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Between Evolution and Stagnation – Immunities in a Globalized World

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Account Within National Political and Juridical
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and Domestic Laws Within an Internationalized Court:
An Example From the Cambodian Extraordinary Chambers’
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Mélanie Vianney-Liaud

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Editorial

Dear Readers,

at the release of our previous issue, the Ukraine crisis, the conflict between Israel and Gaza as well as the activities of IS were dominant in the media.¹ The problems have not at all lost any of their relevance (rather quite contrary), but the omnipresent topic these days is Greece's barely averted exit of the EU's Economic and Monetary Union.² Irrespective of the fact that the whole issue complex primarily relates to the EU, the effect however has a wider international reach. Today, austerity measures – in which European political decision-makers still see the medium- to long-term solution of the Greek debt crises – are increasingly looked at not only from their economic dimension, but also from a legal point of view.³ Apart from the question, if different actions are compatible with EU primary law and human rights provisions, the relationship between law, politics and economics in general becomes subject of the public and academic debate.

But there are also other questions, not as such related to Greece's economical crisis, which are put forth in this context. The Greek government recently claimed reparation payments from Germany for atrocities and forced loans, which had taken place during Second World War.⁴ Besides the disputed question,

¹ Cf. The Editors, 'Editorial', 6 *Goettingen Journal of International Law* (2014) 1, 3, 3.

² This does not mean that a so-called 'grexit' is excluded entirely for the future, as the current discussions since the agreement of 13 July show. See e.g., M. Eddy, 'Germany's Tone Grows Sharper in Greek Debt Crisis' (16 July 2015), *The New York Times*, available at http://www.nytimes.com/2015/07/17/world/europe/eurozone-greece-debt-germany.html?_r=0 (last visited 10 August 2015).

³ See e.g., M. E. Salomon, 'Of Austerity, Human Rights and International Institutions', 21 *European Law Journal* (2015) 4 (forthcoming). See also A. Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding* (2014).

⁴ See e.g., H. Smith, 'Greece Sours German Relations further with Demand for War

whether the issue of reparations is ultimately resolved, this is also a matter of basic principles of immunity in international law (which were approved by the International Court of Justice not too long ago). Immunities are also the subject matter of the first article of GoJIL's present issue:

In 'Between Evolution and Stagnation – Immunities in a Globalized World', *Heike Krieger* is exploring two contradictory aspects of development of immunities in public international law. The author reflects on how the simultaneous evolution and stagnation of immunities can be explained and how they may be put in relation to one another. For that purpose she analyses the current state of legal development and clarifies which structural parameters have led to a certain stagnation of legal development. In this context, the author discusses as to whether immunities meet the demands of a globalized world.

Another aspect at issue with regard to the question of Greece's eurozone membership, is the concept of solidarity.

The article 'Opening the Forum to the *Others*: Is There an Obligation to Take Non-National-Interests Into Account Within National Political and Juridical Decision-Making-Processes?' by *Sergio Dellavalle* takes an abstract look at the concept of "solidarity". The author reflects on the current state of this concept, defined as the legal obligation to take non-national interests into account, and introduces arguments against and in favor of the solidarity concept. In conclusion, he argues that the concept of solidarity has to be enhanced on both the international and national level.

In the third article of this issue, 'The 'Bonn Powers' of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment', *Tim Banning* describes a European example of the exercise of public authority by an international institution (the OHR) in the aftermath of the Dayton Peace Agreement. He critically scrutinizes different interpretations of possible bases on which the OHR could have developed several (vast) authorities and describes their effectiveness from a legal perspective. Besides, he questions whether these powers of an international institution over local authorities should be temporally limited.

Reparations', *The Guardian* (11 March 2015), available at <http://www.theguardian.com/world/2015/mar/11/greece-sours-german-relations-further-demand-war-reparations> (last visited 6 August 2015).

In this regard, the Editors are pleased to announce that the upcoming *GoJIL* Vol. 7, No. 1 will address the topic of international public authority in more detail.

Last but not least, the present issue also contains the winning contribution of GoJIL's yearly Essay Competition. Out of a variety of submissions on the topic 'Principles of International Criminal Law', the Editors declared 'Determining the Relationship Between International and Domestic Laws within an Internationalized Court: An Example From the Cambodian Extraordinary Chambers' Jurisdiction Over International and Domestic Crimes' the winner. In this article, *Melanie Vianney-Liaud* sheds light on the conflictual relationship between international and domestic law within internationalized criminal courts, so called hybrid tribunals that combine domestic and international legal strategies. The combination itself is the root of the question whether domestic or international law is the appropriate legal basis. Examining the work of the Extraordinary Chambers in the Courts of Cambodia, the author illustrates how international and domestic legal strategies can diverge and how this challenges the work of the judges in charge.

We hope that these thoroughly selected articles provide for yet another worthwhile read to our readership.

The Editors

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Between Evolution and Stagnation – Immunities in a Globalized World

Heike Krieger*

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* Dr. Heike Krieger is Professor for Public Law and International Law at Freie Universität Berlin. The article is based on a paper on 'Immunität: Entwicklung und Aktualität als Rechtsinstitut' that was published in A. Paulus *et al.* (eds), *Internationales, nationales und privates Recht: Hybridisierung der Rechtsordnungen?: Immunität*, Berichte der Deutschen Gesellschaft für Internationales Recht, Vol. 46 (2014), 233. A translation was provided by Antonina Sanchez.

Abstract

Immunities have long been a subject of discussion. In the context of globalization, there have, on the one hand, been calls for the limitation or even the abolition of immunities, in particular based on the argument of a lack of responsibility for grave violations of human rights. Contrarily, opposed tendencies can be observed which raise ideas such as the extension of the scope of persons to be protected by immunities, resting upon the pluralization of actors in the globalized world. This article examines these two contradictory aspects of development of immunities in public international law and how they might interrelate with each other. It analyses how the simultaneous evolution and stagnation of immunities can be explained. For that purpose the contribution evaluates at first the current state of the legal development. Further, it takes a look at a certain stagnation of legal development and clarifies the structural parameters within public international law which have led to such a stagnation. In this context, it is critically dealt with the question, whether immunities meet the demands of a globalized world. Lastly, this article addresses the development regarding a denial of immunity in cases of grave human rights violations and asks how it could be more cautiously brought forward.

A. Introduction: Immunity's Relevance in a Globalized World

Immunities in public international law have come under pressure more than ever before. For example, during the years 2012/2013 alone over twenty court proceedings took place against beneficiaries of functional and personal immunity before national and international courts.¹ An apparent discrepancy can

¹ Regarding State immunity, see ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, 99 [ICJ, Jurisdictional Immunities]; Italy: *Frasca v. Germany et al.*, (2013) Preliminary Order on Jurisdiction, No 4284/2013, ILDC 1998 (IT 2013) [Frasca v. Germany] ORIL; *Criminal Proceedings v. Albers and Others*, (2012) Final Appeal Judgment, Case No 32139/2012, ILDC 1921 (IT 2012); *Federal Republic of Germany v. De Guglielmi*, (2012) Appeal Judgment, Case No 941/2012, ILDC 1905 (IT 2012) [Germany v. De Guglielmi]; Canada: *Islamic Republic of Iran c. Hashemi*, (2012) Quebec Court of Appeal 1449 (CanLII) [Quebec Court of Appeal, Iran c. Hashemi]; *Steen v. Islamic Republic of Iran*, (2013) Ontario Court of Appeal 30 (Ont. C.A.) [Ontario Court of Appeal, Steen v. Iran]; Germany: Higher State Court Stuttgart, Resolution of 6 June 2013, Az 5 W 17/13; Higher State Court Berlin, Resolution of 4 June 2012, 20 Sch 10/11; European Court of Justice:

be observed between the high number of proceedings which contest the validity of immunities and the selective legal development. While progress regarding the efforts to limit international organizations' immunity in employment-related disputes seems to be somewhat more dynamic,² the reason for this might stem from a temporary asynchrony; international organizations with commercial functions are subject to a development that has already been concluded in terms of State immunity.

Mahamdia v. People's Democratic Republic of Algeria, (2012) C-154/11. Regarding court proceedings of Greek government bonds owners, see C. Thole, 'Klagen geschädigter Privatanleger gegen Griechenland vor deutschen Gerichten?', 66 *Wertpapier-Mitteilungen* (2012) 38, 1793; U.S.: *Sky Petroleum, Inc. v. Ministry of Economy, Trade and Energy of Albania and Others*, Order and Preliminary Injunction, Texas Western District Court, Case No A-12-CA-023-SS; European Court of Human Rights: *Wallishauser v. Austria* (No. 2), Decision, Application No. 14497/06, (2013) [ECtHR, Wallishauser v. Austria (No. 2)]; *Oleynikov v. Russia*, Decision, Application No. 36703/04, (2013); *Wallishauser v. Austria*, (2012) Decision, Application No. 156/04 [ECtHR, Wallishauser v. Austria]. Regarding diplomatic immunity, see Germany: Federal Labour Court, Decision of 22 July 2012, Az. 5 AZR 949/11 [Federal Labour Court, Az. 5 AZR 949/11]; France: *C.N. und V. v. France*, ECtHR Application No. 67724/09, Decision of 11 October 2010; UK: *Wokuri v. Kassam*, (2012) High Court EWHC 105 (Ch) [High Court, Wokuri v. Kassam]. Regarding immunity of State officials in criminal proceedings see ICJ: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, 422, 432, para. 20 [ICJ, Obligation to Prosecute or Extradite]; Italy: *General Prosecutor at the Court of Appeals of Milan v. Adler and Others*, (2012), Final Appeal Judgment, Court of Cassation No 46340/2012, ILDC 1960 (IT 2012) [Court of Cassation, Adler and Others]; South Africa: *Southern African Litigation Centre and Another v. National Director of Public Prosecutions and Others*, (2012) High Court (77150/09) ZAGPPHC 61 [High Court, Southern African Litigation Centre v. National Director of Public Prosecutions]; Switzerland: Federal Criminal Court Decision of 25 July 2012, BB. 2011.140 [Federal Criminal Court of Switzerland, BB. 2011.140]. Regarding State officials' immunity in civil proceedings U.S.: *Habyarimana v. Kagame*, (2012) United States Court of Appeals 10th Cir. 696 F.3d 1029; *Manoharan v. Rajapaksa*, (2012) United States District Court for the District of Columbia, F. Supp. 2d 2012 WL 642446. Regarding a war ship's immunity, see *The "ARA Libertad" Case (Argentina v. Ghana)*, Order of 15 December 2012, ITLOS Case No. 20 [ITLOS, "ARA Libertad" Case]. Regarding international organizations' immunity, see *Mothers of Srebrenica Association v. the State of the Netherlands and the United Nations*, (2012) Supreme Court of the Netherlands, 10/04437 EV/AS [Supreme Court of the Netherlands, Mothers of Srebrenica]; see also UN Haiti Cholera Dispute: Letter by UN Under Secretary-General, 21 February 2013, available at <http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf> (last visited 16 March 2015).

² See Sec. D.II.1.

All types of immunity are subject to similar criticism: To accord immunities in cases of serious human rights abuses contradicts the efforts of the international community to establish responsibility for such acts.³ Immunity, as a relic of the Westphalian system, seems to defy ideals of global constitutionalism⁴ due to which there are calls for its limitation⁵ or even its abolition.⁶ Is granting immunity in a globalized world thus no longer contemporary?

However, within globalization, there are diametrically opposed tendencies which pose questions as to whether the scope of persons to be protected by immunities should even be extended. Pluralization of actors in international relations is one of the intrinsic features of globalization. The conduct of

³ T. Kleinlein, *Konstitutionalisierung im Völkerrecht* (2012), 18 & 389.

⁴ Regarding said perspective within an international order see B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009); M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *European Journal of International Law* (2004) 5, 907; A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) 3, 579; A. Wiener, 'Constitutionalism Unbound: A Practice Approach to Normativity', 22-23 October 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103049 (last visited 16 March 2015). See also M. Kotzur, 'Overcoming Dichotomies: A Functional Approach to the Constitutional Paradigm in Public International Law', 4 *Goettingen Journal of International Law* (2012) 2, 585, 594; K.-H. Ladeur, 'Ein Recht der Netzwerke für die Weltgesellschaft oder Konstitutionalisierung der Völkergemeinschaft', 49 *Archiv des Völkerrechts* (2011) 3, 246, 259.

⁵ For instance, see J. Besner & A. Attaran, 'Civil Liability in Canada's Courts for Torture Committed Abroad: The Unsatisfactory Interpretation of the State Immunity Act 1985 (Can)', 16 *Tort Law Review* (2008), 150; Z. Douglas, 'State Immunity for Acts of State Officials', 82 *British Yearbook of International Law* (2012), 281, 338-342; C. K. Hall, 'UN Convention on State Immunity: The Need for a Human Rights Protocol', 55 *International and Comparative Law Quarterly* (2006) 2, 411, esp. 426; E. Henry, 'Les immunités juridictionnelles, en particulier d'exécution, en droit international et dans la pratique suisse', in F. Bohnet (ed.), *Quelques Actions en Exécution* (2011), 263, 280-284; L. McGregor, 'State Immunity and Jus Cogens', 55 *International and Comparative Law Quarterly* (2006) 2, 437, 441; A. Orakhelashvili, 'The Classification of International Legal Rules: A Reply to Stefan Talmon', 26 *Leiden Journal of International Law* (2013) 1, 9; P. Tarre Moser, 'Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations: The Human Rights Answer to the ICJ Decision on the Ferrini Case', 4 *Goettingen Journal of International Law* (2012) 3, 809.

⁶ Among others, the following works contain claims to abolish the legal concept of immunity: R. Falk, *The Role of Domestic Courts in the International Legal Order* (1964), 139-145; R. Garnett, 'Should Foreign State Immunity Be Abolished?', 20 *Australian Yearbook of International Law* (1999), 175; E. Lauterpacht, *Aspects of the Administration of International Justice* (1991), 55-57.

international relations is no longer restricted to heads of State and governments. Rather, due to an increase in transnational economic and political activities through a diversification of methods and forms of coordination there are numerous other state and non-state actors.⁷ Do these processes require a legal development which widens the current understanding of immunity from state-relatedness to include other actors in order to allow them to effectively perform their tasks on the international level?

In order to illustrate how these contradictory strains of development can be explained and how they may be put in relation to one another, this contribution will first analyze the current state of legal development, then it will clarify which structural parameters within public international law have led to a certain stagnation of legal development. Afterwards, the questions must be discussed as to whether immunities meet the demands of a globalized world. Lastly, the paper will ask as to how the development regarding denial of immunity in cases of grave violations of human rights could be more cautiously brought forward.

Even though this contribution aims at identifying overarching characteristics of immunities, the analysis acknowledges that the various types of immunity must be clearly distinguished. Moreover, it must be differentiated among immunity *ratione personae* and immunity *ratione materiae*, as well as, immunity from criminal and civil proceedings. The concept of grave violations of human rights is used as a notion that encompasses abuses of public international law norms with *ius cogens* character, which protect the individual.

B. Immunity exceptions in cases of grave violations of human rights

Stagnation in legal development is evident in the granting of immunity from civil proceedings. In recent years several court decisions denied exceptions to immunity, immunity of international organizations and diplomatic immunity regarding grave violations of human rights.⁸

⁷ Ladeur, *supra* note 4, 252 & 253.

⁸ For the above mentioned immunity exception in terms of a slowly evolving norm of customary international law, see A. Bellal, *Immunités et violations graves de droit humains* (2011), 135-136; M. Gavouneli, *State Immunity and the Rule of Law* (2001), 91-118, esp. 117.

I. Adherence to the Grant of Immunity From Civil Proceedings

In its 2012 decision regarding the *Jurisdictional Immunities Case*, the ICJ rejected an exception to immunity from civil proceedings in cases of grave human rights violations.⁹ In one of the decisions' central passages, the ICJ ascertains that there is no conflict between the rules of immunity and norms of international humanitarian law with a *ius cogens* character infringed upon by Germany. As already highlighted by several scholars,¹⁰ the pertinent *ius cogens* norms constitute substantive law, while the rules regarding immunity before national courts belong to procedural law.¹¹ In the summer 2012, the Supreme Court of the Netherlands stated in the case of the *Mothers of Srebrenica*, referring to the ICJ's reasoning, that the United Nations (UN) could not be deprived of its immunity¹²: "The UN is entitled to immunity regardless of the extreme seriousness of the accusations on which the [...] [plaintiffs] base their claims."¹³ In June 2013, the European Court of Human Rights upheld this judgment.¹⁴

⁹ For a critically perspective see among others M. Bothe, 'Remedies of Victims of War Crimes and Crimes against Humanities: Some Critical Remarks on the Judgment of the ICJ on the Jurisdictional Immunity of States', in A. Peters *et al.* (eds), *Immunities in the Age of Global Constitutionalism* (2015), 99, 101 [Peters *et al.* (eds), *Immunities*]; M. Krajewski & C. Singer, 'Should Judges Be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights', 16 *Max Planck Yearbook of United Nations Law* (2012), 1; L. McGregor, 'State Immunity and Human Rights: Is There a Future After Germany v. Italy?', 11 *Journal of International Criminal Justice* (2013) 1, 125, 131-133; assenting M. Kloth & M. Brunner, 'Staatenimmunität im Zivilprozess bei gravierenden Menschenrechtsverletzungen', 50 *Archiv des Völkerrechts* (2012) 2, 218, 227; M. Payandeh, 'Staatenimmunität und Menschenrechte', 67 *Juristen Zeitung* (2012) 19, 949, 956.

¹⁰ H. Fox, *The Law of State Immunity*, 1st ed. (2002), 524-525; M. Rossi, 'Staatenimmunität im europäischen Zivilprozessrecht', in G. B. Portale *et al.* (eds), *Aktuelle Entwicklungen im Handels-, Arbeits- und Zivilprozessrecht* (2011), 47, 56. Critically regarding the differentiation in the ICJ decision, see M. Sarzo, 'The Dark Side of Immunity', 26 *Leiden Journal of International Law* (2013) 1, 105, 122-125.

¹¹ ICJ, *Jurisdictional Immunities*, *supra* note 1, 140-142, paras 92-97.

¹² Supreme Court of the Netherlands, *Mothers of Srebrenica*, *supra* note 1, paras 4.3.10-4.3.14. For a more progressive perspective see R. Freedman, 'UN Immunity or Impunity', 25 *European Journal of International Law* (2014) 1, 239, 250-254 (who does not take into account the 2012 Judgment).

¹³ Supreme Court of the Netherlands, *Mothers of Srebrenica*, *supra* note 1, para. 4.3.14.; critically regarding the decision of the previous instance from the perspective of the ECHR because of a lack of a suitable legal protection alternative, M. Kloth, *Immunities and the Right of Access to Court under Art. 6 of the European Convention on Human Rights* (2010), 153.

¹⁴ European Court of Human Rights: *Stichting Mothers of Srebrenica v. the Netherlands*, Decision, Application No. 65542/12 (2013) [ECtHR, *Mothers of Srebrenica*].

