the existence of humanitarian grounds *for any* motions for provisional release (not only those under Rule 98*bis*). In the Simatovic case, the Trial Chamber used the same phrase than the Appeals Chamber in the Prlic case. It explained that "the Chamber, even when satisfied that the conditions of Rule 65 (b) are met, should exercise its discretion in favour of granting provisional release only if compelling humanitarian grounds tip the balance in favour of allowing provisional release."[22] On 23 May 2011, the Appeals Chamber agreed with this approach by holding that "the "compelling humanitarian grounds" requirement for granting provisional release at a late stage of trial proceedings is well established in the Tribunal's jurisprudence."[23] This very short statement has been criticised by only one Judge who joined a dissenting opinion. According to Judge Güney, "the application of Rule 65 (B) of the Rules does not impose an additional requirement on the accused to demonstrate the existence of "compelling humanitarian reasons" even at a late stage of the proceedings."[24] Besides, one should remind that in 1999, Rule 65 was first amended to remove a very similar condition, "exceptional circumstances." It seems that the ICTY Judges progressively reintegrated the former condition

[20] Prosecutor/Prlic et al., IT-04-74-AR65.7, Decision on "Prosecution's appeal from Décision relative à la demande de remise en liberté provisoire de l'accusé Petkovic dated 31 March 2008", Appeals Chamber, 21 April 2008, para. 15 (italic added).

[21] *Ibid*., para. 18. One of the accused in the Prlic case was finally granted provisional release, Petkovic: Prosecutor/Prlic et al., IT-04-74-T, Further decision to the decision on provisional release of the accused Petković, Trial Chamber III, ICTY, 22 April 2008.

[22] Prosecutor/Simatovic, IT-03-69-T, Decision on urgent Simatovic motion for provisional release, Trial Chamber I, ICTY, 11 March 2011.

[23] Prosecutor/Simatovic, IT-03-69-AR65.7, Decision on Franko Simatovic's appeal against the decision denying his urgent request for provisional release, Appeals Chamber, ICTY, 23 May 2011, p. 1.

[24] Prosecutor/Simatovic, IT-03-69-AR65.7, Decision on Franko Simatovic's appeal against the decision denying his urgent request for provisional release, Dissenting Opinion of Judge Güney, ICTY, 23 May 2011, para. 2.

through their decisions. However, by doing so, they go against the letter of their current RPE.

In order to clarify the applicable law, the Judges finally decided to amend their RPE on October 2011 and, after all, to codify the "humanitarian grounds" conditions. That evolution drawn in Rule 65 is quite surprising, and we shall wonder whether the initiative of the Judges (and even their power to amend the RPE) is compatible with the principle of legality of criminal law.

With regard to the provisional release before the ICC, according to Article 58-1-b in conjunction with Article 60 of the ICC Statute, the Judges must guarantee that the preventive detention of the accused is necessary to ensure that (1) the accused will appear or (2) that he will not interfere with an investigation or proceeding before the Court nor endanger the progress or (3) that he will not proceed with the execution of crimes within the jurisdiction of the Court. In front of the ICC, provisional detention is thus *legal if one of those three conditions* is satisfied.[25] The reasoning suggested by the ICC Statute differs from the ICTY's RPE: in front of the ICC, the Defence shall demonstrate that the pretrial detention is not necessary,[26] whereas before the ICTY the Defence shall demonstrate that the provisional release is possible. The ICC approach is closer to the European Court of Human Rights reasoning: the provisional release seems to be presumed unless the pretrial detention is necessary. However, there is a major difference between the ECtHR and the ICC (and the ICTY) as to the burden of proof. Before the ICC, where the detention is the rule, the Prosecutor does not have to justify it. The burden of proof lies on the Defence who has to ask for provisional release and to bring the evidence in support of it. However, according to Human Rights Law, the burden of proof should lie upon the Prosecutor who would have to demonstrate that the pretrial detention is necessary and reasonable.

Before the ICC, the Trial Chamber has discretion to consider provisional release. In other words, "the examination of conditions of release is discretionary."[27] This formula has two meanings: *first*, the Pre-Trial Chamber can deny the provisional release when one of Article 58's requirements is not fulfilled; *second*, the Pre-Trial Chamber can grant the provisional release even if the three conditions are not met when it considers it appropriate for the accused and when the risks (of flight, contempt, or commission of another crime) could be mitigated by the imposition of conditions. The provisional release becomes then a *conditional* release.[28] The issue of conditional release may arise when a State "has indicated its willingness

[25] Prosecutor/Mbarushimana, ICC-01/04-01/10, Decision on the Defence Request for Interim Release, Pre-Trial Chamber I, ICC, 19 May 2011, para. 38: "the reasons for detention pursuant to article 58(l)(b) (i) to (iii) of the Statute are in the alternative."

[26] *Ibid*., para. 14.

[27] Prosecutor/Bemba, ICC-01/05-01/08 OA 7, Appeals Chamber, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber H I of 27 June 2011 entitled "Decision on Applications for Provisional Release", Appeals Chamber, ICC, 19 August 2011, para. 55.

[28] *Ibidem*.

and ability to accept a detained person into its territory"[29] or when the accused is ill and his conditional release may be granted for medical reasons[30] or for "humanitarian circumstances" such as to attend memorial services for deceased relatives of the accused.[31]

Judge Anita Usacka criticized such a discretionary power of the ICC. In a Dissenting Opinion, she stated that "reasoning for a decision on detention must conform to a high standard."[32] She quoted the Belchev Judgment of the ECtHR[33] in support of her point. And she carried on: "Human rights jurisprudence provides that "(. . .) It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice". As mentioned above, reasoning is specifically important in a case where the liberty of a person is at stake."[34] This Dissenting Opinion expresses a present concern of the international criminal proceedings to take into account more and more the human rights standards (cf. *infra* Sect. 10.3).

[29] Prosecutor/Bemba, ICC-01/05-01/08 OA 9, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled "Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011", Appeals Chamber, ICC, 15 December 2011 (original 23 November 2011), para. 35.

[30] Prosecutor/Gbagbo, ICC-02/11-01/11 OA, Judgment on the appeal of Mr. Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo", Appeals Chamber, ICC, 26 October 2012, para. 87.

[31] Prosecutor/Bemba, ICC-01/05-01/08-1099-Conf, Decision on the Defence Request for Mr Jean-Pierre Bemba to attend his Stepmother's Funeral, Trial Chamber III, 12 January 2011, para. 13: "the Chamber considers that the death of Mr Bemba's stepmother is an exceptional circumstance that justifies the Chamber exercising its inherent power for humanitarian reasons, pursuant to Article 64 of the Statute." Nevertheless, according to the ICC, the wish to complete one's electoral registration and to participate in the elections are not such humanitarian reasons and do not justify a provisional release, Prosecutor/Bemba, ICC-01/05-01/08, Public Redacted Version of the "Decision on Applications for Provisional Release" of 27 June 2011, Trial Chamber III, ICC, 11 August 2011, para. 69. Mr. Bemba was also granted provisional release on June 2009 for his father's funeral.

This provisional release for the death of a relative is also allowed by the ICTY case law, *e.g.* Prosecutor/Limaj, IT-03-66-A, Decision granting provisional release to Haradin Bala to attend his brother's memorial service and to observe the traditional period of mourning, Appeals Chamber, ICTY, 1st September 2006.

On the other hand, the ICTR has never granted any release even for the sick son of an accused treated in Belgium: the Tribunal considered that the temporary release involved risks for witnesses refugees in Belgium, Prosecutor/Ndindiliyimana, ICTR-2000-56-I, Decision on Augustin Ndindiliyimana's emergency motion for temporary provisional release, Trial Chamber II, ICTR, 11 November 2003.

[32] Prosecutor/Gbagbo, ICC-02/11-01/11 OA, Dissenting Opinion Of Judge Anita Usacka, Appeals Chamber, ICC, 26 October 2012, para. 12.

[33] Belchev v. Bulgaria, no. 39270/98, Judgment, ECtHR, 8 April 2004, para. 82.

[34] Prosecutor/Gbagbo, ICC-02/11-01/11 OA, Dissenting Opinion Of Judge Anita Usacka, Appeals Chamber, ICC, 26 October 2012, para. 35.

10.2.2 The Questionable Provisional Release Conditions

When the provisional release is granted, it always comes with very strict conditions that limit the accused's fundamental human rights.[35] Among the measures that could be decided by the judges, some of them restrict the freedom of expression: the accused could be prohibited from discussing his case with anyone—including journalists—to the exception of his lawyer. He could also be prohibited from making public statements on his trial. Other provisional release conditions restrict the free movement of the accused: he often has the duty to report to authorities for judicial review weekly or even daily,[36] to inform the authorities at least 24 h ahead of his movements and their duration, to give his passport to the host State's authorities. He usually must remain in very specific geographic areas as well.

The provisional release does not mean freedom, thus. On the contrary, the accused is always under the supervision of the national authorities of his host State.

Provisional release is strictly regulated. Its legal framework seems far from the human rights requirements. Yet, in the context of a growing dialogue between the international judges, the ICTY and the ICC judges do integrate some human rights considerations in their decisions on provisional release.

10.3 An Interpretation of the Provisional Release More Compliant with Human Rights

Provisional release may be ordered at any stage of the international criminal proceedings:[37] the ICTY judges may grant such release after the presentation of the evidence by the Prosecutor (Rule 98*bis* of the RPE),[38] after the oral stage,[39] during the trial,[40] between the trial and the appeal,[41] or in case of stay of the

[35] *E.g.*, Prosecutor/Hadzihazanovic et al., IT-01-47-PT, Decision granting provisional release to Enver Hadzihazanovic, Trial Chamber II, ICTY, 19 December 2001.

[36] Prosecutor/Stanisic and Zupljanin, IT-08-91, Decision granting Mico Stanisic's request for provisional release, Trial Chamber II, ICTY, 6 June 2012.

[37] Rule 65 (B) of the RPE of the ICTY.

[38] Prosecutor/Prlic et al., IT-04-74-T, Further decision to the decision on provisional release of the accused Petković, Trial Chamber III, ICTY, 22 April 2008. See *supra*.

[39] Prosecutor/Prlic et al., IT-04-74-T, Decision on Jadranko Prlic's Motion for Provisional Release, Trial Chamber III, ICTY, 21 April 2011.

[40] Prosecutor/Brdjanin, IT-99-36-T, Decision on the motion for provisional release of the accused Momir Talic, Trial Chamber II, ICTY, 20 September 2002.

[41] In the Brahimaj case, the Trial Chamber of the ICTY sentenced the accused to 6 years of imprisonment on April 2008. Yet Brahimaj had already made the two-thirds of his sentence in custody. Thus, on May 25, 2009, the Appeals Chamber accepted to grant him provisional release in Kosovo provided that he would come back for the appeal instance. On the 5th of October 2009, the Appeal Judges recalled Brahimaj from provisional release. He returned to prison. The appeal instance began on October 28, 2009. Brahimaj's sentence was confirmed by the Appeal Judgment

prosecution.[42] The study of the case law on provisional release reveals that the judges seem to be more and more receptive to Human Rights Law.

The Talic case is the first one where the Judges not only quoted the ECtHR case law on provisional release but also applied it. In that case, the health condition of the accused was incurable and would only deteriorate with or without medical treatment. In 2002, the judges weighed up two interests: the concerns of the victims and of the witnesses, on one hand, and the interest of the accused, on the other hand. The Trial Chamber referred to the ECtHR decision in Mouisel v. France[43] (in which the judges stated that there shall not be any continued detention of a person suffering from cancer) and declared that "[t]here can be no doubt that when the medical condition of the accused is such as to become incompatible with a state of continued detention, it is the duty of this Tribunal and any court or tribunal to intervene and on the basis of humanitarian law provide the necessary remedies."[44] In line with this humanist approach, the Trial Chamber added that pretrial detention "is not meant to serve as a punishment but only as a means to ensure the presence of the accused for the trial."[45] The Judges finally decided to release Talic (who was still an accused), whereas the trial was ongoing for his codefendants. Talic died on May 2003. This is the only example where the ICTY applied the ECtHR case law concerning provisional release.

In 2011, the ICTY quoted again the case law of the ECtHR in a decision on provisional release[46] but took an opposite point of view. The Trial Chamber first recalled that "the principles of human rights taken from the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) are, as put by the Appeals Chamber, a part of international law and that the provisions of Rule 65 (B) of the Rules must be construed in light of these principles."[47] The Chamber quoted various case law of the ECtHR[48] and various documents of Human Rights Committee of the UN.[49] The judges appeared to be in favor of the provisional release of the accused: "the Chamber finds that the fact that

in July 2010. Yet a partial retrial was ordered. Brahimaj was finally acquitted on November 29, 2012.

[42] This was illustrated in the Lubanga case before the ICC. See *infra* notes 52–54.

[43] Mouisel v. France, no 67263/01, Judgment, ECtHR, 14 November 2002.

[44] Prosecutor/Brdjanin, IT-99-36-T, Decision on the motion for provisional release of the accused Momir Talic, Trial Chamber II, ICTY, 20 September 2002, para. 32.

[45] *Ibid*., para. 32 *in fine*.

[46] Prosecutor/Prlic et al., IT-04-74-T, Decision on Jadranko Prlic's Motion For Provisional Release, Trial Chamber III, ICTY, 21 April 2011.

[47] *Ibid*., para. 31.

[48] Prencipe v. Monaco, no. 43376/06, Judgment, ECtHR, 16 July 2009; Letellier v. France, no. 12369/86, 26 June 1991; Bouchet v. France, No. 33591/96, Judgment, ECtHR, 20 March 2001; Zannouti v. France, no. 42211/98, Judgment, ECtHR, 31 July 2001.

[49] General Comment No. 8 regarding Article 9 of the International Covenant on Civil and Political Rights, 1982; the jurisprudence of the Human Rights Committee, specifically CCPR/CO/79/LVA (Latvia) (HRC, 2003), and CCPR/C/ESP/CO/5 (HCR, 2009).

an accused does not offer humanitarian grounds in support of his request for provisional release does not justify denying provisional release (...) Continuing to hold the Accused Praljak in detention without any activity in the courtroom, even though the requirements of Rule 65 (B) have been met, may therefore be perceived as an anticipatory sentence difficult to reconcile with the principle of the presumption of innocence."[50] However, in the following paragraph, the Trial Chamber stated that "[d]espite this, the Chamber considers itself constrained in its analysis by the legal framework of the Tribunal, namely, the Statute of the Tribunal and the Rules, as interpreted by the Appeals Chamber, and therefore, by the duty to establish sufficiently compelling humanitarian reasons warranting provisional release late in the proceedings."[51] This decision seems to lay down a specific hierarchy of norms: the rules of the Statute and of the RPE as interpreted by the Appeals Chamber take precedence over the international principles of human rights. That is to say, according to the ICTY, the Statute and the RPE can depart from some other international law principles.

The ICC also referred to Human Rights Law when having to take a decision on provisional release. This happened first on the Lubanga case. On May 2006, the Defense asked for interim release. The Pre-Trial Chamber[52] and the Appeals Chamber[53] rejected this application. The decision on interim release was reviewed on June 2007, in accordance with Article 60 (3) of the Statute, and Judge Steiner again remanded Lubanga in custody.[54] In those decisions, references were made to the ECtHR case law in assessing the reasonableness of the detention. But as K. Doran noticed, "although the ICC has relied on, and been persuaded by, the jurisprudence of the ECtHR, it is carving out its own more rigid jurisprudence."[55]

A year later, on 13 June 2008, a stay of proceedings was imposed because the Trial Chamber concluded that the Prosecution had made improper use of Article 54 (3) (e) of the Rome Statute[56] and had prevented thus the accused from preparing his defense (some documents were obtained from information sources, such as the UN and NGOs, with the condition not to disclose them). The suspension of the

[50] Prosecutor/Prlic et al., IT-04-74-T, Decision on Jadranko Prlic's Motion For Provisional Release, Trial Chamber III, ICTY, 21 April 2011, paras. 36–37.

[51] *Ibid*., para. 38.

[52] Prosecutor/Lubanga, ICC-01/04-01/06, Decision on the application for the provisional release of Thomas Lubanga Dyilo, Pre-Trial Chamber I, ICC, 18 October 2006.

[53] Prosecutor/Lubanga, ICC-01/04-01/06, Judgment on the appeal of Mr. Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo, Appeals Chamber, ICC, 13 February 2007.

[54] Prosecutor/Lubanga, ICC-01/04-01/06, Second review of the Decision on the application for the interim release of Thomas Lubanga Dyilo, Pre-Trial Chamber I, ICC, 11 June 2007.

[55] Doran (2011), p. 735.

[56] Article 54 (3) (e) of the Rome Statute authorizes the Prosecutor to receive, exceptionally, information or documents under the seal of confidentiality. This information cannot be used at trial but only to generate additional evidence.

proceedings gave the accused the right to request his release,[57] and not only his provisional release. On 21 October 2008, the Appeals Chamber stated on the motion for release insisting on the fact that the proceedings had only been stayed *conditionally*: "A conditional stay is neither an acquittal or a final termination of the proceedings (. . .). Therefore, the Court is not necessarily permanently barred from exercising jurisdiction in respect of the person concerned. (. . .) For that reason, once a Chamber has ordered a conditional stay of the proceedings, the unconditional release of the person concerned is not the inevitable consequence. Instead, the Appeals Chamber will have to consider all relevant circumstances and base its decision on release or detention on the criteria in Articles 60 and 58 (1) of the Statute."[58] At the same time, the Appeals Chamber quoted articles from various Human Rights Law instruments[59] and made the ECtHR reasoning its own by stating that "the Chamber must be vigilant that any continued detention would not be for an unreasonably long period of time."[60] However, the Appeals Chamber finally decided not to release Lubanga.[61] That decision was criticized by Judge Georghios M. Pikis. According to him, "[s]tay of proceedings for impossibility to hold a fair trial brings the proceedings to an end"[62] so that the accused should be released. And he added that "[e]ven if I were to assume, contrary to the position I espouse, that stay of proceedings on grounds of impossibility of holding a fair trial could be lifted at an indefinite future time, the release of the accused would again be inevitable. (. . .) Authority for the detention of the accused vests in a court for the purpose of ensuring his/her presence at the trial. In this case, there was no trial in sight. At best there existed a possibility of trial at an indefinite future time. To order the detention of the accused in such circumstances would be tantamount to restricting his liberty for reasons that one could not predict that they would materialize, and if so, when."[63] Two years later, the Trial Chamber endorsed that reasoning. On 8 July 2010, the Trial Chamber decided a new stay of proceedings because the Prosecutor

[57] Prosecutor/Lubanga, ICC-01/04-01/06, Observations de la Défense relatives à la libération de Monsieur Thomas Lubanga, Trial Chamber I, ICC, 31 September 2008 (only available in French).

[58] Prosecutor/Lubanga, ICC-01/04-01/06 OA 12, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo", Appeals Chamber, ICC, 21 October 2008, para. 37.

[59] The International Covenant on Civil and Political Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on human Rights, the African Charter on Human and Peoples Rights.

[60] Prosecutor/Lubanga, ICC-01/04-01/06 OA 12, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo", Appeals Chamber, ICC, 21 October 2008, para. 37.

[61] It was right since on November 18, 2008, the judges have lifted the suspension and proposed the date of Monday, January 26, 2009, for the trial. Indeed, the Prosecutor has agreed to disclose all information in its possession while adopting certain measures to protect the identity of witnesses.

[62] Prosecutor/Lubanga, ICC-01/04-01/06 OA 12, Dissenting Opinion of Judge Georghios M. Pikis, ICC, 21 October 2008, para. 10.

[63] *Ibid*., para. 13.

refused to disclose the names of certain witnesses,[64] and on 15 July 2010, the Trial Chamber, in an oral decision, decided to grant immediate and unconditional release to the accused: "The trial has been halted because it is no longer fair, and the accused cannot be held in preventative custody on a speculative basis; namely, that at some stage in the future the proceedings may be resurrected."[65] According to the Trial Chamber, the unconditional stay of proceedings, the uncertainty about the date of the future trial, and the length of the accused's detention justify his release. That decision seems to come closer to the Human Rights standards. However, the Prosecutor appealed both decisions. And on 8 October 2010, the Appeals Chamber invalidated the suspension of the proceedings and thus the provisional release.[66]

10.4 Conclusion

It would be incautious to predict the future case law of the ICC concerning provisional release. However, a tendency emerges. As the ICC stated that "human rights underpin the Statute, every aspect of it,"[67] and that "under article 21(3) of the Statute, the application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights,"[68] the progressive integration of human rights law seems unavoidable. As expressed by Fergal Gaynor, "Few of us wish to encounter at the local bookshop a person accused of mass murder, perusing the shelves, freed on provisional release while he waits for his trial to begin. But most of us would express unease at the concept of a person, presumed innocent, detained in a prison block for several years before his trial, and for several more until the trial concludes."[69]

[64] Prosecutor/Lubanga, ICC-01/04-01/06, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, Trial Chamber I, ICC, 8 July 2010.

[65] Prosecutor/Lubanga, ICC-01/04-01/06-T-314-ENG, Oral Decision, Trial Chamber I, ICC, 15 July 2010, p. 21, lines 8–10.

[66] Prosecutor/Lubanga, ICC-01/04-01/06 OA 17, Judgment on the appeal of Prosecutor against the oral decision of Trial Chamber I of 15 July 2010 to release Thomas Lubanga Dyilo, Appeals Chamber, ICC, 8 October 2010.

[67] Prosecutor/Lubanga, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence challenge to the jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of the 3 October 2006, Appeals Chamber, ICC, 14 December 2006, para. 37.

[68] Prosecutor/Lubanga, ICC-01/04-01/06, Decision on the application for the provisional release of Thomas Lubanga Dyilo, Pre-Trial Chamber I, ICC, 18 October 2006, p. 5.

[69] Gaynor (2008), p. 184.

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Part IV
Human Rights and International Economic Law: Areas of Conflict?

Chapter 11
WTO and Human Rights

Stefan Lorenzmeier

11.1 Introduction

International law is a normative system[1] but is more than a set of independent rules. Yet normative conflicts are endemic in international law.[2] The international rules on world trade and human rights are often regarded as conflicting legal branches in the system of international law. Both sets of rules are distinct but not independent from each other and impacting the respective legal order.[3] International human rights rules can constitute an impediment to trade liberalisation as established by the WTO. For instance, they could be used as a ground of justification for not exporting a good from a country that does not apply the same human rights standard. The Director General of the WTO, *Pascal Lamy*, implies a more positive understanding of the two regimes by stating that "trade and human rights are mutually supportive",[4] which at least indicates a rather fruitful than opposing relationship.

The aim of this article is to scrutinise whether and to what extent Human Rights law influences the WTO legal regime. This will be addressed from the perspective of trade rather than human rights. It will inquire whether and in which ways the WTO regime can be interpreted and seen in light of human rights rules and not whether human rights can be influenced by trade rules. This perspective is important, due to the often-addressed problem of the fragmentation of Public

[1] Higgins (1995), p. 1.

[2] ILC, Study Group (2006), para. 486.

[3] An early analysis of the relationship is provided by Petersmann (2000), pp. 19–26; and McCrudden and Davies (2000), pp. 43–62.

[4] See Pavoni (2010), pp. 649 and 650.

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International Law. This means, in effect, that the influence of an extraneous legal rule in one regime cannot necessarily be extended to another legal regime, e.g., the influence of international human rights rules on the WTO system might differ from the influence of the WTO system on international human rights rules. The frequently expressed argument that trade agreements are sub-optimal for protecting human rights is not fully conclusive, because a number of factual relationships exist between these two sets of rules.[5]

11.2 General Remarks: Clinical Isolation and Conflict of Norm Rules

In this context, it has to be ascertained firstly whether a legal relationship between the two sets of rules can be established. The WTO legal system does not constitute a *self-contained regime*, unlike the rules on diplomatic and consular relations,[6] and the application of other international rules in the WTO system is not excluded. In this respect, the statement of the Appellate Body in *US-Gasoline* in 1996 became famous. The Appellate Body stated explicitly that "WTO law cannot be read in clinical isolation from other rules of international law".[7] Hence, the World Trade regime can be influenced by other international rules, such as international Human Rights law.

Secondly, in Public International Law, parallel norms on the same subject matter are vertical and may raise conflicts between different layers of regulation.[8] Conflicts arising between the two sets of rules could be solved by the applicable conflict of norm rules in international law. On the international level, both sets of rules are independent from each other and do coexist without paying regard to the other set of norms, because Public International Law does not entail a hierarchy of norms-principle, with the exception of the principle of *ius cogens*.[9] Human rights are part of treaty and customary law, which is of special importance, because not all WTO members are members of the basic international human rights instruments, the International Covenants on Civil and Political Rights and on Economic[10] and on Social and Cultural Rights[11]. Thus, both sets of conflicting rules, WTO treaty law and the human rights treaty or customary law are on the same international level,

[5] See Petersmann (2000), p. 19.

[6] For different views in the early WTO regime, see McRae (2000), pp. 27–42.

[7] Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R at 17.

[8] Pauwelyn (2006) Fragmentation, para. 4.

[9] See, e.g., Art. 53 Vienna Convention on the Law of Treaties (VCLT).

[10] UNTS, vol. 999, p. 171.

[11] UNTS, vol. 993, p. 3.

as long as the latter set of rules does not form part of the *ius cogens* category.[12] In such an instance, the human rights rule would trump the treaty trade law rule and a conflict of norms would not exist, due to the non-application of WTO rules.

Unfortunately, the conflict rules of *lex specialis* and *lex posterior* cannot be used for the dissolution of a potential conflict in the situation at bar. Each set of rules is only applicable in the context of the same subject matter of the conflicting rules, and trade and human rights do not belong to the same regulatory subject. This is also founded in the aforementioned idea of fragmentation of international law.[13] The notion means that in the international legal system, unrelated specialised rules and sub-systems flourish and the answer to legal questions becomes highly subjective and dependent upon the focused legal system.[14] Tensions concerning trade and environmental rules occur regularly in the ambit of the WTO system,[15] but the relationship between trade and international human rights has not been explicitly addressed until now. Another issue in this regard is the jurisdiction of the deciding body. Such a body, in most cases a WTO panel, gains its competence from its founding treaty, for instance Art. 3 DSU, and is remitted with the task of interpreting trade agreements. This is due to the need to find an interpretation that embraces the interests of all of the WTO members and also preserves the integrity of the legal system.[16] It will always lead to an approach more favourable towards trade than to the application of the conflicting regime, in this case, international human rights. From this, some scholars draw the conclusion that the challenge of defragmentation is best addressed by means of international governance, i.e. closer cooperation and coordination between the conflicting regimes, instead of international jurisprudence.[17] Although global governance, as a soft way of mitigating differences, may lead to some practical results, it still cannot resolve the problem of a hard conflict, which must be decided by jurisdictional organs, and is the focus of scrutiny in the article at hand.