Likewise, in the Haiti Cholera dispute a U.S. District Court Judge stated in January 2015 that the UN and its subsidiary organ MINUSTAH are immune from court proceedings unless the UN explicitly waives this immunity.¹⁵

In 2011 the Regional Labour Court Berlin-Brandenburg decided that “[...] diplomatic immunity against judicial prosecution [...] regardless as to the severity of the accusations raised against the diplomat, is not open to relativization [...]”, even if grave human rights violations are at issue.¹⁶ The subject of the proceedings was claims for remuneration and compensation in a case involving exploitative employment of domestic workers. The legal proceedings were to be conducted against an *attaché* of the Saudi-Arabian embassy, who was accredited in Germany until 2011.¹⁷ The issue at hand reflects a general problem concerning legal breaches by diplomats in receiving countries.¹⁸ Yet, it has gained special importance through activities of human rights organization, since several of the cases concerned dealt with severe forms of exploitation and abuse pursuant to Art. 7 and Art. 8 of the *International Covenant on Civil and Political Rights* [ICCPR].¹⁹ Consequently, the UN Committee on Migrant Workers recommended to the member States in its Comment No. 1 in 2011 to ensure that legal remedies be

¹⁵ *Delama Georges and Others. v. United Nations and Others*, U.S. District Court for the Southern District of New York, Case No. 1:13-cv-7146, available at http://www.ijdh.org/wp-content/uploads/2011/11/Dkt62_Opinion_and_Order_01_09_15.pdf (last visited 16 March 2015).

¹⁶ Germany: Regional Labour Court Berlin-Brandenburg, 9 November 2011, Az. 17 Sa 1468/11, para. 19 [Regional Labour Court Berlin-Brandenburg, Az. 17 Sa 1468/11]: “Die diplomatische Immunität vor gerichtlicher Verfolgung ist hingegen unabhängig von der Schwere der gegen den Diplomaten erhobenen Vorwürfe zu gewähren; sie ist einer Relativierung nicht zugänglich.” See also *DDR-Botschafter*, (1997) Federal Constitutional Court, BVerfGE 96, 68, 85 [Federal Constitutional Court, *DDR-Botschafter*].

¹⁷ Germany: Federal Labour Court, Az. 5 AZR 949/11, *supra* note 1, para. 1.

¹⁸ For instance, see R. Higgins, ‘The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience’, 79 *American Journal of International Law* (1985) 3, 641.

¹⁹ UN CEDAW: *General Recommendation Nr. 26 on Woman Migrant Workers*, CEDAW/C/2009/WP.1/R, 5 December 2008, para. 21; Special Rapporteur on Contemporary Forms of Slavery, *Including its Causes and Consequences*, UN Doc A/HRC/15/20, 18 June 2010, paras 33, 57-58 & 96; ILO: The General Conference of the ILO, *Domestic Workers Recommendation No. 201* (2011); *Recommendation concerning Decent Work for Domestic Workers No. 26* (2011), para. 4.

available to domestic workers should their rights be abused by beneficiaries of diplomatic immunity.²⁰

Legal enforcement fails first due to the fact that diplomats' private illicit behaviour is not considered to be directly attributable to the sending State;²¹ hence, it may not be held accountable, even though employment related disputes as such are considered *acta iure gestionis*.²² Therefore, most of those affected initiate proceedings against the diplomats themselves. However, the employment of domestic workers, and consequently any illicit conduct related to it, does not fall within the exceptions pursuant to Art. 31 (1) of the *Vienna Convention on Diplomatic Relations* [VCDR]. Consequently, the diplomat enjoys personal immunity regarding his private actions during his accreditation in the receiving State. The wording of Art. 31 (1) (c) *VCDR*, that "[an] action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions [...]" is excluded from diplomatic immunity in the receiving State, implies that also in this context the distinction between *acta iure imperii* and *acta iure gestionis* could be applicable.²³ However, such an equation of diplomatic and State immunity has not been accepted by national courts. In this context, the U.S. Court of Appeals explicitly rejected including employment relations under Art. 31 (1) (c) *VCDR*.²⁴ The Court's decision is supported by the diplomat's key status in the receiving State, who – as a particularly vulnerable organ on foreign soil – requires protection of his personal affairs in order to be able to exercise

²⁰ UN Committee on Migrant Workers, *General Comment on Migrant Domestic Workers*, UN Doc CMW/C/GC/1, 23 February 2011, para. 49.

²¹ U.S.: *Swarna v. Al-Awadi*, (2010) 622 F3d 123 2nd Cir. Court of Appeals [Swarna v. Al-Awadi].

²² *United Nations Convention on Jurisdictional Immunities of States and their Property*, 2 December 2004, Art. 11, 44 ILM 801; e.g. ECtHR: *Wallishauser v. Austria*, *supra* note 1, para. 65. Regarding Switzerland: A. Peters, *Völkerrecht*, 3rd ed. (2012), 177 [Peters, *Völkerrecht*]; for an alternative line of argument see *Benkharbouche and Janah v. Embassy of the Republic of Sudan and Others*, UK Court of Appeal (Civil Division), (2015) EWCA Civ 33.

²³ Cf. H. Fox & P. Webb, *The Law of State Immunity*, 3rd ed., (2013), 586 [Fox & Webb, *State Immunity* (2013)].

²⁴ U.S.: *Tabion v. Mufti*, (1996) 73 F.3d 535, 537, 4th Cir. Court of Appeals [Court of Appeals, *Tabion v. Mufti*]. See also UK: *Reyes and Suryadi v. Malki*, EWCA Civ 32, UK Court of Appeal (Civil Division), 2015; E. Denza, *Diplomatic Law: Commensality on the Vienna Convention on Diplomatic Relations*, 3rd ed. (2008), 305; Fox & Webb, *State Immunity* (2013), *supra* note 23, 708. For a critical evaluation of the U.S. jurisprudence N. Maja Bergmar, 'Demanding Accountability where Accountability is due', 47 *Vanderbilt Journal of Transnational Law* (2014) 2, 501.

his functions for the maintenance of international relations.²⁵ Furthermore, the interpretation of Art. 31 (1) (c) *VCDR* by means of the *travaux préparatoires* clearly demonstrates that the notion of commercial activity does not encompass all civil law aspects of personal lifestyle. The notion rather describes business or trade activities on a continuous basis meant to generate personal profit.²⁶ There is, however, a rather extensive consensus among courts that employment contracts with domestic workers do not fall under the protection of Art. 39 (2) *VCDR*. In other words, contracts do not constitute acts performed in the exercise of functions of a member of the mission; hence, affected workers may bring the diplomats to justice when the functions of the diplomat have come to an end.²⁷ Both the Federal Labour Court²⁸ as well as the British High Court in the case *Wokuri v. Kassam* in 2012²⁹ applied this interpretation.

II. Indications of Legal Development – Immunity of Heads of State and Other State Officials From Criminal Proceedings

Regarding immunity of heads of State and other State officials, there are indications of legal development; however, this change in the law is not as evident as some scholars claim.³⁰ Within the current developments, one

²⁵ Germany: Federal Constitutional Court, *DDR-Botschafter*, *supra* note 16, 85-86; K. Doehring, *Völkerrecht*, 2nd ed. (2004) [Doehring, *Völkerrecht*], 293.

²⁶ Denza, *supra* note 24. Among others, Regional Labour Court Berlin-Brandenburg, Az. 17 Sa 1468/11, *supra* note 16, para 16; Court of Appeals, *Tabion v. Mufti*, *supra* note 24, 537-539.

²⁷ UK: High Court, *Wokuri v. Kassam*, *supra* note 1, paras 22-26, referencing the U.S., Court of Appeals, *Swarna v. Al-Awadi*, *supra* note 21, 134-135, 139; see also U. Seidenberger, *Die diplomatischen und konsularischen Immunitäten und Privilegien* (1994), 118.

²⁸ Germany: Federal Labour Court, Az. 5 AZR 949/11, *supra* note 1, para 10: “His immunity ended pursuant Art. 39 para. 2 *VCDR* with his departure [...] Immunity also does not continue pursuant Art. 39 para. 2 sentence 2 *VCDR*, because the accused is not being suit due to performance of his public work.” (translation by the author). Cf. M. Bitz, ‘§ 18 GVG’, in H. Prütting & M. Gehrlein (eds), *Zivilprozessordnung*, 6th ed. (2014), para. 9.

²⁹ UK: High Court, *Wokuri v. Kassam*, *supra* note 1, para. 27.

³⁰ Bellal, *supra* note 8, 225-234; P. Gaeta, ‘Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?’, in A. Cassese (ed.), *Realizing Utopia* (2012), 227, 229; G. Hokema, *Immunität von Staatsoberhäuptern* (2002), 265-266 & 272-273; M. Lüke, *Die Immunität staatlicher Funktionsträger* (2000), 221-314, esp. 312-313. For a differentiated approach, see R. van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008), 200-415; R. van Alebeek, ‘National Courts, International Crimes and the Functional Immunity of

can distinguish between a core of legal norms whose extent and application is clear and a perimeter within which the boundaries of immunity must still be delimited. Even in cases of grave violations of human rights the serving head of State, head of government, and foreign affairs minister enjoy absolute immunity *ratione personae* from civil and criminal proceedings.³¹ After the ICJ decision on the *Arrest Warrant Case*, national courts followed this jurisprudence³² regarding the proceedings against Robert Mugabe³³ and Paul Kagame³⁴. Likewise, all serving State officials enjoy immunity *ratione materiae* in relation to conduct performed in their official capacity.³⁵ There is however a *ratione loci* exception to immunity of State officials in regard to official acts which constitute severe violations of territorial sovereignty, especially for espionage, political homicide,

State Officials', 59 *Netherlands International Law Review* (2012) 1, 5, 36-41; emphasising the uncertainties: Fox & Webb, *State Immunity* (2013), *supra* note 23, 565.

³¹ For criminal proceeding, see *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3, 22, 24, paras 54-55 & 58 [ICJ, Arrest Warrant]; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Reports 2008, 177, 236-237, para. 170. Before national courts, see Belgium: Cour de Cassation, *H.S.A. and Others, V.S.A. and Others*, Decision Related to the Indictment of Ariel Sharon, Amos Yaron and Others, 42 ILM 3, 596, 600. For general information, see J. Foakes, 'Immunity for International Crimes?: Developments in the Law on Prosecuting Heads of State in Foreign Courts', 2 *International Law Briefing Papers* (2011), 2, 4; A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 247 *Recueil des Cours de l'Académie de Droit International* (1994), 13.

³² See also Federal Criminal Court of Switzerland, BB. 2011.140, *supra* note 1, para. 5.3.

³³ UK: Bow Street Magistrates' Court, Application for an Extradition Warrant against Robert Mugabe, Judgment, 14 January 2004, printed in C. Warbrick (ed.), 'Current Developments: Public International Law', 53 *International and Comparative Law Quarterly* (2004) 3, 769, 770; unresolved in U.S.: *Tachiona v. United States*, (2012) 386 F.3d 205, 2nd Cir. Court of Appeals, because the Court applied Art. 29 VCDR.

³⁴ Spain: Juzgado Central de Instrucción nº 4 de la Audiencia Nacional (Tribunales españoles), Auto (6 February 2008), 32, available at http://www.veritasrwandaforum.org/dossier/resol_auto_esp_06022008.pdf (last visited 16 March 2015).

³⁵ A. von Arnould, *Völkerrecht*, 2nd ed. (2014), 136 [Arnould, *Völkerrecht*]; for a different view, see Italy: Court of Cassation, *Adler and Others*, *supra* note 1.

terrorist and subversive actions,³⁶ as well as torture³⁷ and breaches of International Humanitarian Law³⁸ in the forum State.³⁹

Indications for legal development can be found where a conflict exists between the grant of immunity to State officials and international treaty obligations requiring member States to penalize and prosecute certain crimes, which may only be committed as part of an official function. In favour of such an exception to immunity included in the *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [UN Convention Against Torture] from 1984 is the fact that pursuant Art. 1, torture requires an action in an official capacity. At the same time, Art. 5 of the same Convention specifies duties to penalize. A State could not fulfil said duties, should it be obliged to grant immunity to foreign State officials due to the official quality of their acts.⁴⁰ This line of reasoning may be transferred to all similar conventions which deal with actions in official capacities and

³⁶ Italy: *Adler and 32 Others (Abu Omar case)*, Milan Single Judge, Verdict of 4 November 2009, Reasons filed on 1 February 2010, printed in: A. Cassese *et al.*, *International Criminal Law: Cases and Commentary* (2011), 564-570; Court of Cassation, *Adler and Others*, *supra* note 1, however, in this decision State officials' immunity is generally denied in criminal proceedings; UK: *Khurts Bat v. Investigating Judge of the German Federal Court and Others*, UK High Court, (2011) EWHC 2029 (Admin) [High Court, Khurts Bat v. Investigating Judge of the German Federal Court].

³⁷ Foakes, *supra* note 31, 13; see also Canada: *Bouzari v. Iran*, (2002) Ontario Superior Court of Justice O.J.No. 1624, Court file No. 00-CV-201372, para. 63.

³⁸ M. Bothe, 'Die strafrechtliche Immunität fremder Staatsorgane', 31 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1971) 2, 246, 252. With more cautious wording as compared to the second edition of H. Fox, *The Law of State Immunity*, 2nd ed. (2008), 697-700 [Fox, *State Immunity* (2008)], see now Fox & Webb, *State Immunity* (2013), *supra* note 23, 553.

³⁹ Arnould, *Völkerrecht*, *supra* note 35; Foakes, *supra* note 31, 13; K. Schmalenbach, 'Immunität von Staatsoberhäuptern und anderen Staatsorganen', 61 *Zeitschrift für Öffentliches Recht* (2006) 3, 397, 412; International Law Commission, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by the Special Rapporteur*, UN Doc A/CN.4/631, 56, paras 84-85, 90 [UN Doc A/CN.4/631]; to what extent cases of universal jurisdiction are included is not entirely clear; in favor of such an interpretation: R. Cryer *et al.*, *International Criminal Law and Procedure* (2007), 432-433; emphasising insecurities: P. Webb, *International Judicial Integration and Fragmentation* (2013), 70-72 & 87-91.

⁴⁰ Peters, *Völkerrecht*, *supra* note 22, 186; O. Dörr, 'Staatliche Immunität auf dem Rückzug', 41 *Archiv des Völkerrechts* (2003) 2, 201, 216. See however Fox & Webb, *State Immunity* (2013), *supra* note 23, 569, who hold that exceptions to immunity in cases of grave violations of human rights seem to be restricted to ordinary State officials while the so-called troika appears to retain immunity *ratione materiae* when leaving office.

stipulate duties to sanction such as the *International Convention for the Protection of All Persons from Enforced Disappearance* of 2006.⁴¹ According to its Art. 2 this convention only deals with enforced disappearances which are conducted by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State. Further reaching concepts assume an exception to immunity at least from criminal proceedings whenever international treaties impose extraterritorial duties on States to prosecute international crimes, which are not exclusively restricted to State officials. These concepts extend the idea of a collision of duties beyond crimes which can only be committed in an official capacity to all conventions, which link severe human rights abuses which are usually committed by State officials to extraterritorial duties to prosecute or to the right to exercise universal jurisdiction:

“[...] where extra-territorial jurisdiction exists in respect of an international crime and the rule providing for jurisdiction expressly contemplates prosecution of crimes committed in an official capacity, immunity *ratione materiae* cannot logically co-exist with such a conferment of jurisdiction.”⁴²

Exceptions to immunity and their legal development are, however, subject to significant legal uncertainties. Especially the connection of universal jurisdiction, extraterritorial duties to prosecute and curtailment of high-ranking State officials' immunity from criminal proceedings seems problematic.⁴³ Hence, even sixteen years after the *Pinochet Case* one can only observe a tendency for a legal development in regard to exceptions to the immunity of former heads of State or high-ranking State officials:⁴⁴ The subsequent decisions point in both directions and often depend on the concrete circumstances of each case. For example, in the 2013 decision *Lydiene X v Prosecutor* the French Court of Cassation held that the immunity of Cameroonian State officials did not preclude an investigation by the investigating judge into an alleged crime of

⁴¹ GA Res. 61/177, UN Doc A/RES/61/177, 20 December 2006.

⁴² D. Akande & S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', 21 *European Journal of International Law* (2010) 4, 815, 843-849 & 851; see also Lüke, *supra* note 30, 232-273, in particular 273.

⁴³ For attempts to limit the further reaching consequences of this association, see Akande & Shah, *supra* note 42, 846-849.

⁴⁴ Foakes, *supra* note 31, 1; Fox & Webb, *State Immunity* (2013), *supra* note 23, 586; T. Stein & C. von Buttlar, *Völkerrecht*, 13th ed. (2012), 726.

torture.⁴⁵ In an extensive reading the decision might imply that the immunity of State officials no longer bars investigations in such cases. However, since the complaint was filed against an unspecified person it is also tenable to conclude that in cases of complaints directed against unknown persons at least the identity of the alleged offender has to be established before an issue of immunity arises.⁴⁶ Thus, while the decision represents a certain development in the law of immunities it does not clearly establish a wide exception to immunities of (high-ranking) State officials in criminal cases concerning torture committed by foreign State officials in their home States.

The assertion of uncertainties in the legal development seems indeed to directly contradict the high number of proceedings against former heads of State and other (high-ranking) State officials which transnational human rights NGOs have sought to initiate within the same time span.⁴⁷ Yet, the proceedings against Rumsfeld and Zemin, for instance, were expressly denied by French⁴⁸ and German authorities⁴⁹ through the defendants' immunity *ratione materiae*, even though both cases were similar to the *Pinochet Case*.⁵⁰ The report of the

⁴⁵ *Lydiene X v Prosecutor*, (2013) Appeal Judgment, Case No 12/81676, ILDC 2035 (FR 2013) ORIL.

⁴⁶ T. Margueritte, *ibid.*, A 4.

⁴⁷ See for instance the extensive lists of proceedings, which the Swiss NGO Trial (<http://www.trial-ch.org>, last visited 16 March 2015) and the American NGO The Centre for Justice and Accountability (<http://www.cja.org/section.php?id=5>, last visited 16 March 2015) have sought to initiate before courts in the U.S., Guatemala, Spain and Switzerland. See also the list of the Domestic Case Law on the International Criminal Law Database at the T.M.C. Asser Institute, available at http://www.asser.nl/Default.aspx?site_id=36&level=15246 (last visited 16 March 2015).

⁴⁸ France: Cour d'Appel de Paris, *Decision of the Procureur Générale Regarding the Decision on Criminal Proceedings Against Donald Rumsfeld* (27 February 2008), an English version is available at http://ccrjustice.org/files/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf (last visited 16 March 2015); notice of decision of the Procureur de la République on 16 November 2007, available at http://www.ecchr.de/index.php/rumsfeld-590.html?file=tl_files/Dokumente/Universelle%20Justiz/reponse%20procureur%2016nov07.pdf (last visited 16 March 2015).

⁴⁹ *Federal Public Prosecutor's Criminal Charge Against Jiang Zemin and Others*, Decision's Notice on 24 June 2005, available at <http://www.diefirma.net/download.php?8651010ea2af5be8f76722e7f35c79de> (last visited 16 March 2015).

⁵⁰ I. Wuerth, 'Pinochet's Legacy Reassessed', 106 *American Journal of International Law* (2012), 731, 748 [Wuerth, Pinochet's Legacy]; China ratified the *UN Convention Against Torture* in 1988, the U.S. in 1994. The approach in both cases may be regarded as a mere breach of a treaty obligation. Yet since an exception to immunity is not explicitly defined in the convention, there is some evidence to interpret the decisions as an expression of an opposing legal conviction.