11.3 Relevance of International Human Rights Law for the WTO

The relevance of International Human Rights Law for the WTO legal order is still unresolved and a matter of legal dispute, yet the relationship between the two sets of rules might become more significant in the future, as the WTO sees itself as the

[12] E.g., the prohibition of torture.

[13] For an analysis of the state of fragmentation, see ILC, Study Group (2006).

[14] See ILC, Study Group (2006), para. 483. Pauwelyn (2006, Fragmentation, para. 2) names expressly the relationship between trade and human rights as an example of fragmentation.

[15] See, e.g., Appellate Body, *US – Shrimp Products*, WT/DS58/AB/R.

[16] Van Damme (2010), p. 643.

[17] Wolfrum and Matz (2003), pp. 159 et seq.

basic constitution-like treaty framework for international trade. The WTO regime focuses on the liberalisation of international trade and not on other international subject matters, such as human rights. Yet the drafters broadened, in some instances, the scope of the agreements to human rights, and as such the WTO system is not absolutely oblivious to human rights.

Human Rights law is relevant for the WTO at two distinct levels. Firstly, it may be relevant as part of the ratification process, because the WTO agreements have to be compatible with the respective national legal order of the ratifying state.[18] This aspect will not be closely examined in this contribution due to its dependency on the different national legal systems and their varying standards of human rights protection. Secondly, and more importantly, it may be relevant within the WTO legal order itself. For this it would be required that either the WTO agreements accept the application of human rights rules or they have to be regarded as extraneous rules that influence the WTO agreements.

In particular, human rights form a substantive part of the TRIPS agreement. Patent protection as a part of one's own property right is a well-respected human right. Moreover, Art. XX lit. a) and b) GATT, which speaks of the protection of public morals and human life, respectively, as a means of justifying trade restrictions, has a link to human rights. From this it has to be inferred that some sort of human rights rules are already enshrined in the WTO legal system.[19] Factually, the relationship between human rights and trade is rather interesting. Human rights protection can be regarded as a production factor that increases the price of a product or that can be used for the protection of the home market against imported products. Both effects are a hindrance to international trade and, as such, an obstacle to the WTO rules, as they constitute a non-tariff trade barrier, falling within the ambit of Art. XI para. 1 GATT.

It has to be kept in mind that the enforcement of human rights would be subjected to a DSB panel, whose trade expert panellists are likely to treat the extraneous topic with disfavor.[20] Additionally, there is a constitutional issue, namely; whether it is acceptable for a state to maintain trade relations with states that do not accept or respect core standards of human rights.[21]

11.3.1 Treaty Interpretation: Art. 3.2 DSU

The cornerstone of this analysis, the application of external rules within the WTO agreements, is the aforementioned ruling of the Appellate Body in *US–Gasoline* in

[18] Hörmann (2010), pp. 597 et seq.

[19] Art. 2.2 TBT Agreement and Art. 2 SPS Agreement entail a similar wording but will not be addressed in this article. Art. XX GATT will be analysed infra.

[20] Stoll (2011) World Trade Organization, mn. 105.

[21] Stoll (2011) World Trade Organization, mn. 106.

1996 and its famous statement that "WTO rules cannot be read in clinical isolation from other rules of international law".[22] Yet this very early statement of the Appellate Body does not shed light on the effect of other rules of international law on the WTO. This has to be determined by the covered agreements themselves. The general rule in this respect is entailed in Art. 3.2 DSU,[23] which concerns the clarification of the WTO norms by means of the existing "customary rules of interpretation of public international law". These customary rules are codified in Arts. 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT)[24] Perhaps the most relevant influence of Human Rights law on other fragmented areas of Public International Law is effected by teleological treaty interpretation under the heading of an "evolutionary" or "dynamic" interpretation.[25]

The unmodified application of the customary rules of interpretation in the WTO system is not unproblematic, due to the VCLT's establishment of an objective test, without paying less regard to the respective subject matter of a treaty. This is at odds with the Appellate Body's approach to interpreting a treaty in a subjective manner, with a special emphasis on the "trade" part of the WTO system.[26] This bias may be due to the rather special language of Art. 3.2 DSU, which stresses the tasks of the panels as providing "security" and "predictability" to the members. Yet such an interpretation of the task of the panels is not fully conclusive. Security and predictability can be achieved in a number of ways. A legal interpretation of the covered agreements, in light of other rules of international law, achieves a homogenous legal order for the respective member states and would therefore be an achievement. Moreover, an integrated legal order provides stability for the member itself and its trading partner because they are aware of the full spectrum of applicable rules in a given trade-related context. Hence, the wording of Art. 3.2 DSU should be correctly understood in a modern, integrative manner.

Such a reading is supported by the systematic interpretation of the DSU. Art. 7.2 DSU has a limited wording compared to Art. 3.2 DSU, but its scope is limited to the mandate of the panel and does not entail the applicable law. Art. 11 DSU requires the panel to conduct an objective assessment of the matter before it, which does not exclude external legal rules. Art. 19.2 DSU is simply a restatement of the general rule embodied in Art. 3.2 DSU, namely, that judicial organs can only interpret the law and not create it.[27] Thus, a panel is certainly bound to interpret the covered agreements and cannot add or diminish rights entailed in them, yet the exact content

[22] See supra Fn. 6.

[23] Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement.

[24] Of 23 May 1969, UNTS vol. 1155, p. 331. For the customary status: ICJ, Advisory Opinion, *Palestinian Wall*, ICJ-Reports 2004, p. 38, para. 94 and Gardiner (2008), p. 16, with further references. For the WTO: Appellate Body, *Japan – Alcoholic Beverages II*, WT/DS8, 10-11/AB/R, 1996, Part D. paras. 10–12.

[25] For a first comment in this respect, see Simma (2008), p. 738.

[26] Van Damme (2010), p. 643.

[27] See, with further references, Lorenzmeier (2008a), pp. 178 et seq.

of these rights can be determined by the panels "in light with other applicable rules of Public International Law".

This view is not relativised by "effective interpretation", according to which a treaty provision should be given full effectiveness by its interpreters. The effectiveness of a treaty is dependent upon its context in the network of other rules of international law. So far, the Appellate Body has deployed the technique of effective interpretation to preserve the status quo and not to open new pathways for the members by applying a rather cautious interpretation of the covered agreements.[28]

Furthermore, even if the panels do not interpret a single treaty but a network of treaties,[29] it should be kept in mind that the obligations established under the WTO agreements are generally bipolar in nature between the individual members of the organisation and are not owed *erga omnes*. This construction of the WTO treaties permits a perfect fine-tuning of the individual member's rights and obligations under the treaties.

11.3.2 Art. XX GATT in Light of Human Rights

The GATT is part of the covered agreements within the meaning of Art. 3.2 DSU. Besides the rules on trade liberalisation, it also contains rules on the restriction of the free flow of goods. In the context of applying human rights norms in the GATT, Art. XX GATT, which entails general exceptions to the agreement,[30] is of special importance. Lit. a) permits the member states to enact measures "necessary to protect public morals", while lit. b) is concerned with national measures "necessary to protect human [. . .] life". Both clauses are subject to the chapeau of art. XX GATT, which requires that the measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade".

The pertinent question is whether the said provisions permit recourse to human rights protection. Not followed will be the scholarly opinion that products that have been made in violation of core human rights standards are not "like" products in the meaning of the GATT. This view does not pay sufficient regard to the accepted definitions of the term "like product" as it is frequently used by the WTO Dispute Settlement Body.[31]

The *International Law Association* has declared "that WTO members and bodies are legally required to interpret and apply WTO rules in conformity with the human rights violations of WTO members under international law".[32] Such a view is not

[28] Van Damme (2010) p. 643.

[29] Van Damme (2010), op. cit.

[30] Wolfrum et al. (2011), Art. XX, General Exception, para. 1.

[31] Van den Bossche/Zdouc (2013), pp. 325 et seq. and 360 et seq.

[32] ILA Resolution 5/2008 on International Trade Law, which is not binding on the WTO bodies.

undisputed. Firstly, the principle of inter-temporality may constitute an obstacle for such an interpretation. According to a famous statement of Judge *Huber* in the 1928 *Island of Palmas* arbitration, "a juridical fact [must] be appreciated in the light of the law contemporary with it, and not the law in force when a dispute in regard to it arises or falls to be settled".[33] Yet this concept does not apply when the concepts of the interpreted treaty are either open or evolving and rules of international law subsequent to the conclusion of such a treaty can be taken into account.[34] The mentioned Appellate Body's permanent jurisprudence on the openness of the GATT[35] supports the conclusion that the rule of inter-temporality shall not be used in the context of the interpretation of Art. XX GATT. Additionally, due to the separate legal identity of the GATT 1994 to the GATT 1947,[36] it is rather doubtful that the corpus of human rights law, which already existed in 1994 but not necessarily in 1947, would not have been respected by the drafters of the 1994 treaty.

Secondly, the problems arising from extraterritorial application of a member's national law on another member, as well as the control of the production and processing methods in an exporting country of a good by an importing state, are also at stake. These issues will be dealt with in detail in the context of the interpretation of Art. XX lit. a) and b) GATT.

11.3.3 Protection of Public Morals, Art. XX Lit. a

Art. XX lit a) GATT[37] has rarely been invoked in WTO disputes.[38] Despite this, the provision entails great potential for the justification of national measures.[39] At stake for this article is whether the term "public morals" can be understood to include human rights norms. In the interpretation of WTO panels, "public morals" by way of an autonomous interpretation refers to "standards of right and wrong conduct maintained by or on behalf of a community or nation".[40] In light of this reasoning, purely national standards of a WTO member define the notion of public morals.

[33] RIAA 2 (1928), 829, 845.

[34] ILC, Study Group (2006), para. 478 Gardiner (2008), pp. 252 et seq.

[35] AB, *US – Reformulated Gasoline*, WT/DS2/9, ILM 1996, pp. 603 et seq.; AB, *US – Shrimp Products*, WT/DS58/AB/R, para. 129.

[36] Art. II.4 WTO Agreement.

[37] A parallel provision for services is laid down in Art. XIV lit. a) GATS.

[38] See e.g. the EU-Seals dispute: AB, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400,401/AB/R of 22 May 2014.

[39] Wenzel (2011), Art. XX GATT, lit. a), para. 1, in: Wolfrum R, Stoll PT, Hestermeyer HP (2011) Max Planck commentaries on World Trade Law.

[40] Panel, *China – Audiovisual Services*, WT/DS363/R, para 7.759; Panel, *US – Gambling*, WT/DS285/R, para 6.465 (for Art. XIV lit. a GATS). See also Panel European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400,401/R, para. 7.631.

Hence, it also encompasses national human rights and social standards of the member relying on the exception.[41] Moreover, the standard of protection has to be seen in an evolutionary manner. Hence, it is always the individual member's standard of protection at the time of invoking the norm that is relevant. As a result, Art. XX lit. a) GATT refers inherently to human rights applicable in a state, including international human rights if they have become part of national law.

Further, at question is whether the production and process method (PPM) in the exporting WTO member state can be used for the importing member to rely on the public moral exception, which also addresses the problem of extraterritorial application of the exception clause. If this were the case, a state may impose trade sanctions against the production process of a good and not only in respect of the objective characteristics of a product itself.[42] In this instance, two cases have to be distinguished. Firstly, the applicable human rights rule applies to both states. In this instance, a violation of the state sovereignty of the exporting member cannot be seen because the breached human rights rule applies in its legal system as well. The invocation of the importing member does not violate the exporting member's state sovereignty, due to a missing legal link between the two states. The importing state is unable to alter the legal system in the exporting state, and therefore any measure is as such neutral. A violation of the principle of non-intervention is not given by any impact of a state's measure on another state,[43] although it is difficult to draw a definite threshold.[44] In such an instance, restrictions on the product, as well as the production and processing process, are covered by the term "public morals".[45]

Secondly, the situation differs when the invoked national or international human right is only applicable in the importing member's jurisdiction. In this case, the importing state would apply his own laws extraterritorially and tries to influence indirectly the other member's legal regime by transferring its own moral values to the exporting state. This is much closer to a prohibited form of intervention than the first hypothetical because individuals in another state, rather than in the importing state, shall be protected.

Another aspect of the invocation of Art. XX lit. a) GATT is that the measure must be taken "to protect" public morals, which definition is part of a scholarly debate. At the centre of the debate is whether a nexus exists between the protected public moral in the importing state and the imported product. According to the stated presumption, the international human right at stake, e.g. the prohibition of child labour, is part of the public morals of the importing state, and this state has banned all sorts of child labour. Yet the imported good is produced by means of child labour in the exporting state, which, for the sake of the argument, is not bound by the international human right in question (child labour). A further result of the

[41] Wenzel (2011), Art. XX GATT, lit. a), para. 6, in: Wolfrum R, Stoll PT, Hestermeyer HP (2011) Max Planck commentaries on World Trade Law.

[42] Stoll (2011) World Trade Organization, para. 100.

[43] See, e.g., ICJ, *Nicaragua II*, ICJ-Rep. 1986, para 205.

[44] Kunig (2008) Intervention, Prohibition of, para. 2 et seq.

[45] Wenzel (2011), Art. XX GATT, lit. a), para. 7, in: Wolfrum R, Stoll PT, Hestermeyer HP (2011) Max Planck commentaries on World Trade Law.

ban would be the protection of children in the exporting state. In the described situation, it is argued that the nexus between the protected public moral and the product is rather insufficient[46] and that the systematic interpretation of Art. XX GATT would clearly show that PPMs are only covered in the context of Art. XX lit. e) GATT.[47] The latter view is not necessarily convincing. The existence of Art. XX lit. e) GATT could also be used for the opposite argument that the GATT is not oblivious to PPMs.[48]

In light of the stated reasoning, neither the wording nor the systematic interpretation of Art. XX lit. a) GATT excludes the application of the provision to PPMs. The argumentation of the Appellate Body in the *Shrimps* case cannot be used because the protected species were highly migratory and at least at some moment in time also in the exclusive economic zone of the US.[49] On the contrary, the recent ruling of the Appellate Body in *EU-Seals* is supporting the proposed reading of the provision. In that case, the EU was justifying its import ban on seal products from Greenland, Norway and Canada with the high importance of moral concerns for the protection of animals in the European legal order.[50] The hunting method of seals is a production method and, because it does not take place on the territory of the European Union, it expands its legal order to other members of the WTO.[51]

Next, the teleological interpretation may shed some light on the legal problem at bar. The object and purpose of Art. XX lit. a) GATT is the protection of public morals in the importing state. Some scholars limit the scope of Art. XX lit. a) GATT to either dangers stemming from the imported product or protectionist measures if these are applicable to the exporting and the importing state.[52] Such a reading does not seem fully convincing as an effective protection of public morals. Properly understood, the protection is not limited to dangers stemming from the imported product, but it covers the production method as well if it constitutes a potential danger to the public morals in the importing state. It is not necessary that the protected public moral also applies in the exporting state. This reading of the provision would not lead to a direct extraterritorial application of the norm, which would be rather problematic[53], and would establish a reasonable nexus between the imported product and the public morals in the importing state.

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[46] Eres (2004), pp. 618 et seq.

[47] Feddersen (1998), p. 109.

[48] In this regard, see Howse (1999), p. 143.

[49] For the opposite view, see Wenzel (2011), Art. XX GATT, lit. a), para. 15, in: Wolfrum R, Stoll PT, Hestermeyer HP (2011) Max Planck commentaries on World Trade Law.

[50] Panel, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400,401/R, 7.625.

[51] This had been accepted by the Panel as well as the Appellate Body in the *Seals*-case.

[52] Wenzel (2011), Art. XX GATT, lit. a), para. 16, in: Wolfrum R, Stoll PT, Hestermeyer HP (2011) Max Planck commentaries on World Trade Law.

[53] Wenzel (2011), Art. XX GATT, lit. a), paras. 16 and 22 et seq., in: Wolfrum R, Stoll PT, Hestermeyer HP (2011) Max Planck commentaries on World Trade Law.

The term "public morals" has to be interpreted in an evolutionary manner, and it is not restricted to the product but has a broader ambit and also covers the production and/or processing method of a product. In an interdependent and globalised economic world, it is no longer apt to distinguish between the product and its production process because both are part of the same mechanisms, the production of a good. Moreover, second generation human rights, in particular economic and social human rights, are aimed at the production process and are also part of the interpretation of the term "public morals" in line with human rights provisions. Second generation human rights as embodied in the International Covenant on Economic, Social and Cultural Rights[54] are, to some extent, full and enforceable rights. The proposed view is also in line with the Appellate Body's ruling in the *Shrimps* case, in which it had been held that for the interpretation of Art. XX lit. g) GATT, the applicable rule for the interpretation of the norm must not be applicable between all WTO members.[55] Such an interpretation has to be distinguished from the application of an extraneous rule of public international law in the WTO legal order, in accordance with Art. 3.2 DSU and the customary rule of interpretation codified in Art. 31 para. 3 lit. c) VCLT.[56] Finally, the reading of Art. XX lit. a) GATT in light of its object and purpose would strengthen the international legal order and provide human rights norms with a proper application within the GATT system and mitigate the fragmentation of public international law. The broad interpretation of "public morals" is not at odds with its legal nature as an exception clause. Generally, these clauses are to be interpreted restrictively, and the exception needs to be proved.[57] Yet this does not exclude an interpretation in light of the object and purpose of the norm, which would, in our case especially, respect the—in the realm of the GATT accepted—principle of evolutionary interpretation and the panel's jurisprudence that Art. XX GATT is not necessarily to be interpreted narrowly.[58] This reading cannot be qualified as an overruling of the strict interpretation clause because the parties usually do intend such an interpretation.[59] Hence, the proposed understanding is within the norm's scope.

As a result, international human rights norms can have a considerable effect on the interpretation of the term "public morals" in Art. XX lit. a) GATT. In the

[54] Of 19 December 1966, UNTS vol. 993, p. 3.

[55] AB, *US – Shrimp Products*, WT/DS58/AB/R para. 129 et seq.

[56] Panel, *EC – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291-293, para. 7.70 et seq.

[57] Qureishi (2006), pp. 104 et seq.

[58] AB, *US – Shrimp Products*, WT/DS58/AB/R, para. 157, speaks only of "limited and conditional exceptions". See also AB, *EC – Hormones* (WT/DS26, 48AB/R, para. 104: "[. . .] merely characterizing a treaty provision as an exception does not by itself justify a stricter or narrower interpretation of that provision than would be warranted by examination of the ordinary meaning of the treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation."

[59] Qureishi (2006), pp. 109 et seq.

author's view, the provision entails the application not only of human rights norms on the product itself but also of human rights in the production process.

11.3.4 Protection of Human Life or Health, Art. XX Lit. b) GATT

The exception laid down in Art. XX lit. b) GATT[60] concerning the protection of human life could also be applicable. Therefore, it has to be interpreted to respect human rights obligations.[61] Generally, the reasoning stated supra does also apply here. Yet it must always be decided whether a measure is a life or health measure or a public moral, e.g., labour conditions are generally in the ambit of lit. a) and not lit. b) GATT. Moreover, the ambit of Art. XX lit. b) GATT is limited, due the required proof of the impact of the measure on the human being. It is sufficient for the scope of lit. a) that a human right as part of a public moral is violated. Hence, in the context of applying human rights, lit. a) enjoys a much wider scope than lit. b). The notion "protection" is given when a state has identified a risk for human life or health, which may be assessed in quantitative or qualitative terms.[62] The risk has to be proven by scientific evidence, and relevant societal circumstances can be taken into account.[63] The state relying on the exception is free to determine its level of protection;[64] hence, this may vary among the WTO members. To conclude, international human rights may be available for the interpretation of human life or health and PPMs are not generally excluded from the ambit of Art. XX lit. b) GATT, yet the provision has, compared with lit. a), as analysed supra, a limited scope of application.

11.3.5 The Chapeau of Art. XX GATT

Next to the fulfilment of the requirements of the exception clauses enshrined in Art. XX GATT, each exception also has to be in accordance with the chapeau of Art. XX GATT, the "exception of the exception".[65] Art. XX GATT establishes a

[60] For services, a parallel exception is enshrined in Art. XIV lit. b) GATS.

[61] For parallel regulations on sanitary measures, see Art. 2.3, 4 SPS Agreement; for technical barriers to trade, see Art. 2.2 TBT Agreement. The exceptions are not mutually exclusive, Wolfrum et al. (2011), Art. XX GATT, para. 7.

[62] AB, *EC – Asbestos*, WT/DS135/AB/R, para. 186; Stoll and Strack (2011), Art. XX GATT, lit. b), para. 31, in: Wolfrum R, Stoll PT, Hestermeyer HP (2011) Max Planck commentaries on World Trade Law.

[63] Stoll and Strack (2011), Art. XX GATT, lit. b), paras. 33–35, in: Wolfrum R, Stoll PT, Hestermeyer HP (2011) Max Planck commentaries on World Trade Law.

[64] AB, *EC – Asbestos*, WT/DS135/AB/R, para. 168.

[65] Stoll and Strack (2011), Art. XX GATT, lit. b), para. 47, in: Wolfrum R, Stoll PT, Hestermeyer HP (2011) Max Planck commentaries on World Trade Law.

two-tier test, and besides the examination as to whether a measure fulfils the requirement of an exception clause, it is also to be stated whether the requirements of the chapeau are met.[66] The aim of the chapeau is to prevent abuse of the exception clauses, and it strikes a balance between the rights of a member to invoke an exception and the duty to respect the treaty rights of other members.[67] Whether this is at stake cannot be answered in the abstract. What is important is that a member applying an exception is not permitted to do so for a disguised protection of its own industry. Thus, a reliance on the exception of "public morals" must be for the purpose of protecting morals and not for the home industry.

11.3.6 Application of Art. XX GATT Outside of the GATT Agreement

Further at bar is whether Art. XX GATT can be used as an exception clause in the context of other WTO agreements besides the GATT. The Appellate Body in *China-Audiovisuals* decided that Art. XX GATT is also applicable in the context of China's Accession Protocol to the WTO,[68] namely, Art. 5.1 APC. Art. 5.1. APC has relatively open language in this regard, which opened the door for the Appellate Body's interpretation.[69] Yet after the *Audiovisuals* ruling, it was rather unclear whether Art. XX GATT could always be used as a justification to non-GATT commitments or if it is only applicable if the other agreement entails a provision permitting such a reading.[70] In *China-Raw Materials*, the Appellate Body chose the second option and did not apply Art. XX GATT in the context of Art. 11.3 APC because this provision lacks an opening clause for the application of other WTO rules and does therefore not incorporate them.[71] Also, the Panel in *US–Chinese Poultry* did not apply Art. XX GATT in the context of the SPS Agreement.[72] The jurisprudence of the WTO panels shows clearly that a treaty provision only applies outside of its treaty if the other treaty entails a provision in this regard.[73] Otherwise,

[66] AB, *US – Shrimp Products*, WT/DS58/AB/R, paras. 119 and 120.

[67] Van den Bossche/Zdouc (2013), p. 573.

[68] AB, *China – Measures affecting Trading Rights and Distribution services for certain Publication and Audiovisual Entertainment Products*, WT/DS363/AB/R, 12 August 2009, para. 215 et seq.

[69] It states in its pertinent part: "Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement [. . .]".

[70] Spiegel Feld and Switzer (2012), p. 25.

[71] Appellate Body, *China – Measures Relating to the Exportation of Various Raw Materials*, WT/DS394/AB/R, para. 303. Critical: Gu (2012), pp. 1007 et seq.

[72] Panel, *United States – Certain Measures affecting Imports of Poultry from China*, WT/DS392/R, para. 4.174–4-198.

[73] It remains to be seen how the Panel in *China – Raw Materials* will address the issue (*China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431-433).

the principle that a state can only be bound by an international rule when it has already adhered to it[74] would be violated.

11.4 Defragmentised Interpretation, Art. 31 Para. 3 Lit. c) VCLT as Part of Customary Law

Art. 31 para. 3 lit. c) VCLT, the "master key to the house of international law",[75] requires the application of "relevant rules of international law applicable in the relations between the parties" for the interpretation of a treaty and establishes the principle of systemic interpretation, i.e., the interpretation of a treaty in the broader context of other sources of public international law.[76] This rule is also part of customary law[77] and applies in the context of Art. 3.2 DSU. The difference to the interpretation of a treaty as it had been scrutinised supra is that in the ambit of Art. 31 para. 3 lit. c) VCLT, it is not the term of a treaty that is interpreted in the light of an internal treaty rule but by a rule outside of the treaty's terms. As such, a treaty rule is seen in light of an extraneous rule, and both rules should be interpreted harmoniously. For the analysis at bar, recourse to Art. 31 para. 3 lit. c) VCLT would only be necessary if the proposed interpretation of the term "public morals", especially with its effect on PPMs, would not be regarded as being conclusive.

11.4.1 Relevant Rules of International Law Applicable in the Relations Between the Parties

The named "rules of international law" are legal norms stemming from all sources of international law,[78] meaning that the international rules on the protection of human rights would be covered. The "relevance" of the external rule is not limited to the subject matter of the treaty to be interpreted but has a more temporal meaning.[79] One must also scrutinise, who are the "parties" in the notion "applicable in the relations between the parties". A subject of scholarly dispute is whether the term refers to all parties of the treaty to be interpreted or only to the parties of an actual dispute. For the WTO, this would boil down to the issue on whether all 159 WTO members must be bound by the international human rights rule.

[74] Cassese (2005), p. 170.

[75] ILC, Study Group (2006), para. 420.

[76] Pauwelyn (2006) Fragmentation, para. 29.

[77] See Lorenzmeier (2008b), p. 161, with further references.

[78] Panel, *EC – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291-293, para. 7.67; Lorenzmeier (2008a), p. 170.

[79] McLachlan (2005), p. 280.