ILC's first Special Rapporteur regarding immunity of State officials reinforced the above mentioned uncertainties. Beyond the immunity exceptions *ratione loci*, the Rapporteur ascertains: "[The] Pinochet Case [...] has not led to the establishment of homogenous court practice. In this respect it is difficult to talk of exceptions to immunity as having developed into a norm of customary international law [...]"⁵¹ These findings were criticized as too conservative by both members of the ILC⁵² and several other scholars.⁵³ However, the national representatives' comments in the Sixth Committee of the General Assembly mirror this inconsistent picture⁵⁴ and there are recurring scholarly voices that judge immunity exceptions in cases of grave violations of human rights critically or that doubt the legal validity of these exceptions.⁵⁵

⁵¹ International Law Commission, UN Doc A/CN.4/631, *supra* note 39, para. 90. See also Wuerth, 'Pinochet's Legacy', *supra* note 50, 732; already in 2002 C. Tangemann, *Die völkerrechtliche Immunität von Staatsoberhäuptern* (2001), esp. 224. See also D. L. Rothe, 'Shedding the Blanket of Immunity: A Commentary on the Global Principle of Ending Impunity, Realpolitik, and Legal Precedent', 53 *Crime, Law and Social Change* (2010), 397, 409.

⁵² International Law Commission, *Report on the Work of its Sixty-Third Session*, UN Doc A/66/10, para. 121.

⁵³ E.g. C. Kreß, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', in M. Bergsmo & L. Yan (eds), *State Sovereignty and International Criminal Law* (2012), 223, 245.

⁵⁴ Sceptic about or rejecting immunity exceptions in cases of severe human rights abuses, see UN Doc A/C.6/66/SR.18 (24 October 2011), para. 52 (Mexico); UN Doc A/C.6/66/SR.19 (25 October 2011), para. 43 (Niger) & para. 56 (Hungary); UN Doc A/C.6/66/SR.24 (28 October 2011), para. 72 (Indonesia); UN Doc A/C.6/66/SR.26 (1 November 2011), para. 14 (Switzerland), paras 44 & 47 (Thailand) & para. 85 (very explicit Germany); UN Doc A/C.6/66/SR.27 (2 November 2011), para. 10 (China), para. 23 (Sri Lanka), para. 38 (Belarus), para. 54 (Cuba) & para. 66 (Russia); UN Doc A/C.6/66/SR.28 (4 November 2011), para. 1 (Australia), para. 23 (Israel), para. 30 (Singapore), para. 45 (Algeria) & para. 51 (Kenya); open or in favour, partially *de lege ferenda*: UN Doc A/C.6/66/SR.26 (1 November 2011), paras 5-8 (Norway), paras 30-36 (Greece), para. 39 (Italy), para. 58 (Peru), para. 70 (Belgium) & para. 77 (Austria); UN Doc A/C.6/66/SR.27 (2 November 2011), para. 33 (Spain), para. 45 (Iran), paras 70 & 73 (Portugal), para. 79 (India), para. 86 (New Zealand) & para. 91 (USA); UN Doc A/C.6/66/SR.28 (4 November 2011), paras 10-11 (UK), para. 26 (South Korea), para. 34 (Japan), para. 57 (the Netherlands) & para. 66 (Rumania).

⁵⁵ B. B. Jia, 'The Immunity of State Officials for International Crimes Revisited', 10 *Journal of International Criminal Justice* (2012), 1303, 1320-1321; Wuerth, 'Pinochet's Legacy', *supra* note 50; I. Wuerth, 'Foreign Official Immunity: Invocation, Purpose, Exceptions', 23 *Schweizerische Zeitung für internationales und europäisches Recht* (2013), 207, 219 [Wuerth, 'Foreign Official Immunity']; emphasizing regional differences: P. Webb, 'Regional Challenges to the Law of State Immunity', *European Society of International*

At least, in the summer 2012, the Federal Criminal Court of Switzerland established in a decision regarding the opening of a criminal proceeding against the former Algerian defence minister Kahled Nezzar that he could not raise a plea of immunity *ratione materiae* for the prosecution of war crimes and torture, which took place between 1992 and 1993 and which he allegedly committed within his official capacity.⁵⁶ In the same year, the South African High Court decided in the so called *Torture Docket Case*, a proceeding to force criminal prosecution, that the immunity *ratione personae* of the State officials of Zimbabwe did not impede the initiation of a criminal proceeding against the accused pursuant to the *South African Act on the Implementation of the Rome Statute of the International Criminal Court*.⁵⁷ Moreover, in 2014 the High Court of Justice held that a son of the King of Bahrain in his role as Commander of the Royal Guard did not enjoy immunity *ratione materiae* from criminal proceedings in relation to the crime of torture because the UK and Bahrain are both parties to the 1984 *UN Convention Against Torture*.⁵⁸ The Court applied the rationale of the *Pinochet Case* to an acting State official.

C. Decentralized Mechanisms of Law-Making

At first sight, the findings on the pace of the legal development are sobering in spite of a few new court decisions; this leads to a need for explanation. A prominent reason lies within the decentralized law-making mechanisms of public international law. Initiatives towards legal development concerning immunity have always emanated from national courts, not from the executive branch which is normally the driving force in public international law. Yet, court decisions have not generated a uniform State practice because its formation is hampered by States' perceived self-interests and reciprocity. Both of these reasons will remain influential as long as public international law lacks centralized mechanism of law-making as well as obligatory enforcement

Law Conference Paper Series, No. 6/2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193750 (last visited 16 March 2015), 6-7.

⁵⁶ Federal Criminal Court of Switzerland, BB. 2011.140, *supra* note 1, para. 5.4.3. Algeria ratified the *UN Convention Against Torture* in 1989.

⁵⁷ South Africa: High Court, *Southern African Litigation Centre v. National Director of Public Prosecutions*, *supra* note 1. Zimbabwe is not a member State of the *UN Convention Against Torture*.

⁵⁸ UK: *FF v Director of Public Prosecutions*, High Court of Justice Queen's Bench Division Divisional Court, (2014) EWHC 3419 (Admin).

mechanism.⁵⁹ Although legal development initiatives on immunity exceptions are a consequence of transnational policy strategies by non-governmental actors, these policies rely on traditional means of implementation; thus, the State's overall legal position remains the decisive part of the legal process.

I. States' Self-Interests and Reciprocity

Political science theories of international relations evidence that States are prepared to legally limit their actions, if it serves their self-interests and seem beneficial if other States also subscribe to a certain norm.⁶⁰ Reciprocity, i.e. States' mutual interest in the law making process, is an essential element of legal development. A process of legal assertion, consent, emulation, or rejection guarantees that developed norms are based on actual States' consensus. The more States' self-interests and reciprocity expectations are involved, the more clearly a norm can surface.⁶¹

These observations explain the reasons why States indeed accepted the change from absolute to restrictive immunity;⁶² however, do not seem to be ready to consent to immunity exceptions with regard to grave violations of human rights. The introduction of the legal concept *acta iure gestionis* corresponded to importing nations' economic interests. For instance, the first case regarding restrictive immunity in 1879 dealt with a Peruvian ship in the port of Ostend, which had Guano as cargo to be imported into Belgium.⁶³ States, such as Belgium, recognized early on the necessity to give individuals the opportunity, as a part

⁵⁹ Cf. B. Simma, 'Reciprocity', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VIII (2012), 651.

⁶⁰ Theories which put emphasis on States' self-interest are assigned to realism and in new varieties the rational choice theory; on the one hand for instance: F. A. Boyle, 'The Irrelevance of International Law', 10 *California Western International Law Journal* (1980), 193, 198; J. Grieco, 'Anarchy and the Limits of Cooperation: A Realistic Critique of the Newest Liberal Institutionalism', 42 *International Organizations Law Review* (1988), 485, 488; on the other hand, among others: J. Goldsmith & E. Posner, *The Limits of International Law* (2005); E. Posner, 'Do States Have a Moral Obligation to Obey International Law?', 55 *Stanford Law Review* (2003), 1901, 1917.

⁶¹ J. Beckett, 'Countering Uncertainty and Ending Up/Down Arguments', 16 *European Journal of International Law* (2005), 213, 235-236; Kleinlein, *supra* note 3, 500-501.

⁶² J. Bröhmer, *State Immunity and the Violation of Human Rights* (1997), 20; X. Yang, *State Immunity in International Law* (2012), 22.

⁶³ E. Suy, 'Immunity of States before Belgian Courts and Tribunals', 27 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1967), 660, 665-666.

of the fairness imperative, to argue before courts civil law disputes with States.⁶⁴ The more a State's overseas trade partners only granted restrictive immunity, the more likely that the State would apply the concept of restrictive immunity itself. Otherwise, the maintenance of the doctrine of absolute immunity would have only protected foreign States. Still, large export nations denied for a significant amount of time the introduction of restrictive immunity.⁶⁵ Hence, the United Kingdom only recognized the restrictive character of immunity during the seventies of the 20th century.⁶⁶

In contrast, exceptions to immunity in cases of grave violations of human rights are not related to States' self-interests, but require the acceptance of community values.⁶⁷ Although common interests of non-reciprocal nature may become relevant in the process of law-making, it will be much more difficult to realize such values.⁶⁸ In addition, the concept of negative reciprocity is rather dominant, especially in cases of immunity of State officials including diplomatic immunity due to the vulnerable position of these State officials abroad. Therefore, the U.S. State Department has affirmed repeatedly regarding the claim for a *ius cogens* based immunity exception in proceedings before national courts: "[t]he recognition of such an exception could prompt reciprocal limitations by foreign jurisdictions exposing U.S. state officials to suit abroad on that basis."⁶⁹ The U.S. worries that by altering their own judicial practice, it will contribute to the

⁶⁴ Fox & Webb, *State Immunity* (2013), *supra* note 23, 36, citing *The Charkieh* (1873), LR 4 A&E 59, 97.

⁶⁵ P.-H. Verdier & E. Voeten, 'How Does Customary International Law Change? The Case of State Immunity' (24 January 2013), available at <http://ssrn.com/abstract=2106627> (last visited 8 November 2014), 20; UK: *NML Capital Limited (Appellant) v Republic of Argentina (Respondent)*, (2011) UKSC 31, para. 11: "The absolute doctrine of State immunity could pose a disincentive to contracting with State and some States attempted to avoid this disadvantage by including in contracts an agreement not to assert State immunity."

⁶⁶ Fox & Webb, *State Immunity* (2013), *supra* note 23, 139-143 & 165.

⁶⁷ For an interpretation of the *Pinochet Case* as a conflict between States values and Community values, see A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001), 270-284.

⁶⁸ Kleinlein, *supra* note 3, 498 & 501.

⁶⁹ Court of Appeals, *Matar and Others v. Dichter*, Brief for the United States of America as Amicus Curiae in Support of Affirmance, (2007) 2nd Cir. Docket No. 07-2579-cv, available at <http://ccrjustice.org/files/Matar%20v%20%20Dichter,%20US%20for%20Defendants%20Amicus%20Brief%2012.19.07.pdf> (last visited 16 March 2015), 4. See also J. B. Bellinger, 'The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities', 44 *Vanderbilt Journal of Transnational Law* (2011), 819, 834.

creation of a new customary international law rule that would lead to their State officials being subject to similar proceedings all over the world. In this respect, there is a not entirely unfounded apprehension that these proceedings may be conducted in an abusive manner.⁷⁰

II. Courts' Proactive Role in a Globalized World

The creation of customary international law rules through judicial practice may be a means to overcome a State's opposition to legal development since judicial reliance on customary international law allows for the State's explicit consent to become less important. At least in democratic constitutional States court networks may, in horizontal and vertical dialogs, expedite the development of customary international law norms even against the expressed intention of the executive branch due to principle of judicial independence.⁷¹

In American law, the question, to what extent courts should give deference to the executive branch's assessment of immunity has been disputed.⁷² In the *Samantar* decision, the U.S. Supreme Court in 2010 concluded that Common Law not the *Foreign Sovereign Immunities Act* of 1976 governs State officials' immunity due to which courts had to take into account the executive's views on immunity.⁷³ The extensive consequences of the decision were countered by the follow up decision of the Court of Appeals in *Yousuf v. Samantar* in November 2012. The Court of Appeals adopted an absolute deference to the State Department's determination only with regard to heads of States' immunity and affirmed a court's extensive right to examine State officials' immunity.⁷⁴ On

⁷⁰ Bellinger, *supra* note 69, 834; comparable reflections already played a role during the change from absolute to relative immunity, see Verdier & Voeten, *supra* note 65, 15.

⁷¹ Cf. Ladeur, *supra* note 4, 269.

⁷² J. Elsea, 'Samantar v. Yousef, The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials', *CRS Report for Congress* (2012), 11-12; in favour of a competence for the State Department: Bellinger, *supra* note 69, 827; H. Koh, 'Foreign Official Immunity after Samantar: A United States Government Perspective', 44 *Vanderbilt Journal of Transnational Law* (2011), 1141; opposed to it: P. B. Rutledge, 'Samantar and Executive Power', 44 *Vanderbilt Journal of Transnational Law* (2011), 885; I. Wuerth, 'Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department', 51 *Virginia Journal of International Law* (2011), 915.

⁷³ Supreme Court, *Samantar v. Yousuf*, (2010) 130 Ct. 2278.

⁷⁴ U.S.: *Yousef v. Samantar*, (2012) 699 F.3d 763 4th Cir. Court of Appeals, 772-773 [Court of Appeals, *Yousef v. Samantar*]; for a follow-up: E. Smith, 'Immunity Games: How the State Department Has Provided Courts With a Post-Samantar Framework for Determining Foreign Official Immunity', 67 *Vanderbilt Law Review* (2014), 569, 569-608.

this basis, it denied Samantar immunity due to violations of norms with *ius cogens* character.⁷⁵ Moreover, in the case of the former Algerian defence minister, Kahled Nezzar, the Swiss Federal Criminal Court expressly deviated from the opinion of the Swiss Foreign Affairs Department, which had confirmed the former defence minister's immunity from court proceedings.⁷⁶

The Executive may, however, try to stop the above mentioned court dialogues by prompting an international court's decision. Likewise, the executive branch – at least in a parliamentary democracy – may also hold back legal development through instigating legislation. The ICJ can probably not assert the formation of a customary international law rule, if there is a lack of corresponding State practice in the legislative field.⁷⁷

Through its decision in the *Jurisdictional Immunities Case*, the ICJ has probably interrupted or at least delayed, until further notice, a development in State immunity.⁷⁸ Numerous courts have already relied on its findings. Thus, the European Court of Human Rights held in its 2014 judgment *Jones v. the United Kingdom* that the ICJ judgment is “[...] authoritative as regards the content of customary international law [...]” and that therefore the UK had not violated the Convention by granting immunity to Saudi Arabia in civil claims for torture.⁷⁹ In the same year, the Canadian Supreme Court rejected the proposition that an exception to State immunity in civil proceedings for acts of

⁷⁵ Court of Appeals, *Yousef v. Samantar*, *supra* note 74, 777. However, the State Department, itself, denied the immunity of the accused, because the U.S. had not recognized the Somalia Government at that time and Samantar had become a U.S.-citizen. The accused once again filed a petition for writ of *certiorari* before the Supreme Court on 4 March 2013, available at <http://cja.org/downloads/Samantar%20Certiorari%20Petition%20.pdf> (last visited 5 August 2015) and on 5 March 2014, available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/06/Samantar-v-Yousuf-Cert-Petition-FINAL.pdf> (last visited 5 August 2015). The Supreme Court denied both petitions.

⁷⁶ Federal Criminal Court of Switzerland, BB. 2011.140, *supra* note 1, E.

⁷⁷ R. Higgins, ‘Equality of States and Immunity from Suit: A Complex Relationship’, 43 *Netherlands Yearbook of International Law* (2013), 129, 145 [Higgins, Equality of States].

⁷⁸ Krajewski & Singer, *supra* note 9, 29; Payandeh, *supra* note 9, 954. See however European Court of Human Rights: *Jones v. the United Kingdom*, Judgment, Application Nos 34356/06 40528/06 (2014), para. 215 [European Court of Human Rights, *Jones v the United Kingdom*]: “However, in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States.”

⁷⁹ ECtHR, *Jones v. the United Kingdom*, *supra* note 78, para. 198.

torture existed as a rule of customary international law based, *inter alia*, on an analysis of the ICJ decision.⁸⁰

However, the political will to push for a more progressive development of the law remains. While the Italian legislation aimed to comply with the ICJ decision,⁸¹ the Italian Constitutional Court declared this legislation unconstitutional, in particular insofar as it obliged Italian courts to follow the ICJ's decision.⁸² According to the Constitutional Court, such a duty would violate one of the supreme principles of the Italian Constitution, namely the judicial protection of fundamental rights. Where immunity protects acts of foreign States which constitute most serious human rights violations a complete bar from judicial protection cannot be justified under the Italian Constitution.⁸³ The Court applied its jurisprudence on “[...] ‘counter-limits’ [*controlimiti*] to the entry of European Union law [...]” into the Italian legal order to general international law and stressed that “[...] the fundamental principles of the constitutional order and inalienable human rights constitute a [...] limit to the introduction (...) of generally recognized norms of international law [...]”.⁸⁴

In its self-perception the judgment pressures for a progressive evolution of international law⁸⁵ and aligns itself with the *Kadi* decision of the European Court of Justice⁸⁶ in that it aims to protect “constitutional principles” against conflicting international obligations.⁸⁷ However, while the *Kadi* decision is directed against a political organ whose nearly unfettered discretion is hardly controlled by international courts the decision of the Italian Constitutional Court

⁸⁰ Canada: Supreme Court of Canada, *Kazemi Estate v Islamic Republic of Iran*, [2014] 3 S.C.R. 176, paras 61, 103-108; on appeal from Quebec Court of Appeal, *Iran c. Hashemi*, *supra* note 1. See also Ontario Court of Appeal, *Steen v Iran*, *supra* note 1.

⁸¹ Art. 3, Legge 14.01.2013 n° 5, G.U. 29.01.2013: “Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, fatta a New York il 2 dicembre 2004, nonché norme di adeguamento all’ordinamento interno”, available at <http://www.altalex.com/index.php?idnot=61325> (last visited 15 March 2015). See also Italy: *Frasca v Germany*, *supra* note 1; *Criminal Proceedings v. Albers*, *supra* note 1; *Germany v. De Guglielmi*, *supra* note 1.

⁸² Italy: Constitutional Court, *Sentenza* No. 238 (2014) [Constitutional Court, *Sentenza* No. 238].

⁸³ *Ibid.*, para. 5.

⁸⁴ *Ibid.*, para. 3.2.

⁸⁵ *Ibid.*, para. 3.3: “At the same time, however, this may also contribute to a desirable – and desired by many – evolution of international law itself.” (translation by the author).

⁸⁶ *Ibid.*, para. 3.4.

⁸⁷ European Court of Justice: *Kadi and Al Barakaat*, Joint Cases C-402/05 P & C-415/05 P, [2008] ECR I-6351, para. 285.

second-guesses a judgment of the globally most authoritative legal institution and violates Art. 94 para. 1 *UN Charta*. This tug o'war around the exceptions to State immunity is representative for the dangers which might arise when national courts are the main driving force behind a progressive development of international law: challenging the decisions of international (judicial) organs can be detrimental to the normativity of the international legal order, in particular where it questions the authority of the UN's principal judicial organ. Likewise, it endangers universality and multilateralism as important foundations of the international legal order in favour of unilateralism: "It gives priority to one (state's) national outlook about what constitutes a proper legal order over the universal standard pronounced by an international court."⁸⁸ In the long run recurring precedences of national disobedience might be as dangerous for the normative force of international human rights law as they are at present detrimental for general international law.

D. Rationale Behind Immunities in a Globalized World

If legal development on exceptions to immunity to end impunity may only be attained in a slow and selective manner, then the question as to whether immunity under the conditions of a post-modern globalized world may at all be justifiable becomes more manifest. On what rationale is immunity based?

Generally, the protection of State sovereignty and the principle of equal sovereignty of States are known as the sources of State immunity,⁸⁹ while immunity of State officials and diplomatic immunity are justified by safeguarding functionality of these organs.⁹⁰ In addition, pursuant paragraphs 3 and 4 of the *VCDR*'s preamble, the protection of international relations is also cited as the basis for diplomatic immunity. The immunity of international organizations does not only serve to secure the performance of their functions, but also to

⁸⁸ A. Peters, 'Let Not Triepel Triumph – How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order', *EJIL: Talk!* (22 December 2014), available at <http://www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/> (last visited 16 June 2015).

⁸⁹ ICJ, *Jurisdictional Immunities of the State*, *supra* note 1, para. 57; Arnault, *Völkerrecht*, *supra* note 35, 133 *et seq.*; Rossi, *supra* note 10, 50. Cf. Peters, *Völkerrecht*, *supra* note 22, 173; differentiating B. Hess, *Staatenimmunität bei Distanzdelikten* (1992), 306-308.

⁹⁰ Seidenberger, *supra* note 27, 22-23; R. van Alebeek, 'Immunity, Diplomatic', in Wolfrum (ed.), *supra* note 59, Vol. V (2012), 98, 99; Peters, *Völkerrecht*, *supra* note 22, 173.

guarantee their autonomy.⁹¹ However, should one mainly anchor the rationale of State immunity in the protection of sovereignty, then the main aims served by immunity under conditions of globalization would be concealed. Rather, a functional, comprehensive and overarching approach is required since the principal congruence between these different forms of immunity is that both, immunity of State officials as well as diplomatic immunity, are ultimately manifestations of State immunity.⁹² Comparability of State immunity and immunity of international organizations is given due to that in both cases the exercise of public authority⁹³ is guaranteed through immunity.⁹⁴

Thus, the rationale of immunity lays in its functional necessity. Accordingly, immunity allows for effective performance of public activities in international relations. Additionally, immunity serves as a rule on the exercise of jurisdiction in a decentralized multi-level system where competences are divided between different levels and different actors. Consequently, immunity also guarantees legal security, peaceful international relations and – at least for the time being – the legitimate interests of democratic constitutional States.

I. Effective Performance of Public Functions Within International Relations

The meaning of immunity as a means to perform public functions in international relations is becoming especially perspicuous under the conditions

⁹¹ A. Reinisch, *International Organizations Before National Courts* (2000), 233 [Reinisch, *International Organizations*].

⁹² Fox & Webb, *State Immunity* (2013), *supra* note 23, 131-133 & 135; M. Lüke, *supra* note 30, 216 & 218; for a clear distinction between State and diplomatic immunity, M. Kohen, 'The Distinction between State Immunity and Diplomatic Immunity', in G. Hafner, M. Kohen & S. Breau (eds), *State Practice regarding State Immunities* (2006), 48; for a clear distinction between State immunity and immunity of State officials, G. Boggero, 'Without State Immunity, No (Individual) Responsibility', 5 *Goettingen Journal of International Law* (2013) 2, 375, 388.

⁹³ For a classification of international organizations activities as an exercise of international public authority: A. v. Bogdandy, P. Dann & M. Goldmann, 'Völkerrecht als öffentliches Recht: Konturen eines rechtlichen Rahmens für Global Governance', 49 *Der Staat* (2010), 23.

⁹⁴ For the comparability T. Neumann & A. Peters, 'Switzerland', in A. Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (2013), 241, 247-248 [Reinisch, *International Organizations in Domestic Courts*]; A. Peters, 'Die funktionale Immunität internationaler Organisationen und die Rechtsweggarantie', 21 *Revue suisse de droit international et européen* (2011) 3, 397, 415-416 [Peters, *Funktionale Immunität*]; Reinisch, *International Organizations*, *supra* note 91, 232.

of globalization. Through pluralization of actors and an increase of their transnational public activities, a tendency has been generated due to which the circle of the beneficiaries of immunity has been expanded. This is shown by two new legal developments, namely the ascertainment of rights of special missions under customary international law and the granting of immunity to global public-private partnerships.

1. Special Missions as Functional Equivalents

During special missions, public representatives are sent for a limited period of time to another State with the consent of the latter in order to attend to specific questions or perform specific functions.⁹⁵ Scholars contest to what extent customary international law rules apply in addition to the *Convention on Special Missions* from 1969.⁹⁶ Yet, in light of a uniform State practice there are by now a few customary international law rules that may be identified.⁹⁷

As far as special missions owe their renewed importance to the increasing plurality of foreign-policy actors who fulfil public functions in a transnational context, a wider circle of immunity beneficiaries may be discerned in customary

⁹⁵ *Convention on Special Missions*, 16 December 1969, Art. 1, 1400 UNTS 231; Doebling, *Völkerrecht*, *supra* note 25, 225-226.

⁹⁶ Opposing view K. Ipsen, *Völkerrecht*, 5th ed. (2004), 596; N. Kalb, 'Immunities, Special Missions', in Wolfrum (ed.), *supra* note 59, 95; U.S.: *Sissoko v. USA*, United States District Court, Southern District of Florida, Order, 121 ILR 600.

⁹⁷ Akande & Shah, *supra* note 42, 822; Bellinger, *supra* note 69, 832; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 414; Foakes, *supra* note 31, 11-12; Fox & Webb, *State Immunity* (2013), *supra* note 23, 562; C. Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations', in M. D. Evans (ed.), *International Law*, 3rd ed. (2010), 380, 390-392; M. Wood, 'The Immunity of Official Visitors', 16 *Max Planck Yearbook of United Nations Law* (2012), 35, 65; from State practice: UK: *Re Bo Xilai*, Bow Street Magistrates' Court, (2005) 128 ILR 713; *Re Ehud Barak*, District Court, (29 September 2009); *Re Gorbachev*, City of Westminster Magistrates' Court, Judge Wickham, Deputy Senior District Judge, (30 March 2011), unreported, printed in 82 *British Yearbook of International Law* (2012), 570 [City of Westminster Magistrates' Court, *Re Gorbachev*]; High Court, *Khurts Bat v. Investigating Judge of the German Federal Court*, *supra* note 36. See also Written Ministerial Statement by Mr Henry Bellingham (Under-Secretary of State for Foreign Affairs), HC Deb., 13 December 2010, Vol. 520, Column 72 WS; U.S.: *Weixum v. Xilai*, District Court, (2008) 568 F.Supp.2d 35 [District Court, *Weixum v. Xilai*].

international law.⁹⁸ A requirement is that the visitor represents the State.⁹⁹ Indeed a high ranking visitor must be involved, yet, they do not have to be government officials. For instance, a head of State's consultant may qualify for special mission immunity status. The Dutch Advisory Committee on Issues of Public International Law explicitly confirmed this status in an expert report in 2011.¹⁰⁰ The individuals do not even have to have a similar rank as a member of the government.¹⁰¹ In fact, a chief of police may also be a beneficiary as part of a special mission.¹⁰² The Dutch report presented another case of application for special missions: when within the frame of a non-international armed conflict, armed groups and government representatives meet for peace negotiations in third States.¹⁰³ An example proving the need for such an application stems from autumn 2012 when representatives of the Colombian rebel organization FARC requested immunity from criminal proceedings in Norway in order to conduct peace negotiations with representatives of the Colombian Government there.¹⁰⁴

At the same time, special missions have become a functional equivalent to immunities of State officials in order to diminish legal uncertainties and allow for the smooth functioning of international relations.¹⁰⁵ Accordingly, a customary international law rule has crystallized that members of special

⁹⁸ Wood, *supra* note 97, 51. Regarding previous cases see U.S.: *Chong Boon Kim v. Kim Yong Shik and David Kim*, 1st Cir. Circuit Court (State of Hawaii), Judgment of 9 September 1963, reproduced in 58 *American Journal of International Law* (1964), 186-187 (regarding a Korean Foreign Secretary); *Kilroy v. Windsor (Prince Charles, the Prince of Wales) and Others*, Northern District of Ohio, Eastern Division, Civil Action No C-78-291, 7 December 1978, International Law Report 1990, 605-607; Germany: *Tabatabai*, BGHSt 32, 275.

⁹⁹ Cf. UK: The Secretary of State for Foreign and Commonwealth Affairs (Mr William Hague), 'Special Mission Immunity', Daily Hansard - Written Ministerial Statement, 4 March 2013, Column 55WS [UK, Written Ministerial Statement].

¹⁰⁰ Advisory Committee on Issues of Public International Law, 'Advisory Report on the Immunity of Foreign State Officials', Advisory Report No. 20 (2011) 34 [Advisory Committee on Issues of Public International Law].

¹⁰¹ The Netherlands: The Hague District Court (Rechtbank), Case LJN: 380820 / KG ZA 10-1453 (24 November 2010), available at <http://jure.nl/ECLI:NL:RBSGR:2010:BO6114> (last visited 16 March 2015); Wood, *supra* note 97, 68.

¹⁰² P. Smolar, 'La justice française annule la procédure sur les disparus du Beach de Brazzaville', *Le Monde* (24 November 2004).

¹⁰³ Advisory Committee on Issues of Public International Law, *supra* note 100, 34-35.

¹⁰⁴ 'FARC Demands Immunity From Arrest in Norway', *The Local* (Norway) (3 October 2012).

¹⁰⁵ See already in Doehring, *Völkerrecht*, *supra* note 25, 292.

missions, with approval of the receiving State¹⁰⁶, shall enjoy complete immunity from criminal proceedings for the duration of a specific official visit,¹⁰⁷ even if the accused is suspected to have committed grave violations of human rights.¹⁰⁸ The Israeli opposition leader Tzipi Livni was repeatedly treated accordingly in visits to London as member of a special mission. As a consequence, courts have refused applications for an arrest warrant on the grounds of commitment of war crimes.¹⁰⁹ Other cases concerned the Israeli military chief of staff as well as a retired major general.¹¹⁰ On a similar basis, court proceedings were suspended in France against the detained Congolese chief of police N'Dengue on account of crimes against humanity.¹¹¹ In a civil law case of Falun Gong supporters against the acting Chinese Trade Secretary Bo Xilai, a U.S. court rejected a claim due to immunity of special missions in accordance with a corresponding submission by the State Department.¹¹²

2. Granting of Immunity to Global Public-Private Partnerships

The granting of immunity to global public-private partnerships shows that immunity is an essential means to enable globalization. Since the midst of the last decade, the UN started to fulfil certain functions through establishing

¹⁰⁶ UK, Written Ministerial Statement, *supra* note 99, Column 56WS; High Court, *Khurts Bat v. Investigating Judge of the German Federal Court*, *supra* note 36, paras 37-40; A. Sanger, 'Immunity of State Officials from the Criminal Jurisdiction of a Foreign State', 62 *International & Comparative Law Quarterly* (2013) 1, 193, 197.

¹⁰⁷ *Convention on Special Missions*, *supra* note 95, Art. 31; Foakes, *supra* note 31, 11; Wood, *supra* note 97, 67.

¹⁰⁸ Advisory Committee on Issues of Public International Law, *supra* note 100, 31; Akande & Shah, *supra* note 42, 823. See also ICJ, *Arrest Warrant*, Counter-Memorial of the Kingdom of Belgium on 28 September 2001, paras 1.11–1.12 & 3.2.32, available at www.icj-cij.org/docket/files/121/8304.pdf (last visited 16 March 2015); City of Westminster Magistrates' Court, *Re Gorbachev*, *supra* note 97, 570.

¹⁰⁹ O. Bowcott, 'Tzipi Livni spared war crime arrest threat', *The Guardian* (6 October 2011); H. Sherwood, 'Israeli Minister Tzipi Livni Given Diplomatic Immunity for UK Visit', *The Guardian* (13 May 2014).

¹¹⁰ *Ibid.*

¹¹¹ Smolar, *supra* note 102; Wood, *supra* note 97, 77-78.

¹¹² District Court, *Weixum v. Xilai*, *supra* note 97. See also District Court (*Weixum v. Xilai*), Suggestion of Immunity and Statement of Interest of the United States (24 July 2006), available at <http://www.state.gov/documents/organization/98832.pdf> (last visited 16 March 2015).

global public-private partnerships.¹¹³ A pertinent example is the Global Fund to Fight Aids [Global Fund] – a charitable foundation pursuant to Art. 80 *et seq.* of the *Swiss Civil Code*.¹¹⁴ The Foundation funds the battle against the illnesses AIDS, malaria and tuberculosis.¹¹⁵ This kind of international privatization aims at providing more flexible instruments as compared to traditional interstate organizations which are considered to be slow and heavy-handed. Hence, in the founding process in 2001, the status as a foundation was deliberately chosen because it seemed faster and more effective than the founding of an international organization.¹¹⁶ After the Global Fund was initially joined to the WHO, a claim to its own immunity already seemed indispensable in 2003 after organizational detachment. Immunity was seen as a necessary prerequisite for effectively performing the Fund's functions.¹¹⁷ According to the Global Fund's evaluation reports immunity from jurisdiction and execution should especially serve to protect the organization's financial activities¹¹⁸ as well as the employees' personal security and performance of functions during trips outside Switzerland. Immunity should also guarantee the Global Fund's autonomy against potentially abusive behaviour in implementer countries.¹¹⁹ Finally, a competitive disadvantage was seen in relation to other organizations regarding employee

¹¹³ B. Hamm (ed.), *Public-Private Partnership und der Global Compact der Vereinten Nationen* (2002). See also from a legal perspective L. Clarke, *Public-Private Partnerships and Responsibility under International Law* (2014); L. Clarke, 'The Exercise of Public Power over Global Health Through Public-Private Partnerships and the Question of Responsibility under International Law', 105 *American Society of International Law: Proceedings of the Annual Meeting* (2011), 96; L. Clarke, 'Global Health Public-Private Partnership: Better Protecting Against Disease but Creating a Gap in Responsibility Under International Law', 20 *Finch Yearbook of International Law* (2009), 349-372.

¹¹⁴ The entry in the electronic foundation directory is available at http://www.edi.admin.ch/esv/05263/index.html?webgrab_path=aHR0cDovL2VzdjIwMDAuZWwRplMfkbWluLmNoL2QvZW50cnkuYXNwP0lkPTI1MDg%3D&lang=de (last visited 16 March 2015).

¹¹⁵ The Global Fund's By Laws, Art. 2, as amended 21 November 2011, available at <http://www.theglobalfund.org/en/board/> (last visited 17 March 2015).

¹¹⁶ The Global Fund, Fourth Board Meeting (29 to 31 January 2003), *Report on Legal Status Options for the Global Fund*, Doc GF/B4/12, 2, available at <http://www.theglobalfund.org/en/board/meetings/fourth/> (last visited 17 March 2015) [The Global Fund, Legal Status].

¹¹⁷ *Ibid.*, 3.

¹¹⁸ The Global Fund, Thirty-Second Board Meeting (20 to 21 November 2014), *Privileges and Immunities of the Global Fund*, Doc GF/B32/19, paras 14 *et seq.* [The Global Fund, Immunities].

¹¹⁹ *Ibid.*, paras 16, 19-22; The Global Fund, *Legal Status*, *supra* note 116, 6.

recruitment, if immunity could not be ensured.¹²⁰ Switzerland concluded a headquarters agreement with the Global Fund in 2004; Art. 5 of the headquarters agreement grants jurisdictional immunity before Swiss courts.¹²¹ The lack of immunity in other States was still considered as a significant disadvantage for the Global Fund's work;¹²² therefore, the Global Fund has concluded in the meantime similar agreements¹²³ for its missions with Ethiopia, Georgia, Ghana, Moldavia, Montenegro, Rwanda, Swaziland and Uganda.¹²⁴

The conclusion of the agreement between the Global Fund and Switzerland has been reflected in a new host State law.¹²⁵ According to Art. 2 (1) (b), the Federal Government may also grant immunity to "quasi public organizations", which must be differentiated from interstate organizations and which should encompass public-private partnerships.¹²⁶ Pursuant Art. 8 it is required that the organization's members mainly be States, public institutions or be entities which fulfil public functions, that it be structured similarly to interstate organizations, as well as that it be active in two or more States. Similarly, the U.S. has accorded immunities to the Global Fund in 2006¹²⁷ as well as

¹²⁰ *Ibid.*, 4-5. See also D. Aziz, 'Privileges and Immunities of Global Public-Private Partnerships: A Case Study of the Global Fund to Fight AIDS, Tuberculosis and Malaria', *Institute of International Law and Justice Emerging Scholars Papers* 2009/14, 26.

¹²¹ *Abkommen zwischen dem Schweizerischen Bundesrat und dem Globalen Fonds zur Bekämpfung von Aids, Tuberkulose und Malaria zur Regelung des rechtlichen Statuts des Globalen Fonds in der Schweiz* [Agreement Between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in View of Determining the Legal Status of the Global Fund in Switzerland], 13 December 2004, SR 0.192.122.818.11; English version available at http://www.theglobalfund.org/documents/board/08/BM08_07Annex4AAgreement_Annex_en (last visited 17 March 2015).

¹²² Aziz, *supra* note 120, 26.

¹²³ The Global Fund, Twentieth Board Meeting (9 to 11 November 2009), *Annex A: Agreement on Privileges and Immunities of the Global Fund to Fight AIDS, Tuberculosis, and Malaria*, GF/B20/4 Attachment 1, available at <http://www.theglobalfund.org/en/board/meetings/twentieth/> (last visited 17 March 2015).

¹²⁴ The Global Fund, *Immunities*, *supra* note 118, para. 10; G. A. Newton, 'The Global Fund to Fight AIDS, Tuberculosis and Malaria: An Innovation in the Form of International Organization', *Istituto di Ricerche sulla Pubblica Amministrazione, Global Administrative Law Working Paper* 2012/3, 6.

¹²⁵ *Bundesgesetz über die von der Schweiz als Gaststaat gewährten Vorrechte, Immunitäten und Erleichterungen sowie finanziellen Beiträge* [Federal Law Regarding Privileges, Immunities and Relief as well as Financial Contributions Awarded by Switzerland as Host State], GSG, SR192.12, 22 June 2007, .

¹²⁶ Peters, *Völkerrecht*, *supra* note 22, 184 (translation by the author).

¹²⁷ *22 U.S. Code Chapter 7, Subchapter XVIII – Privileges and Immunities of International Organizations*, paras 288 & 288f-6.

to the International Union for Conservation of Nature – an NGO composed of governments and civil society members alike.¹²⁸ Basically we can observe a kind of international reprivatization. The practical experience of the pertinent institutions has demonstrated that granting immunity is pivotal for effective performance of functions.

II. A Plea Against the Exercise of Jurisdiction Where Competences Are Divided

Immunity serves as a plea against the exercise of jurisdiction in a decentralized legal system where competences are divided. The ICJ rightly clarified that jurisdictional rules are generally to be distinguished from procedural impediments due to immunity.¹²⁹ The determination of general jurisdiction precedes granting of immunity.¹³⁰ However, should a court affirm in the next step the plea for immunity, then jurisdiction may no longer be exercised. Thus, immunity fulfils also a function as a rule on the exercise of jurisdiction in a decentralized system where competences are divided. As Fox and Webb formulated: “A plea of State immunity is therefore a signal to the forum court that jurisdiction belongs to another court or method of adjudication.”¹³¹

This proposition seems acceptable, since granting immunity does not generally lead to the loss of a claim.¹³² Likewise, an offender remains criminally responsible.¹³³ As a rule, there are alternative legal paths or international mechanism available that correspond to each kind of immunity. Claims may be, depending on each case’s details, pleaded before States’ and State officials’ national courts.¹³⁴ Criminal and also disciplinary responsibility may also be achieved in a home State. In the case of international crimes, international

¹²⁸ *Ibid.*, para. 288f-4.