The Panel in *EC-Biotech* decided that the term "parties" refers to all parties of the interpreted treaty.[80] Thus, a human rights rule could only be used in this context if it is accepted by all WTO members, which would considerably limit the scope of the provision's application. The panel based its view on a textual analysis of the VCLT. However, the word "all" is missing in Art. 31 para. 3 lit. c) VCLT as only the "parties" are mentioned. Yet a systematic analysis of the VCLT would rather lead to the opposite result that "all parties" are within the ambit of the provision.

Such a reading is not addressing all aspects of the notion under scrutiny. The wording of the norm implies that it is concerned with the significant relationship between the parties having an interest in the interpretation of the treaty.[81] Moreover, the reasoning of the panel fails to mention that it is not, in fact, the treaty rule of Art. 31 para. 31 lit. c) VCLT that is applicable in the given context but its customary sister provision. Hence, a literal and systematic interpretation of the VCLT does not seem to be fully convincing. Additionally, the decisions of the panels are only binding *inter partes* and not *erga omnes* and do not carry further legal obligations for the members.[82] Moreover, the jurisdiction of the panels in matters of accepting the decisions of other regional juridical bodies is supporting this view. In *Brazil–Tyres*,[83] as well as in *Mexico–Sweeteners*,[84] the respective WTO panel did not consider itself bound by the decision of the other body, because it does not entail any legal force on the WTO legal system. By the same token, third states or third judicial bodies would not be bound by the decision of a WTO panel. Thus, the WTO legal system would also be fragmented internally between its members, but it would also apply the principle of justice in the relations between the disputing parties because they chose the external rule as being applicable in their relations. Such an understanding would also in no way determine the rights and obligations of other members. These rights must be determined on a bilateral basis, and a breach of the *pacta tertiis* rule is not given. Moreover, a limitation of the interpretation of the WTO agreements only by other multilateral agreements finds no basis in the agreements, and it does not seem to be plausible to interpret a multilateral agreement without application of a bilateral rule, if this rule is applicable between the parties of the dispute. On the contrary, such an approach would be in line with the consensual principle in public international law, meaning that a subject of public international law is only bound by its rules if it has accepted them,

[80] WT/DS291-293, para. 7.68. Also Lennard (2002), p. 36.

[81] Gardiner (2008), p. 265.

[82] The Appellate Body has not yet applied the doctrine of *stare decisis* (Van Damme 2010, p. 614), and its permanent jurisprudence, that its rulings "create reasonable expectations", cannot be held against the proposed reading because this is only a self-understanding of the Appellate Body and is not laid down in the covered agreements or the DSU. Moreover, the Appellate Body had not found on the precise meaning of Art. 31 para. 3 lit. c) VCLT yet.

[83] Appellate Body, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, para. 233.

[84] Appellate Body, *Mexiko – Sweeteners*, WT/DS308/AB/R, para. 44 et seq.

either by ratifying a treaty or by the *opinio iuris* to a customary rule or a general principle of law.[85]

Additionally, the proper understanding of the legal nature of the material obligations of the GATT, in dispute is whether they are either reciprocal[86] or integral,[87] supports the proposed view. In light of the GATT's last preambular paragraph, the reciprocal view is much more convincing because it speaks of "reciprocal arrangements". Art. I GATT, establishing the most-favoured-nation principle, cannot be held against this principle because the established tariff obligations are always bilateral[88] and it is a rule of non-discrimination of a member by another member.[89] Finally, it is not limited to an advantage granted to another WTO member, but to any other state and is, thus, not limited to the WTO members.[90] Interestingly, the proposed and very fragmented view would lead to the respect of extraneous rules to a much greater extent than the opposite one, because the panels only have to pay regard to the applicable bilateral legal relationship between the parties of a dispute. As such, in practice it comes close to the principle of mutual supportiveness, because the legal rules will be taken into account for interpreting each other and exert a real legal influence on the other rule.

Both opinions, the narrow one propounded by the Panel in *EC-Biotech* and the broader one supported here, would come to the identical result for universal human rights, which are part of customary law and apply worldwide. For basic first generation human rights, this is often the case. Second generation human rights, like the right to work, do frequently lack such a territorial scope and would only be applied by the reading of "parties" as the "parties to the dispute".

11.4.2 Interpretation of a Treaty

Further, it is necessary to ascertain the issue of how far-reaching the ambit of Art. 31 para. lit. c) VCLT is for the interpretation of a treaty rule. The determination of the limits of "interpretation" in this respect is problematic. Most importantly, it is to question whether it is possible to displace the applicable law by way of treaty interpretation. Hence, is it possible by using Art. 31 para. 3 lit. c) VCLT to extend the scope of the interpreted treaty or to fill in an omission in the treaty's text? This is particularly pertinent in the case of conflicting obligations, such as the respect for

[85] Cassese (2005), pp. 153 et seq.

[86] Pauwelyn (2003), p. 316.

[87] Qureishi (2006), p. 163.

[88] For the opposite opinion, see Qureishi (2006), p. 163. Yet, even if the nature of the GATT obligations would be integral, the parties would only be the parties of a conflict and not all WTO members due to the *inter partes* effect of WTO panel decisions.

[89] Van den Bossche/Zdouc (2013), p. 318.

[90] Van den Bossche/Zdouc (2013), p. 317.

trade rules and for international human rights. In this regard, the principle of effectiveness comes into play as well, according to which an interpreter cannot adopt a reading that would result in reducing treaty provisions to inutility or redundancy.[91] The US–Iran States Claims Tribunal decided in *Amoco International* that the meaning of undefined terms in the interpreted text can be clarified by other legal sources.[92] This would come to a rather narrow reading of the object and purpose of Art. 31 para. 3 lit. c) VCLT and only mitigate the fragmentation of international law to a small degree. The aim of the systemic interpretation of Public International Law is to harmonise the system by applying both conflicting sets of rules in a given legal context. The effect would come close to one of a balancing of interest test, as it is known from the national and the European Union legal orders.[93] In such a regime, the extraneous rule could, as a result of the interpretative method, influence the yet-to-be interpreted rule to a degree that it is not applicable anymore. Judge *Higgins* in her separate opinion in the *Oil Platforms*-case of the ICJ criticised this approach strongly by stating that this would be, by way of interpretation, an unacceptable disposal of treaty law.[94] The majority of the judges of the ICJ applied the provision differently and by using a well-established rule of Public International Law, self-defence, for the deference of a treaty provision.[95] The European Court of Human Rights concluded most notably in its *Al-Adsani* judgment that extraneous rules can override the terms of the interpreted treaty[96] and the "broader normative environment"[97] can be fully respected. Hence, the distinction between the interpretation of a treaty and its applicability is not strict, and the "information" of a treaty by an extraneous rule can lead in essence to its non-applicability in a certain context, which comes close to the named balancing of interests test.

In conclusion, in the context at stake, an international human rights rule could in a case of conflict override a provision of the WTO agreements if the parties of the conflicts are both bound by the same rule.[98] In essence, an importing state would be permitted to enact import restrictions on certain goods if these are produced or processed in violation of human rights even if the WTO system is not open for the PPMs of a product.

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[91] Appellate Body, *US – Standards for Reformulated or Conventional Gasoline*, WT/DS2/AB/R, at 21.

[92] 15 Iran–US CTR 18, p. 222, para. 112. Also the separate opinion of Judge *Kooijmans* in the *Oil Platforms* case (Fn 91), para. 23.

[93] See infra Sect. 11.5.2.

[94] ICJ, *Oil Platforms*, ICJ-Reports 2003, pp. 225, 238, para. 49.

[95] ICJ, *Oil Platforms*, ICJ-Reports 2003, para. 78.

[96] ECtHR, *Al-Adsani*, Reports 2001-XI, p. 79, 100, para. 55 et seq.

[97] ILC, Study Group (2006), para. 415.

[98] To exemplify this, an importing state relying on a human rights provision would not, for instance, violate Art. XI GATT. The provision's object and purpose would, by way of interpretation, be limited to the extent that the norm would fully respect international human rights. See Lorenzmeier (2008b), pp. 168 et seq.

11.5 Other Means of Establishing a Harmonious Interpretation

Finally, the analysis shall also address other means of establishing a harmonious interpretation, namely the principle of mutual supportiveness and the principle of balancing of interests, which had been shortly addressed supra.

11.5.1 Principle of Mutual Supportiveness

The principle of mutual supportiveness has recently been named by scholars as a probable ground for establishing a harmonious interpretation.[99] As an interpretative principle, it disqualifies solutions to tensions between competing regimes, and it involves the application of a conflict of rules principle. Mutual supportiveness seems to be a pre-step to the full acknowledgment of a balancing of interest test and is not yet internationally recognised as a tool for interpretation, because it does not fall within one of the categories of legal sources enshrined in Art. 38 para. 1 lit. a)–c) ICJ-Statute. It is more an expression of the *telos* of legal concepts, as the Arbitral Tribunal in *Ijzeren Rijn* aptly put it for the relationship of environmental law and development,[100] and can be considered as a part of the concept of sustainable development.[101] In the realm of environmental issues, the Appellate Body in *Shrimps* acknowledged the principle, and that it could be used for the interpretation of the chapeau of Art. XX GATT.[102] From this, it is concluded that the principle of mutual supportiveness invites a conciliatory interpretation of conflicting norms and, moreover, that it entails a lawmaking dimension as well, by imposing a duty upon states to conclude agreements in light of other international rules. As such, it should lessen the fragmentation issue.[103] In any case, the principle of mutual supportiveness does not stand alone and does not have a special legal ground in the context of WTO and human rights because the preamble of the WTO agreements refers exclusively to environmental law but not to human rights issues. The disadvantage of the mutually supportive approach is that it does not always lead to conclusive results, because rules of a different legal regime cannot in any case be understood as being mutually conclusive. The concept is a rather "soft" way for trying to establish a harmonious legal system. It is not helpful in a number of hard conflicts lacking a respective opening clause. As such, the (emerging) principle of mutual supportiveness does not seem to be helpful for the case at bar.

[99] Pavoni (2010), pp. 660 et seq.

[100] Arbitral Award of 24 May 2005, para. 59: "Environmental Law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts."

[101] ICJ, *Gabcikovo-Nagymaros*, ICJ-Reports 1997, p. 7 at p. 78, para. 140.

[102] Appellate Body, *US-Shrimp*, paras. 166–172.

[103] Pavoni (2010), p. 678.

11.5.2 Balancing of Interest Test

The next applicable principle could be the "Balancing of Interests"-test, as it is known from national jurisdictions and the legal order of the European Union.[104] The balancing of interest test tries to harmonise different and, in a given case, conflicting legal rules by way of a harmonious interpretation. Its legal basis is argued to be found in a systematic and teleological interpretation of one legal text, like a nation's constitution. This text is deemed to be a single, harmonious instrument whose rules shall not conflict with each other. For instance, an all-embracing balancing of interest test has been established by the German Constitutional Court in a long line of judgments, bringing conflicting norms of the German constitution to full effect in a situation in which they are limiting themselves and it stems from the unity of the constitution. The doctrine is best known under its German name *praktische Konkordanz*. Despite the criticism voiced against the approach in German academic writing, the approach has now been widely accepted. The approach has also been adopted by the European Court of Justice in its *Schmidberger* decision for establishing the legal reach of conflicting provisions of its primary law as far as possible.

Yet, in public international law, the test has so far not generally been adopted. A necessary precondition for the balancing of interests test is the existence of a coherent legal system, due to the relativity of all legal norms under the test, which is lacking on the international stage. Generally speaking, is it possible for every norm to limit another rule, and can it also be limited by other rules? In this regard, the *opinio iuris* of the subjects of international law is required to accept such a rule. In coherent, defragmented legal systems like the national legal orders or the European legal order, such an effect is easier to establish. Additionally, it is rather telling that even in coherent legal systems it is impossible for the lawmaker to pay regard to every possible conflict that a new norm might invoke and that the rule is extremely jurisprudence driven. In the cases mentioned, the respective courts developed the balancing of interest test for their legal order. Due to the limitation of courts to the interpretation of legal rules, dogmatically it is therefore required that the test already forms an inherent part of the legal order because courts are not lawmakers, only law interpreters of pre-existing legal rules.

Thus, the principle of a balancing of interest test cannot be used for the harmonious interpretation of WTO and international human rights norms.

[104] For Germany: e.g., German Constitutional Court, BVerfGE 19, 206/220; for the EU: ECJ, C-112/00, Schmidberger, ECJ-Reports 2003, I-5659.

11.6 Conclusion

The scrutiny has shown that human rights law has a considerable impact on the WTO system. The focus upon international trade rules can be interpreted in light of human rights, especially Art. XX lit. a) GATT, and not only the product itself is covered but also the production or processing method (PPM). A second strain for balancing trade and human rights is the customary rule embodied in Art. 31 para. 3 lit. c) VCLT, which could lead to a harmonious interpretation of trade rules by respecting human rights. The restricted view of the Panel in *EC-Biotech* on the scope of application of Art. 31 para. 3 lit. c) VCLT is not fully convincing, and it should be reversed in upcoming matters. Otherwise the WTO system might face difficulties in addressing aptly the challenges stemming from an evermore interconnected world with interdependent work processes. The system could be further developed *de lege ferenda* by establishing a coherent international legal system and, as a consequence therefrom, by applying the balancing of interests-test.

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Chapter 12
Investor-State Arbitrations and the Human Rights of the Host State's Population: An Empirical Approach to the Impact of *Amicus Curiae* Submissions

Sarah Schadendorf

12.1 Introduction

Foreign investment activities bear the potential to negatively affect the human rights of the people living under the host State's jurisdiction. Projects of foreign investors might mainly interfere with the rights to life and human health, the economic and social rights of the population, with indigenous peoples' collective rights or labour rights.[1] Legislative and administrative measures that the host State adopts in furtherance of its human rights obligations towards the population potentially violate investment protection standards. A conflict between the State's human rights obligations and its investment treaty obligations, between inhabitants' human rights and the investor's rights (possibly human rights by themselves[2]) arises.

12.1.1 The Negligence of Human Rights Arguments in Investor-State Arbitration

Human rights concerns of the host State's population can be invoked in international investor-State arbitration either by directly using them as arguments, for example in favour of a certain interpretation of investment rules, or by relying on the host State's human rights obligations in order to justify its measures. In several investor-State disputes, the host State employed its human rights obligations as a

[1] For details, see Kriebaum (2009), pp. 654–655.

[2] See de Brabandere (2013), p. 194.

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defence.[3] However, in a number of arbitrations, host States did not make use of obvious human rights arguments.[4] This omission of human-rights-based reasoning might result from the States' fear of acknowledging obligations for themselves in other settings.[5] It might also be due to the fact that many human rights violations by the investor occur in complicity with the host State.[6]

12.1.2 Amicus Curiae *Submissions as a Potential Remedy?*

Since the 1990s, the practice of submitting *amicus curiae* briefs has been more and more recognised by international courts and tribunals.[7] During the last decade, a number of international investment tribunals have been faced with written statements and other claims of participation by various actors of civil society in its broadest sense, such as NGOs, trade unions, business associations, and indigenous communities. The admission of *amicus* briefs has entailed a scholarly debate about their compatibility with the features of investment arbitration (e.g., confidentiality, consensual nature) and about their potential benefits for the arbitration process (e.g., improved quality of the awards, increased transparency, and legitimacy).[8] With regard to the human rights implications of international investment disputes, *amicus* briefs offer an opportunity to present facts about the human rights situation or elaborate a human-rights-based reasoning. If the host State leaves out the human rights dimensions of the case in its pleadings, *amici* submissions are the main "legal avenue" by which human rights considerations enter investor-State arbitrations and the main mechanism to represent the affected citizens, consumers, or workers.

12.1.3 Empirical Approach to the Impact of Amicus Curiae *Submissions*

This chapter will examine the existing practice of dealing with those *amicus* submissions whose purpose is to promote human rights concerns of the host State's population. The aim is to evaluate whether *amicus* briefs by civil society actors are an effective means for incorporating human rights issues in international investment arbitrations. If so, we will discover how human rights arguments influence

[3] See Kriebaum (2009), pp. 672 et seq.; Reiner and Schreuer (2010), p. 89; de Brabandere (2013), pp. 202 et seq.

[4] See, e.g., Suda (2006), pp. 140 et seq.

[5] Harrison (2010), p. 414; Simma and Kill (2009), p. 680, fn. 11.

[6] Gray and Peterson (2003), pp. 16 et seq.; Reiner and Schreuer 2010, p. 89.

[7] Bartholomeusz (2005), p. 209.

[8] Gomez (2012), pp. 543 et seq.; Levine (2011), pp. 118 et seq.

arbitral decisions on investors' rights. If, on the contrary, *amicus* briefs prove to be ineffective, there will be a need to reconsider the *amicus* mechanism and possibly think of other ways to introduce human rights arguments to investment arbitration.

In its first part, the chapter will explore the rationale for accepting *amicus* submissions and take stock of *amicus* submissions in NAFTA and ICSID investor-State arbitration. The second part will be dedicated to an analysis of the cases in which human rights of the host State's population were invoked by *amici* in substantive submissions. The analysis will extend to the submitted *amicus* briefs, as well as to the procedural orders, decisions, and awards of NAFTA and ICSID investment tribunals–as far as they have already been issued and are publicly available. This section will explore which human rights the *amici* refer to and in how far the tribunals respond to the alleged human rights arguments. This rather empirical approach is supposed to evaluate the relevance of *amicus* briefs containing human rights arguments related to the host State's population. Their actual influence is hard to measure. Nevertheless, the results will help to assess the impact of human-rights-related *amicus* submissions on contemporary investment arbitration and international investment law in general.

12.2 *Amicus Curiae* Submissions in NAFTA and ICSID Investor-State Arbitration

12.2.1 Legal Basis and Conditions for Admitting Amicus Curiae *Submissions*

During the last decade, investor-State tribunals adjudicating under UNCITRAL and ICSID Arbitration Rules have consistently relied on their procedural powers to admit submissions by various civil society actors as *amici curiae*. The pioneer tribunal in the *Methanex v. US* arbitration (governed by NAFTA Chapter 11 and UNCITRAL Arbitration Rules) inferred from its general procedural powers under Art. 15(1) UNCITRAL Arbitration Rules the discretionary power to allow *amicus* submissions.[9] In contrast to the first ICSID tribunal confronted with *amicus* applications (*Aguas del Tunari, S.A. v. Bolivia*),[10] the ICSID tribunal in *Suez/Vivendi v. Argentina* came to the conclusion that its procedural powers under Art. 44 ICSID Convention granted the same power.[11]

[9] *Methanex Corp. v. US*, Decision of the Tribunal on Petitions from Third Persons to intervene as "Amici Curiae", 15 January 2001, paras 24 et seq.

[10] *Aguas del Tunari, S.A. v. Bolivia*, ICSID ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, paras 17–8; Appendix III, Letter from the Tribunal to Earthjustice, Counsel for Petitioners, 29 January 2003.

[11] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 March 2005, paras 9–16.

Both the NAFTA and the ICSID regimes have reacted to this development in non-disputing party participation by issuing the NAFTA Free Trade Commission (FTC) Statement in 2003 and by introducing Rule 37(2) ICSID Arbitration Rules in 2006, respectively. UNCITRAL Working Group II currently discusses the adoption of an explicit rule on *amicus* participation.[12] According to the FTC Statement and the *Suez/Vivendi* jurisprudence, one of the criteria that tribunals should consider in exercising their discretion is a public interest in the subject matter.[13]

The increasing admission of *amicus* briefs by subsequent tribunals suffered a setback in 2012. Two identically composed tribunals (*Pezold/Border Timbers v. Zimbabwe*) adopted a very restrictive reading of certain criteria of Rule 37 (2) ICSID Arbitration Rules and found, among others, that the human-rights-related content of the *amicus* submissions was unrelated to the matters before the tribunal and outside the scope of the dispute.[14] This narrow understanding of the conditions of Rule 37(2) precludes civil society actors from initiating human rights arguments.[15] It has to be awaited whether this strict view will be upheld by other ICSID tribunals.

12.2.2 Public Interest as a Rationale for Admitting Amicus Curiae *Submissions*

In the very first case, *Methanex*, the tribunal's discretion in admitting *amicus* applications was co-determined by the fact that the subject matter of the case implied a public interest in this arbitration.[16] The *UPS* tribunal picked up the "important public character of the matters" and stated that it was of importance to consider whether *amici* petitioners are able to provide assistance beyond that provided by the disputing parties.[17] In *Glamis Gold*, the tribunal held the view that "given the public and remedial purposes of non-disputing submissions, leave to file and acceptance of submissions should be granted liberally".[18] Another NAFTA tribunal that rejected an *amicus* application argued that, in matters of public interest, the tribunal should have "access to the widest possible range of views"

[12] See Report of Working Group II (Arbitration and Conciliation) on the work of its 57th session, UN Doc. A/CN.9/760, 12 October 2012, paras 39–57.

[13] For the ICSID Arbitration Rules, see Triantafilou (2008), pp. 584–585.

[14] *Bernhard von Pezold et al./Border Timbers Ltd. et al. v. Zimbabwe*, ICSID ARB/10/15 and ARB/10/25, Procedural Order No. 2, 26 June 2012, paras 57, 60.

[15] For details, see Schadendorf (2013), pp. 10 et seq.; Mowatt and Mowatt (2013), pp. 37–44.

[16] *Methanex Corp. v. US*, Decision of the Tribunal on Petitions from Third Persons to intervene as "Amici Curiae", 15 January 2001, para 49.

[17] *United Parcel Services of America, Inc. v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, para 70.

[18] *Glamis Gold, Ltd. v. US*, Award, 8 June 2009, para 286.

and should ensure "that all angles on, and all interests in, a given dispute are properly canvassed".[19]

The ICSID tribunals in *Suez/Vivendi* and *Suez/InterAguas* reasoned that courts "have traditionally accepted the intervention of *amicus curiae* in ostensibly private litigation because those cases have involved issues of public interest and because decisions in those cases have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case". The particular public interest in the cases originated from the fact that the investments at issue concerned "basic public services to millions of people" that may raise "complex public and international law questions, including human rights considerations".[20] After the introduction of Rule 37(2) ICSID Arbitration Rules, the *Biwater Gauff* tribunal stated that granting leave to file *amicus* submissions is "an important element in the overall discharge of the Arbitral Tribunal's mandate"[21] and cited passages from the *Methanex* and *Suez* decisions relating to the public interest dimension of the disputes.[22] The tribunals in *Pezold/Border Timbers*, on the contrary, recognised that the indigenous communities had "some interest in the land" and that therefore the determinations in the case would probably have an "impact on the interests of the indigenous communities"[23] but rejected any human rights considerations.

Hence, the pioneer tribunals, as well as most of the following decisions on *amicus* applications, seem to have been guided by the potential impacts of investment projects and investor-State arbitrations on the rights of other than the disputing parties. In many cases, the public interest and human rights implications were one of the main considerations when accepting *amicus* submissions.

12.2.3 Stocktaking of Amicus Curiae *Submissions*

All in all, there are seven cases under ICSID Arbitration Rules, six cases under NAFTA Chapter 11 and UNCITRAL Arbitration Rules, and one case governed by NAFTA Chapter 11 and ICSID Arbitration Rules with *amicus* applications from

[19] *Apotex Inc. v. US*, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, para 22.

[20] Suez, *Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 March 2005, para 19; *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID ARB/03/17, Order in response to a Petition for Participation as Amicus Curiae, 17 March 2006, para 18.

[21] *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID ARB/05/22, Procedural Order No. 5, 2 February 2007, para 50.

[22] Ibid., paras 51–55.

[23] *Bernhard von Pezold et al./Border Timbers Ltd. et al. v. Zimbabwe*, ICSID ARB/10/15 and ARB/10/25, Procedural Order No. 2, 26 June 2012, para 62.

civil society (status: August 2013). The number of arbitrations where tribunals authorised and actually received substantive *amicus* submissions amounts to three governed by ICSID Arbitration Rules and three under NAFTA Chapter 11 and UNCITRAL Arbitration Rules. Set in relation to the total number of known ICSID and NAFTA Chapter 11 arbitrations,[24] these cases represent less than 1 % of all ICSID and approximately 6 % of all NAFTA arbitrations.

12.3 Human Rights Arguments in *Amicus Curiae* Submissions in NAFTA and ICSID Arbitrations

In six out of the seven arbitration cases with authorised substantive *amicus* briefs, at least one of the submissions used international human rights law as an argument for their position.

12.3.1 Methanex Corp. v. US

In the NAFTA case *Methanex*, several *amici* argued in favour of a Californian ban on the gasoline additive MTBE. The leakage of MTBE into the groundwater posed danger to the environment and human health. In their joint submission, the *amici* pointed to obligations of States to protect human rights, in this case the right to water and linked rights like the rights to health, to life, and to own means of subsistence. They shortly asserted that California's measures to protect the integrity of groundwater sources were thus mandated by international law.[25]

In its Award, the *Methanex* tribunal mentioned the *amicus* submissions only as part of the procedural history and stated that it would not summarise the contents of the submissions as they "were detailed and covered many of the important legal issues that have been developed by the disputing parties".[26] In the merits, the tribunal did not deal with any human rights arguments.

[24] Total number of arbitration cases registered under the ICSID Convention and Additional Facility Rules as of June 30, 2013: 424. See the ICSID Caseload Statistics (Issue 2013–2), p. 8. Total number of NAFTA claims (a summary based on several sources): 66. See NAFTA Chapter 11 Investor-State Disputes (to October 1, 2010), Canadian Center for Policy Alternatives, p. 22.

[25] *Methanex Corp. v. US*, Submission of non-disputing parties, Bluewater Network, Communities for a Better Environment, Center for International Environmental Law (represented by Earthjustice), 9 March 2004, paras 3, 16–18.

[26] *Methanex Corp. v. US*, Final Award, para 29.