¹²⁹ ICJ, *Arrest Warrant*, *supra* note 31, para. 59: “It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.”

¹³⁰ C. Appelbaum, *Einschränkungen der Staatenimmunität in Fällen schwerer Menschenrechtsverletzungen* (2007), 30.

¹³¹ Fox & Webb, *State Immunity* (2013), *supra* note 23, 27.

¹³² See also in this regard Regional Labour Court Berlin-Brandenburg, Az. 17 Sa 1468/11, *supra* note 16, para. 29.

¹³³ Fox & Webb, *State Immunity* (2013), *supra* note 23, 94.

¹³⁴ For instance, *Vienna Convention on Diplomatic Relations*, 24 April 1964, Art. 31 (4), 500 UNTS 95.

criminal courts provide an alternative forum.¹³⁵ Similarly, depending on the circumstances, courts or committees of international and regional human rights conventions are also available.¹³⁶ Furthermore, there are, contingent on the field of law concerned, different public international law instruments available from claims commissions and the exercise of diplomatic protection¹³⁷ to special enforcement mechanisms pursuant to the *VCDR*.

1. Changes in the Law of Immunity of International Organizations?

The immunity of international organizations also serves as a means to channel the exercise of jurisdiction where competences are divided. This is especially shown by the way employment-related disputes with their staff are handled.¹³⁸ Both granting of immunity and the creation of internal administrative tribunals is supposed to ensure legal uniformity and predictability, which would

¹³⁵ See for instance the proceedings against Chad's former President, Hissène Habré: 'Human Rights Watch, Senegal: Hissène Habré Court Opens' (8 February 2013), available at <http://www.hrw.org/news/2013/02/08/senegal-hissene-habre-court-opens> (last visited 17 March 2015) [HRW, Habré Court Opens].

¹³⁶ For instance, *Edgar Fernando García* (Admissibility), IACHR Petition 12-343, Report No. 91/06; *Case of the Rio Negro Massacres v. Guatemala*, ICtHR, Judgment of 4 September 2012, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_250_ing.pdf (last visited 17 March 2015).

¹³⁷ R. O'Keefe, 'Immunity and Human Rights: Heads and Walls, Hearts and Minds', 44 *Vanderbilt Journal of Transnational Law* (2011) 4, 999, 1041.

¹³⁸ U.S.: *Mendaro v. The World Bank*, Court of Appeals (D.C. Cir. 1983), 717 F.2d 610: "[The] purpose of immunity from employee actions is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory. The sheer difficulty of administering multiple employment practices in each area in which an organization operates suggests that the purposes of an organization could be greatly hampered if it could be subjected to suit by its employees worldwide." *Broadbent v. Organization of American States*, Court of Appeals (1980), 628 F.2d 27: "An attempt by the courts of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organizations." UN-Memorandum, in Belgium: *Mandelier v. Organisation des Nations Unies*, Brussels Civil Tribunal (11 May 1966), ILR 1972, 446: "[In] civil cases, the uniform practice is to maintain immunity, while offering, in accord with section 29 of the General Convention, alternative means of dispute settlement. In disputes with third parties, the alternative means of dispute settlement offered is usually negotiation, conciliation, mediation and/or arbitration [...]. This practice achieves two fundamental goals: it ensures the independence of the United Nations and its officials from national court systems, but at the same time it eliminates the prospect of impunity, as the United Nations provides the appropriate mechanisms to resolve all complaints of a private law nature."

be at risk, should member States' courts base their decisions on their national law. Otherwise, the organizations' internal employment regulations could run the risk of being fragmented. Hence, different legal protection standards could emerge, depending on the location, for employees of organizations with worldwide operations.¹³⁹ Nevertheless, a development may be observed particularly in Europe: in some cases courts deny international organizations' immunity regarding employment-related disputes although this development does not (yet) cover the UN itself.¹⁴⁰

The changes in the law are based on the case *Waite and Kennedy*¹⁴¹ before the European Court of Human Rights. Some courts rigorously follow the path set by the decision. Courts in Belgium, France, Italy and apparently Russia¹⁴² refused granting immunity in employment-related disputes, if by not doing so, Art. 6 (1) of the *ECHR* would be violated. Here, the case *Banque africaine de développement v. M.A. Degboe* stands out.¹⁴³ The French Court of Cassation denied immunity to an international organization in a dispute regarding the right to terminate an employment contract due to a lack of an alternative legal remedy as required in the *Waite and Kennedy* decision.¹⁴⁴ Also courts in Belgium, Italy and Switzerland scrutinize whether organizations provided an adequate alternative to judicial protection. Thereby, they increase the intensity of judicial review. As a result Belgian and Italian decision have also denied immunity to international organization due to a lack of alternatives to judicial

¹³⁹ A. Reinisch, 'The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals', 7 *Chinese Journal of International Law* (2008) 2, 285, 285-286.

¹⁴⁰ J. Wouters & P. Schmitt, 'Challenging Acts of Other United Nations' Organs, Subsidiary Organs and Officials', in A. Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (2010), 77. See however Freedman, *supra* note 12, 242. See on immunity and accountability for UN acts in the light of the dispute over the cholera outbreak in Haiti, P. Lewis, 'Who Pays for the United Nations' Torts? Immunity, Attribution, and "Appropriate Modes of Settlements"', 39 *North Carolina Journal of International Law and Commercial Regulation* (2014) 2, 259.

¹⁴¹ *Waite and Kennedy v. Germany*, ECtHR Application No. 26083/94, Judgment of 18 February 1999, 15, para. 67.

¹⁴² S. Y. Marochkin, 'The Russian Federation', in Reinisch (ed.), *International Organizations in Domestic Courts*, *supra* note 94, 221, 236 *et seq.*

¹⁴³ France: *Banque africaine de développement c. M.A. Degboe*, Cour de Cassation (Chambre Social), Case No. 04-41012, 25 January 2005, JDI 2005, 1142; for a high standard of scrutiny see *Illemassene c OCDE*, Cour de Cassation (Chambre Social), Case No. 1804 FS-D, 29 September 2010.

¹⁴⁴ Even further in France: *UNESCO v. Boulois*, Cour d'appel de Paris (14e Ch. A), Rev. arb. 1999, 343, 344-345.

protection.¹⁴⁵ Some Belgian cases are even further reaching, particularly the decision on *Siedler v. Western European Union*. A Brussels court determined that although the WEU indeed had an internal procedure, said procedure did not provide an *adequate* alternative to judicial protection. Thus, Art. 6 (1) *ECHR* and Art. 14 (1) *ICCPR* were infringed and the court denied immunity.¹⁴⁶ Such a broadening of the intensity of judicial review has not yet been observed beyond Belgium.¹⁴⁷

Some courts outside the Council of Europe member States take increasingly notice of the *Waite and Kennedy* jurisprudence.¹⁴⁸ Thus, in an employment-related dispute against the Northwest Atlantic Fisheries Organization [NAFO] before the Supreme Court of Nova Scotia the plaintiff referred to the ECtHR judgment and the Court refused to accept the organization's immunity defence, *inter alia*, on the basis of Art. 14 *ICCPR*.¹⁴⁹ However, in 2013 the Canadian Supreme Court upheld NAFO's immunity rejecting quite explicitly the requirement of alternative legal remedies:

“The fact that the appellant has no forum in which to air his grievances and seek a remedy is unfortunate. However, it is the nature of an immunity to shield certain matters from the jurisdiction of the host state's courts [...] it is an ‘inevitable result’ of a grant of immunity that certain parties will be left without legal recourse [...]”¹⁵⁰

¹⁴⁵ A. Reinisch, ‘Comments on a Decade of Italian Case Law on the Jurisdictional Immunity of International Organizations’, 19 *Italian Yearbook of International Law* (2009), 101, 105-108 [Reinisch, Comments on Italian Case Law]; C. Ryngaert, ‘The Immunity of International Organizations Before Domestic Courts: Recent Trends’, 7 *International Organization Law Review* (2010) 1, 121, 133.

¹⁴⁶ Belgium: *Siedler c. UEO*, Cour du Travail (Bruxelles), *Journal des Tribunaux* (2004), 25, 617.

¹⁴⁷ Reinisch, ‘Comments on Italian Case Law’, *supra* note 145, 108.

¹⁴⁸ Already in 1983 the Argentine Supreme Court had applied a comparable jurisprudence based on the right to judicial protection under the Mexican Constitution; *Cabrera v. Comisión Técnica Mixta de Salto Grande*, (5 december 1983) 305 Fallos de la Corte Suprema 2150; R. E. Vinuesa, ‘Argentina’, in Reinisch (ed.), *International Organizations in Domestic Courts*, *supra* note 94, 17, 22.

¹⁴⁹ *Amaratunga v Northwest Atlantic Fisheries Organization*, 2010 CanLII 346 (NSSC); P. Saunders, ‘Canada’, in Reinisch (ed.), *International Organizations in Domestic Courts*, *supra* note 94, 73, 95.

¹⁵⁰ *Amaratunga v. Northwest Atlantic Fisheries Organization*, [2013] 3 S.C.R. 866.

While U.S. courts have not yet applied Art. 14 *ICCPR* to immunity cases,¹⁵¹ the UN Human Rights Committee has only vaguely stated that:

“The failure of a State party to establish a competent tribunal [...] would amount to a violation of article 14 if such limitations are not based [...] on exceptions from jurisdiction deriving from international law such, for example, as immunities.”¹⁵²

Thus, it cannot (yet) be safely inferred from jurisprudence that Art. 14 (1) *ICCPR* entails the same obligation as Art. 6 (1) *ECHR*.¹⁵³

Consistently applied, the *Waite and Kennedy* jurisprudence leads to a conflict of norms. On the one hand, should Art. 6 (1) *ECHR* be infringed because courts through granting immunity do not ensure legal protection in spite of a lack of alternative mechanisms, then the contracting Member State is responsible under the *ECHR*. On the other hand, should the State not grant immunity to an international organization, even though it is obliged to do so under the founding treaty or a headquarters agreement, then the State would also be responsible under public international law.

The courts that have recognized this conflict solve it differently. The Swiss Federal Court circumvents the conflict on the *ECHR* level. In a case concerning immunity of the Bank for International Settlements the court interprets the jurisprudence of the European Court of Human Rights to the effect that pursuant Art. 6 (1) *ECHR* the necessary “[...] proportionality assessment [may] not lead to an international organization having to subject itself to national jurisdiction [...]”.¹⁵⁴ The Belgian Court of Cassation justifies the precedence of the *ECHR* in a decision concerning the African, Caribbean and Pacific Group of States [ACP] through stating that an agreement that contravenes Art. 6 (1) *ECHR*

¹⁵¹ C. H. Brower II, ‘United States’, in Reinisch (ed.), *International Organizations in Domestic Courts*, *supra* note 94, 303, 310.

¹⁵² UN Human Rights Committee, *General Comment No. 32*, UN Doc CCPR/C/GC/32 (2007), para. 18.

¹⁵³ See, however, Sec. 29 of the 1946 *Convention on the Privileges and Immunities of the United Nations*; A. Reinisch, ‘To What Extent Can and Should National Courts ‘Fill the Accountability Gap’?’, 10 *International Organization Law Review* (2013) 2, 572, 576 [Reinisch, Accountability Gap].

¹⁵⁴ Switzerland: *NML Capital Ltd. und EM Limited gegen Bank für Internationalen Zahlungsausgleich (BIZ) und Betreibungsamt Basel-Stadt*, BGE 136 III 379, 4.5.3 (translation by the author); differently evaluated by Peters, *Funktionale Immunität*, *supra* note 94, 422.

may not be applied by a Belgian judge.¹⁵⁵ Lastly, a British court affirmed UNESCO's immunity in the case *Entico v. UNESCO* by Art. 30 (4) (b) of the *Vienna Convention on the Law of Treaties*, because the *ECHR* only became effective after the conclusion of the *Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations* from 1947 and the *ECHR* is only binding for a minority of the member States.¹⁵⁶ The judge invokes the European Court's case-law in the *Golder* decision and interpretes the *ECHR* in light of a presumption of concordance among public international law norms.

In the case of *Mothers of Srebrenica v. the Netherlands* the European Court of Human Rights explicitly addresses this norm conflict:

“[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 [...]”¹⁵⁷

In relation to the UN the decisive norm is Art. 103 *UN Charter*. The Court argues that the presumption established in its *Al-Jedda* case that Art. 103 *UN Charter* would not necessarily override regional human rights obligations¹⁵⁸ can be rebutted. For this purpose, the Court distinguishes legal remedies against peacekeeping missions from employment-related disputes. In line with its reasoning in the *Behrami and Saramati* case it holds that domestic jurisdiction over acts and omissions of the Security Council can only be created with the UN's consent because otherwise member States could interfere with

¹⁵⁵ Belgium: *Secrétariat Général du Groupe des Etats d'Afrique, des Caraïbes, et du Pacifique c. Lutchmaya*, Cour de Cassation, C 03 0328 F, ILDC 1573 (BE 2009), available at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20091221-5 (last visited 17 March 2015). See also in this regard C. Ryngaert, 'Belgium', in Reinisch (ed.), *International Organizations in Domestic Courts*, *supra* note 94, 55, 58.

¹⁵⁶ UK: *Entico Corp Ltd v United Nations Educational, Scientific and Cultural Organization and Another*, (2008) High Court of Justice, 1 CLC 524, 536, para. 19. See also in this regard S. Sarooshi & A. Tzanakopoulos, 'United Kingdom', in Reinisch (ed.), *International Organizations in Domestic Courts*, *supra* note 94, 275, 294.

¹⁵⁷ ECtHR, *Mothers of Srebrenica*, *supra* note 14, para. 139.

¹⁵⁸ ECtHR, *Al-Jedda v. the United Kingdom* [GC], Judgment, Application No. 27021/08 (2011), para. 102.

the effective fulfilment of the UN's main purpose.¹⁵⁹ Consequently, the Court explicitly rejects the tendency to assume that "[...] in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a court".¹⁶⁰ With this decision, the European Court of Human Rights has aimed to contain the effects of its *Waite and Kennedy* jurisprudence, although it is not yet clear whether it will also have a restricting effect on employment-related disputes.¹⁶¹

However, all attempts to solve the conflict of norms developed through judicial practice do not reach a reconciliation of interests. The Belgian Court of Cassation, which does not apply Art. 14 *ICCPR*, does not consider that the *ECHR* is not binding for the ACP and its member States. The solution proposed by the British court does indeed present an interpretation of public international law norms that conforms to rules of precedence *lege artis*; yet, the notion that the protection of human rights should be effective and practicable is not done any justice at least in the cases in which international organizations do not provide any kind of alternative legal protection. The same holds true for UN cases in matters concerning the maintenance of peace and security. Therefore, in order to meet the function of immunity as a rule on the exercise of jurisdiction a pragmatic solution to the conflict is required. The norm conflict which so far apparently only arises for member States of the *ECHR* is best solved if Art. 6 (1) *ECHR* is interpreted as a call upon its member States to, if necessary, negotiate in order to ensure that alternative dispute settlement mechanisms exist. Within these negotiations, there would be room for the interests of international organizations which have member States that have not or mainly have not joined the *ECHR*.¹⁶² The European Court of Human Rights might have contested this proposition in its *Mothers of Srebrenica* decision where it holds that the lack of alternative mechanism "[...] is not imputable to the Netherlands."¹⁶³ Yet, the court lags behind the Swiss Federal Supreme Court in its case *NADA v. Seco* concerning the targeted sanctions regime. While the Swiss Court considers the regime to be in violation of Art. 6 para. 1 *ECHR* it acknowledges that redress can only be attained at the UN level and approves of the Swiss government's efforts to work towards introducing an effective Security Council control mechanism. It

¹⁵⁹ ECtHR, *Mothers of Srebrenica*, *supra* note 14, para. 154.

¹⁶⁰ *Ibid.*, para. 164.

¹⁶¹ Reinisch, 'Accountability Gap', *supra* note 153, 576.

¹⁶² However, it should be borne in mind that not only the *ECHR* calls for alternative dispute settlement mechanisms.

¹⁶³ ECtHR, *Mothers of Srebrenica*, *supra* note 14, para. 165.

also holds that the State is obliged to support the plaintiff during the de-listing procedure.¹⁶⁴ Such a duty to work towards (*Hinwirkungspflicht*) alternative dispute settlement mechanisms constitutes an adequate compromise between the interests of international organizations, member States and plaintiffs.

2. Guaranteeing Legal Stability and Certainty as well as Peaceful International Relations in a Multipolar World

Understood as a rule on the exercise of jurisdiction, immunity also ultimately guarantees legal stability and certainty as well as peaceful international relations. There is no consensus on what a proper understanding of legal stability requires. Is it sufficient to convey a state of stability through law¹⁶⁵ in order to achieve legal security for all parties?¹⁶⁶ Accordingly, a state of legal stability may be achieved even if material claims are not settled and injustice has not been eliminated. As a contrast there is a concept of legal stability according to which this state may only be reached if injustice is actually countered.¹⁶⁷ However, certain legal concepts, such as the limitation period,¹⁶⁸ rather point to a formal understanding.¹⁶⁹ To accord immunities contributes to such an understanding of legal stability and certainty as well as peaceful international relations. The argument has, for instance, been raised in relation to the *Jurisdictional Immunities Case*. Tomuschat stressed that denying State immunity in order to grant reparation claims to every individual victim of violations of the laws of war in the aftermath of an armed conflict would endanger any definitive

¹⁶⁴ *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative Appeal Judgment, Case No 1A 45/2007; ILDC 461 (CH 2007); BGE 133 II 450, paras 8.3. & 9.

¹⁶⁵ A. von Arnould, *Rechtssicherheit: Perspektivische Annäherung an eine idée directrice des Rechts* (2006), 111.

¹⁶⁶ In this spirit by K. Doehring, 'Staatenimmunität dient dem Rechtsfrieden: Kriegschäden oder -unrecht sind keine Angelegenheit nationaler Gerichte', *Frankfurter Allgemeine Zeitung* (1 September 2001), 10; R. Müller, Rechtsfrieden, *Frankfurter Allgemeine Zeitung* (3 February 2012), available at <http://www.faz.net/aktuell/politik/staat-und-recht/entscheidung-in-den-haag-rechtsfrieden-11636702.html> (last visited 17 March 2015).

¹⁶⁷ In this spirit for instance by K. Thorn, 'Diskussionbeitrag', in A. Zimmermann *et al.*, *Moderne Konfliktformen: humanitäres Völkerrecht und privatrechtliche Folgen*, Berichte der Deutschen Gesellschaft für Völkerrecht, Vol. 44 (2010), 414.

¹⁶⁸ A. Guckelberger, *Die Verjährung im Öffentlichen Recht* (2004), 421.