12.3.2 *United Parcel Services of America, Inc. v. Canada*

The claimant UPS itself argued that a Canadian law prohibiting certain postal workers from exercising collective bargaining rights constituted a breach of Canada's international human rights and labour rights obligations and therefore a breach of Art. 1105 NAFTA.[27] In a joint *amici* submission, the Canadian Union of Postal Workers and the Council of Canadians agreed with the claimant that the Canadian law violated international labour law obligations. They supported Canada's position by arguing that the NAFTA dispute settlement procedure was an inappropriate forum for claims based on violations of international labour law provisions as the most directly affected persons, the workers, had no rights in these proceedings at all. Only the International Labour Organization with its special tripartite structure should be able to adjudicate labour rights infringements. Otherwise, Canada's obligations under NAFTA and those under the ILO would be placed in conflict.[28] Therefore, from the *amici*'s perspective, the tribunal "must seek an interpretation of NAFTA investment disciplines that most readily accords with Canada's obligations under ILO and other treaties".[29] With regard to the other human rights instruments invoked by UPS, the *amici* reinforced their argument concerning the exclusion of victims of human rights violations by citing Art. 26 ICCPR. They stated that the claims offended the spirit and "letter of the very human rights instruments it [UPS] seeks to rely on".[30]

In its Award, the *UPS* tribunal briefly mentioned the submission in the procedural history[31] yet did not respond to the *amici*'s arguments. The labour rights arguments raised by the claimant failed because UPS did not provide sufficient factual or legal arguments.[32]

12.3.3 *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*

At the core of the arbitration *Suez/Vivendi* was Argentina's privatisation of water and sewerage systems in the area of Buenos Aires. The claimants, holding the concession for running these systems, brought a claim under the relevant BITs against several measures Argentina had taken during the Argentine financial crisis.

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[27] *United Parcel Services of America, Inc. v. Canada*, Investor's Memorial (Merits Phase), 23 March 2005, paras 645–671.

[28] *United Parcel Services of America, Inc. v. Canada*, Application for Amicus Curiae Status by the Canadian Union of Postal Workers and the Council of Canadians, 20 October 2005, paras 26–35.

[29] Ibid., para 37.

[30] Ibid., paras 55–58.

[31] United Parcel Services of America, Inc. v. Canada, Award on the Merits, 24 May 2007, para 3.

[32] Ibid., para 187.

In their joint submission, five NGOs described in detail the human rights implications of the dispute and their legal relevance to the adjudication. They demonstrated the recognition and importance of the right to water and linked rights and Argentina's obligation to respect and protect these human rights.[33] They argued that the measure of freezing the water tariffs served to fulfil Argentina's human rights obligations and that, for this reason, human rights law should be applicable to the dispute as part of the "international law as may be applicable" under Art. 42 (1) ICSID Convention.[34] *Amici* also claimed a "systemic integration of the international legal system" according to Art. 31(3)(c) Vienna Convention on the Law of Treaties, stating that "human rights law can add color and texture to the standard of treatment included in a BIT" and that "contextual interpretation leads to normative dialogue, accommodation, and mutual supportiveness among human rights and investment law".[35] Subsequently, they provided suggestions on the interpretation of the BIT provisions on the standard of fair and equitable treatment and indirect expropriation from a human rights' perspective.[36] Finally, they submitted that there are two situations in which human rights law could displace investment law: in a conflict of norms situation and in a situation of necessity.[37]

In its Decision on Liability, the tribunal acknowledged that it had benefited from the submission "that further developed the relationship of the human rights law to water and to the issues in this case" and gave a very brief summary of the *amici*'s legal argumentation and claims.[38] Argentina, too, had invoked the human rights to water and to health by stating that it had a "responsibility to assure the continuation of a public service that was vital to the health and well-being of its population" and, more explicitly, by explaining that the State "adopted the measures in order to safeguard the human right to water of the inhabitants".[39] Furthermore, Argentina had asserted that the tribunal "must take account of the context in which Argentina acted and that the human right to water informs that context".[40] In considering Argentina's defence of necessity, the tribunal accepted the health and well-being of nearly ten million people as essential interest of the Argentine State yet argued that Argentina could have attempted more flexible means to assure the functioning of the water and sewerage services, which, at the same time, respected its obligations under the BIT. The human rights and BIT obligations were "by no means mutually

[33] Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina, ICSID ARB/03/19, Amicus Curiae Submission, 4 April 2007, pp. 4–12.

[34] Ibid., pp. 13 f.

[35] Ibid., p. 15.

[36] Ibid., pp. 16–26.

[37] Ibid., pp. 26–28.

[38] Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina, ICSID ARB/03/19, Decision on Liability, 30 July 2010, para 256.

[39] Ibid., paras 202 and 252.

[40] Ibid., para 252.

exclusive".[41] The tribunal reaffirmed this view when addressing an argument that had been brought forward by Argentina, as well as by the *amici*. They had both argued that Argentina's human rights obligations could overrule obligations under the BIT and provide the authority to take actions in breach of its BIT obligations. The tribunal rejected this assumption as it found no basis for it in the BIT or in international law. Rather, the arbitrators held the view that Argentina had to respect its human rights and BIT obligations that were, under the circumstances of the present case, "not inconsistent, contradictory, or mutually exclusive".[42]

Until today, *Suez/Vivendi* remains the only case of a tribunal explicitly responding to a human rights argument raised by *amici*. This may result from the very complex and detailed human rights analysis provided by the *amici* in this case. However, very probably the tribunal only dealt with the relationship of human rights law and investment law because this argument had also been brought forward by the respondent State. Strikingly, the tribunal did neither make use of any human rights argument in support of its findings where appropriate, nor did it comment on the influence of human rights on the relevant investment norms. Considering that only those arguments were treated that Argentina had raised as well, the influence of the *amici*'s submission on the Decision on Liability seems to have been limited.

12.3.4 Biwater Gauff (Tanzania) Ltd. v. Tanzania

The *Biwater Gauff* case dealt with a water and sewerage lease contract between a UK investor and Tanzania concerning the area of Dar es Salaam. The government of Tanzania cancelled the contract because the inhabitants had to cope with erratic supplies and water shortages. In consequence, the Republic of Tanzania was sued for expropriation and breach of fair and equitable treatment. Five NGOs petitioned for *amicus* participation, emphasising the "salient" relationship of service delivery to basic human rights in the water sector and the "substantial influence" of the arbitration process on the population's ability to enjoy basic human rights.[43] In their submission, the *amici* professed to be motivated by human rights and sustainable development considerations[44] and requested the tribunal to take these into consideration. However, the NGOs admitted that human rights law would not be their legal starting point[45] and provided instead an investment-law-oriented analysis. In the course of their reasoning, the *amici* claimed that the human right to water and

[41] Ibid., para 260.

[42] Ibid., para 262.

[43] *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, Petition for Amicus Curiae Status, 27 November 2006, pp. 7 and 8.

[44] *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, Amicus Curiae Submission, 26 March 2007, paras 7 and 10.

[45] Ibid., para 7.

sustainable development goals should be understood as increasing the standards of responsibility of investors in the water sector. They submitted that "human rights and sustainable development issues must be factors that condition the nature and extent of the investor's responsibilities, and the balance of rights and obligations between the investor and host State".[46] According to the *amici*, foreign investors "engaged in projects intimately related to human rights" should have the "highest level of responsibility to meet their duties and obligations".[47] Finally, the *amici* switched from the investor's responsibilities to those of the host State. They argued that the Tanzanian government had to take action under its obligations under human rights law to ensure access to water for its citizens and that therefore there was no breach of contract.[48]

The Award includes a section about the *amici* brief in which the tribunal extensively reproduced these arguments.[49] In the merits, the tribunals stated that it had "taken into account the submissions" in relation to one of the *amici*'s arguments in the context of determining the threshold for a violation of fair and equitable treatment.[50] Neither the strict human-rights-based standard proposed by the *amici* nor Tanzania's human rights obligations towards its population were considered.[51] As the tribunal found violations of investment protection standards but did not award any compensation, there remains at least "a smack of the acknowledged public interest concerns".[52]

12.3.5 Glamis Gold, Ltd. v. US

In the NAFTA case *Glamis Gold*, the US government and California imposed several measures on open-pit miners in order to avoid further damages to the environment and the sacred land of American native tribes. A Canadian mining company whose mining rights were affected alleged a breach of Art. 1110 and Art. 1105 NAFTA. Among several *amici*, only one raised human rights arguments: the Quechan Indian Nation. They provided information on the nature of the cultural resources and sacred places at issue and the cultural and environmental impacts of the proposed mine and invoked several human rights law instruments related to indigenous peoples' rights like religious and cultural rights and land rights. The Quechan argued that the preservation and protection of indigenous rights in ancestral land was an obligation of customary international law that had to be taken into

[46] Ibid., para 51.
[47] Ibid., para 53.
[48] Ibid., paras 96 and 98.
[49] *Biwater Gauff (Tanzania), Ltd. v. Tanzania*, Award, paras 370–391.
[50] Ibid., para 601.
[51] For details, see Harrison (2010), pp. 411–412.
[52] Kulick (2012), p. 255.

consideration for the interpretation of the relevant NAFTA provisions.[53] In their supplemental submission, the Indian Nation worked out these arguments in far more detail, specifying each indigenous right and referring to Art. 1131(1) NAFTA and Art. 31(3) of the Vienna Convention on the Law of Treaties.[54] The Tribe expressed its concern that an award in favour of the investor's claims could "result in cultural and environmental harms".[55]

In its Award, the tribunal explained that it was aware of the context in which it operated, namely of concerns on environmental regulation and interests of indigenous people. Nevertheless, the tribunal found itself to be "not required to decide many of the most controversial issues raised in the proceedings".[56] Its "case-specific mandate" was seen as an argument to limit the tribunal's decision to the "issues presented", meaning presented by the parties. The tribunal appreciated the "thoughtful submissions" made by the various *amici* and stated "that it should address the filings explicitly in its Award to the degree that they bear on decisions that must be taken".[57] It continued by announcing that it would not reach the particular issues raised by the *amici*. Apparently, the tribunal deemed the human rights issues as irrelevant to their decision-making process, and thus neither provided a summary nor any analysis of the human rights arguments brought forward by the Quechan Indian Nation. As the tribunal upheld the regulatory measures and action and thus effectively protected the Nation's human rights, the tribunal could have mentioned the relevant human rights norms in support of its investment-law-based findings.[58]

12.3.6 Pac Rim Cayman LLC v. El Salvador

The arbitration *Pac Rim Cayman LLC* centred on mining activities in El Salvador. After having invested in the mineral exploration of certain areas with the approval of the government, the claimant was not permitted to proceed to the extraction and exploitation phase and therefore alleged breaches of several CAFTA provisions. In their *amicus* submission, eight NGOs disclosed the human rights implications of the mining activities, namely, the critical water supply in the area of the investment and

[53] *Glamis Gold, Ltd. v. US*, Amicus Curiae Submission, Quechan Indian Nation, 19 August 2005, pp. 8–14.

[54] *Glamis Gold, Ltd. v. US*, Non-Party Supplemental Submission, Quechan Indian Nation, 16 October 2006.

[55] *Glamis Gold, Ltd. v. US*, Amicus Curiae Submission, Quechan Indian Nation, 19 August 2005, pp. 14–15.

[56] *Glamis Gold, Ltd. v. US*, Award, 8 June 2009, para 8.

[57] Ibid., para 9.

[58] Karamanian (2012), pp. 262–263. Cf. also Kulick (2012), pp. 303–304.

possible negative environmental and health impacts.[59] Furthermore, they submitted that the investor's lobbying strategies had caused "violence and denial of human rights", which is why the investment "should not receive the protection of international law".[60] As to the legal aspects in the jurisdictional phase, human rights arguments were invoked to deny jurisdiction of the ICSID tribunal. The NGOs held the view that bringing claims to an ICSID tribunal, a forum for governmental actions where the affected communities as "genuine opponent" have no rights as a party but only as *amici*, was abusive.[61] They stated that it is a "bedrock principle of international law that where the rights of a third party 'would not only be affected by a decision, but would form the very subject-matter of the decision,' exercise of jurisdiction otherwise granted is inappropriate".[62] This resembles the argumentation elaborated by the *amici* in *UPS v. Canada*. Lastly, in a footnote, the petitioners found it worth considering that "accepting jurisdiction over Pac Rim's claim would essentially punish the Republic for fulfilling its own international law obligations to be response [*sic*] to its citizens and to secure their rights, including their economic, social, and cultural rights",[63] and thus returned to the standard reasoning in defence of a State's measures.

In its Decision on the Respondent's Jurisdictional Objections, the tribunal summarised the matters addressed in the *amicus* submission and compared them to those raised by the respondent.[64] In the context of the abuse of process issue, the tribunal reproduced some of the *amici*'s arguments and cited three passages of the submission; two of these passages indicated the potential human rights impacts on the communities living in the area of investment, one of them contained the wrong forum argument.[65] Nonetheless, the tribunal decided only to address the arguments related to issues that had also been invoked by the respondent[66] and eventually rejected them.[67] At no point did the tribunal return to the rights of the affected communities. It remains to be seen whether the tribunal will take up human-rights-related facts or legal arguments in its final award.

[59] *Pac Rim Cayman LLC v. El Salvador*, ICSID ARB/09/12, Application for Permission to proceed as *Amici Curiae*, 2 March 2011, p. 8.

[60] Ibid., p. 11.

[61] Ibid., p. 19.

[62] Ibid., p. 20.

[63] Ibid., p. 20, fn. 85.

[64] *Pac Rim Cayman LLC v. El Salvador*, ICSID ARB/09/12, 1 June 2012, Decision on the Respondent's Jurisdictional Objections, paras 1.33–1.38.

[65] Ibid., paras 2.36–2.40.

[66] Ibid., paras 1.38 and 2.39.

[67] Ibid., para 2.43.

12.3.7 Conclusions

In three of six cases with submitted human rights arguments, the arbitral tribunals at least summarised the *amici*'s position. In each of the same three cases, the arbitrators responded to one of the *amici*'s arguments, yet only one out of these arguments was human rights related (*Suez/Vivendi*). The general attitude towards human rights arguments brought forward by *amici* seems to be rather dismissive and limited to the respondents' statements. Human rights arguments provided by *amici*, sometimes detailed and well founded, were not observably employed by the tribunals in support of their findings, and sometimes even explicitly disregarded. Two investment tribunals (*Glamis Gold* and *Pezold/Border Timbers*) even refused to accord any role to human rights considerations for lack of mandate. Concerns that investment arbitration might not be the right forum when arbitral awards will affect human rights of the population (*UPS, Pac Rim Cayman* and, to some extent, *Glamis Gold*) have been ignored. However, the human rights and public interest dimensions of the disputes might have influenced the tribunals' decision-making process. As most of the cases have been effectively decided in line with the *amici*'s position, the tribunals might have given thought to human rights implications–although they preferred to base their written decisions exclusively on investment law.

12.4 Final Conclusion

Amici curiae have provided useful and relevant human rights arguments in investor-State arbitrations. However, they have not succeeded in provoking a substantiated statement on the role of human rights in international investment law and arbitration. Heightened sensibility to public interests and human rights involved in investment disputes as expressed in the rationales for accepting *amicus* submissions has so far not been mirrored in the rendered arbitral decisions and awards. NAFTA and ICSID tribunals have not made any notable efforts to develop a human-rights-oriented interpretation of investment law standards or a methodology to balance human rights and investment concerns.[68] Tribunals formally recognise the need to open up to human rights concerns but appear unwilling to substantially engage in them.

Given the results of this analysis, human-rights-related *amicus* submissions by civil society actors have not proved to be an effective means for the sincere connection of the two legal regimes. As they completely depend on the discretion of the tribunals, changes in the *amicus* mechanism or even the introduction of further-reaching intervention rights for affected citizens and groups should be considered.[69] Besides, the involvement of regional organisations as *amici* could

[68] For a recently suggested approach, cf. Karamanian (2013), pp. 432 et seq.

[69] Wieland (2011), pp. 357 et seq.

prove more successful.[70] Initiatives and pressure from human rights organisations and judicial dialogue between international investor-State tribunals and human rights courts should increase to promote a meaningful interaction and to improve coherence between these two branches of international law.

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[70] Cross and Schliemann-Radbruch (2013), pp. 33 et seq.

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Part V
Civil Society and Individuals

Chapter 13
The Assertion of Subjective Rights for Migrant Workers

Camille Papinot

13.1 Introduction

In 1927, Louis Varlez wrote that "the study of international law on migration (expression approved by the author) shows that there is a very strong and fertil regulatory activity".[1] Indeed international migration allows to focus on the evolutions of international law and represent a challenge for the field.

Surely, the assertion of individual's rights and duties in the international legal order has been slow and progressive (LaGrand case, 2001).[2] But strikingly, one of the first international rules concerning individual treatment by States concerned *foreigners*. As Driscoll D. J. pointed out, the traditional theory of exclusion of human rights from international law—as they were considered as pertaining to the so-called reserved or exclusive domain[3]—"suffered some exceptions, and the most

[1] Varlez (1927), p. 171.

[2] ICJ, LaGrand case (Germany v. U.S.), 27 June 2001, §75. In this case, the Court recognizes not only rights for the national States but also "subjective rights" for individuals. It confirms the expectations put off by the Permanent Court of International Justice in 1928 (PCIJ, advisory opinion, 3 March 1928, *Jurisdiction of the Courts of Danzig*, *Publications of the Permanent Court of International Justice* Series B—No. 15). In this case, the PCIJ had asserted that even if the treaty did not create rights for the individuals, it obliged member states to adopt rules on relationships between them and individuals, so people have the possibility of invoking these rules in national courts.

[3] The notion of "exclusive domain" means that there is "a domain of activities for which the State is not obliged by international law, and has a discretionary competence, so as a consequence it does not have to suffer from interference of any other State or international organization. [...] If the scope of the State's exclusive domain generally corresponds to areas linked to its identity as its constitutional organization, this domain is defined negatively by the scale of the State's

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notable was probably concerning the duty for States to respect some minimum rules on the legal regime applicable to foreigners."[4] As a matter of fact, between the nineteenth and the twentieth centuries, States were considered to be liable for damages caused to foreigners even if, at the same time, international law was supposed to recognize only States—and surely *not* foreigners—as subjects of international law.[5] As a consequence, if the violation of the "minimum standard of treatment" benefitting foreigners was accepted as a cause of international responsibility of States, which generally had to pay a financial compensation, this compensation was owed not to the injured person itself[6] but to the State of the injured person.

The focus of this study, "migrant workers," must be précised. Even if some authors mention an "international law on migration"[7] as if this was a coherent branch of international law, the choice to focus specifically on migrant *workers* is justified by the fragmented approach of international law regarding migrant people

international commitments. So the exclusive domain corresponds to a sort of residual liberty." Salmon (2001), p. 356.

[4] Salmon (2001), p. 57.

[5] See, for example, Phillimore (1923), p. 63.

[6] It is only because the alien embodies the State where he comes from, that he melts into one of the constituents represented through its population, that such person must be respected by a host State (Island of Palmas case (Netherlands v. USA), 4 April 1928, Reports of International Arbitral Awards, Vol. II, pp. 829–871). This point of view has always been confirmed by international case law. A problem appears about the fact generating the liability of the territorial State that caused damage to a foreigner. Indeed, the establishment of the liability in the international legal order implies an international wrongful act because of the violation of an international duty attributable to a State. But which can be this international rule? Which international duties can be imposed on the State for alien treatment (Chétail 2007, pp. 36–39)? For a long time, a confusion has been made between State liability rules (secondary rules) and norms on the condition of the foreigner (primary rules), which obscures the understanding of the content of the alien treatment under international law. Two different theories have been defended in international law. The national treatment one was promoted by European countries and the United States, and the minimum international treatment one was promoted by developing countries (see Verdross-Drossberg 1931, pp. 327–412). Under the "national treatment theory," a foreigner cannot claim to be treated better than a national. On the contrary, the "international treatment theory" means that a State must recognize a minimum treatment to a foreigner; the latter is defined from universal customary law and general principles of law. A lower treatment makes the State liable. This theory has been asserted in international case law. See, for example, General Claims Commission, Roberts Case of 1926: "Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. The test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization" (General Claims Commission, Roberts Case, 2nd November 1926, RSA, Vol. IV, p. 77). See also British property in the Spanish Zone of Morocco (United Kingdom v. Spain, 1st May 1925, AA.II, 615, and George W. Hopkins (U.S.A.) v. United Mexican States, 31st March 1926, Reports Of International Arbitral Awards, Vol. IV pp. 41–47.

[7] Chétail (2008), introduction.

and, consequently, the need for a clarification. Under article 11 of ILO convention no 97,[8] article 11 of ILO convention no 143,[9] and article 1 of Council of Europe Convention of 1977, a migrant worker "means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker." This definition excludes independent workers, other categories of migrants allowed to work (refugees, students), and irregular migrants (who sometimes can be regularized and then become migrant workers in the sense given above).

If all migrants are not workers, this is indeed the case that migrant workers constitute a huge part of the migrant people and that they are generally in a very fragile position. In this regard, the International Labor Organization (ILO) established that in 2010 there were 214 million of international migrant people (3 % of global population).[10] Half of them were workers, 15 % irregulars.[11] This phenomenon has probably many reasons. One of them is that trade and investments liberalization has been accompanied by the break of production process, linking products and labor markets of developing and developed countries. Economic openness reached to the creation of production centers, which, stimulated by international competition, became attractive destinations for work force migration.[12] These migrants are in a very vulnerable situation because they decide mainly to emigrate for economic reasons and often accept work in worse conditions than national workers. They usually have no information on living conditions and labor legislation in the host country. So it is very difficult for them to have their rights represented.

Despite recent debates on the contribution of migrations to the development of home and destination countries,[13] international dialogue on foreign workers pro-

[8] ILO Convention no 97 concerning migration for employment, 1st of July 1949, *UNTC 1952*, Vol. 120, 1-1616, pp. 72 and 73. Entered into force on 22nd January 1952.

[9] ILO Convention no 143, concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers, 24th June 1975, *UNTC 1978*, Vol. 1120,1-17426, p. 324. Entered into force on 9 December 1978.

[10] ILO (2010).

[11] ILO (2009), p. 70.

[12] For more details, see Maupin (1996), pp. 45–100.

[13] See the United Nations Program for Development (UNDP) 2009, Human Development Report. Overcoming barriers: Human mobility and development. See also Organization for Economic Co-operation and Development (OECD) 2010, International Migration Outlook, and International Organization for Migration (IOM) 2011, World Migration Report, Communicating Effectively about Migration. These reports show the benefits of migration for the development of origin and receiving States, at mid and long terms. The first assessment is that international migration takes place in a world demographic imbalance context. Then, for national countries, emigrant people are a source of income, thanks to the transfers of funds, and also reduce the pressure on employment. For host States, immigrant people are employed in areas where nationals do not want to do domestic work or work with seniors, the developed countries' population becoming older. But

tection[14] remains complicated as the interests of concerned States are often contradictory. For home countries, it is proved that emigrants represent a source of income, and so they try to obtain a decent treatment at work for their nationals abroad, a protection of commodities acquired, and they seek to avoid arbitrary and massive expulsions. Host countries, for their part, have a tendency to open only some activities to foreigners on the basis of market needs and to protect the labor market by closing their boundaries specifically in periods of economic crisis.[15] Moreover, they tend to consider that the admission and treatment of foreigners still pertain to their "exclusive domain" and are therefore quite reluctant to any international legislation in this regard.

Indeed, the inherent statute of being a "foreigner" of a "migrant worker," meaning a person who is not a national, has for long limited any positive evolution of international law for this category of person—beyond the traditional minimum standard rule. But the "worker" quality[16] of the migrant workers has been the starting point for the development of a protective international regulation.[17] To put it in a nutshell, work has been a framework for rights assertion, and the improvement thereof has also benefited migrant workers. As is well known, in the twentieth century, developing and developed countries began to introduce social rules in their domestic law, as well as in international law, and trade unions' actions allowed workers to get individual and collective rights at work. At an international level, the ILO created in 1919 paid a great attention to the definition of these rights. Apart from bilateral agreements that are the oldest and main source of rights (we will not study these agreements here), steps have been taken on the multilateral field with the adoption of two ILO conventions: Convention no 97 on migrant workers of 1949 and Convention no 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers. Another convention has been adopted more recently at the UN level, the New York Convention on the Protection of the Rights of All Migrant Workers and

immigration is also attractive for foreign direct investments, when the relevant company needs to create new jobs.

[14] We want to underline here that we will use both expressions of "migrant worker" or "foreign worker." The first one will refer to the whole migratory process, whereas the second term will be used once the worker has immigrated, meaning he is already in the host country.

[15] For host State, the IOM counts four kinds of aims. The first one is to manage better labor migration by matching the demand and supply sides of the market. The second aim is the reduction of irregular migration, offering (few) possibilities to migrate in a regular way. The third aim is to collaborate on this topic with countries with which they want to establish an economic partnership. The fourth aim is for the receiving States to keep relationships with countries with which they have historic links. For home countries, the main aim is to facilitate their nationals the access to the international labor market, protecting them against trafficking and exploitation. Economic and social consequences of international migration are very important. Marmora (2002), p. 404.

[16] The labor relation is characterized by the fact that a person provides, in favor or under the direction of another person, services for wages. Cornu (2007), p. 933.

[17] Commission internationale de Juristes (2008), pp. 16–17.

Members of their Families (1990).[18] At the regional level, the rise of European Union law is also a good example of improvement of foreign workers protection.

But labor law is not the only source of rights for migrant workers. Obviously, the development of international human rights law, and its coverage of all people, including migrant workers, offers a complement to social rules applicable to migrants workers and finally promotes the emergence of a more comprehensive migrants workers' international legal status.

The specific purpose of this study is to show how the development of a legal personality for migrant workers, a vulnerable category of people whose protection by international law is very progressive, strengthens the emergence of the international personality of individuals. To this end, the complementarity between international social rules and international human rights rules regarding the assertion of a legal status for foreign workers will be discussed (Sect. 13.2). Then it will be shown how international human rights law comes to reinforce the justiciability of migrant workers' rights (Sect. 13.3).

13.2 Complementarity Between International Social Law and International Human Rights Law for the Assertion of a Legal Status of the Migrant Worker

It must be stressed that international cooperation focuses only on the workers' conditions of treatment when they are already in a foreign territory, never on their access to the said foreign territory, which always needs the receiving State's prior authorization. Of course, this authorization can be granted under a general framework established by a bilateral or regional agreement concluded by sovereign States under the cover of a reciprocal approach, but the principle of freedom of a sovereign State for the admittance or not of an alien on its territory has never been put into question.[19] This being said, the actual legal status of migrant workers is based on different sources (treaties, customs), divided into different branches of international law. According to Richard B. Lillich, "the foreigner status in international law can be compared with a big puzzle which parts have been appearing over time, but the final number is still uncertain, that's why the overall picture is to be invented."[20]

[18] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, New York, 18th December 1990, UNTC 2004, No 39481, Vol. 2220, p. 3.