¹⁶⁹ Critically with respect to the concept of legal stability due to lack of objectivity, H. Rottleuthner, 'Zum Rechtsfrieden', in J. Brand, D. Stempel & E. Blankenburg (eds), *Soziologie des Rechts: Festschrift für Erhard Blankenburg zum 60. Geburtstag* (1998), 683, 692.

peace settlement and thus the (re-)establishment of peaceful co-existence and cooperation among States.¹⁷⁰

The decision of the International Tribunal for the Law of the Sea in the “*ARA Libertad*” Case is based on a comparable concern for the maintenance of peaceful international relations.¹⁷¹ Argentine presented the argument that “[...] [f]urther attempts to forcibly board and move the Frigate without the consent of Argentina would lead to the escalation of the conflict and to serious incidents in which human lives would be at risk”.¹⁷² The court agreed with the argument, requested “[...] full compliance with the applicable rules of international law [...]”¹⁷³ and stressed that “[...] any act which prevents by force a warship from discharging its mission and duties is a source of conflict that may endanger friendly relations among States [...]”.¹⁷⁴

The function of immunity to ensure legal stability and certainty as well as peaceful international relations, should gain even more importance the more the international order should develop into a multi-polar world order.¹⁷⁵ This is shown by the dispute between the African Union (AU) and the European Union (EU) regarding the exercise of universal jurisdiction. The dispute started through several criminal law proceedings, which were initiated in France and Spain against members of the Rwandan government and other State officials.¹⁷⁶ The dispute did not only revolve around universal jurisdiction, but also – if one looks at the AU decisions – specifically around discarding immunity in cases of grave violations of human rights.¹⁷⁷

¹⁷⁰ C. Tomuschat, ‘The International Law of State Immunity and its Development by National Institutions’, 44 *Vanderbilt Journal of International Law* (2011) 4, 1105, 1107 & 1135. See also J. Schaarschmidt, ‘Die Reichweite des völkerrechtlichen Immunitätsschutzes – Deutschland v. Italien vor dem IGH’, 5 *Beiträge zum Europa- und Völkerrecht* (2010), 19.

¹⁷¹ F. Bothway, ‘The Immunity Conundrum’, 22 *African Journal of International and Comparative Law* (2014) 2, 258, 270.

¹⁷² ITLOS, “*ARA Libertad*” Case, *supra* note 1, para. 82.

¹⁷³ *Ibid.*, para. 100.

¹⁷⁴ *Ibid.*, para. 97.

¹⁷⁵ Regarding the general consequences of this phenomenon on public international law for instance, M. Happold (ed.), *International Law in a Multipolar World* (2011); Y. Onuma, *A Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century* (2010). On African States from a perspective of political science see U. Engel & M. J. Ramos, *African Dynamics in a Multipolar World* (2013).

¹⁷⁶ Wuerth, ‘Pinochet’s Legacy’, *supra* note 50, 753.

¹⁷⁷ See also African Union, *Decision on the Abuse of the Principle of Universal Jurisdiction*, Doc Assembly/AU/11(XIII), para. 6: “CALLS UPON all concerned States to respect

It would be short-sighted to merely understand the dispute as an expression of African despots' concern to be held responsible before a court, since also democratic African States supported the AU's position.¹⁷⁸ The question as to which courts – African or European – attain jurisdiction to establish responsibility for grave violations of human rights is the actual subject matter of the dispute.¹⁷⁹ Though the European side does rightly point-out that there is often a lack of readiness by African States to criminally prosecute,¹⁸⁰ the African States' claim to be able to independently provide for accountability of severe human rights abuses is not without any reasonable chance. For instance, in February 2013 a proceeding was opened against Chad's former President, Hissène Habré, before the so-called Extraordinary African Chambers.¹⁸¹ Surely this development was also a product of political pressure, which Europe exerted, among others, through the ICJ proceeding between Belgium and Senegal regarding *aut dedere aut iudicare* duties.¹⁸² Nonetheless, political pressure may be exerted in several different ways. It does not necessarily need to materialize through discarding immunity. It should be borne in mind that African States perceive proceedings in which immunity has been denied as politically selective. In the AU and EU Commission's joint report – a commission which was appointed during the dispute on the exercise of universal jurisdiction – it was clear that African States assume the use of double standards.¹⁸³

Is this accusation farfetched? If proceedings are carried out against foreign States and their State officials in cases of grave violations of human rights before

International Law and particularly the immunity of State officials when applying the Principle of Universal Jurisdiction."

¹⁷⁸ K. Mills, "Bashir is Dividing us": Africa and the International Criminal Court', 34 *Human Rights Quarterly* (2012) 2, 404, 440.

¹⁷⁹ Cf. *ibid.*, 407, 412 & 444. This dispute must be distinguished from the dispute around the ICC and the lack of immunity for acting Heads of State before this court. To stress its position in this respect the AU Assembly adopted a *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (Doc STC/Legal/Min/7(I) Rev. 1, 15 May 2014) in which Article 46A *bis* stipulates that: "No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."

¹⁸⁰ *Report of the AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction*, 16 April 2009, 8672/1/09 REV 1, para. 44 [AU-EU Report].

¹⁸¹ HRW, 'Habré Court Opens', *supra* note 135. The Zimbabwean *Torture Docket Case* is also worth mentioning: South Africa: High Court, *Southern African Litigation Centre v. National Director of Public Prosecutions*, *supra* note 1.

¹⁸² ICJ, *Obligation to Prosecute or Extradite*, *supra* note 1.

¹⁸³ *AU-EU Report*, *supra* note 180, para 34.

national courts in the U.S., Switzerland, Canada, Italy and the UK through adoption of universal jurisdiction and extraterritorial duties to penalize, these States will also have to accept such proceedings against themselves and their State officials before national courts in Algeria, China, Iran, Congo, Rwanda or Zimbabwe. That democratic constitutional States are not yet ready for this has not only been shown in the development of the law on special missions, but also through the practice of agreeing to functional immunity for members of the armed forces in receiving States through Status of Force agreements.¹⁸⁴ Accordingly, in the deployments to Bosnia and Herzegovina, Iran and Afghanistan so-called exclusive jurisdictional agreements were increasingly used, which accorded immunity from host nation jurisdiction and have even resulted in criminal prosecution gaps.¹⁸⁵

In the end, the denial of immunity requires an international community of constitutional States. As long as this requirement is not met democratic constitutional States will perceive the perspective of transnational models of enforcement at least as ambivalent from a fundamental rights standpoint. As long as there is no such international community of constitutional States, immunity serves democratic constitutional States to protect their State officials from being exposed to court proceedings which do not meet the standard of the rule of law. Hence, the United States District Court clearly stated in the case *Tabion v. Mufti* that the aim of granting immunity was “[to] protect United States [officials] from [...] prosecution in foreign lands [...] [because] not all countries provide the level of due process to which United States citizens have become accustomed [...]”.¹⁸⁶ In light of such conflicts between normative claims and legal reality, immunity seems to be, in the words of Hazel Fox, “[...] a neutral way of denying jurisdiction to States over the internal administration of another State and diverting claims to settlement in the courts of that State, or by diplomatic or other international means to which that State has consented.”¹⁸⁷

¹⁸⁴ Arnould, *Völkerrecht*, *supra* note 35, 136; P. J. Conderman, ‘Status of Armed Forces on Foreign Territory Agreements (SOFA)’, in Wolfrum (ed.), *supra* note 59, Vol. IX, 586, 593.

¹⁸⁵ Regarding the gap, as well as all legal attempts to close it, see Conderman, *ibid.*, 596-597.

¹⁸⁶ U.S.: *Tabion v. Mufti*, District Court, (E.D. Va. 1995) 877 F. Supp. 285, 293.

¹⁸⁷ H. Fox, ‘In Defence of State Immunity, Why the UN Convention on State Immunity is Important’, 55 *International and Comparative Law Quarterly* (2006), 399, 405.

E. Prospects

Since immunity still fulfils important functions in a globalized world, the question must ultimately be asked as to how international law development regarding denial of immunity in cases of grave violations of human rights could be more cautiously brought forward. In the end, an alternative legal remedy is not always actually available. Victims remain unheard, while perpetrators evade being punished.

A careful step forward may have been mapped out by the ICJ in the case *Djibouti v. France*. The ICJ stated that the State, which claims immunity *ratione materiae* for its state officials, needs to notify the forum State of the existence of said immunity. Only that way courts may ensure that immunity is not unjustly denied; hence, relieving the forum State of incurring responsibility under public international law.¹⁸⁸ The requirement of notification is legally justified due to that immunity *ratione materiae* of a state official is ultimately a product of State immunity. Whether the ICJ's statement may claim customary international law validity, may be doubted if one considers that not only in Germany¹⁸⁹, but also in Great Britain¹⁹⁰, for instance, jurisdictional immunity must be reviewed by courts *proprio motu*, i.e. on their own initiative. In addition, Art. 6 (1) of the *UN Convention on Jurisdictional Immunities of States and their Property* also requires that forum States ensure that courts review jurisdictional immunity of their own initiative.

Nevertheless, it is submitted that procedural law, limited to cases regarding severe human rights abuses, should be changed to the effect that the

¹⁸⁸ ICJ, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Reports 2008, 177, 244, para. 196: "The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs"; see also International Law Commission, *Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction by the Special Rapporteur*, UN Doc A/CN.4/646, paras 16-17; however, there was no diplomatic dialogue regarding the presence of the accused in the forum State; Higgins, 'Equality of States' *supra* note 77, 135.

¹⁸⁹ *Philippinisches Botschaftskonto*, (1977) Federal Constitutional Court, BVerfGE 46, 342, 359; Baumbach-Lauterbach-Hartmann (ed.), *Zivilprozessordnung*, 72nd ed. (2014), Einf. vor §§ 18-20 GVG, para. 2.

¹⁹⁰ Sec. 1 (2) *State Immunity Act 1978*.

State, whose officials are to undergo trial, must invoke their immunity.¹⁹¹ This would open twofold possibilities: the concerned State, whose officials are to undergo trial, could decide whether transgressing immunity would run contrary to the rationale behind immunity. In other words, whether a State's interests in performing public functions would be at risk or whether there are other reasons against the jurisdiction of the forum State. Hence, State's interest would be taken into account. At the same time, a link would be created for civil society transnational enforcement strategies, which could put political pressure on the concerned States in order to bring them not to claim immunity. A procedural problem would be solved at a procedural level.

¹⁹¹ See also A. Peters, 'Immune against Constitutionalisation?', in Peters *et al.* (eds), *Immunitates*, *supra* note 9, 1, 18; Wuerth, 'Foreign Official Immunity', *supra* note 55, 223 *et seq.*

Opening the Forum to the *Others*: Is There an Obligation to Take Non-National- Interests Into Account Within National Political and Juridical Decision-Making-Processes?

Sergio Dellavalle*

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Abstract

Decisions taken in a national forum affect the interests of individuals who, as non-citizens, are excluded from the decision-making-process. In the contemporary world, individuals and social groups can be severely harmed as a result of decisions taken far away from the place where they live and often even without any direct intervention. The issue of the consideration of non-national interests within national decision-making-processes is thus becoming increasingly important. The contribution begins with a brief analysis of the concept of *solidarity*, as the legal obligation to take into account non-national interests has been labelled in the international law scholarship. In contemporary international law, *solidarity* is a principle to be interpreted and further developed, rather than a *right* articulated in firm rules. Yet, from the epistemological point of view the legal system is always based on extra-legal concepts and reasoning. Thus, the reference in legal principles to non-legal arguments should not be regarded as a disadvantage but as a precious contribution to the inescapable link between legal and extra-legal discourses. On the basis of this assumption, the article concentrates on the main extra-legal reasons that have been brought into the debate in order either to deny both the existence of a duty of *solidarity* within the *lex lata* as well as the necessity to introduce it *de lege ferenda*; or, on the contrary, to maintain the paramount importance of such a duty. The analysis will end with some considerations on how the political and juridical forum could be concretely opened up, through proper legal and institutional arrangements, to a deliberation that gives access to the arguments of the *others*.

A. Introduction

In several ways, decisions taken within the national scope affect both people who, as non-citizens, are excluded from the decision-making-process and their justified interests. These individuals, as well as social and national groups, are required to live with the consequences of choices made by other social groups without any chance of influencing the outcome of the pronouncement and, therefore, also their own destiny.¹ This fact, however, goes against our deepest

¹ “The human rights of individuals, groups and peoples are affected by and dependent on the extraterritorial acts and omissions of states. The advent of economic globalization, in particular, has meant that states and other global actors exert considerable influence on the realization of economic, social and cultural rights across the world.” See: O. De Schutter *et al.*, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States

sense of justice as well as our commitment to a participatory and democratic understanding of human interactions. Nevertheless, precisely this attitude has characterized much of human history, and the focusing of attention within the decision-making-process exclusively on the self-centred interests of the national community is a correct description of what is still happening today – at least in the most cases and in spite of normative attempts heading to the opposite direction. Yet, this has not been the only view of things in the past two thousands years. The obligation – or, better, the moral duty – to take a universal and not merely an egoistic point of view in framing political decisions has been proclaimed by many thinkers and philosophers since Stoicism first introduced to the Western world the idea that the whole of human society can be seen as ruled by only one *nomos* and all human beings build a “cosmopolis”.² Yet, when it comes to the implementation of this obligation within the political and juridical praxis, historical examples are few and generally far from adequate: universalism was understood as based more on respect for the general principles of divine and rational law than on a forum in which a discursive recognition of the *reasons of the others* can be achieved.³

In the contemporary, ever more interconnected world we are confronted with the possibility of doing harm, as a consequence of national decisions, not only to neighbours but also to peoples living far away from the place where the decisions are taken.⁴ Unlike the damage inflicted during the era of colonialism,

in the Area of Economic, Social and Cultural Rights’, 34 *Human Rights Quarterly* (2012) 4, 1084-1085 (Preamble, para. 1).

² On Stoicism as the first attempt to conceive order as universal see: M. C. Nussbaum, ‘Kant and Stoic Cosmopolitanism’, 5 *The Journal of Political Philosophy* (1997) 1, 1, 12; A. von Bogdandy & S. Dellavalle, ‘The Paradigms of Universalism and Particularism in the Age of Globalisation: Western Perspectives on the Premises and Finality of International Law’, in The Xiamen Academy of International Law, *Collected Courses of the Xiamen Academy of International Law*, Vol. 2 (2009), 45, 53; S. Dellavalle, *Dalla comunità particolare all’ordine universal - I paradigmi storici dell’ordine*, Vol. I (2011).

³ A first – surely partial and ultimately self-interested – example of the consideration of non-national claims was the old Roman *ius fetiale*. On its praxis as well as on the limits of this approach see: A. Nussbaum, *A Concise History of the Law of Nations* (1950), 16. To some extent, the duty of Christian States to respect divine and rational law – and therefore also the justified interests of other Christian or even non-Christian peoples – under the supreme moral authority of the Roman Church can also be seen as such an early example. For a presentation of this theory, albeit without direct references to the recognition of non-national interests, see: F. Suárez, ‘Defensio fidei catholicae et apostolicae adversus anglicanae sectae errores’, in F. Suárez, *Selections from three Works*, Vol. III (1944), 667.

⁴ See, as an important reflection on one of the most discussed examples of transboundary negative effects of national decisions: R. M. Bratspies & R. A. Miller (eds), *Transboundary*

contemporary harms to non-citizens can even be indirect, for example through pollution or financial as well as economic policies, hitting foreign populations in a subtler way, but on a significantly wider scale. On the other hand, our world is characterized by media coverage which includes a large part of the global society and is capable of mobilising what has been called the *colère publique mondiale*.⁵ The globalization of the possibility of doing harm corresponds, therefore, to the globalization of sensitization to the worldwide violations of human rights. As a consequence, the issue of the consideration of non-national interests within the political decision-making-process and the jurisprudential praxis is urgently coming to the fore and has an unprecedented chance of achieving concrete results.

The legal obligation to take non-national interests into account has in the international law scholarship been labelled *solidarity*. Thus, I will begin my analysis with a brief presentation of how this concept has been elaborated within the *lex lata* (B.). Although strong arguments sustain the view that *solidarity* has already been established in positive law, the fact that the provisions on *solidarity* have mainly taken the form of legal principles has raised some concerns about their consistency as legal norms. In other words, it may be countered that the concretisation of the concept of *solidarity* in legal terms seems rather to have been built – at least hitherto – either on interpretations resorting to extra-legal considerations⁶ or on arguments *de lege ferenda*. The claim that legal norms are valid only if they are self-subsistent and, therefore, unrelated to any extra-legal discourse is grounded on the assumption that the legal system has to be – and can be – logically and epistemologically self-sufficient. In contrast, a short presentation of the inherent contradictions and conceptual difficulties in which even the most ambitious attempts to demonstrate the self-sufficiency of the legal system are trapped justifies the claim that the legal discourse has necessarily to

Harm in International Law: Lessons from the Trail Smelter Arbitration (2006).

⁵ A. Fischer-Lescano, 'Globalverfassung: Verfassung der Weltgesellschaft', 88 *Archiv für Rechts- und Sozialphilosophie* (2002) 3, 349, 359, who derives the concept from Émile Durkheim.

⁶ I understand *legal discourse*, in this context, as the discourse concerning directly legal norms and their application. By contrast, *extra-legal discourse* is, in principle, any kind of discourse that concerns fields other than the above-mentioned. Linking the former with the latter means, concretely, that interpretations or developments regarding any component of the legal system (rules, principles, etc.) always imply a reference to arguments elaborated in contexts other than the law, mainly in social (non-legal) and political interactions as well as in scientific discourses reflecting on them (such as sociology, political science, as well as moral, social and political philosophy).

be extended to – and integrated by – extra-legal concepts and reasoning (C.). Admitting, therefore, that a cautious extension of the legal discourse to extra-legal arguments is, from an epistemological point of view, not only acceptable but even inescapable, I will move on to describe the main extra-legal reasons that have been brought into the debate in order either to deny the interpretation of the existing law in the sense of a duty to *solidarity* as well as the need for a further development of the law in this direction (D.), or, on the contrary, to support the opening up of the national forum to the *others* (E.). The analysis will end with some tentative remarks on how the political and juridical forum could be concretely made accessible, by means of proper legal and institutional arrangements, to a deliberation that includes the arguments of the *others*, i.e. to non-national interests (F.).

B. Is There a Legal Obligation Concerning Solidarity?⁷

Taking non-national interests into consideration requires comprehension of two dimensions (*infra*, F.): the one concerning the legal and institutional response at the national level; the other consisting of international law provisions. While the first dimension, in general, is on the whole yet to be built, the second one – which may also have significant influence on national policies and on adjudication practice – has already been implemented, at least partially, through the provisions of international law regarding *solidarity*.⁸

According to the definition proposed by Rüdiger Wolfrum, *solidarity* in international law rests on the consideration that “States acting merely on an individual basis cannot provide satisfactorily for solutions which the interests of the community demand. Such demands require a common action.”⁹ Solidarity thus means “[...] that States in shaping their positions in international relations should not only take into consideration their own individual interests but also those of other States or the interests of the community of States or both.”¹⁰

⁷ I am grateful to Matthias Goldmann and Holger Hestermeyer for helpful conceptual and bibliographical suggestions on the topic of this section.

⁸ For a general overview on the concept of *solidarity* in international law, see: D. Campanelli, ‘Principle of Solidarity’, in R. Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law*, Vol. IX (2012), 288.

⁹ R. Wolfrum, ‘Solidarity amongst States: An Emerging Structural Principle of International Law’, in P.-M. Dupuy *et al.* (eds), *Völkerrecht als Wertordnung – Common Values in International Law: Festschrift für Christian Tomuschat* (2006), 1087 [Wolfrum, Solidarity amongst States].

¹⁰ *Ibid.*, 1087-1088.

Concretely, the implementation of solidarity implies a twofold task: on the one hand the requirement to cooperate in order to achieve shared interests,¹¹ on the other the amelioration of “[...] existing deficiencies or disparities [...]”.¹²

References to *solidarity* have been introduced into positive international law in several different legal regimes.

a) In the *international system on the protection of peace*, solidarity is implied, first, in the “[...] inherent right of ... collective self-defence [...]”, according to “[...] the underlying rationale of Art. 51 UN Charter [...]”,¹³ and, second, in the system of collective security (Chapter VII UN Charter) insofar as “[...] it obliges States to act in the interest and defence of a common value, namely the preservation of peace.”¹⁴

b) As regards *international environmental law*, Wolfrum refers in particular to the principles of sustainable development and of common but differentiated responsibility, as established in the *Rio Declaration* of 1992 as well as in documents and agreements such as the *Convention on Biological Diversity* and the *Framework Convention on Climate Change*.¹⁵

c) Considering the *world trade law regime*, “[...] [the] objectives referred to in the Preamble of the WTO Agreement define a common value, namely the enhancement of the economic development.”¹⁶ Moreover, we have here also the second aspect of solidarity, namely the commitment to “[...] the amelioration of existing deficiencies, and the need to further promote the economic development

¹¹ The need to implement *solidarity* can be thus a strong justification for *cooperation*. Nevertheless, *solidarity* has to be generally distinguished from *cooperation* since the former is an attitude – or rather a duty – based on a legal principle, the accomplishment of which does not imply necessarily the existence of mutual advantages. In this sense, *solidarity* may impose *unilateral* obligation on just one actor of the interaction. At the same time, it is *universalistic* in its essence insofar as the obligations are thought to be valid towards every human being who may be affected by the actor’s decisions. By contrast, *cooperation* always presupposes – even if it is inspired by an initial attitude of solidarity – *mutual* obligations concerning the parties to the treaty. Furthermore, it is *particularistic* because the obligations are imposed only on the signing parties. On the concept of *cooperation* in international law, see: R. Wolfrum, ‘International Law of Cooperation’, in R. Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law*, Vol. II, (2012), 783.

¹² Wolfrum, ‘Solidarity amongst States’, *supra* note 9, 1088.

¹³ *Ibid.*, 1090.

¹⁴ *Ibid.*, 1093.

¹⁵ *Ibid.*, 1093-1094.

¹⁶ *Ibid.*, 1097.

of developing countries.”¹⁷ The liberalization of trade must be seen, therefore, in the light of those higher normative priorities.¹⁸

d) Lastly, in the field of *humanitarian assistance and intervention* solidarity has been implicitly invoked in the *Resolution on Humanitarian Assistance to Victims of Natural Disasters*, adopted by the General Assembly on 8 December 1988.¹⁹ Furthermore, the institutional powers of the Security Council under Chapter VII UN Charter, with the competence to take action to protect the peace or even to legitimize humanitarian interventions, are based upon the principle of solidarity.²⁰ It is particularly significant that solidarity is exercised, in the case of humanitarian intervention, not *among states* but by states *towards a population of another state*.²¹

e) Although within the four above-mentioned law regimes the taking into consideration of non-national interests is related, in a broad sense, to the issue of human rights protection, the question arises whether the reference to solidarity has made its entry into that *specific* law regime which is explicitly dedicated, at the global-international as well at the continental level, to the *safeguarding of human rights*.²² As a consequence, *solidarity* would be unambiguously qualified, in this case, as a right the fulfilment of which every human being (or, according to a more communitarian understanding, every social and political group) can demand from any other individual or group. Starting with the global-international level, the essential relationship between human rights and solidarity – whereby solidarity in itself is deemed to be a right, so that a *specific right to solidarity* should be introduced or regarded as already existing – has been proclaimed in particular by documents issued by the Human Rights Council (HRC) either directly (i.e. in form of a resolution of the HRC),²³ or through the special rapporteur appointed by the HRC to study this particular issue.²⁴

¹⁷ *Ibid.*, 1097.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, 1098.

²⁰ *Ibid.*, 1099.

²¹ *Ibid.* (emphasis added). For the justification of this *shift in the reasoning* from solidarity between States to solidarity with foreign citizens in their cosmopolitan quality see: *infra*, E. IV., F.

²² I am grateful to Christopher McCrudden for this suggestion.

²³ *Human Rights and International Solidarity*, UN Doc A/HRC/RES/15/13, 30 September 2010.

²⁴ Note by the United Nations High Commissioner for Human Rights on *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*. *Human Rights and International Solidarity*, UN Doc

The references made in these cases to existing international law norms address²⁵ provisions contained in the *Charter of the United Nations*,²⁶ in the *Universal Declaration of Human Rights*,²⁷ and in the *Covenant on Economic, Social and Cultural Rights*.²⁸ Despite some normative evidences, the positions taken by the HRC have been highly controversial, having met with strong resistance especially from Western countries.²⁹ Among the reasons behind the Western states' opposition to the introduction of an explicit *right to solidarity* along the lines laid down by the HRC and its special rapporteur might have been a narrow-minded fear of being made responsible for injustice and harms inflicted upon non-Western countries by colonialistic and imperialistic policies, as well as a general scepticism – conceptually highly contestable, but well-rooted especially in the legal tradition of the Anglophone countries – against the establishment of positive rights, i.e. of rights that, for their implementation, require pro-active intervention by the public powers. Furthermore, the Western world's opposition may also have been motivated by understandable concerns as regards the wording of the resolution and, in general, of the documents of the HRC, in which, although there are references not only to the “right of peoples” but also to the “right of individuals” to international solidarity,³⁰ the prevailing attitude appears to be in favour of an understanding of solidarity as a “third generation right”,³¹ namely a right that can be implemented only collectively. It is precisely this *collective* dimension that characterizes certain entitlements insofar as they

A/HRC/9/10, 15 August 2008; *Report of the Independent Expert on Human Rights and International Solidarity*, UN Doc A/HRC/15/32, 5 July 2010.

²⁵ See, in particular UN Doc A/HRC/9/10, *supra* note 24, paras 8 & 9.

²⁶ *Charter of the United Nations*, 26 June 1945, Art. 1, para. 3; Chapter IX, Arts 55 & 56, 1 UNTS XVI.

²⁷ *Universal Declaration of Human Rights*, GA Res. 217 A (III), UN Doc A/RES/810 at 71, 10 December 1948, Art. 28.

²⁸ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Art. 2; Art. 11, para. 2, 993 UNTS 3.

²⁹ The resolution of the HRC on *Human Rights and International Solidarity*, *supra* note 23, has been adopted by a recorded vote of 32 to 14. Among the states that voted against the resolution were all members of the European Union which were part of the HRC, along with the United States of America, Japan, South Korea, Norway, Switzerland, Moldova and Ukraine.

³⁰ UN Doc A/HRC/RES/15/13, *supra* note 23, Arts 10, 12 and 14; UN Doc A/HRC/9/10, *supra* note 24, paras 2, 5, 17, 25-26; UN Doc A/HRC/15/32, *supra* note 24, paras I. 3, II. C. 37, III. A. 40, IV. 60.

³¹ UN Doc A/HRC/RES/15/13, *supra* note 23, Art. 9; UN Doc A/HRC/9/10, *supra* note 24, para. 1, Annex: 3, 5, 7; UN Doc A/HRC/15/32, *supra* note 24, paras II. A. 11, Annex: 3, 4, 7.

are thought to belong to the *third generation* of rights and, however, clearly comes up against the *individualistic* rights conception which is predominant within the Western tradition.

If solidarity can hardly be seen as a recognized right at the global-international level, the situation is not essentially different as regards the continental, in this case European, level.³² Indeed, Art. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) states that “[the] High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”³³ With reference to the protection of non-citizens from harms³⁴ and the taking into consideration of their justified claims, the question is therefore how far this jurisdiction can reach. Yet, the interpretation by the European Commission of Human Rights (ECommHR) and the European Court of Human Rights (ECtHR) has been quite restrictive in its substance, insofar as they eventually opt, regardless of the cautious introduction of some elements of a “relational” approach to the question,³⁵ for a conception of *jurisdiction* as being identical to *territorial control*. This preference was expressed in particular by the Grand Chamber of the ECtHR in its decision of principle concerning the *Banković* Case.³⁶ However, while a “relational” interpretation of jurisdiction could cover all cases of transboundary harm inflicted on individuals by state powers or by private actors subjected to state power even if the state involved did not exercise effective control on the territory in which the individuals concerned lived, the identification of *jurisdiction* with *territorial control* limits the application of the provision to only a few cases, excluding many situations

³² N. Vennemann, ‘Application of International Human Rights Conventions to Transboundary State Acts’, in Bratspies & Miller (eds), *supra* note 4, 295.

³³ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 1, 213 UNTS 221 [ECHR].

³⁴ The protection of non-citizens from harms, guaranteed – at least according to a progressive interpretation strategy, as we see below – by Art. 1 of the ECHR, defines the rather *negative* side of *solidarity*, i.e. of the general aim of taking into account the justified request by non-citizens not to suffer significant impairments as the result of decisions taken within national fora. The *positive* side, on the other hand, which also includes pro-active actions by state powers in order to overcome conditions of past and present injustice, characterizes the introduction of the solidarity principle into international law provisions – as described under a) (limited, here, to the system of collective security), b), c) and d), as well as the approach of the HRC considered under e).

³⁵ Vennemann, *supra* note 32, 297.

³⁶ *Banković and others v. Belgium and others*, ECtHR Application No. 52207/99, Decision of 12 December 2001.

that may result from “the increasingly transboundary or extraterritorial range of state action”.³⁷ Surely, Art. 1 of the ECHR does not, in principle, exclude a broader understanding of *jurisdiction*. Moreover, since “[the] reluctance to apply the international law of human rights to extraterritorial state acts is no longer tolerable”,³⁸ a dynamic interpretation of the legal instrument provided by Art. 1 ECHR would be much needed. Nevertheless, such an interpretation has, for the time being, to be seen as part of a discourse *de lege ferenda*, the concrete implementation of which is far from being certain.³⁹

Considering the lights and shadows of the normative situation,⁴⁰ two main criticisms have been formulated against the thesis that solidarity has already become part of positive international law: the first claims that provisions on solidarity are abstract and generic, and so an exercise of goodwill or a project *de lege ferenda*, rather than effective law;⁴¹ the second points to the partial and, in general, inadequate implementation of the provisions.⁴² As regards the first criticism, in spite of the perception by some actors in international relations⁴³ and of the efforts undertaken by the HRC, the idea of introducing *solidarity* as an individual or collective right or interpreting international law provisions in

³⁷ Vennemann, *supra* note 32, 307.

³⁸ *Ibid.*

³⁹ On the emerging principle of international law asserting, to the contrary, the disjunction of “acts and omissions” of States “that have effects on the enjoyment of human rights” from the condition of territorial jurisdiction, see: De Schutter *et al.*, *supra* note 1, 1101 (Art. 8 a).

⁴⁰ A further field could be taken into account as regards the introduction of solidarity as a legal principle, namely the law of the European Union. Indeed, solidarity is here more strongly asserted than within international law regimes, although it remains weaker than in national legal systems. Yet, the clearer affirmation of solidarity is due, in EU law, precisely to the fact that this legal system contains federalist elements which distinguish it from international law regimes in the proper sense of the word. See A. von Bogdandy, ‘Constitutional Principles’, in A. von Bogdandy & J. Bast (eds), *Principles of European Constitutional Law*, 2nd ed. (2010), 3, 11-12 [Bogdandy, Constitutional Principles]. As a result of the introduction of EU citizenship as well as of other provisions of EU law concerning the free movement of workers, solidarity has to be regarded in the Union as a duty towards fellow citizens and not towards foreigners. As a matter of fact, however, EU solidarity is proving – despite the federalist contents – to be more fragile than expected.

⁴¹ Y. Dinštein, ‘Discussion Following the Presentation by Philipp Dann’, in R. Wolfrum & C. Kojima (eds), *Solidarity: A Structural Principle of International Law* (2010), 79.

⁴² H. P. Hestermeyer, ‘Reality or Aspiration? – Solidarity in International Environmental and World Trade Law’, in D. König *et al.* (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, Vol. I (2011), 45.

⁴³ UN Doc A/HRC/15/32, *supra* note 24, 3.

the sense of a pre-existing *right to solidarity* has met and still constantly meets – as briefly depicted *supra*, under e) – relevant challenges and resistance. Indeed, as a consequence of these difficulties, solidarity has not generally been seen as a *right* expressed by exactly defined *rules*, but rather as a “principle”⁴⁴ – and as such it has also been understood within the legal regimes described above (a – d). In doctrine, in particular, solidarity has been interpreted as a “structural principle of international law”,⁴⁵ or as a “[...] fundamental and fundamentally sound principle of international law [...]”,⁴⁶ or even as a “constitutional principle”.⁴⁷ Therefore, the standing of *solidarity* as a matter of international law is, at least for the time being, strictly dependent on the status of *principles* within the legal system.

In this regard, it has been argued⁴⁸ that the concept of *principle* can be used, in legal discourse, in three ways. First, principles can be firmly anchored legal norms – like the “legal principles” of national constitutional law and of EU law⁴⁹. Second, principles can have a predominantly philosophical meaning. Finally, *principle* may be used in a purely *colloquial* sense. In both the second and third usages, *principles* would, from the perspective of a formalistic legal approach, be a rather shaky basis for the legal discourse. These are, however, precisely the ways in which the reference to solidarity as a *principle* emerges in contemporary international law. Yet, this interpretation ignores the specific – and very special – role played by *principles* in legal systems. Indeed, *principles* are purposely distinct from *rules*,⁵⁰ in particular, they are explicitly thought to be weighted and to build, as “[...] optimization commands [...]”,⁵¹ the conceptual

⁴⁴ *Ibid.*

⁴⁵ Wolfrum, ‘Solidarity amongst States’, *supra* note 9; R. Wolfrum, ‘Solidarity amongst States: An Emerging Structural Principle of International Law’, 49 *Indian Journal of International Law* (2009) 1, 8.

⁴⁶ R. S. J. Macdonald, ‘Solidarity in the Practice and Discourse of Public International Law’, 8 *Pace International Law Review* (1996) 2, 259.

⁴⁷ K. Wellens, ‘Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations’, in R. S. John Macdonald & D. M. Johnston (eds), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community* (2005), 775; K. Wellens, ‘Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections’, in Wolfrum & Kojima (eds), *supra* note 41, 3.

⁴⁸ Hestermeyer, *supra* note 42, 46.

⁴⁹ On “founding principles” within EU primary law see Bogdandy, ‘Constitutional Principles’, *supra* note 40, 12.

⁵⁰ R. Dworkin, *Taking Rights Seriously* (1977).

⁵¹ R. Alexy, ‘On the Structure of Legal Principles’, 13 *Ratio Juris* (2000) 3, 294; R. Alexy, *Theorie der Grundrechte*, 2nd ed. (1994), 75-76.

context in which rules are also embedded. In the dimension of legal principles – and, more specifically, in all meanings in which the concept of *principle* can be used – legal discourse meets moral, ethical, philosophical and, in general, extra-legal arguments,⁵² making interpretation of the law possible as well as paving the way for its further development.⁵³

“I love to sail forbidden seas, and land on barbarous coasts” – asserts Ishmael in Herman Melville’s *Moby Dick*.⁵⁴ The craft from within the legal system that helps us to reach unexplored coasts of jurisprudence is what we call *principles*. Solidarity’s status as a principle, therefore, is not a discredit. Instead, the skilful and courageous interpretation of principles based on ethical arguments or even on *colloquial* practices should be seen as an extremely useful and rational characteristic, belonging in general to all legal principles by reason of their position within the legal system. From this perspective the second supposed shortcoming of the solidarity principle – namely its alleged ineffectiveness – can also be viewed in a more positive light: law is not a static system; thus, in order to adapt to new situations and improve, it needs concepts and norms which accept the challenge of discovering a broader horizon and exploring unknown territories.⁵⁵

C. On the Relationship Between Legal and Extra-legal Discourses

My positive evaluation of the role of solidarity as a legal principle within the international law system – against the many critiques that have been raised against it – is lastly grounded on the epistemological premise that legal and extra-legal discourses are not impermeable but, instead, are open to each other in a kind of osmosis. Legal propositions are always connected to extra-legal concepts and assumptions, and on this connection is based the ability to

⁵² J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1992), 552 [Habermas, Faktizität und Geltung].

⁵³ For a different understanding of *principles*, according to which their essential relationship with extra-legal discourses is not stressed, but rather their structural function *within* the legal system, see: A. von Bogdandy, ‘General Principles of International Public Authority: Sketching a Research Field’, 9 *German Law Journal* (2008) 11, 1909.

⁵⁴ H. Melville, *Moby Dick* (2008), 5.

⁵⁵ This consideration should not, however, lead us to the conclusion that legal norms on solidarity do not necessitate further clarification and better realization, but just to the conviction that this task can be accomplished only by opening the legal discourse to suggestions from outside.

interpret and further develop the law. I will support my assertion *ex negativo* by briefly analysing the claim to self-sufficiency of the legal system advanced by some strands of legal theory.

At the end of the 16th century, as political scientists and legal theorists fought to emancipate the law from the primacy of metaphysics and theology, Alberico Gentili – one of the most prominent and committed among those intellectuals – formulated the famous motto: “Silete, theologi, in munere alieno!”⁵⁶ The task of silencing theologians on non-religious questions, i.e. the task of building a legal system which had to be independent of the law of God and of its interpreters as well as of moral or ethical truth in general, would still take many centuries to achieve. The project of finding a legal science not based on extra-legal assumptions was not properly accomplished until the 20th century, as two significant theoretical attempts were started with the explicit aim of decoupling the legal system from extra-legal discourses, the first – Hans Kelsen’s *Reine Rechtslehre*⁵⁷ (a) – collocated in legal theory, the second – Niklas Luhmann’s systems theory of the law⁵⁸ (b) – in legal sociology.

a) In order to address whether the project of a self-sufficient legal doctrine is feasible and whether it is really capable of producing better results than a legal doctrine linked with extra-legal discourses, it may be useful to focus first on the criticism that Kelsen formulated against Kant – in his eyes the most important and ambitious exponent of the *old school*. Kelsen asserts that Kant actually based his concept of the positive law on the metaphysical foundation of natural law. For that reason, Kant as a political and legal philosopher would betray his own methodological premises as a theoretical philosopher: while Kant’s theory of knowledge overcomes metaphysics, his legal and political thought would yet presuppose an *objective* truth, therefore conflicting with that ethical plurality which is essential in contemporary society, and jeopardizing the possibility of conceiving the law as the formal mediation of different conceptions of the good.⁵⁹ In fact, Kant leaves no doubt about the link between the law and extra-legal discourses, in particular moral principles: indeed, both are interpreted as aiming at the realization of *autonomy* as the condition in which human beings – as both moral and political subjects – give themselves the rules that they

⁵⁶ A. Gentili, *De jure belli libri tres*, Vol. I (1933).

⁵⁷ H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (1934) [Kelsen, *Reine Rechtslehre*].

⁵⁸ N. Luhmann, *Das Recht der Gesellschaft* (1993) [Luhmann, *Recht der Gesellschaft*].

⁵⁹ H. Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928).

ought to follow.⁶⁰ Nevertheless, Kant's morals can hardly be seen as *metaphysical* in the usual sense of the word, since morality does not in his conception resort to an *objective* truth rooted in God's will or in nature and situated beyond and above the critical reflexion of individuals. Rather, Kant's moral principles build a *transcendental* foundation for peaceful and cooperative human interaction: insofar as they express the fundamental rules that humans give themselves so as to live with each other in peace and solidarity, they are not objective but *subjective*, not substantial but *formal*.