[19] The question of access to a territory for foreigners appears at the same time than the consolidation of the Nation-State. The idea of Nation-State has progressively erected the boundary as a true barrier for free movement of people, the development of international trade going with States' protectionism of their labor market. The security-oriented vision on migrations and the world economic crisis have strengthened closing borders. For more details, see ILO (2012), Global Employment Trends—Preventing a Deeper Job Crisis.

[20] Lillich (1984), pp. 3 and 123.

We will not study bilateral agreements, which are the oldest source of this law,[21] but rather we will focus on multilateral ones. Generally, this status is inspired by, and elaborated from, the principle of nondiscrimination, which means that it is forbidden to distinguish, for the benefit of subjective rights, between people on the basis of some criteria.[22] The nondiscrimination principle is reflected in the rights at work (this is the "social" aspect) (Sect. 13.2.1) and in the rights regarding the status of migrant workers as foreigners (this is the "human rights" aspect) (Sect. 13.2.2).

13.2.1 The Assertion of an Equality of Treatment at Work

The main contribution of specific agreements on migrant workers' protection at work is to guaranty the equality of treatment between national and foreign workers.[23] They reflect a classical approach of international law under which equality of treatment is asserted only for a list of rights at work (equality for employment and remuneration, right to health at work, trade union freedom, right to social security). Other conventions nonspecific to migrant workers but aiming at guarantying a right to certain groups of workers, or protecting these groups, are also applicable to migrant workers (ILO Convention no 189 of 2011 on domestic work or ILO convention no 87 of 1948 on freedom of association). All in all, this is putting in force the national treatment principle. According to some authors, "the national treatment consists in the assertion by international law that foreigners have to be protected only against discrimination and can only claim equality with nationals for the application of national law."[24] This nondiscrimination principle

[21] For more details on bilateral agreements on workforce, see Lô Diatta (2008), pp. 101–131.

[22] That is the meaning given by the main international texts on human rights: Art 1§3 of the UN Charter; art. 2 of the UDHR; art. 2§1 of the IPCPR; art. 14 of the HREC; art. 1§1 of the ACHR; art. 2 of the African Charter; art. 21 of the European Union Charter of Fundamental Rights; art. 19§4 of the European social Charter; art. 2§2 IPESCR. We clarify that such principle is unanimously recognized as a higher principle; it is recognized as an *erga omnes* duty by the ICJ (ICJ, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), 7th February 1970). The ECHR affirmed a "fundamental principle" that "underlies" the Convention (ECHR, Strain and Others v. Romania, 21st July 2005, §59). It has been constitutionalized in community law (Tchotourian 2010, pp. 507–532). The Inter-American Court qualified the nondiscrimination principle as an imperative norm (ACHR, advisory opinion no 18, 17th September 2003, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18).

[23] Article 6 of ILO Convention of 1949 and article 10 of ILO convention of 1975, article 25 of the UN Convention of 1990; art. 21 of EU Charter of Fundamental Rights; art. 19§4 of the European Social Charter; art. 2§2 of the IPESCR; art. 45§2 TFUE.

[24] Dailler et al. (2009), p. 745.

is not always respected, depending on historical periods that can be either favorable or discriminatory for migrant workers.[25]

The main limit to this national treatment principle is that the level of the protection depends on the quality of the laws of the host country. Indeed, equality of treatment with nationals supposes to refer to the receiving State's legislation. This margin left to the expression of sovereignty by international labor rules is a classical approach for the ILO, which very rarely defines in detail the substantial rights of workers (it does so, for example, concerning the prohibition of forced work or the worst forms of child labor). The ILO generally tries to harmonize working conditions without defining the right in substance.[26] Consequently, at domestic level, ideological, political, and economic considerations affect the evolution of the migrant worker status, as well as, more generally, worker status. These considerations also have some influence on the international level because they determine States' participation in international protective norms.

Nevertheless, one can question whether there exist supportive factors for a minimum treatment for all workers, including migrant workers. To this end, ILO has developed the concept of "fundamental rights at work" and the concept of "decent work." According to the Declaration on Fundamental Principles and Rights at Work of 18 June 1998, ILO has considered the existence of four fundamental rights: the right to collective bargaining, the prohibition of forced work, the abolition of child labor, and the prohibition of discrimination in terms of employment and occupation. The Declaration also creates a monitoring mechanism.[27] The Agenda for Decent Work is a program adopted in 1999, which aims at creating jobs, guarantying rights at work, extending social protection, and promoting social dialogue. Both texts are nonbinding,[28] and this is why it would therefore be premature to consider that a minimum treatment for workers currently exists. However, the importance of the soft law should not be understated, particularly in

[25] The law on aliens keeps changing. In France we can note that if the order of 2 November 1945 concerning the entry and the stay of foreigners in France has not been modified until 1980, later it has been modified many times. This is due to the economic and social crisis, and the rise in structural unemployment in the middle of the 1970s closed the boundaries to foreigners. Andriantsimbazovina et al. (2008), p. 322.

[26] This observation is the same at the EU level, despite the assertion of a competence in favor of the EU on the basis of article 156 of TFEU. Dubouis and Blumann (2009), p. 133 s.

[27] Burda (2010), pp. 249–252.

[28] The noncompliance with "soft law" rules cannot engage the liability of the State authors of the violation, and no recourse may be pursued. According to a part of the doctrine, such soft law instruments do not have a legal nature and only include moral and political engagements that are not governed by international law. In addition to the confusion of the "legal" and the "binding" nature, another part of the doctrine relativizes the fact that "soft law" has no legal force. As such, recommendations from international organizations are in reality governed by international law and have legal significance because if States are not obliged by these rules, they are bound by the principle of good faith. Moreover, States could not argue the exception of national competence in concerned areas, and application for enforcement will not be an unlawful interference in the State affairs. Dailler et al. (2009), p. 4.

this tripartite organization that is ILO, because it constitutes a positive framework for a dynamical promotion of rights at work. Furthermore, some courts have recently recognized the customary aspect of fundamental social rights.[29]

As regards the employment relationship, international law only adopts a regulatory framework for the exercise of the exclusive jurisdiction by the host State. The latter is still free to choose the substantial applicable rules.

13.2.2 The Indiscriminate Protection of the Migrant Worker as "Individual"

The development of international norms protecting human rights has had an important impact on the structure of classical international law and thus on principles applicable to foreigners.[30] According to some authors, the place occupied by international human rights law does even challenge the traditional approach of foreigner status in international law. Indeed, the notion of "individual," and the rights attached to any individual, questions the distinction between national and alien.[31] For Vincent Chétail, the development of international human rights law appears like a synthesis of the theory of assimilation of the foreigner to the national and the theory of the minimum treatment standard. Indeed, the human rights law asserts the principle of equality of treatment between nationals and foreigners while ensuring that this minimum is guaranteed by international law. Many authors consider that the law for foreigners will disappear to blend into international law on human rights, because human rights require State to respect the rights of all the individuals under their jurisdiction.[32]

Some categories of foreigner clearly benefit from the minimum standard theory, in particular diplomatic or consular agents, or some of their activities (taxation, flows of capital).[33] But beyond these specific regimes, Mr. Virally tried to identify what could be the hard core of fundamental rights that foreigners could claim for. According to the author, "the minimum standard [...] includes the respect of essential freedoms : freedoms of the individuals, the property right, duly acquired rights, the safety of people and goods, and an impartial system of juridical guaranties, in particular judiciary ones, accessible to foreigners, enabling to obtain justice."[34] But the appropriation of the law for foreigners for the time being remains a

[29] For more details, see Marleau (2004), p. 363 s. To be noted is that if the customary nature of fundamental rights at work were confirmed, it could question the legal status of irregular migrant workers in international law.

[30] Chétail (2007), p. 47.

[31] Chétail (2007), p. 55.

[32] Chétail (2007), p. 56.

[33] Dailler et al. (2009), pp. 745 and 746.

[34] Virally (1983), pp. 116 and 117.

tendency that is not totally finished.[35] The New York Convention adopted by the UN represents the main step for the apprehension of the migrant workers question by human rights. It represents a summary of previous texts and studies made by the UN. It also reinforces the juridical framework for migrant workers' protection,[36] because it takes into account the whole migratory process.

In view of the current regional and universal trends on migrant workers, we can divide the rights they benefit from in two categories, "unconditional" rights, on one hand, and "conditional" rights, on the other hand.[37] Unconditional rights can be defined as individual rights, identified as necessary for the respect of their dignity, not subject to condition of nationality and not available for the legislator.[38] This concept is linked to the minimum treatment standard. This category of rights, which could be seen as irreductible, is more easily admitted for civil and political rights[39] than for economic, social, and cultural rights that programmatic aspect is still often argued.[40]

Conditional rights for their part, as the name suggests, presuppose to fulfill a condition for their benefit. This condition can be the nationality of the foreigner, which determines, for example, its right to vote, which is admitted in certain regional systems. But we will leave aside this question, which concerns mainly foreigners having the resident status. In general, migrant workers do not benefit from this right. Another condition is the regularity of the stay, which can be a trigger for the benefit of some rights granted in some places. In fact, as he is defined by international law, a migrant worker is always in a regular situation—if he is not, he is not a "migrant worker" considered as such by international law, but the rights

[35] A first attempt of merger of the two branches has been promoted by the International Law Commission during the preparation of a proposal of codification of the State International liability. Between 1961 and 1965, six reports were presented by the special reporter Garcia Amador on State liability for damage caused to foreigners. See International Liability: First Report of Garcia Amador, Annuaire de la Commission du droit international, 1956, vol. II, document A/CN.4/96, p. 175, p. 200 et 203. Article 6 tried to identify a non-exhaustive list of fundamental rights recognized internationally. It was only as from 1985 that human rights could benefit a subsequent development of legislation, they started to include foreigners' condition, with the adoption of the Declaration on human rights of people that do not have the nationality of the country they live in (Res. 47/144, 13th December 1985) that have the value of principle. This appropriation tendency by human rights will develop by applying existing norms to foreigners by the UN committees (for example, Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant), inserting provisions applicable to foreigners in recent texts (for example, art. 3 of the UN Convention against torture of 1984), or adopting specific instruments (as the UN Convention of 1990 on migrant workers). Moreover, a lot of conferences confirm this trend. Chétail (2007), p. 58 s. We can also underline the creation of a special reporter mandate on the human rights of migrant people.

[36] Agbetse (2004), p. 49.

[37] The distinction between conditional and unconditional rights has been established by Rodriguez-Piñero Bravo-Ferrer (2004), p. 546.

[38] Rodriguez-Piñero Bravo-Ferrer (2004).

[39] See Lillich (1978), pp. 329–442.

[40] See, for example, Roman (2010), p. 4.

granted to migrant workers vary from place to place. For example, migrant workers can have the right to family reunification that allows a foreigner—living regularly on a territory—to be joined by his spouse and his minor children, as established by the principle of respect for private and family life. The New York Convention of 1990, at article 44, encourages States to grant the right to family reunification, but it is recognized only in Europe on the basis of article 8 of the European Convention on Human Rights. But even in Europe this right is not absolute[41] because it presupposes to fulfill conditions of income and form of housing.

As can be seen, international human rights law has reinforced the migrant workers' rights deriving from international social law, guarantying, to a limited extent, other substantial rights linked to the stay and not linked to the employment relationship. It is more clearly at the procedural level that international human rights law comes to reinforce their status by offering them legal remedies in the international legal order.

13.3 International Human Rights Law and the Justiciability of Migrant Workers' Rights

The international legal personality of individuals cannot only be analyzed as the ability to be recipient of rights and duties in the international legal order but also as the ability to claim the breach of these rights.[42] Diplomatic protection has still a role to play, because the right of individual petition is not always recognized in international instruments. However, this mechanism tends to be marginalized with the multiplication of legal remedies that can be used by migrant workers, before domestic and regional courts.[43] Although the right of individual petition before domestic courts is guaranteed in specific or nonspecific conventions concerning migrant workers, we will focus on international legal remedies. In this respect, International Social Law and International Human Rights Law offer complementary legal remedies (Sect. 13.3.1), while civil and political rights reinforce the justiciability of the social rights of migrant workers (Sect. 13.3.2).

[41] Article 8 of the ECHR does not require a State to let a foreigner come into its territory to create new family links (ECHR, 28th May 1985, Abdulaziz, para. 68). In contrast with the Community law (ECCJ, 18th May 1989, Commission c. RFA, aff. C-249/68, *Rec.*, 1263), the ECHR first did not recognize the rights to family reunification and then has progressively changed its case law and questioned on the existence of a State positive duty to let the family members live with the migrant to maintain and develop their family life. Sudre et al. (2009), p. 565.

[42] Salmon (2001), p. 820.

[43] Chétail (2007), p. 56.

13.3.1 A Complementarity of Legal Remedies

The New York Convention of 1990 is the seventh UN Convention that creates a control mechanism via the establishment of a committee.[44] However, the Committee on Migrant Workers is not yet entitled to receive individual communication (10 States have to accept this procedure for it to be enforced). The monitoring of the implementation of the Convention is only based on the review of the periodic reports of States party (arts. 73 and 74). At the ILO level, none of the two Conventions concerning migrant workers' protection propose a mechanism of legal remedies; they are only monitored through the review of periodical States reports. This lack of right of individual petition before the only body specifically created to protect migrant workers' rights leads us to focus on other mechanisms, not reserved to migrant workers but accessible to them.

Indeed, many mechanisms specifically created to guaranty social rights in general offer quasi-judicial recourses to migrant workers. The first three examples are part of the ILO framework. It concerns "representation" procedure (arts. 24 and 25 of ILO Constitution) that can be initiated by workers' or employers' organizations against a State for the non-implementation of conventional duties. The "complaints" procedure (arts. 26–34 of the same Constitution) can be introduced by a State or by a delegate to the International Labor Conference. 24 representations and 13 complaints concerning migrant workers have occurred,[45] but none has been introduced on the basis of the two ILO conventions concerning migrant workers' protection. It can be explained by the need of representativeness and because other conventions are preferred as a basis for action, like the Convention on forced labor. The third ILO mechanism concerns the complaint before the Freedom of Association Committee, which can be introduced by a trade union. This procedure has been often used to defend the freedom of association of migrant workers, the recourse being introduced by a trade union of migrant workers or by a trade union acting to protect a migrant worker.[46] The fourth mechanism for the protection of social rights concerns the European Committee of Social Rights for States that have accepted this collective claim mechanism. Indeed, it requires migrant workers to be represented by an NGO or a trade union authorized to introduce claims. And

[44] Agbetse (2004), p. 47.

[45] Servais (2004), p. 260.

[46] *Ibid*, p. 262. It happened for the case before the Inter-American court concerning the Advisory opinion no 18 already mentioned. See also Freedom of Association Committee, Malaysian Trade-Unions Congress (MTUC) v. Malaysia, case no 2637, on the rights of domestic workers, including migrant workers to participate or create trade-union (Conseil d'administration du BIT, 312e session, Neuvième question à l'ordre du jour: Rapports du Comité de la liberté syndicale, 362e rapport du Comité de la liberté syndicale, Genève, novembre 2011, GB.312/INS/9, p. 23 s.). See also Freedom of Association Committee, Complaint against the Government of the Republic of Korea presented by the Korean Confederation of Trade Unions (KCTU) and the International Trade Union Confederation (ITUC), case no 2620, for refusal of registration of the migrant workers' trade union (Conseil d'administration du BIT, 312e session, *Ibid*, p. 149 s.).

these claims can only be based on the articles of the European Social Charter accepted by the State concerned.[47] And finally, the fifth procedure concerns the UN Committee on economic, social and cultural rights, which, since the Optional Protocol came into force on 5 May 2013, can receive individual communications.[48] So, clearly, procedures protecting social rights do exist, but they are difficult to implement, particularly because of the need of representativeness.

International human rights law also offers other complementary legal remedies, judicial or quasi-judicial. Foremost, at the international level, migrant workers can access UN Committees that can receive State reports and individual communications. They have developed a case law concerning migrant workers: the Human Rights Committee stated on freedom of movement,[49] the Committee against Racial Discrimination[50] adopted two recommendations on foreigners, the Committee against Torture stated on the condition of foreigner treatment in administrative detention centers[51] or on the expulsion of foreigners towards countries where torture is practiced.[52] Women migrant workers can also lodge a claim before the Committee on Discrimination against Women.[53] As for legal remedies, UN Committees adopt nonbinding decisions, which render their acceptance easier for the States concerned. But these Committees have developed a quasi-judicial way to operate, which reinforces their authority.

Finally, foreigners have a direct or indirect right of individual petition before regional courts of human rights.[54] But except the African Court of Human Rights,

[47] See http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault_FR.asp. Accessed 28 July 2014.

[48] 11st December 2009, Doc. A/63/435, U.N.T.C., No 14531.

[49] HRC, Ackla c. Togo, 1996, no 505/1992: it considers that the freedom of movement applies to the whole territory, included for Federal States; HRC, General Comment no 27: Freedom of movement (article 12), 2nd November 1999. HRC, General Comment no 15: The position of aliens under the Covenant, 11th April 1986.

[50] Article 1 defines the scope of the Convention and excludes at §2 the distinctions between nationals and nonnationals. If such measures exist, they are not considered as discriminatory under the Convention. But §3 of the same article gives mandate to the Committee to ensure that any distinction could be made between the different foreign nationalities. The Committee's role should be limited to establishing if there are discriminations between nationalities, but it gave an extensive interpretation of its mandate, supported by the General Assembly of the UN. The Committee against Racial Discrimination has adopted two recommendations. The first is General Recommendation no 11 of 1993, which precises that articles 1§2 of the Convention do not dispense States to inform about their law concerning foreigners. General Recommendation no 30 on discrimination against nonnationals of 2004 wants to draw attention to the situation of vulnerable group and invites to implement some measures that aim to resolve their daily problems. Bidault (1997), p. 131 s.

[51] The Committee as examined the fourth periodic report of France, 946th session, 10th May 2010 (CAT/C/SR.946), final observations.

[52] CAT, Communication no 414/2010, N.T.W. v. Switzerland. Decision adopted by the Committee at its 48th session, 7 May–1st June 2012.

[53] CEDAW, General recommendation No. 26 on women migrant workers, 5th December 2008.

[54] Indeed, regional conventions prevail over the States for people under their jurisdiction. See articles 1 of ECHR and of American Convention on Human Rights.

for which the right of individual petition has not been generalized, and which has also jurisdiction for both civil and economic and social rights,[55] other mechanisms have jurisdiction to state principally on civil and political rights. These remedies have been widely used but are only of a regional nature. For example, one can refer to the case law on the right to family reunification before the European Court of Human Rights.

13.3.2 The Use of Civil and Political Rights to Guaranty the Social Rights of Migrant Workers

The main problem concerning social rights is either the courts have jurisdiction but are reluctant to sanction their breaches as it is the case for domestic courts or the mechanisms are uneasily accessible because of their limited jurisdiction or because of the need of representativeness to implement them. The carefulness of Judges to guaranty social rights reflects the current debate on their justiciability.[56] Without considering the arguments on the relevance of the distinction between civil and political rights, on one hand, and economic social and cultural rights, on the other hand, this debate has a real practical impact that is partly circumvented by an "indirect protection." Through this mechanism, the monitoring body can combine a civil or political right with an economic, social, or cultural one, to assert a jurisdiction, as does the ECHR, or to bypass the arguments on the necessary progressivity in guarantying social rights. This jurisprudential tendency worked in favor of the implementation of migrant workers' social rights.

Concerning domestic tribunals, we can refer to the example of the Constitutional Court of South Africa in Khosa and Others v. Minister of Social Development and Others case (4th March 2004), which found unconstitutional the Law on Social Security that restricts assistance to South African nationals. The Court relied on the principle of nondiscrimination to grant to migrant workers the same right to social security. At an international level, we can refer to the Ylimaz Dogman v. Netherlands case of 29 September 1988, introduced before the Committee

[55] The African Commission states on the migrant workers' right to work. This right is affirmed in article 15 of the African Charter. The Commission agrees that the abrupt expulsion without any possibility of due process or recourse to national courts to challenge the Respondent State's actions severely compromised the victims' right to continue working in Angola under equitable and satisfactory conditions (ACHPR, May 2008, Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others)/Angola, 24th Report of Activities of the ACHPR (pp. 133–153), § 76). Moreover, foreigners' deportation constitutes a violation of the right to work (ACHPR, 11th November, Union Inter Africaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v. Angola, no 159/96, 11th Report of Activities of the ACHPRP (pp. 25–27), para. 17).

[56] Roman (2010), pp. 249–252.

against Racial Discrimination, which condemned the dismissal of a Turkish woman living in the Netherlands on the ground that women migrant workers had a tendency to abuse sick leave. The Committee considered that the plaintiff suffered discrimination in the enjoyment of her right to work. At the European level, the European Court of Human Rights does not hesitate to grant the allowance of social benefits on the basis of the property right affirmed in Protocol no 1 to the European convention combined with the prohibition of discrimination (art. 14). In the Gaygusuz v. Austria case of 16 September 1996, the Court found that the difference of treatment between foreigners and nationals for the attribution of an emergency allowance was not based on an objective and reasonable justification and was thus discriminatory. In the Koua Poirez v. France case, 30 September 2003, the Court followed the same reasoning about a noncontributory social benefit to an adult with disability because of his national origin. At the inter-American level, the Court stated in its advisory opinion no 18 the prohibition to discriminate migrant workers even in an irregular situation compared with nationals concerning the allowance of rights and benefits.

We can observe that in certain cases, the nondiscrimination principle is used to assert a competence and grant rights to migrants workers, while in other cases the principle can be combined with another right, as for example the right to property for the allowance of benefits. The elasticity of the definition of the equality principle will be used by judges to justify differences. But the judge oscillates between "audacity" and "timidity" and always takes care of the economic impact of its decisions. If the access to the courts is a compelling point for the protection of migrant workers, NGOs are uncertain on the role that the judge has to play to grant foreigners rights. NGO are also in favor of direct interaction with the administration and often have quasi-judicial remedies. The different legal remedies, judicial or quasi-judicial, are complementary in migrant workers' protection.

13.4 Conclusion

The quality of "worker" of migrant workers permitted the adoption of specific instruments guarantying the equality of treatment between national and foreign workers. But the quality of "alien" of migrant workers is still a curb for the evolution of international cooperation on workers' freedom of movement, except in a regional or bilateral framework, and for the ratification of the most comprehensive conventions. The UN Convention of 1990 concerning the protection of all migrant workers and the members of their families is one of these, but it has not been ratified by any big host country, and the monitoring mechanism only requires the State members to present periodical reports.

As to their worker statute, ILO Conventions and Recommendations are the referent instruments. But the reading of these instruments suggests a protection *a minima*, as they principally grant equality of treatment at work. It is in this context that there is a complementarity between international labor law and international

law on human rights. These two sets of rules permit to determine the rights applicable to migrant workers not only in the context of the employment relationship but also in the other aspects of their stay in the host territory. René Chiroux wrote in 1979 that a legal status of migrant workers did not exist, referring to the analyses of Professor Charles Rousseau on the place of individuals in international law. Charles Rousseau considered that except in exceptional cases, "individuals could not directly and immediately claim for international rules, these being applied by domestic procedures meaning States' ones." For René Chiroux, this argument is pertinent for migrant workers.[57] Nevertheless, we have demonstrated that migrant workers now can claim, if States whose jurisdiction they are under have accepted the mechanisms, before many quasi-judicial or judicial, universal, or regional bodies. If those mechanisms are particularly competent to extend the guaranty of rights to migrant workers category, more than to protect them as such category, they are necessary to develop and reinforce progressively the contents and the scope of those rights.

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[57] Chiroux (1978), p. 17.

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Chapter 14
The Individual, the State and a Cosmopolitan Legal Order

Sinthiou Estelle Buszewski

14.1 Introduction

Recently, it became mainstream to consider individuals as subjects of international law.[1] Generally, this assessment refers to human rights law and international criminal law containing individual rights and obligations deriving directly from international law. However, individuals are not considered as being on equal footing with states. Here, the term of "partial" subjects of international law comes into play even though the accuracy of the term is limited.[2] This article will elaborate on the philosophical foundations of international law following Immanuel Kant's legal philosophy in order to discuss two interrelated phenomena of current global law: on one hand, the role of states and the changed relationship between states and individuals and, on the other hand, the claim for legal empowerment of the individual beyond state borders. The line of argumentation will support the development of a cosmopolitan global order that primarily aims at securing individual external freedom.

[1] von Arnauld (2012), p. 22, § 2 at 65; Walter (2012); Cassese (2005), pp. 71 f. and 134 ff.; Higgins (1978), pp. 1–19.

[2] Gött (2013).

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14.2 Kant's Legal Philosophy

Kant's legal philosophy is threefold and consists of three distinct but interrelated legal orders. First, there is the law within a state that ensures that every human being can enjoy rights domestically.[3] Second, "the law of nations shall be founded on a federation of free states."[4] Finally, there is the cosmopolitan constitution. The cosmopolitan right (*Weltbürgerrecht*) is founded on "the rights of men, as citizens of the world" to universal hospitality.[5]

Kant's philosophy of law is based on the assumption that every human being carries the natural right of men to freedom.[6] The external or outer freedom is the independence of constraints imposed by others, the independence from another's necessitating choice.[7] This faculty of free agency constitutes tensions within an unavoidable community of free human beings. Kant calls the situation of unsecured freedom the "natural state."[8] The natural state is a non-juridical state, outside the required order in which everyone follows his own inclination and no distributive justice exists. However, within the natural state, human beings have rights, private rights, rights by virtue of being human. But in the state of nature, those rights remain unsecured, provisional:

> As long as Robinson lives alone on his island, he has no right to external freedom. It is first when Friday joins him that rights vest and legal issues can evolve. Because both Robinson and Friday have an original right they can come into conflict.[9]

Kant proclaims that there is a necessity based on the concept of reason to leave the natural state. The obligation to leave the natural state (*exeundum esse e statu naturali*) and to enter the juridical state is called the *postulate of Public Law*.[10] Individual rights can only be secured in a state of public justice. That requires public laws to be mere transformations of the common will of all citizens.[11] In such a state, mutual security from interference is granted by and under enforceable laws.[12] Thus, the only end of every legal order is the installation of an order that ensures equal individual external freedom.

This line of argument seems to justify the emergence and existence of states because within a juridical state the natural state is negated. That means the state is supposed to be capable of ensuring individual freedom by procedurally tying public laws to the common will of its citizens.

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[3] Kant (1797), § 41.

[4] Kant (1795), p. 64, B30 [354] second definitive article.

[5] Kant (1795), p. 69, B40 [357], third definitive article.

[6] Byrd and Hruschka (2010), p. 24.

[7] Kant (1797) [238].

[8] Kant (1797), § 41.

[9] Byrd and Hruschka (2010), p. 79.

[10] Kant (1797) §§ 41, 42.

[11] Kant (1797) § 47.

[12] Byrd and Hruschka (2010), p. 170.

The fact that there is no world state, but rather a multiplicity of states that coexist, leads to Kant's interstate law and cosmopolitan law.[13] Interstate law shall ensure that the juridical state within a state is not endangered. And cosmopolitan law addresses situations in which individuals leave their home country. In theory, these three legal regimes ensure universal freedom.

Either because he underestimated the contemporaneous status and the development of transnational activities beyond the degree of trade and refugee situations or perhaps because the time was simply not right for a more holistic cosmopolitan right, Kant only makes a claim for a true juridical state on the domestic level.[14] The legal concept is based on the premise that the state can secure the natural right of individuals within its jurisdiction and that a world state is not desirable or realizable.[15]

Humanitarian disasters in Somalia, Ruanda, Kosovo, Afghanistan, and elsewhere clearly question Kant's belief in the state as the principal ensurer of freedom. Nowadays, international reality is characterized by failed/failing state situations, by states that are unable or unwilling to ensure its citizens' rights, by globally active networks of non-state actors such as terrorists, pirates, and groups of organized crimes or multinational enterprises that contradict international human rights standards without being bound by them. What's more, modern borderless communication technologies boost global interdependencies between all kinds of actors. Additionally, the financial and economic crisis as well as natural disasters and ecological challenges have worked to underline the necessity of global political institutions and regulations.[16] Referring to the multifaceted processes of globalization, it is not surprising that the traditional nation-state of the nineteenth century seems to be overwhelmed[17] by the task of establishing inner state conditions that allow every citizen to execute her external freedom according to the categorical imperative.

In the article *Idea for a Universal History from a Cosmopolitan Perspective* (1784), Kant advocates a world state with coercive laws, a federation of peoples, the cosmopolitan republic. Following the concept of reason, all individuals that can mutually affect each other are entitled to oblige each other to enter the juridical state.[18] But as in a globalized world, political, social, and economic movements located in one state (or even on one continent) can very easily affect every human being no matter where. Thus, the necessity of building a lawful condition does not lead to a multitude of nation-states. The ultimate juridical state consists in a single

[13] Geismann (2011), p. 172.

[14] Habermas (1995), pp. 295 f.; Kersting (1998), pp. 538 f.

[15] Kant (1795), p. 80, B63 [367]; Kant (1795), pp. 64 ff., B30f. [354]; Carson (1988), pp. 177 ff.; Capps (2007), p. 18; Slaughter (1997), p. 183.

[16] In detail Held and McGrew (2007).

[17] Habermas (1998), pp. 122 ff.; Leibfried and Zürn (2006), pp. 41 ff.; Hurrelmann et al. (2007), pp. 7 ff.

[18] Hirsch (2012), pp. 481 and 488.

cosmopolitan world state.[19] The obligation to create a juridical state with others does not exclude people who live farther away. Every human being may inflict harm on the external freedom of another human being. To avoid this conflict, it is reasonable to enter into a cosmopolitan state with enforceable laws. Thus, the creation of states is a mere historical fact but not a reasonable means to ensure the natural right of men to freedom. States are a means to ensure individual freedom but are not ends in themselves. According to practical reason, the cosmopolitan state is a moral duty.[20]

This conclusion is often criticized. However, even if it must be admitted that some of the arguments brought up against the world state are well placed and point out some serious difficulties, first, most of the arguments brought up—such as the lack of governability of a world state—are speculative and not conceptual.[21] Second, most of those reasons can also be upheld against the creation of states in general.[22] Nevertheless, as states do not want the world state,[23] Kant eventually rejects the idea of a world state embracing every free being.[24] The fact that states do not want the world state does not inflict the moral duty to enter into a juridical state, but it hinders the installation of a true lawful condition from a realistic point of view.[25] In consequence, Kant develops a second best option of a federation of states that will lead the way to an approximation of the juridical condition.[26]

14.3 Kant Now

Kant's legal philosophy can help in understanding the dynamics of current global law. Furthermore, it might even provide current debates about the constitutionalization of international law with a theoretical underpinning.

The diverse challenges of globalization have caused efficiency deficits on the national level and therefore have gradually diminished the set of classical state functions.[27] Consequently, traditional state competencies have been increasingly transferred to transnational institutions that regulate the life of individuals alongside domestic law.[28] Due to the increased interpenetration of the national and the international, international law has come to address subjects and objects of

[19] Cf. Kleingeld (2012), pp. 40 ff.
[20] Habermas (2010), p. 382.
[21] Hirsch (2012), pp. 497 f.
[22] Höffe (2010), p. 250.
[23] Kant (1795), p. 68, B38 [357]; Kant (1797), p. 40, §D [231].
[24] Carson (1988), pp. 201 ff.
[25] Kleingeld (2012), p. 51.
[26] Kant (1797), p. 467, § 54.
[27] Held (1995), p. 102.
[28] Simma et al. (2012), pp. 163 f. at 70.

domestic law.[29] Concomitant with the shrunken state functions and the weakening of state sovereignty came the demand for a more cosmopolitan legal order. Despite the fact that Kant's remarks on cosmopolitan law remained very limited, his legal philosophy can still serve as a blueprint for a supranational legal order. Due to the categorical reasoning, the underlying principles of his state law also hold true in other legal orders.[30] But what ingredients are needed to support the true Kantian juridical condition that can cope with twenty-first century challenges?

14.3.1 A Multilevel Legal Order

As a matter of historical fact, the Kantian second-best option of interstate coordination reflects the origins of the international legal order. The foundation of the United Nations (U.N.) after two world wars in 1945 through state contract clearly demonstrates the demand for transnational solutions. Originally, the U.N. represented the consent-based structure of a power-coordinative international legal order. Since the twentieth century, the coordinative part is consecutively replaced by cooperative elements. This development came along with the veil-piercing powers of the U.N. Security Council. The competences of the U.N. Security Council were gradually widened to the point where it started to authorize humanitarian interventions,[31] to create general and abstract norms like a legislator,[32] to establish international criminal tribunals, and to address non-state actors individually in its resolutions.[33] Thus, the U.N. Security Council has powers that equal or even surpass state powers. However, despite the enlarged powers of the U.N. Security Council and the growing need for global approaches, the U.N. does not establish a cosmopolitan legal order that negates the natural state universally. It rather establishes what Kant called a federation of states.[34]

Kant advocates for a loose federation of states for pragmatic reasons. Categorically applied, the postulate of Public Law demands a world state in which every individual is a cosmopolitan citizen. Here, the *exeundum* obligation could demand for a single cosmopolitan state that dissolves all states. Alternatively, it could lead

[29] Besson (2009), p. 349.

[30] Byrd and Hruschka (2010), p. 188.

[31] Lillich (1995).

[32] U.N. Doc. S/RES/1373 (2001); U.N. Doc. S/RES/1540 (2004).

[33] In details, see Steiger (2013).

[34] Kant (1795), B30 [354], second definitive article.

to a state of states. Keeping in mind that nation-states exist and are still believed to fulfill important tasks in regard to the protection of their citizens and their cultural particularities, today cosmopolitan law is often discussed referring to multilevel constitutionalism or constitutional pluralism.[35] It is accepted that there is a society that cannot be taken captive by state borders but will develop itself transnationally by building "communicative forms and rationalities."[36] Simultaneously, the processes of globalization made state sovereignty a porous concept.[37] Thus, public international law has been gradually reconceptualized from a state-centric to a more value-driven,[38] cosmopolitan global law.[39] The Kantian legal philosophy is compatible with a legal order that allows states to fulfill their remaining functions and that authorizes supranational institutions to administer global challenges. Especially the protection of fundamental human rights and the maintenance of peace would fall into the latter's set of competencies.[40]

14.3.2 Human Rights as Normative Ground: Strong Individuals

Based on the natural right of all men, the end of any legitimate legal order is the protection of individual freedom.[41] The natural right to freedom as well as the postulate of Public Law ask for a legal regime that provides every human being with basic rights that ensure the execution of external freedom. As argued above, domestic state law alone cannot fulfill this task. In order to peremptorily ensure individual freedom, a global order is required that provides the individual with a legal position linked to a set of individual rights and adequate protection mechanisms. In this regard, legal position means the recognition of every individual as a legal person carrying the natural right to freedom. This necessitates protectable individual rights.

Indeed, current developments in international law mirror the normative quality of fundamental human rights. Since the emergence of international human rights, public international law holds more and more direct rights and duties for the individual. And since the Nuremberg trials, it is generally unchallenged that the individual is also bearer of international human rights obligations and therefore

[35] Kleingeld (2012), p. 55; Habermas (2010), pp. 392 ff.; Kumm (2009), pp. 272 ff.; Peters (2009); von Bogdandy et al. (2008), pp. 1398 f.

[36] Stone Sweet (2012), pp. 61 f.

[37] Zumbausen (2012), pp. 33 f.; Peters (2009), p. 398, Habermas (2008), p. 444.

[38] Tomuschat (2001), p. 162.

[39] Meron (2006); Held (1995), pp. 103 ff.

[40] Habermas (2010), p. 400.

[41] Habermas (2005), pp. 338 and 356 ff.; Peters (2009), p. 398.

bound directly by international law.[42] Benhabib asserts in this respect even the transition from international human rights norms to cosmopolitan norms of justice.[43] Further, the U.N. Security Council has started to address non-state actors as bearers of international legal duties.[44] In the case of recognized *jus cogens* norms, the superiority of the norm goes without saying, but also human right norms without *jus cogens* character might influence the norm corpus of the international legal order through means of interpretation.[45] The creation of new institutions such as U.N. tribunals has created opportunities for a new, dynamic interpretation of existing norms. Courts increasingly apply a teleological and purposeful approach while sometimes even overriding the ordinary meaning of a treaty.[46] Thus, through the means of interpretation, fundamental human rights are being granted a particular status within the international legal order. Human rights law can be seen as a catalyst for the constitutionalization of international law.

14.3.3 Legitimacy of Global Law

According to Kant's legal philosophy, public laws are the mere transformation of the (individualized) common will of all.[47] In this regard, the legitimacy of laws is linked to the will of every individual as a self-governed being. This requires a legal order that provides procedures that allow the individual to participate in the lawmaking process. This is precisely one of the main arguments brought up against global constitutionalism.[48] The globalization of policy making and the transfer of competences to transnational or even supranational institutions undermines the democratic legitimation through national decision-making procedures.[49] No detailed evaluation of possible methods to legitimize global law can be provided here. Nevertheless, it seems to be evident that in order to play a genuine role in regard to legitimacy, foremost decision-making processes must be made transparent for the slowly emerging global society. Furthermore, the lawmaking process requires a forum of debate, means to affect the outcome of the process, and opportunities of norm contestation.[50,51] So far, Held rightly argues in favor of a cosmopolitan model of democracy.[52]

[42] von Arnauld (2012), p. 22 § 2 at 66; Peters (2009), p. 398; Frau (2013), pp. 13–20.
[43] Benhabib (2006), p. 16.
[44] Steiger (2013), pp. 70 ff.
[45] Addo (2010), Meron (2006), and Gondek (2009).
[46] Meron (2006), p. 444.
[47] Kant (1797), pp. 130 ff. § 47 [313].
[48] Maus (2011), pp. 375 ff.; Dobner (2010), pp. 141–161.
[49] Steffek (2007), p. 112.
[50] Wiener (2014), pp. 190–209.
[51] For an overview, see Steffek (2007), pp. 109–129.
[52] Held (1995), pp. 231 ff.

As the end of every legal order is to ensure individual freedom, adequate protection mechanisms are inevitable. We cannot seriously talk about individual rights if we don't connect those rights with adequate protection mechanisms.[53]

However, in current global law, the mechanisms to protect subjective rights are underdeveloped. As diplomatic protection is a mere relict of state-centered international law and does not provide for true legal protection, beyond the state, the individual is left with a weak legal position.[54] However, the lesser the nation-state's capacity to ensure human rights on a pure domestic level, the higher the need of empowerment of the individual on the global domain. This assessment goes hand in hand with the need for adequate and globally competent institutions.[55]

14.4 Conclusion

Referring to Kantian premises allows mounting an argument of principle in favor of a cosmopolitan legal order. Taking the Kantian postulate of Public Law seriously, the installation of a cosmopolitan legal order is inevitable. Every discussion about global constitutionalism and the evolution of global law and its institutions must consider the end of every legal order. Neither the state nor the law is an end in itself but a means to ensure the true end of law: individual freedom.

Consequently, every legal order, no matter if domestic or cosmopolitan, must grant all human beings a legal position that mirrors the recognition of individual freedom as end of the law. It follows from Kantian premises to recognize the individual as a legal person with a set of subjective rights and, furthermore, adequate protection mechanisms. This assessment also holds true in the global realm. On these grounds, it is necessary to recognize the individual as the principal subject of global law, also to create adequate deliberative mechanisms that allow individual participation in the global lawmaking process and to implement individual legal remedies that award every human being the authority to defend his rights.

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[53] Byrd and Hruschka (2010), p. 189.

[54] See EuGH, Judgement of 18. July 2013—C-584/10P (Kadi) at 133 referring to ECHR of 12 September 2012—No. 10593/08 (Nada/Schweiz) at 211.

[55] Byrd and Hruschka (2010), p. 189; von Forst (2007), pp. 321 and 355 f.

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Part VI
European Union and Human Rights

Chapter 15
Human Rights Clauses in EU Trade Agreements: The New European Strategy in Free Trade Agreement Negotiations Focuses on Human Rights—Advantages and Disadvantages

Tobias Dolle

> [. . .] The aim of our commercial policy is also to project our values with respect to human rights [. . .] with respect to the rights of workers, and they are, and they will be, an integral part of my approach with respect to trade policy.[1]

15.1 Introduction

Human Rights and Trade Agreements lie at the core of European policies. The policies are based on a long history of economic cooperation and integration in order to protect Human Rights and to establish and maintain a high level of Human Rights protection. Although recent developments have emphasized a more streamlined approach to the integration of Human Rights issues into other areas of action, the issue of Human Rights has already influenced European external policies for several decades. Thus, while certain aspects of this policy may be deemed "new," the general approach has been established for a long time. Starting point for the discussion on integrating Human Rights clauses into EU external policy was a 1977 massacre in Uganda at a time the EU had committed development assistance to Uganda but did not wish to contribute to Human Rights abuses in Uganda. More recent developments have actually shown the EU moving somewhat away from a strict approach of including Human Rights clauses in its agreements and thereby contradicting its own policy guidelines and rhetoric.

[1] Karel de Gucht, EU Trade Commissioner, 10 January 2010.

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This chapter will briefly highlight the development of the integration of Human Rights clauses into European Trade Agreements, explain the *status quo*, and focus on the existing advantages and disadvantages.

15.2 Human Rights Clauses in EU Trade Agreements

The European Union has been a particularly strong proponent of Human Rights. This is reflected by a long history of political and philosophical debate on the issue across the European nations. The foundation of the European Communities and its evolution towards the European Union was in several ways a direct reaction to the horrific events of World War II, and according to Article 2 of the Treaty on European Union, the EU is founded on the core values "of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights." Founded on these values, the EU aims at aligning its actions with them and at acting accordingly. Article 3 of the Treaty on European Union states that the EU "[. . .] shall uphold and promote its values and interests [. . .]" and "[. . .] shall contribute to [. . .] the protection of human rights [. . .]." According to Article 21 of the Treaty on European Union, the external actions of the EU "[. . .] shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." Consequently, the EU has to take account of the issue of Human Rights when dealing with other countries and negotiating and concluding international agreements.

One way to advance this policy objective of advancing Human Rights and democracy in the wider world has been the inclusion of Human Rights clauses in agreements negotiated and concluded with third parties. The EU is one of the rare examples around the world to include general Human Rights clauses in its agreements. Another prominent example is the inclusion of clauses concerning worker's rights in free trade agreements, a practice often applied by the United States.

Still, the EU remains the strongest proponent of the inclusion of Human Rights clauses or references to Human Rights in its agreements. This has been affirmed by EU Trade Commissioner Karel de Gucht when he stated that "the aim of our commercial policy is also to project our values with respect to human rights, with respect to the protection of the environment, with respect to climate change, with respect to the rights of workers, and they are, and they will be, an integral part of my approach with respect to trade policy."[2] The EU has been pursuing this approach for quite some time now and has always encountered difficulties. A look back at the

[2] Minutes of the hearing of Karel de Gucht, then Commissioner-designate for Trade at the International Trade Committee of the European Parliament, 10 January 2010, p. 20.

evolution of the EU approach to include Human Rights clauses in Trade Agreements will lead the way to an analysis and evaluation of this strategy.

15.2.1 The EU and Free Trade Agreements

The European Communities were relatively reluctant to conclude free trade agreements with third countries, especially after the founding of the WTO and prioritizing its efforts on the multilateral level. Agreements were concluded, though, with neighboring countries and especially with countries expected to join the Communities at some point. This fundamentally changed with the slowdown and potential impasse of the WTO negotiations. The EU and nearly every other state or regional bloc began to negotiate and conclude free trade agreements with partner countries around the world. By now it is hard to estimate an exact number of free trade agreements as negotiations are ongoing and agreements are nearly concluded on a daily basis. By January 2013, more than 540 agreements were notified to the WTO (counting goods and services separately).[3] The EU officially observed a moratorium from negotiating bilateral agreements from 1999 to 2006 after the 1995 founding of the WTO and devoted all its efforts into the multilateral level.[4]

While negotiations do continue at the WTO, many countries are mostly devoting their efforts into negotiating bilateral free trade agreements and thereby circumventing the WTO and also the impasse in WTO negotiations.

15.2.2 Background of EU Human Rights Clauses

Human Rights clauses in EU Free Trade Agreements do have a considerably long history and have evolved over time. A closer look at their development will help the later analysis and evaluation of this approach.

15.2.2.1 Reason

While the EU has probably never been involved in as many parallel negotiations of bilateral free trade agreements as right now, the debate about including Human Rights clauses goes back to the 1970s. In 1977, a massacre took place in Uganda.[5] The EU relations with Uganda were governed by the Lomé I Convention, a treaty

[3] WTO Website, Trade Topic, Regional trade Agreements, http://www.wto.org/english/tratop_e/region_e/region_e.htm. Accessed 28 July 2014. Not all agreements concluded are notified though.

[4] Ahearn (2011), p. 2.

[5] Hoffmeister (1998), p. 11 (with further references).

concluded by the EU with the so-called African, Caribbean and Pacific (ACP) states. The EU had committed funds and payments of development aid and withdrew those funds as a reaction to the massacre in order to avoid contributing (financially) to the Human Rights violations.[6] The withdrawal of the payment naturally had a second objective, coercing Uganda to end the Human Rights violations. A direct consequence of the events in Uganda were the so-called Uganda Guidelines stating that "any assistance given by the Community to Uganda does not in any way have as its effect a reinforcement or prolongation of the denial of basic human rights to its people."[7]

Thus, the debate about the inclusion of Human Rights clauses in bilateral trade agreements did not constitute a decision by the European Communities to proactively advance its Human Rights values but a defensive reaction to concrete Human Rights violations in order to avoid contributing to the Human Rights violations. The debate that followed focused on this approach of avoiding EU involvement in Human Rights violations in third countries. There did exist certain legal problems, as there was no legal basis for the withdrawal of such payments or the suspension of the treaty or parts of the treaty. Consequently, the EU wanted to include a legal basis in the Lomé Agreement for suspending the agreement in case of such cases of Human Rights violations.[8] The debate remained mostly theoretical during the 1980s though the Lomé IV Convention, signed in 1989, did contain a reference to Human Rights, although without any potential legal consequences in case of Human Rights violations.[9] It was not until a 1990 cooperation agreement between the EC and Argentina that a more meaningful Human Rights clause was included.[10] Despite the discussion after the Uganda massacre, the Human Rights clause was included at the request of the Argentinian side.

Since the early 1990s, EU bodies have affirmed the EC's commitment to Human Rights and emphasized a "positive approach" favoring dialogue and declaring sanctions the last resort. Human Rights clauses became standard in agreements concluded by the European Communities; in May 1992, the EC established this approach by declaring that respect for democratic principles shall be "an essential part of agreements between the EC and the Conference on Security and Cooperation in Europe (CSCE) countries."[11] The first agreements concluded with regard to

[6] Bartels (2008), p. 2.

[7] "Uganda Guidelines" cited in Bartels (2008), p. 2; Hoffmeister (1998), p. 11.

[8] Bartels (2008), p. 6; Hoffmeister (1998), pp. 13 f. and 21 ff.

[9] Miller (2004), pp. 11 and 12; "Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries," 23 May 1995 COM(95) 216, p. 2; Hoffmeister (1998), pp. 38 ff.

[10] Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic, Official Journal of the European Communities, 26 October 1990, L 295: Article 1 (1): "Cooperation ties between the Community and Argentina and this Agreement in its entirety are based on respect for the democratic principles and human rights which inspire the domestic and external policies of the Community and Argentina." Hoffmeister (1998), pp. 100 f.

[11] Miller (2004), p. 13; Hoffmeister (1998), pp. 117 ff.

this approach included a similar provision. An Agreement between the European Economic Community and the Republic of Albania on trade and commercial and economic cooperation affirms in its Article 1: "Respect for the democratic principles and human rights established by the Helsinki Final Act and Charter of Paris for a new Europe inspires the domestic and external policies of the Community and Albania and constitutes an essential element of the present agreement."[12] This provision needs to be read with regard to Article 21 (3), which states that "The parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious violation occurs of the essential provisions of the present Agreement."

This constitutes an important and innovative development, especially considering the possible legal consequences. The wording makes reference to Article 60 (3) lit. b) of the Vienna Convention on the Law of Treaties (VCLT).[13] It states that "A material breach of a treaty, for the purposes of this article, consists in: [...] (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty." By designating the Human Rights clause an "essential element" of the treaty, the contracting parties are enabled to terminate "the treaty or suspending its operation in whole or in part" according to Article 60 (1) of the VCLT. Without any further explanation in the treaties themselves, the EC has created a strong legal basis for reaction to Human Rights violations. As this provision was also used in agreements with the Baltic States, it came to be known as the "Baltic clause."[14] This clause evolved into the "Bulgarian clause,"[15] which allowed for greater flexibility and enabled the parties to "take appropriate measures" but only after having had recourse to the Association Council and a political dialogue. This clause was integrated into agreements with Vietnam, South Korea, and Israel, as well as Association Agreements with Tunisia and Morocco and the revised Lomé IV Convention (all concluded in 1995).

It took the EC nearly 20 years to achieve an adequate solution for the question of reacting to Human Rights violations, but the EC did arrive at a firm clause enabling reactions.

15.2.2.2 Formalization of the Approach

After including strong and enforceable Human Rights clauses in its treaties, the EC began to consolidate and to formalize the approach.

[12] Agreement between the European Economic Community and the Republic of Albania, on trade and commercial and economic cooperation, Official Journal of the European Communities, 25 November 1992, L 343/2, 3; Cf. Hoffmeister (1998), pp. 124 f.

[13] Cf. Hoffmeister (1998), pp. 248 ff.

[14] Miller (2004), p. 13; Bartels (2008), p. 5.

[15] The term was coined due to its first use in the 1993 Europe Agreements with Bulgaria and Romania; cf. Hoffmeister (1998), p. 126.

Considering the different approaches, the Commission published guidelines on the integration of Human Rights clauses into EC agreements.[16] The decision established guidelines for the preamble of agreements (general references to Human Rights and Human Rights instruments) and for the body of the agreements (respect for democratic principles and human rights constitute essential elements of the agreement).

A "Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries"[17] again described the Commission's position on the issue, evaluated the implementation of the 1993 decisions, and proposed draft clauses to be used in future negotiation directives and upcoming agreements. After criticism and concern voiced by the European Parliament and the Council, the Commission aimed at improving "the consistency, transparency and visibility of the Community approach and to make greater allowance for the sensitivity of third countries and the principle of non-discrimination."[18]

The Commission revised the guidelines and proposed more elaborate standard clauses for the draft negotiating directives. There were no changes related to the references in the preamble of future agreements. The proposed articles for the body of the agreement included a clause defining Human Rights and democratic principles and a second clause on nonexecution of an obligation of the agreement. The Commission also proposed the insertion of an interpretative declaration regarding the nonexecution clause and the question of cases of special urgency that allow the taking of appropriate measures without having prior recourse to the Association Council. According to the proposed interpretative declaration, the violation of an essential element does constitute a "special urgency." The Communication was directed at the Council and the Parliament and was taken up only a few days later by the Council in the Council Conclusions. The Council concluded that "a suspension mechanism . . . should be included in Community agreements with third countries to enable the Community to react immediately in the event of violation of essential aspects of those agreements, particularly human rights."[19]

By 2001, the "essential elements clause" had been included in a plethora of agreements and applied to more than 120 countries. Since then, the EU continues to pay attention to the issue. A 2001 Communication from the Commission on the EU's role in promoting Human Rights and Democratisation in Third Countries sets forth the Commission's position on the issue and especially underlines the Commission's intent to reinforce Human Rights dialogues with partner countries.[20]

More recently, several documents have taken up the issue of Human Rights and the EU's external policies. The Commission published a Communication regarding

[16] COM Decision, 26 January 1993, MIN(93) 1137, point XIV.

[17] COM(95) 216 published on 23 May 1995.

[18] COM(95) 216, p. 5.

[19] Council Conclusions, 29 May 1995 cited in Bartels (2008), p. 3; Hoffmeister (1998), pp. 173 ff.

[20] COM(2001) 252 final, 8 May 2001.

the trade policy aspects of the strategy "Europe 2020: A strategy for smart, sustainable and inclusive growth" and underlined that the EU's trade and political relations are supposed to "encourage our partners to promote the respect of human rights, labour standards, the environment, and good governance [...]."[21] In late 2011, the Commission and the High Representative of the European Union for Foreign Affairs and Security Policy issued a Joint Communication to the European Parliament and the Council entitled "Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach"[22] and again highlighted the Human Rights clauses in EU agreements with third countries and the relevance of Human Rights for EU trade policy.[23] Finally, in 2012 the Council of the European Union agreed on a "Strategic Framework and Action Plan on Human Rights and Democracy."[24] The framework emphasized again that the EU will integrate the promotion of Human Rights into—among other policies—trade and investment policies. The Action Plan also referred to certain specific measures to further strengthen the role of Human Rights in EU trade policy, including the reinforcement of Human Rights dialogues with FTA partners.[25]

It seems obvious that the EU remains committed to promoting Human Rights through its external actions, including cooperation agreements and free trade agreements, and the guidelines call for Human Rights clauses to be included in all EU agreements. However, recent bilateral trade agreements do not always contain elaborate Human Rights clauses anymore as they have often been strongly opposed by the respective negotiating partners.

15.2.2.3 Further Examples After Formalization

After the formalization, Human Rights clauses have continued to be included in most agreements concluded by the EU. More recently though, especially with regard to agreements solely focused on trade, less elaborate clauses have been included—if present at all.[26]

The Association Agreements between the EU and the Mediterranean countries as well as the bilateral free trade agreements concluded with South Africa, Mexico, and Chile all include Human Rights clauses establishing respect for Human Rights and democratic principles as an essential element of the agreement. The most elaborate mechanism can be found in the 2000 Cotonou Agreement between the EU and the Group of ACP countries. The Cotonou Agreement, successor to the

[21] COM(2010) 612 final, 9 November 2010.

[22] COM(2011) 886 final, 12 December 2011.

[23] COM(2011) 886 final, 12 December 2011, p. 11.

[24] Council of the European Union, Press statement, 25 June 2012, document number 11855/12.

[25] EU Action Plan on Human Rights and Democracy, No. 11 (b).

[26] Paasch (2011), p. 14.

Lomé Conventions, contains a Human Rights clause in its Article 9,[27] and Article 96 and Annex VII establish a highly elaborate mechanism in case of violations of the principles set out in Article 9 (so-called Article 96 Consultations).

More recent agreements, however, often do not include Human Rights clauses. While the agreement between the EU and the Andean Community states of Colombia and Peru (concluded in 2010, signed in 2012) does include a Human Rights clause in its Article 1, the bilateral free trade agreement concluded between the EU and the Republic of Korea (signed 2009, in force since 2011) does not include such a clause at all. The agreement does, however, include a chapter concerning Trade and Sustainable Development, which makes reference to environmental and labor protection. The provisions on labor protection are very detailed and constitute probably the highest number of specifically defined Human Rights in an EU trade agreement so far.[28] It remains to be seen, though, how effectively these provisions will be implemented over time.

Many agreements do include Human Rights clauses, though there are some notable exceptions. So far, no agreement concluded by the EU with a developed country includes a Human Rights clause. In fact, agreements between the EU and Australia as well as New Zealand did not materialize due to Australia's and New Zealand's opposition to the EU's intent of including Human Rights clauses.

Another notable exception is sectoral trade agreements. Agreements on specific goods, such as fisheries, steel, or textiles, do not include Human Rights clauses even though they do sometimes cover areas prone to Human Rights violations (i.e., labor conditions of textile workers). A new development is mentioned in the 2012 EU Human Rights Report[29]: the Commission indicated in a 2011 Communication that it wished to insert a Human Rights clause into the existing bilateral fisheries agreements. In 2011, protocols inserting the clause into the respective agreements had already been initialed with Cape Verde, Comoros, Greenland, Guinea-Bissau, Mauritius, Mozambique, São Tomé and Príncipe, and the Seychelles.[30]

Finally, current negotiations between the EU and the Gulf Cooperation Council and with India have been difficult due, to a large extent, to the reluctance of the Gulf states and of India to accept the EU's proposal for Human Rights clauses. It remains to be seen if the EU will succeed in including such clauses into the agreements.

[27] Article 9 (2) ACP-EC Partnership Agreement ("Cotonou Agreement"): "[...] Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement."

[28] Sen and Nair (2011), p. 430.

[29] Since 1999, the EU has annually published a "Human Rights Report" detailing the EU's actions in this policy area and containing a section on the Human Rights clauses in EU agreements. The latest report was published in June 2012 for the year 2011, entitled "Human Rights and Democracy in the world – Report on EU action in 2011," available on the website of the EU External Action Service, http://eeas.europa.eu/human_rights/docs/index_en.htm. Accessed 28 July 2014.

[30] Human Rights and Democracy in the world – Report on EU action in 2011, p. 21.

Reasons for this strong opposition will be examined after a closer look at the actual implementation of Human Rights clauses.

15.2.3 Application of Human Rights Clauses in EU Agreements

Before looking at their advantages and disadvantages, their potential problems and opportunities, it is essential to examine the actual use and implementation of the Human Rights clauses in EU trade agreements. In general, there exist two possible means to enforce the Human Rights clauses. The first option consists of a resolution of the issue through consultations. The second option refers to an approach based on coercion (the agreement or parts of the agreement may be suspended, trade preferences granted or withdrawn). Depending on the case at hand, a combination of the two options may be the solution of choice.

The 2012[31] EU Human Rights Report covering the year 2011 explains that no new agreements containing a Human Rights clause were signed or came into force in 2011,[32] though consultations were held concerning a case of Guinea Bissau and making use of the Article 96 Consultations of the ACP–EU Cotonou Agreement. The Article 96 Consultations under the Cotonou Agreement are in fact the clauses that are most regularly put into action. Article 96 Consultations were held with Togo, Niger, Guinea-Bissau, Comoros, Côte d'Ivoire, Haiti, Fiji, Liberia, Zimbabwe, the Central African Republic, and Mauritania.[33] The consultations did often lead to an improved situation and a better protection of Human Rights.[34] Apart from the Article 96 Consultations, there have been several cases in which development aid was withheld; this concerns cases of Belarus, Russia, and the Palestinian Authority.[35] There have, however, also been cases in which other EU institutions, particularly the EU Parliament, as well as nongovernmental organizations have called for EU action and the EU Commission did not act.[36] This has lead to accusations of the existence of a lack of coherence and of the Commission applying a double standard.[37]

[31] An overview of the previous application can be found in Hoffmeister (1998), Chapters 11–13.

[32] Human Rights and Democracy in the world – Report on EU action in 2011, p. 20.

[33] Paasch (2011), p. 13; Website of the Council of the European Union, http://www.consilium.europa.eu/policies/eu-development-policy-(ec-wbesite)/main-themes/cotonou-partnership-agreement/consultations-under-articles-96-and-97-of-cotonou-agreement/policy-archive?lang=en. Accessed 28 July 2014.

[34] Hafner-Burton (2005), pp. 610 and 611.

[35] Paasch (2011), p. 14.

[36] This concerns cases of Algeria, Israel, and Vietnam (Bartels 2008, p. 2; Paasch 2011, p. 14).

[37] Bartels (2008), pp. 11–13.

But other factors may need to be taken into account, especially the potential effectiveness of the clauses' implementation.[38] In a study for the European Parliament,[39] the cases and their outcomes were examined, and the study concludes that a distinction can be made between cases in which a general political crisis exists (due to mutiny, coup d'état, flawed elections, etc.) and individual cases of sudden and grave human rights violations (so far, the EU has not acted in cases of "mere Human Rights abuses"[40]). In cases of a general political crisis, measures taken by the EU can be deemed more successful, while in cases of Human Rights abuses, EU reactions have not been as successful. The success in countries with new or illegitimate regimes is attributed to the fact that the countries in question (Central African Republic, Ivory Coast, Fiji, Haiti, and Togo) have aimed at achieving closer relations with the EU and the potential (financial) benefits that go along with it.[41] The lack of action in some cases may therefore also be attributed to a negative forecast concerning the potential outcome. Then why does the EU act in certain cases of grave human rights abuses even though success may be limited? A change of perspective may be necessary. In the case of the EU financially supporting a government accused of grave human rights violations, the reason for action may be the very reason the Human Rights clauses were included in the first place—to prevent EU financial aid to contribute to the Human Rights violations.

The EU's actions may therefore be more coordinated than they might appear even though this may be unsatisfactory from a Human Rights point of view.

15.3 Advantages and Disadvantages: Problems and Opportunities

Since its introduction into EU policies in 1977, the issue of Human Rights in EU agreements has developed into a formal policy and has been applied in several cases. There does, however, still exist a debate concerning the mere existence of this approach, as well as a debate concerning the actual application of the policy.

15.3.1 Advantages and Opportunities

As has already been shown, there exist very legitimate reasons for the EU approach.

[38] Bartels (2008), p. 12.

[39] Bartels, The Application of Human Rights Conditionality in the EU's bilateral Trade Agreements and other Trade Arrangements with Third Countries, November 2008.

[40] Bartels (2008), p. 12.

[41] Bartels (2008), p. 12.

The EU does not wish to contribute—financially or politically—to Human Rights violations in its partner countries. If a treaty binds the EU and another country, there needs to be a legal option for the EU to react in case of grave Human Rights violations. This will be particularly relevant in cases with a development focus as these are the countries often requiring financial assistance and some of them are prone to political crisis. A reaction by the EU may as well be necessary due to general EU foreign policy considerations. The success of this approach in cases of new or illegitimate regimes further confirms the legitimacy of the EU approach.

There has also been a more general support for the inclusion of Human Rights clauses in EU agreements, particularly in trade agreements beneficial for partner countries. The idea behind this support is the linkage of the EU's Human Rights objectives with its trade policy and thus creating an incentive to ensure the observance of the Human Rights clause in order to keep benefitting from the agreement.

Why may this be necessary? The idea of tying trade policy benefits to the compliance with Human Rights clauses may make trade agreements more effective to achieve Human Rights objectives than general Human Rights treaties that do not include any sanctions in cases of noncompliance.[42] Human Rights agreements are an important means of establishing Human Rights standards and thereby triggering domestic policy changes in the countries signing the respective agreement.[43] These agreements do not, however, usually include any provisions on implementation and enforcement; they are based on the idea that states are persuaded by the Human Rights agreements to act accordingly. Despite having signed Human Rights treaties, many countries purposefully violate the protected Human Rights without any direct consequences. While some trade agreements in regions outside of Europe also contain Human Rights clauses, they are usually considered "soft" since they only establish an obligation of the contracting parties to adhere to the Human Rights principles but do not contain any mechanisms to enforce the Human Rights clause. Agreements with "hard" Human Rights clauses tie the benefits of the agreements to the compliance with the Human Rights clause and put an emphasis on coercion rather than on persuasion. The change of behavior in order to comply with the Human Rights clause may thus constitute a minor side payment for benefitting—in case of preferential trade agreements—from better market access.[44] Several cases have shown the success of the Article 96 Consultations with ACP countries under the Cotonou Agreement.[45]

Trade agreements may be a very good choice as an incentive for compliance with Human Rights principles. Most countries have a strong interest in concluding preferential trade agreements and in keeping the benefits of the agreements.

[42] Hafner-Burton (2005), p. 593.

[43] Hafner-Burton (2005), p. 594.

[44] Hafner-Burton (2005), p. 606.

[45] Cf. the remarks concerning Article 96 Consultations in Sect. 15.2.3.

This constitutes a rather strong incentive to adhere to the clauses in the agreement, including the Human Rights clauses. Necessary for said adherence is of course a consistent application of the Human Rights clause and the consequences provided in case of noncompliance.

The inclusion of Human Rights clauses also highlights the EU's commitment to the protection of Human Rights, which is stipulated in the EU treaties.

Human Rights clauses therefore do attain two major objectives: they ensure that EU policies are enacted it a way that is consistent with EU principles, on one hand, and international law, on the other. Finally, they have proven successful in a certain number of cases—a fact that should not be underestimated.

15.3.2 Disadvantages, Problems, and Criticism

Despite the success of the Human Rights clauses, they have also been strongly criticized. Criticism mostly stems from two separate perspectives. On one hand, there is the Human Rights perspective, particularly criticizing the way it is used and highlighting the deficiencies of the EU approach. On the other hand, there is the trade perspective, assessing the Human Rights clauses on the basis of EU trade policy.

Some of the criticism has already been mentioned. The EU approach is being depicted as lacking coherence and creating double standards. The prospects for success may be the very pragmatic reason for the EU when deciding on the reaction to noncompliance with Human Rights clauses. However, this allegedly inconsequential approach may lead to less compliance by partner countries and thereby highly weaken the effectiveness of the Human Rights clauses. And even if the EU does act in cases of noncompliance, the success also heavily depends on the other party.[46] It does not seem to be the case, however, that countries with a repressive regime avoid being party to an agreement with a Human Rights clause.[47]

A lack of coherence can also be observed with regard to the types of EU agreements containing Human Rights clauses. Until 2011, EU sectoral agreements did not contain any Human Rights clauses and thereby making the EU lose some of its credibility. This situation seems to be changing, though, since the EU has begun negotiating protocols inserting Human Rights clauses into its fisheries agreements. The same lack of Human Rights clauses may be observed concerning recently concluded agreements. The EU approach needs to be consistent in order to produce the results the EU is aiming at. Although some of the more recent agreements do contain a Human Rights clause, some of them lack a clause concerning its implementation or enforcement. Without the ability to put pressure on the other party, any Human Rights clause will lose its effectiveness. In order to improve the

[46] Hafner-Burton (2005), p. 607.

[47] Hafner-Burton (2005), p. 608.

effectiveness of the Human Rights clauses, the Commission introduced the idea of creating working groups as part of the cooperation agreements to discuss Human Rights issues.[48]

The scope of the Human Rights clauses has also drawn some criticism. The clauses are mostly used only with regard to so-called first generation Human Rights (i.e., Human Rights protecting civil and political liberties). Other countries, like the United States, put a stronger emphasis on protecting workers' rights.[49] However, the scope also depends on the way the Human Rights clause is interpreted, and EU Human Rights clauses may thus be open to a broader interpretation than currently used.

A more forceful opposition originates in the trade policy area. Some see Human Rights clauses as having nothing to do with the trade provisions covered in the agreement and regard the Human Rights clause as an extraneous element of trade agreements. The clauses are seen as being inappropriate in a trade agreement, and they have actually prevented some agreements from being concluded. Major examples include trade agreements between the EU and Australia, as well as New Zealand. In 1997, the EU was in the process of negotiating framework agreements with Australia and New Zealand and insisted on the inclusion of Human Rights clauses as this has been practiced since 1995.[50] While Australia was not opposed to references to Human Rights in general, Australia did not accept an "operational" Human Rights clause and the inclusion of a clause concerning actions in case of noncompliance.[51]

A more recent example concerns the negotiations between the EU and India regarding a comprehensive bilateral free trade agreement, as well as the negotiations between the EU and the Gulf Cooperation Council (GCC) regarding a bilateral free trade agreement. The negotiations with the GCC have stalled, one of the reasons used to be the insistence of the EU regarding a Human Rights clause. The negotiations with India are still ongoing, but they are only slowly progressing, which was for some time primarily attributed to the EU's insistence regarding the inclusion of a Human Rights clause.[52] Even if the debate concerning the Human Rights clause may not always impede the conclusion of the agreement, it often substantially prolongs the negotiations.

Another major point of criticism concerns the intention of including Human Rights clauses into trade agreements. It is asserted that the inclusion of a Human Rights clause linking the benefits of the agreement to the issue of Human Rights compliance is actually a method of adding a layer of conditionality to the agreement and being a sign of protectionism. The assertion, therefore, is that the issue of Human Rights protection is only an excuse for protectionism.

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[48] Miller (2004), p. 35.

[49] Hafner-Burton (2005), p. 614.

[50] Miller (2004), pp. 58 and 59; Bartels (2008), p. 3.

[51] Miller (2004), pp. 59 and 60; Bartels (2008), p. 3.

[52] Sen and Nair (2011), p. 433.

The issue has especially been raised in the case of labor rights provisions in free trade agreements negotiated and concluded by the United States. One may argue that the area of worker's rights has a closer connection to a trade agreement than a general Human Rights clause, and in fact the inclusion of such clauses has been advocated by United States labor unions wanting to assure a similar level of competitiveness. However, new labor standards and regulations may weaken the developing countries' competitiveness in the time after the conclusion of the agreement.[53] Labor unions often feared the conclusion of free trade agreements because of potential job losses in the United States. Including labor right's provisions in the agreements might weaken the other party's competitiveness, and this is one the reasons the clauses have been criticized of constituting an element of protectionism.[54] One of the first major free trade agreements to make reference to labor rights is the North American Free Trade Agreement (NAFTA) in which the labor rights provisions are included in a side agreement (North American Agreement on Labour Cooperation). A more positive interpretation of this approach is the assertion that the provisions for labor and environmental rights may contribute to further leveling the playing field.[55]

The fact that the Human Rights provisions are not always enforced adds to the impression that there exists another motivation than assuring a higher level of Human Rights protection.

A second layer of criticism in this area concerns the general situation of developed countries and developing countries. Human Rights clauses are often proposed by developed countries in agreements with developing countries. This often leads to the assumption that developing countries impose their values and Human Rights standards upon the developing countries. Considering the colonial history, this is often a cause of irritation and perceived as condescending.[56] Many developing countries see this as a violation of their sovereign rights.[57]

The question remains if it is in fact desirable to make something as sensitive as Human Rights protection a sort of trade policy instrument and thereby a subject of negotiations. Negotiating partners also fear the use of the Human Rights clause as a veritable "trade weapon" that would discredit the approach if it were used to achieve trade policy objectives and not to ensure the protection of basic Human Rights.[58] There is also a risk that Human Rights and Human Rights clauses may be sacrificed in cases in which a strong negotiating party is opposed to the inclusion and the other party has a strong desire to conclude the agreement.

If states intend to use the area of trade policy to advance Human Rights, the WTO may be the more appropriate forum to pursue this goal. In fact, it has been

[53] Sen and Nair (2011), p. 424.
[54] Sen and Nair (2011), p. 425.
[55] Sen and Nair (2011), p. 423.
[56] Zwagemakers (2012), p. 5.
[57] Miller (2004), p. 40.
[58] Sen and Nair (2011), pp. 433 and 434.

tried to adopt certain provisions on workers' rights at the WTO, though these attempts have never succeeded.[59]

Nongovernmental organizations (NGOs) especially criticize the fact that the Human Rights clauses do not explicitly apply to Human Rights violations caused by the trade agreement itself. This includes the fact that the agreements tie tariffs and market access to compliance with the Human Rights clause when the agreements themselves may have negative effects on the situation in developing countries and may even be the cause for an aggravation of the Human Rights situation in the respective country. This has been taken up by the recently published *EU Action Plan on Human Rights and Democracy*, which calls for the development of a methodology "to aid consideration of the human rights situation in third countries in connection with the launch or conclusion of trade and/or investment agreements."[60] NGOs also call for an assessment of the positive and/or negative impacts the agreements may have on the Human Rights conditions in the respective country.[61] The ACP–EU Cotonou Agreement does contain a provision that can be interpreted in a way to include Human Rights violations caused by the agreement. Article 9 (4) of the Cotonou Agreement stipulates that "The Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance." Article 9 enumerates the "essential elements regarding human rights, democratic principles and the rule of law, and fundamental element regarding good governance" and may thus be construed in a way that negative impacts caused by the agreement constitute a reason for consultations or the suspension of the agreement.[62]

15.4 Conclusion

The issue of Human Rights clauses is rather complex. Many aspects have to be taken into consideration. Negotiations may be prolonged, some agreements are not concluded at all, and the effectiveness of the clauses is put into question. A major trading power as the European Union is kept from concluding important agreements due to the insistence of the inclusion of Human Rights clauses, extraneous provisions to the trade subject at the heart of the agreements. But still the issue of the protection of Human Rights constitutes one of the core values of the European Union. Even if the costs are high and success is not guaranteed, it does seem plausible for the EU to continue with its strategy to include Human Rights clauses in the agreement the EU negotiates. It enhances the credibility of the EU, and in the

[59] Hafner-Burton (2005), p. 624.

[60] Council of the European Union, Press statement, 25 June 2012, document number 11855/12, EU Action Plan on Human Rights and Democracy, No. 11 (a).

[61] Paasch (2011), p. 16.

[62] Paasch (2011), p. 15.

matter of Human Rights, even some success should be regarded a positive result. And while generally there should not be a need for an incentive to maintain a high level of Human Rights protection, if the incentive does improve the situation, it seems to be worth the effort. The approach may also take up the criticism of some NGOs concerning the Human Rights situation in the partner countries with whom the EU is engaged in negotiations. The legitimate criticism discussed should not be disregarded though. The EU approach needs to be further evaluated and adjusted in order to improve it. It remains to be seen if the recently adopted *Action Plan* can lead to improvements.

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Chapter 16
The Binding Effect of EU Fundamental Rights for Switzerland

Astrid Epiney and Benedikt Pirker

16.1 Introduction

The relationship between the EU and Switzerland is determined nowadays by the so-called Bilateral Agreements. Having rejected by a clear majority of the Swiss cantons and a narrow majority of the Swiss people accession to the European Economic Area on December 6th 1992, Switzerland opted to follow what is often referred to as the 'bilateral path' to foster economic relations to the EU internal market. Switzerland's strategy essentially consists thus of the conclusion of sectoral agreements with the EU and also of a simultaneous unilateral effort of adapting Swiss law autonomously to the ever-changing requirements of EU law, in particular but not limited to areas covered by the EU internal market.[1]

Two 'packages' of Bilateral Agreements between the EU and Switzerland can be distinguished. The first package was signed in June 1999 and entered into force collectively in 2002. These agreements cover the topics of free movement of persons, research, technical barriers to trade, agricultural products, land transport, air transport, and public procurement.[2] The second package of agreements was signed in 2004 and entered into force separately during the subsequent years. These agreements cover the topics of the taxation of pensions received by former EU

The present contribution is partly based on an earlier book contribution; see Epiney (2013b), pp. 141 ff.

[1] See, on the promises and pitfalls of this strategy of 'autonomous implementation' Maiani (2013), pp. 29 ff.

[2] See, for the full text in English, respectively OJ 2002 L 114, 6 ff.; OJ 2002 L 114, 468 ff.; OJ 2002 L 114, 369 ff.; OJ 2002 L 114, 132 ff.; OJ 2002 L 114, 91 ff.; OJ 2002 L 114, 73 ff.; OJ 2002 L 114, 430 ff.

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officials resident in Switzerland, processed agricultural goods, the participation of Switzerland in the European Environmental Agency, statistics, the participation of Switzerland in various programs concerning education, professional training and youth, 'Schengen' and 'Dublin,' the taxation of savings income, and the combat against fraud.[3]

The various agreements exhibit different structures and objectives and have thus typically been allocated categories: 'Cooperation agreements' provide for the participation of Switzerland in EU programs, while 'liberalisation and harmonisation agreements' such as the Free Movement of Persons Agreement achieve partial access to the EU internal market; 'partial integration agreements' establish a very close cooperation in particular sectors, typically with an even somewhat integrated institutional framework between Switzerland and the EU.[4] The present contribution does not purport to examine the content of the Bilateral Agreements in further detail;[5] instead, it focuses on the absence of provisions on fundamental rights in the agreements and the questions raised by this absence. This absence is all the more relevant in the light of the topics covered by the agreements, some of which are highly likely to raise fundamental rights concerns such as the free movement of persons or Schengen and Dublin.

At a first look, the transfer of parts of the EU legal *acquis* seems thus to exclude the case law of the Court of Justice of the European Union (CJEU) on fundamental rights and the EU Charter of Fundamental Rights, which codifies to a considerable extent this case law.[6] Consequently, this case law could be considered irrelevant in the application of the Bilateral Agreements in Switzerland. However, such a conclusion proves deceptive upon a closer look: EU fundamental rights are to be respected throughout the interpretation and application of all EU law, which could also have an impact on the interpretation and application of the Bilateral Agreements. This claim is examined in the present contribution, detailing first the manner of 'transfer' of parts of the EU legal *acquis* into the agreements and the relevance of the CJEU's case law for their interpretation (Sect. 16.2). The scope of the binding effect of EU fundamental rights is subsequently assessed (Sect. 16.3), to conclude lastly with some observations on the consequences of the thesis put forward in this paper (Sect. 16.4).

[3] See again, respectively, Agreement of 26 October 2004, not published in the Official Journal; OJ 2005 L 23, 19 ff.; OJ 2006 L 90, 36 ff.; OJ 2007 L 303, 11 ff.; OJ 2008 L 53, 50 ff.; OJ 2008 L 53, 5 ff.; OJ 2004 L 385, 30 ff.; OJ 2009 L 46, 8 ff.

[4] See for this categorisation, Felder (2006), pp. 101 f.

[5] See, for a recent overview of the Bilateral Agreements and their integration mechanisms, Pirker and Epiney (2014). See also for an instructive overview on the current state of relations between the EU and Switzerland the Report of the European Parliament (2010) Internal Market beyond the EU: EEA and Switzerland.

[6] See generally, on the Charter and on EU fundamental rights law and case law, Iglesias Sanchez (2012), De Búrca (2011), and Bryde (2010), *passim*.

16.2 Mechanisms of 'Transfer' of the EU Legal *Acquis* in the Bilateral Agreements

To fully understand the potential relevance of EU fundamental rights in the application of the Bilateral Agreements in Switzerland, we must first turn to the mechanisms of transfer that the agreements establish for the parts of the EU legal *acquis* that they cover. In a second step, we then assess to what extent the interpretation given to EU law by the CJEU is also pertinent to interpret the 'transferred' or parallel norms contained in the Bilateral Agreements.

16.2.1 Transfer Mechanisms in the Bilateral Agreements

A large number of the Bilateral Agreements are based in different ways, but to a substantial degree on the EU legal *acquis*.[7] The object and material scope of each agreement determines the degree of transfer: some agreements aim for integration of Switzerland into parts of EU law more than others and require thus a more far-reaching adaptation to the existing EU legal *acquis*.

Technically, the transfer of EU law is implemented in the respective agreement, either through a direct reference to EU legal acts such as secondary legislation[8] or through the use of provisions that replicate or at least resemble in their wording EU legal provisions.[9] Since the agreements are treaties under international law, in principle the obligations they contain are formally of a static nature: in particular, changes in EU law to which they refer or that they replicate do not 'automatically' modify the content of a treaty. However, since the objective of the agreements is to secure a legal situation in Switzerland as parallel as possible to the one in the EU, specific provisions in the agreements provide for an integration of new EU legislative developments into the agreements. Three mechanisms can be distinguished for this purpose.

First, the Joint Committees formed by representatives of the contracting parties are often attributed the competence to modify annexes to agreements to, e.g., adapt the list of EU secondary legislation accordingly. Typically, the Bilateral Agreements I contain this mechanism, as the example of the Agreement on the Free Movement of Persons shows. As Joint Committees decide by unanimity, such

[7] See, for a detailed examination of the various mechanisms of transfer, Epiney et al. (2012), pp. 140 ff.

[8] See, e.g., Annexes II and III of the Agreement on the Free Movement of Persons, which list relevant secondary legislation and impose an obligation on Switzerland to create 'equivalent legislation.'

[9] See, e.g., Annex I of the Agreement on the Free Movement of Persons, which replicates at some points word by word EU law.

adaptations may also fail to take place, leaving the *acquis* under the Bilateral Agreements behind concerning relevant new developments in EU law.

Second, the Schengen and Dublin Association Agreements provide for an obligation for Switzerland to continuously adopt new developments in the respective field of EU law but leave it to Switzerland's ordinary legislative procedure to implement the necessary changes. If new developments are not adopted, the respective agreement is automatically terminated after a certain period of time. There is thus no 'automatic' duty to adopt new EU law for Switzerland, but if new legal developments are for whatever reason not adopted in Switzerland, the subsequent termination of the agreement constitutes a very heavy sanction. Switzerland is thus effectively left with little leeway.[10]

A third, somewhat similar mechanism, has been found in the more recent Agreement on Customs Security:[11] while initially automatic termination in case of non-implementation of new legal acts by Switzerland had been the objective for the EU,[12] the eventual compromise provides for the possibility for the EU to take compensatory measures if Switzerland does not implement new legal acts. The Joint Committee can then turn to an arbitral tribunal to examine the proportionality of such compensatory measures.

It should be noted that for the future, the EU insists on finding a solution that ensures a continuous and dynamic integration of Switzerland into the developing EU legal *acquis*. The Schengen/Dublin model is thus likely to represent the 'minimum standard' for future bilateral cooperation, while the Agreement on Customs Security constitutes rather a 'special case' than a true model for other, less specific agreements.[13] While the Swiss government is hoping to be able to continue with bilateral, sector-specific solutions,[14] the EU's position is more sceptical and demands that before the conclusion of any new agreements an adequate institutional framework has to be found; according to the Council of the EU, such a framework must ensure a dynamic adaptation to the EU legal *acquis* and international mechanisms of surveillance and judicial interpretation of the Bilateral *acquis*.[15]

[10] The literature often uses the term of the 'all or nothing' principle applying to the Schengen and Dublin Agreements; see Epiney et al. (2005), pp. 38 ff.; Baudenbacher (2010), p. 258.

[11] OJ 2009 L 199, 24 ff.

[12] Baumgartner et al. (2009/2010), pp. 420 ff.

[13] See, on this point, *Neue Zürcher Zeitung* (7.7.2010).

[14] See also, on other options discussed in Switzerland, Thürer (2012), p. 483.

[15] Council Conclusions on EU relations with EFTA countries of 20 December 2012, pt. 33. See on this topic Epiney (2013a), pp. 59 ff.

16.2.2 The Relevance of the Interpretations Given to EU Law by the CJEU

The partial integration of Switzerland into the EU legal *acquis* through the Bilateral Agreements raises the question if and to what extent parallel norms of the Bilateral *acquis* ought to be interpreted in the same way as the parallel norms of EU law.[16] The answer to this question simultaneously lays the groundwork for the main issue of this paper, i.e., whether the interpretation of the Bilateral Agreements requires taking into account EU fundamental rights as used by the CJEU when interpreting the parallel EU legal *acquis*.

The argument in favor of such 'parallel' interpretation is particularly strong where the regulatory objective of an agreement is to achieve a parallel legal situation in the EU and in Switzerland. For this purpose, alignment with the jurisprudence of the CJEU appears indispensable. Some agreements expressly provide for the consideration of such case law. In the Agreement on the Free Movement of Persons, Article 16 paragraph 2 provides that '[i]nsofar as' concepts of EU law are concerned, 'account shall be taken of the relevant case-law of the Court of Justice' prior to the date of signature of the agreement. But also in the case of the Schengen and Dublin agreements, the wording and objective of the respective agreement provide strong arguments in favor of a 'parallel' interpretation in line with the CJEU's holdings.[17] Indeed, when interpreting the Agreement on the Free Movement of Persons, the Swiss Supreme Court routinely refers to the CJEU's case law as a relevant source of inspiration.[18]

Of course, the temporary scope of inspiration by the CJEU's jurisprudence also requires clarification. The mentioned Article 16 paragraph 2 of the Agreement on the Free Movement of Persons refers only to case law handed down 'prior to the date of its signature.' Taking a formalist approach, one could thus consider later case law to be irrelevant. However, in practice the Swiss Supreme Court takes a pragmatic approach and routinely takes into account also later case law to fulfill the objective of creating a continuous parallel legal situation.[19] Similarly, the CJEU has referred in the few cases on the Agreement on the Free Movement of Persons to its own earlier as well as later case law while interpreting the Agreement's provisions.[20] This pragmatic approach seems also well founded based on the objectives

[16] See on this topic Epiney and Zbinden (2009), pp. 7 ff.; Klein (2006), pp. 1 ff.; Bieber (2011), pp. 1 ff.

[17] Epiney et al. (2012), pp. 175 ff. See also with similar results on the Agreement on the Free Movement of Persons Oesch (2011), pp. 583 ff.; Maiani (2011), pp. 27 ff.; Burri and Pirker (2010), pp. 165 ff.; Baudenbacher (2012); pp. 574 ff.

[18] See, e.g., the overview of the case law on the Agreement on the Free Movement of Persons Epiney and Metz (2011/2012), pp. 223 ff.

[19] The landmark case to be mentioned at this point is BGE 136 II 5.

[20] See, e.g., CJEU, Case C-16/09 *Schwemmer*, ECR [2010] I-09717, para 32 f.

pursued by individual Bilateral Agreements, as well as the overall framework they have established.[21]

While there is thus a good argument in favor of taking into account EU case law generally in the interpretation of the Bilateral Agreements, a number of questions remain to be answered in each concrete case. First, it is not always obvious whether notions in the Bilateral Agreements are effectively taken from EU law. Furthermore, the relevance of new developments in EU law for the interpretation and application of a provision in a Bilateral Agreement is not always obvious, in particular as regards new case law of the CJEU. Contentious questions may eventually only be resolved at the level of the highest courts, with the consequent lack of legal certainty and the additional problem that there may be a simple continuous divergence of opinions between the EU and Switzerland because of the lack of a binding mechanism for dispute settlement between both contracting parties.[22]

Despite these difficulties, we can retain that the need to take into account EU case law in the interpretation of the Bilateral Agreements provides in principle a basis for the thesis of this paper that the interpretation of the Bilateral Agreements requires taking into account EU fundamental rights as used by the CJEU when interpreting the parallel EU legal *acquis*.

16.3 The Relevance of EU Fundamental Rights in the Interpretation and Application of the Bilateral Agreements

To assess to what extent we can speak of a binding effect of EU fundamental rights in the sphere of application of the Bilateral Agreements, we must now as a further step first examine the dogmatic problem of the transfer of EU fundamental rights itself. Then we turn to an assessment of the scope of the effect of these rights within EU law, to be able to eventually judge to what extent we can actually support such a binding effect for the application of the Bilateral Agreements.

16.3.1 Defining the Problem

The case law on the Bilateral Agreements has yet to address the question as to whether the jurisprudence of the CJEU on fundamental rights is relevant for the interpretation of said agreements. Dogmatically speaking, we must ask whether the 'transfer' of EU law through the Bilateral Agreements encompasses at least in some

[21] Epiney et al. (2012), pp. 169 ff.

[22] Epiney (2011/2012), pp. 81 ff.

cases also the EU fundamental rights *acquis* or, put differently, whether the 'concepts' of EU law mentioned in provisions like Article 16 paragraph 2 of the Agreement on the Free Movement of Persons also include EU fundamental rights standards.

The question concerns thus the reach of the transfer of the EU legal *acquis* under the Bilateral Agreements, which is of particular importance because of the CJEU's supreme authority to interpret EU law. Even if the Court is basing its case law on concepts that have not been transposed to the Bilateral Agreements as such, arguably such case law or at least certain parts of it may be relevant to construe provisions of an agreement: 'parallel' rights could be at issue.

This point as well as the difficulty of distinguishing relevant from irrelevant parts of the CJEU's case law can perhaps best be demonstrated with the example of Union citizenship as a concept of EU law. While Union citizenship has not been transposed to the Bilateral Agreements, a number of rights of free movement contained in the Agreement on the Free Movement of Persons are equivalent to and effectively mirror rights held by Union citizens. As soon as the CJEU construes these citizenship-based rights, such jurisprudence ought to be considered relevant just as well for the 'parallel' rights contained in the Agreement. As an example, the finding of the CJEU that a parent of a minor Union citizen entitled to custody can derive a right of residence[23] was also found pertinent and relevant by the Swiss Supreme Court for a case on the right to free movement of nonworkers.[24]

Consequently, as a crucial problem it is only possible to establish which aspects of EU law and the CJEU's case law are relevant in the framework of a case-by-case analysis. Even where at first look no EU law notions or concepts seem to have been transferred to a Bilateral Agreement, only interpretation can tell with certainty for the case at hand whether, notwithstanding this preliminary conclusion, certain aspects of EU case law may prove effectively relevant.

As a consequence, the relevance of EU fundamental rights cannot simply be denied based on the fact that such rights are not explicitly mentioned in the Bilateral Agreements. There may very well be situations where interpretation of the Bilateral Agreements will require recourse to EU legal principles, including EU fundamental rights. However, such recourse requires a finding that these concrete principles of EU law interpreted by the CJEU have actually been transferred into the Bilateral Agreement at issue.

In contrast to the mentioned case of Union citizenship, for EU fundamental rights there does not exist a set of rights in the Bilateral Agreements that would be similar to those granted by citizenship but simply based on a different heading such as 'free movement' instead of 'citizenship.' The question therefore is not about fundamental rights having been transferred *verbatim* to the Bilateral Agreements but rather whether they have become part of the Agreements as an implicit and

[23] CJEU, Case C-200/02 *Zhu and Chen*, ECR [2004] I-9925.

[24] 2 C_574/2010, Judgment of 15 November 2010; see also BVGer, C-8146/2010, Judgment of 18 April 2011. See already earlier on the topic Epiney et al. (2004/2005), pp. 42 ff.

inextricable part of the treaty obligations, i.e., of the EU legal notions contained in the Agreements. While an answer to this question can only be found on a case-by-case basis by examining each Bilateral Agreement's provisions and notions, the approach of and reason for the potential binding effect of EU fundamental rights is always the same: EU fundamental rights become part of the respective agreement and therefore binding upon Switzerland in the application of said agreement because they form part of the notions of EU law transferred to the agreement, which—for the above-mentioned reasons—have to be interpreted taking into account EU law and the latter's interpretation by the CJEU.

16.3.2 The Binding Effect of EU Fundamental Rights for EU Member States

The extent of the binding effect of EU fundamental rights for EU Member States is a complex and disputed subject that cannot be addressed in full for the sake of the present contribution. It ought to suffice to base our findings on the current legal situation as mostly defined by the CJEU's case law. EU fundamental rights apply in principle to the institutions and organs of the EU and also to Member States when they apply or implement EU law. The codification of fundamental rights through the EU Charter of Fundamental Rights has also included Article 51 paragraph 1, which states that these rights apply 'to the Member States only when they are implementing Union law.' There are various readings as to whether this clause has actually restricted the scope of application of EU fundamental rights under the Charter or simply confirmed the pre-existing practice.[25]

Despite the controversy on details, generally three constellations can be distinguished in which Member States can be bound by EU fundamental rights standards. First, they are bound in 'agency situations,'[26] where they are directly applying or implementing EU law. This is often also referred to as the 'Wachauf' situation based on the pertinent jurisprudence by the CJEU.[27] A typical situation is the transposition of provisions of a directive, which has to comply with EU fundamental rights standards.[28] The question remaining is, however, to what degree Member State action must be determined by the requirements of EU law to speak of implementation.[29]

[25] See in favor of a less restrictive reading of Article 51, e.g., Lenaerts (2012), p. 17; reading Article 51 as a mere declaratory clause, Borowsky (2011b), p. 633, n. 11; in favor of a restrictive interpretation, Jacobs (2010), pp. 137 f.

[26] See, on the notion of agency, Kingreen (2011), p. 2959, n. 8 ff.

[27] CJEU, Case 5/88 *Wachauf*, ECR [1989] 2609.

[28] See, e.g., CJEU, Case C-540/03 *Commission v. Council*, ECR [2006] I-5769.

[29] See, e.g., Nusser (2011), p. 130.

Second, EU fundamental rights must be respected when Member States deviate from the fundamental freedoms of the EU internal market. Based on the respective case law, this is often termed an 'ERT' situation.[30] A pertinent example is the expulsion of EU citizens based on public order or security reasons, which requires respect of EU fundamental rights in particular as regards the right to family life. Some of the literature has offered criticism of the Court's holdings,[31] but the case law continues to require such respect.[32]

Third, recent case law has added that Member States also have to respect EU fundamental rights where EU secondary law provides for various options of implementation without requiring specific action.[33] In the case at issue, the CJEU had to answer several questions on the applicability of EU fundamental rights and the admissibility of refoulement of asylum seekers to Greece under EU asylum law, in particular Regulation 343/2003.[34] Centrally, the Court decided that if a Member State took the decision to examine a request for asylum itself under Article 3 of the Regulation, although based on the 'Dublin' criteria another Member State would be competent, this would constitute an act of implementation of EU law. Despite the fact that the Member State had thus discretion in exercising this right to examine a request itself, the Charter of Fundamental Rights would apply. This somewhat mirrors the situation where Member States have the option of deviating from fundamental freedoms under EU internal market law but still have to respect EU fundamental rights when doing so according to the Court.

This development is particularly important as the applicability of EU fundamental rights also means that the CJEU is the competent ultimate authority to construe these rights and verify compliance with them.[35] Applying these findings to the case at hand, the CJEU subsequently found that it was contrary to EU law to establish an irrefutable presumption in one Member State that EU fundamental rights would be respected in another Member State and that refoulement under the Dublin system would thus always be admissible without taking into account at all the possibility of systematic failure of the asylum procedure in that Member State with severe consequences for the asylum seekers' right not to suffer inhumane or degrading treatment in the sense of Article 4 of the Charter of Fundamental Rights.

[30] CJEU, Case C-260/89 *ERT*, ECR [1991] I-2925.

[31] Jacobs (2010), pp. 137 f., criticizes the needless overwriting of domestic standards of fundamental rights protection; others argue that when Union law permits derogations by Member States it cannot be impeded, even as far as its fundamental rights standards are concerned; see Kingreen (2011), p. 2961, n. 14 f.; the possibility of derogation should for some also include the freedom to choose domestic fundamental rights protection standards, Borowsky (2011a), p. 655, n. 29.

[32] See, e.g., CJEU, Case C-368/95 *Familiapress*, ECR [1997] I-3689; Case C-112/00 *Schmidberger*, ECR [2003] I-5659; Case C-438/05 *Viking*, ECR [2007] I-10779.

[33] CJEU, Cases C-411/10 and C-493/10 *N.S.*

[34] OJ 2003 L 50, 1.

[35] Sceptical on a perceived transformation of the CJEU towards a veritable fundamental rights court, e.g., Bryde (2010), p. 125; Ludwig (2011), p. 733.

Summing up, it is thus the question of when Member States are implementing EU law that will require further clarification in the future. Bold proposals would ask the reach of EU fundamental rights to be essentially based on the existence of EU competences.[36] Some more cautious proposals have been proposed in the doctrine.[37] For the present purposes, it suffices, however, to assess the CJEU's case law. Generally, the Court seems to take a continuously expanding view in its recent decisions.[38] As an example, in one of the most recent decisions it found that a system of criminal and administrative sanctions established under national law to punish infringements of value added tax legislation fell within the scope of EU law and thereby could be considered an implementation of EU law to which EU fundamental rights applied,[39] although it was only the VAT legislation that implemented Directive 2006/112/EC.[40] These findings can now help to understand to what extent the binding effect of EU fundamental rights standards has been transferred to the Bilateral Agreements.

16.3.3 The 'Integration' of EU Fundamental Rights into the Bilateral Agreements

As previously discussed, the Bilateral Agreements take over EU law in a number of areas. This transfer of law, however, raises the question as to whether EU fundamental rights are also encompassed, i.e., whether the rules just set out on the binding effect of EU fundamental rights for EU Member States are also applicable under the Bilateral Agreements. This would mean that the concepts and notions of the Bilateral Agreements that are based on EU law also have to be applied and interpreted in accordance with EU fundamental rights. Simultaneously, margins of discretion for implementation opened by such concepts or notions would also have to be used respecting EU fundamental right standards.

Since EU fundamental rights encompass a very broad range of rights, including economic and procedural ones, practically all Bilateral Agreements could be potentially concerned. The most important agreements in this regard are, however, certainly the Agreement on the Free Movement of Persons and the Schengen/Dublin Association Agreements. As one example, with these principles in mind

[36] See Conclusions of Advocate General Sharpston in Case C-34/09 *Ruiz Zambrano*, ECR [2011] I-01177. See for a discussion of this proposal von Bogdandy et al. (2012), p. 500; see more sceptical Streinz and Michl (2012), p. 2864, n. 15.

[37] See, e.g., Nusser (2011); others mainly call for cooperation between the various fundamental rights courts active in the EU; see, e.g., Iglesias Sanchez (2012), pp. 1606 ff.

[38] See, e.g., CJEU, Case C-339/10 *Krasimir A. Estov*, ECR [2010] I-11465; Case C-457/09 *Chartry*, ECR [2011] I-00819.

[39] CJEU, Case C-617/10 *Akerberg Fransson*, Judgment of 26 February 2013, paras 20 and 21.

[40] OJ 2006 L 347, 1 ff.

expulsion of an EU citizen based on the grounds of public order and security as enshrined in Article 5 of Annex I of the Agreement on the Free Movement of Persons would only be possible in accordance with EU fundamental rights as interpreted by the CJEU. Furthermore, Switzerland would also have to consider the fundamental rights case law of the CJEU under the Dublin Agreement. This would encompass case law not only on the interpretation of the relevant provisions of EU secondary law but also on the appropriate use of the margin of discretion doctrine, which must also comply with EU fundamental rights standards.

As an argument against the relevance of EU fundamental rights, some may raise the fact that fundamental rights as such are not part of the Bilateral Agreements. Neither do they appear in the text of the Agreements or their preambles, nor are there parallel provisions that are simply based on different grounds as in the case of free movement rights of Union citizens, on one hand, and the rights granted to individuals under the Agreement on the Free Movement of Persons, on the other hand. Additionally, one could contend that the Bilateral Agreements as a whole aim for a lower degree of integration than, e.g., the European Economic Area, which would justify a more cautious approach to the parallel interpretation of provisions of the agreements to the corresponding norms of EU law.[41] Taking into account the effect of EU fundamental rights on EU Member States, one could argue moreover that accepting EU fundamental rights in the legal regime of the Bilateral Agreements may lead to a much deeper integration of Switzerland into the EU legal *acquis* than the substance of the Bilateral Agreements could possibly justify or than it might have been intended by the conclusion of the agreements.

However, at the end of the day, the arguments in favor of a transfer of EU fundamental rights standards and the respective case law of the CJEU appear more convincing, as long as the precondition is fulfilled that notions of EU law are to be applied and interpreted because the Bilateral Agreement in question is following EU law in the norm at issue. The Swiss Supreme Court has also followed this approach when adjudicating upon the rights contained in the Agreement on the Free Movement of Persons, which are fashioned following the model of EU law, including the pertinent EU fundamental rights standards.[42] Centrally, the exact scope and content of such rights or other notions and concepts is to be determined in EU law itself, taking into account EU fundamental rights; these standards of fundamental rights protection are thus necessarily part of the norms of EU law that are transferred to the Bilateral Agreements.

If the principle of parallel interpretation of such transferred parts of the EU legal *acquis* is accepted,[43] there is no convincing reason why an exception should be made for EU fundamental rights. This point is reinforced by the mentioned

[41] See in this sense CJEU, Case C-70/09 *Hengartner*, ECR [2010] I-7233. See, however, a different approach in more recent case law, CJEU, Case C-506/10 *Graf*, Judgment of 6 October 2011, and C-257/10 *Bergström*, Judgment of 15 December 2011.

[42] BGE 130 II 113.

[43] See already Sect. 16.2.2.

objectives pursued by the Bilateral Agreements, which aim for a parallel legal situation in Switzerland as compared to the EU; this aim in particular requires taking into account EU fundamental rights, as otherwise no parallel legal situation could be ensured. Furthermore, it seems more than difficult to try to split the case law of the CJEU on specific legal guarantees into components or layers to be able to avoid taking into consideration those components or layers that are based on the application of EU fundamental rights. The relevance and impact of EU fundamental rights was, moreover, well known during the negotiation and at the date of signature of the Bilateral Agreements, which makes it possible to claim that exceptions from the principle of parallel interpretation for EU fundamental rights would have had to be laid down more expressly in the text of the agreements.

Summing up, our analysis thus supports a well-founded argument that within the interpretation of notions and concepts in the Bilateral Agreements that have been taken from the EU legal *acquis* EU fundamental rights have to be respected in the same manner as under EU law. If we generalize this approach, the implicit relevance of principles of EU law can also play a role as regards other norms or legal acts of primary or secondary EU law that have not been explicitly mentioned in the Bilateral Agreements. As an example, it appears conceivable that during the interpretation of the Dublin Regulation under the Dublin Association Agreement systematic interpretation would also refer to other legal acts of EU asylum law even if those acts are not part of that Agreement. As a consequence, such legal acts would be relevant for Switzerland not via their integration into the Agreement but as part of the interpretation of the Dublin Regulation.

Having found EU fundamental rights applicable under the Bilateral Agreements based on the previous reflections as far as they have been transferred implicitly to those agreements as part of EU law notions and concepts, one may wonder whether there is also a direct legal basis to apply EU fundamental rights under the Bilateral Agreements. There is, however, no such basis as a matter of principle, as far as an 'isolated' reliance on EU fundamental rights is concerned. EU fundamental rights are only binding standards as part of the notions and concepts of EU law included in the Bilateral Agreements; they are not granted as self-standing rights as, e.g., the rights granted under the European Convention on Human Rights. Still, they can be relied upon by individuals in the framework of the implementation of notions of EU law used in the Bilateral Agreements. As a consequence, an asylum seeker can, e.g., argue that his transfer to a certain EU Member State based on the obligations under the Dublin Association Agreement violates his right under Article 4 of the EU Charter of Fundamental Rights not to suffer torture or inhumane or degrading treatment or punishment. Similarly, an EU citizen could rely on Article 7 of the Charter on the respect for private and family life to contest the legality of his expulsion for reasons of public order or security. In the mentioned cases, however, EU fundamental rights are not applied directly as self-standing guarantees but only as a result of the need to apply and interpret the relevant provisions of the Bilateral Agreements in conformity with EU fundamental rights.

16.4 Conclusion

The approach developed in the present contribution that suggests that EU fundamental rights are relevant also in the application and interpretation of the Bilateral Agreements is not only of theoretical or dogmatic interest. In practice, the fundamental rights at issue are substantially also contained in the European Convention on Human Rights and therefore binding on Switzerland. Furthermore, also the CJEU's case law constantly takes inspiration from that of the European Court of Human Rights, and Article 52 paragraph 3 of the EU Charter of Fundamental Rights requires that Charter rights corresponding to those contained in the European Convention ought to have the same scope and content as those rights. All this notwithstanding, the binding effect of EU fundamental rights as argued for in this contribution not only is a different dogmatic construction but also has significant practical implications. In particular, the present approach requires a relevant interpretation reached by the CJEU to be respected simultaneously under the Bilateral Agreements, irrespectively of whether the European Court of Human Rights has already given a reply to the question at issue or not. Furthermore, the catalogue of rights of the EU Charter of Fundamental Rights is more comprehensive than the one of the European Convention on Human Rights; several of the rights not contained in the European Convention on Human Rights could arguably be relevant under the Bilateral Agreements.

At the same time, the suggested approach also illustrates the difficulty of assessing the exact scope of the EU legal *acquis* that has effectively been transferred through the Bilateral Agreements; not easily predictable aspects are encompassed under the obligations contained in the Bilateral Agreements, despite the fact that the contracting parties may not have clearly considered them at the time of negotiation.

As regards the respect for human rights, the approach suggested in this contribution entails a further 'internationalisation' of human rights protection in Switzerland. The minimum standard granted to date only by the European Convention on Human Rights is enlarged in terms of substance, as far as the application of notions of EU law under the Bilateral Agreements is concerned. Moreover, the jurisprudence of a further international court—the CJEU—must be considered in Switzerland as regards the protection of human rights if the mentioned preconditions are fulfilled. Ultimately, an additional, dogmatically different mechanism of implementation becomes available for the human rights granted under the European Convention on Human Rights next to the European Court of Human Rights; the effectiveness of the protection of fundamental rights is likely to benefit both in general and as regards the rights granted under the European Convention on Human Rights. It thus becomes conceivable that the rights granted under the Agreement on the Free Movement of Persons are at least partly considered to be 'fundamental rights,' which could—just like the rights granted directly by the European Convention on Human Rights—even claim primacy over federal law where the Swiss legislator intentionally legislated contrary to international obligations such as those

included in the Agreement on the Free Movement of Persons.[44] This is of particular relevance for the current problems related with the initiative on expulsion (*Ausschaffungsinitiative*).[45]

At the end of the day, the binding effect of EU fundamental rights as part of the application and interpretation of provisions of the Bilateral Agreements entails a diversification of the system of protection for fundamental rights, which is certainly advantageous in terms of effectiveness. At the same time, the rising complexity of the system of fundamental rights protection must not be underestimated, which encompasses three levels, none of which are identical neither in terms of the content of fundamental rights nor in terms of their mechanisms of implementation. Fundamental rights protection thus operates at the level of the Swiss Constitution, the European Convention on Human Rights, and the Bilateral Agreements.

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[44] In the *Schubert* case (BGE 99 Ib 39), the Supreme Court had accepted such legislation as having primacy over international law within the Swiss legal order, unless obligations under the European Convention on Human Rights would be at stake. This latter exception would thus also apply here.

[45] See on the topic Epiney (2011/2012), pp. 107 ff.

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