Furthermore, in Kant's approach the connection between law and morals guarantees three essential functions: a) a criterion for the validity of the law (a law that violates the principle of autonomy can be effective and in force, but cannot claim to be endowed with full normative validity); b) a conceptual basis for criticism of the existing law, as a precondition for further development of the legal system (on the basis of the principle of autonomy it is justifiable to criticize a law that violates this principle and seek its amendment); c) a definition of the social function of the law (a law endowed with full normativity assumes the function of guaranteeing autonomy in social and political interactions). The question now arises whether a legal system that claims to deny any extra-legal reference may accomplish these functions. According to Kelsen's "Pure Theory of Law", the legal system is made up of hypothetical propositions – without any resorting to social realities or ethical principles⁶¹ – the validity of which is guaranteed exclusively by the fact that their production follows the rules established by a higher norm. Therefore, in the formal pyramid of legal positivism the validity of any proposition is founded on the validity of a norm situated at a hierarchically higher level. Yet, the logic of such a conception leads inescapably to a regression ad infinitum, so that Kelsen – in order to avoid this conceptual shortcoming that would undermine his whole construction – creates a borderline concept of legal theory, the *Grundnorm* (fundamental norm).⁶² When we reach

⁶⁰ I. Kant, 'Grundlegung zur Metaphysik der Sitten', in I. Kant, *Werkausgabe*, edited by W. Weischedel, Vol. VII (1977), 9, 65-66; I. Kant, 'Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis', in I. Kant, *Werkausgabe*, *supra* note 60, Vol. XI, 125, 150; I. Kant, 'Zum Ewigen Frieden: Ein philosophischer Entwurf', in I. Kant, *Werkausgabe*, *supra* note 60, Vol. XI, 191, 204 [Kant, Zum Ewigen Frieden]; I. Kant, 'Die Metaphysik der Sitten', in I. Kant, *Werkausgabe*, *supra* note 60, Vol. VIII, 306, 432, para. 46; I. Kant, 'Der Streit der Fakultäten', in I. Kant, *Werkausgabe*, *supra* note 60, Vol. XI, 264, 364.

⁶¹ Kelsen, *Reine Rechtslehre*, *supra* note 57, 21.

⁶² H. Kelsen, *General Theory of Law and State* (1945), 115-123 [Kelsen, General Theory]. For a recent analysis of the *Grundnorm* theory see A. Jakab, 'Probleme der Stufenbaulehre', 91

the top of the positivistic legal system's pyramid – i.e. the constitution within the national legal system and, at an even higher, global level, the essential norms of international law – we find, according to Kelsen, sets of positive norms on which all other norms are grounded. Nonetheless, these positive norms, so as to be valid, have also themselves to be based on another, even more essential norm. In order to interrupt the regression *ad infinitum*, Kelsen describes this most fundamental of all norms as non-positive, namely as a pre-positive principle which is the source of any validity of the law. The *Grundnorm* may actually assume any content: the only quality that is essential to the pre-positive principle of the whole legal system is its effectiveness.⁶³

Thus, considered in relation to his criticism of Kant, Kelsen's proposition does not in the end offer any convincing solution. First, the *Grundnorm* turns out to be no less extra-legal than Kant's morality – actually uncontroversial evidence that the epistemological content of the law cannot rest exclusively on the law itself. And, second, the content of Kelsen's extra-legal law reference is eventually less convincing than Kant's idea of morality: indeed, it guarantees far less than the latter an adequate standard for the normativity of the law, nor does it propose a rational criterion for its further development.

b) In more recent years a new attempt, based on systems theory, has been made to conceive of the law as a self-sufficient system. According to Niklas Luhmann's theory of systems, law is an independent social system the function of which consists in stabilizing the normative expectations deriving from other social subsystems.⁶⁴ According to the interpretation of society based on systems theory, every social subsystem produces expectations as a consequence of the achievement of its functions. In order to prevent the disruptive effects that could arise from the pretensions formulated by social actors, their expectations are expressed in the form of norms, and the claims appealing to these norms

Archiv für Rechts- und Sozialphilosophie (2005) 3, 333.

⁶³ Kelsen, *General Theory*, *supra* note 62, 120. H. L. A. Hart tried to avoid Kelsen's resorting to the pre-positive assumption of the *Grundnorm* by introducing the concept of the "rule of recognition" see *The Concept of Law*, (1994), 90-96. Thus, the foundation of the legal system in Hart's theory is itself a rule and not a pre-legal postulation. Nevertheless, the "rule of recognition" consists lastly in imposing a duty the acceptance of which is based on extra-legal conditions. As a result, Hart's revised positivism shares with Kelsen's conception the same flaws that seem to affect every positivist understanding of the legal system: first, the legal system cannot refrain from references to extra-legal circumstances; second, through the extra-legal conditions on which it is based legal positivism meets with an unreflected and normatively untamed social and political power. This way, the normativity of the law is largely – and dangerously – reduced to its effectiveness.

⁶⁴ Luhmann, *Recht der Gesellschaft*, *supra* note 58, 131.

are processed in formal procedures following the principles laid down by law. On these premises, systems theory elaborates a significantly better articulation of the social function of the law than Kelsen's *Grundnorm*.

Nevertheless, here the assertion of the self-subsistence of the legal subsystem is also problematic. Systems theory claims, in fact, that the legal subsystem – like any other social subsystem – only operationalizes communication that unfolds according to its specific internal binary code⁶⁵ which is based, for this particular subsystem, on the contraposition between lawful and unlawful.⁶⁶ This assumption may simply mean what is self-evident in a context of social differentiation, namely that inputs from outside can be operationalized within a system only if they are translated into its own language. Systems theory however – at least in Luhmann's interpretation – maintains more than just this, asserting that no extra-systemic actor can become part of the infra-systemic interaction if he does not give up his extra-systemic character, as well as that no external content can penetrate into the causal chain of the infra-systemic operations. Indeed, every subsystem not only has its own rationality but is also self-referential, i.e. its operational chain is impermeable to the environment.⁶⁷ Communications coming from outside are interpreted exclusively as *irritations* affecting the usual functioning of infra-systemic operations.⁶⁸ In fact, no extra- or supra-systemic reason – i.e., a rationality rooted in the *lifeworld*⁶⁹ – is thinkable in systems theory's conception of self-contained social subsystems. According to this postulation, the law is also understood as a self-referential subsystem characterized by a self-sufficient rationality: as in Kelsen's "Pure Theory of Law", albeit following very different conceptual premises, the law would therefore be based exclusively on itself.

Yet, the idea of an exclusively self-reliant rationality of the legal subsystem meets its limits when the epistemological question is raised whether the membrane between system and environment can really be seen as impenetrable and, as a consequence, whether the adaptations of the system's operations to the environment can adequately be explained merely by resorting to the concept of *irritation*. An alternative description of the relations between system and environment would consist in presupposing the intervention of external actors as

⁶⁵ N. Luhmann, *Die Gesellschaft der Gesellschaft*, Vol. I (1997) [Luhmann, *Gesellschaft der Gesellschaft*].

⁶⁶ Luhmann, *Recht der Gesellschaft*, *supra* note 58, 60-62.

⁶⁷ Luhmann, *Gesellschaft der Gesellschaft*, *supra* note 65, 95-96.

⁶⁸ *Ibid.*, 118.

⁶⁹ J. Habermas, *Theorie des kommunikativen Handelns*, Vol. II (1981) [Habermas, *Kommunikatives Handeln*].

well as the raising of non-system-immanent claims within the communication process of the legal subsystem. From this perspective, provided that the external actors' action and the non-system-immanent claims were translated into the language of the legal subsystem, it would be possible to explain how the system-immanent rationality can benefit from direct input from the lifeworld. Furthermore, it would not be necessary to assume – as in Luhmann's systems theory – an epistemologically and sociologically problematic double-blind coupling between different non-communicating systems.⁷⁰ The advantages of the approach that presupposes interaction with external actors as well as the existence of an extra- and supra-systemic rationality becomes evident when it comes to the analysis of extra- or supra-systemic phenomena like human rights protection and justice. The difficulties that systems theory meets in explaining these issues by maintaining the principle of systemic self-referentiality⁷¹ may offer sufficient evidence that the legal subsystem, even if relying on the conceptual organon of systems theory, can hardly be seen as self-sufficient: in order to understand some aspects of its functions the resort to forms of extra-legal rationality seems to be inevitable.

In conclusion, the most radical attempts to ground the system of the law exclusively in itself have substantially failed in their purposes: legal propositions are always connected to extra-legal concepts and assumptions, and on this connection is based the ability to interpret and further develop the law. From this perspective, the fact – outlined in the last section – that the norms on *solidarity* are always, as legal principles, related to non-legal arguments in order to specify their content should not be seen as disturbing; indeed, the legal propositions concerning *solidarity* share their epistemological status with all other legal propositions: in order to be understood, interpreted and developed, they have to be situated against a non-legal conceptual and social background. Insofar as legal norms – like the provisions on solidarity – are explicitly receptive for the discursive world outside, they should not be considered an underdeveloped element of the legal system. Rather, they have to be appreciated as precisely

⁷⁰ Luhmann, *Gesellschaft der Gesellschaft*, *supra* note 65, 100.

⁷¹ See, e.g. A. Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte* (2005); Fischer-Lescano, 'Globalverfassung: Verfassung der Weltgesellschaft', *supra* note 5; M. Neves, 'Die symbolische Kraft der Menschenrechte', 91 *Archiv für Rechts- und Sozialphilosophie* (2005), 159; G. Teubner, 'Selbstsubversive Gerechtigkeit: Kontingenz- oder Transzendenzformel des Rechts?', 29 *Zeitschrift für Rechtssoziologie* (2008) 1, 9; G. Teubner, 'Die anonyme Matrix: Zu Menschenrechtsverletzungen durch „private“ transnationale Akteure', in W. Brügger, U. Neumann & S. Kirste (eds), *Rechtsphilosophie im 21. Jahrhundert* (2008), 440.

that component of the *corpus iuris* that, more than anything else, enables it to be deeply rooted in social interaction. The time has thus come to reformulate Gentili's motto by inviting lawyers to pay more attention to ideas coming from other disciplines: "animum attendite, jure consulti, ad notiones e munere alieno!"

D. Two Arguments Against Solidarity

Legal arguments have to be situated within the horizon of a broad understanding of practical reason so as not to lose their epistemological content as well as the social function of the law. This justifies an examination of the claims arising from extra-legal discourses that either support or undermine the case for *solidarity* as a guiding principle of law. In this overview, I will start with the latter strand, namely with the arguments that deny the existence of an obligation to take non-national interests into account within national fora. This approach is developed in two main variants: the first asserts that solidarity with non-nationals leads eventually to the destruction of the political community in the midst of the struggle for survival between peoples (D. I.); and the second claims that egoism is simply the most rational choice (D. II.).

I. Egoism as the Consequence of the Existential Struggle Between Political Communities

The most ancient – and, at least for a long time, the most powerful – conception that excludes non-national interests and arguments from internal decision-making-processes is based on the assumption that the interactions between political communities are essentially characterized by their existential struggle for survival. We find this idea throughout the whole history of Western political and legal thought: having been first elaborated by the Greek historian Thucydides⁷², it reappeared at the dawn of modernity in the works of Machiavelli⁷³ and Bodin.⁷⁴ Later, it became part of the nationalistic philosophy from the beginning of the 19th century⁷⁵ as well as of the neo-realistic theory of

⁷² Thucydides, *The Peloponnesian War* (2009), Book V, Chapter XVII, para. 84 ff.

⁷³ N. Machiavelli, *Il Principe* (1995); N. Machiavelli, *Discorsi sopra la prima deca di Tito Livio* (1997).

⁷⁴ J. Bodin, *Six livres de la république* (1579). Bodin's concept of sovereignty would mean "[...] the death of any international law [...]" as the law of coexistence and cooperation among states, see: H. Kipp, *Völkerordnung und Völkerrecht im Mittelalter* (1950), 124.

⁷⁵ A. Müller, *Die Elemente der Staatskunst* (1922); E. Lemberg, *Nationalismus* (1964); H. Kohn, *Die Idee des Nationalismus: Ursprung und Geschichte bis zur Französischen Revolution*

international relations from the middle of the 20th century.⁷⁶ Lastly, on the cusp of the second and third millennia, it has informed the influential theory of the “clash of civilizations”.⁷⁷

According to the core facets of the theoretical approach shared by all these authors, relations between political communities are largely comparable to a *state of nature*, in which no compelling legal norms situated at a level above the individual entities can be established. In this *status naturae* every social and political entity is largely homogeneous within its boundaries, although the fundamentals of this indispensable homogeneity may be quite different: from the mythical origins of the *polis* to the assumption of the polity as enlarged family,⁷⁸ as well as from the historical, linguistic, ethnic and even racial unity of the nation⁷⁹ to the rather religion-focussed concept of “civilisation”.⁸⁰ It is essential to this perspective only that the *other* is perceived as an essential and existential threat to one’s own community – as an *hostis* or a “foe”, as Carl Schmitt pointed out.⁸¹

In these terms, political and legal order is possible only within the boundaries of the single political community, by reason of its cohesion and homogeneity. Against any form of *universalism*, order – in the sense of a social condition in which legal norms guarantee a peaceful and cooperative interaction – cannot but be *particular*. Beyond the borders of the individual polities no real order can be established, but merely a precarious limitation of disorder, a *Hegung des Krieges* preventing severely destructive and eventually annihilating outcomes for one’s own community.⁸² Yet, if the rivalry that arises between communities – for

(1950); L. L. Snyder, *Varieties of Nationalism: A Comparative Study* (1976).

⁷⁶ H. J. Morgenthau, *Politics Among Nations. The Struggle for Power and Peace*, 2nd ed. (1954); S. Burchill *et al.* (eds), *Theories of International Relations* (2001) 70; A. Jacobs, ‘Realismus’, in S. Schieder & M. Spindler (eds), *Theorien der Internationalen Beziehungen* (2006), 39.

⁷⁷ S. P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996).

⁷⁸ The idea of the familistic origin of the polity reaches, over a period of two thousand years, from Aristotle, *Politics* (1967), I, 2, 1252a ff., to Bodin, *supra* note 74, 1, and R. Filmer, *Patriarcha, Or the Natural Power of Kings* (1680).

⁷⁹ A. D. Smith, *The Ethnic Origins of Nations* (1986).

⁸⁰ Huntington, *supra* note 77, 42.

⁸¹ C. Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien* (1963), 20, 26–28.

⁸² C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950), 111 ff. Arguments in favour of the limitation of the most destructive consequences of conflicts can also be found throughout the history of the particularistic strand of political thought, from Thucydides, *supra* note 72, Book III, Chapter 10, para. 59; Book IV,

instance, as a consequence of the scarcity of resources – cannot be settled through generally recognized procedures, the conflict may degenerate into a relentless struggle in which no interests of the counterpart are recognized as legitimate – except for the cases in which such interests coincide with those of the first party – nor can the arguments of the *other* be accepted as a truthful contribution to the solution of the problem. In the midst of a struggle for survival, where no independent perspective or procedure is established and no shared arguments can be developed, any claim is an instrument at the service of the particularistic self-affirmation of one conflicting party.

From the perspective of an existential struggle between particularistic social and political communities, egoism is justified not only because, as already mentioned, no supra-state normative and institutional level – i.e. no legal and political system, with functioning, inclusive and representative international organizations, as well as with an independent adjudication system – exists above the individual polities. A second cause – an epistemological one – may, in fact, be considered even more significant. Indeed, within the conceptual horizon of the *holistic* understanding of the political community, in which the *totality* of each polity (the *holon*) is collocated clearly above its members, namely above individuals with their rights and interests, reason is never *universal*, but always *situated*. In other words, reason cannot but be deeply rooted in the hermeneutic context of a specific culture, language and history.⁸³ We will, therefore, have *our* arguments, based on *our* reason, or arguments based on the reason of the *others*, but we will never have shared arguments arising from a common reason. The only rational approach that we all share is, from this point of view, the reason of expediency, so that the only claims of the counterpart that we can accept are those occasionally and casually coinciding with our egoistic priorities. Otherwise, the endorsement of the interests of the *others* always runs the risk of being seen as a betrayal.

Two main arguments can be developed against the extra-legal discourse that grounds the egoistic refusal of solidarity on the assumption of the relations between the polities as a *state of nature*. The first addresses the concept of reason. Indeed, if it may be difficult to reject the claim that reason always develops

Chapter XIV, para. 118, to Plato, *Republic* (1980), 469c ff., until the neo-realistic theorists of international relations (see Morgenthau, *supra* note 76, 205-209 & 505-517) and even among the prophets of the “clash of civilizations” (see Huntington, *supra* note 77, 308).

⁸³ On the contextualization of subjectivity and, therefore, of reason as one of its most important features see: M. Sandel, *Liberalism and the Limits of Justice* (1982); A. MacIntyre, *Whose Justice? Which Rationality?* (1988); R. Forst, *Kontexte der Gerechtigkeit: Politische Philosophie jenseits von Liberalismus und Kommunitarismus* (1994), 23, 306.

against the background of a social context, it would nevertheless be incorrect to overlook totally those elements of rational communication that supersede the specific contexts, encompassing a plurality of human societies and allowing interactions far beyond the individual communities. Even if there are no doubts about the massive presence of the use of instrumental – or strategic – reason in human interaction, no less convincing arguments speak in favour of the existence of something more and else in the realm of practical reason (see *infra*, E.).

The second criticism that may be raised against the justification of nation-centred egoism presented in this section has a rather teleological character. The question in this case is what kind of world we assume that we are living in, and whether this assumption may not presume a – perhaps unintended – perlocutionary dimension. In other words, if we deny solidarity because we understand the world as a *status naturae*, we make – precisely by assuming that and by acting, as a consequence, egoistically – a decisive contribution to shaping the world exactly that way, namely as a *state of nature*. And in the *status naturae* the life of the political communities, like the life of individuals before the contract that created the *commonwealth*, cannot but be “[...] solitary, poor, nasty, brutish, and short.”⁸⁴ Therefore, if a political community wants to have a wealthy, cultivated and long life, it should commit itself to leaving the state of nature: *exeundum est e statu naturae*.

II. The Egoistic Choice as Rational Choice

If we assume that rationality is not a universal quality with which every human is endowed but, on the contrary, that it is always embedded in social contexts and thus particularistic in its essence, it will not be surprising that the only rational perspective for action will consist in the egoistic defence of the interests of one’s own community. Nonetheless, a further approach has recently been developed in order to reject solidarity with the *others*, which is based on a universal understanding of rationality. In particular, Jack L. Goldsmith and Eric A. Posner resort in their analysis of the limits of international law to the *rational choice theory* so as to demonstrate the low normative level of the rules that should bring order to relations among states.⁸⁵

Beginning with the assumption that every rational actor will prefer the choice that promises to obtain the highest immediate payoffs, and arguing that

⁸⁴ T. Hobbes, *Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil* (1651), Chapt. XIII, 99.

⁸⁵ J. L. Goldsmith & E. A. Posner, *The Limits of International Law* (2005).

states, in international relations, always face the possibility of being trapped in a situation comparable to that of the prisoner's dilemma, Goldsmith and Posner maintain that every rationally acting state, given the fact that the behavior of its counterparts turns out to be unpredictable in the most cases, cannot but pursue its own egoistic interest. Neither customary international law nor treaty law can build a reliable normative framework of shared and effective rules, really able to guarantee the stable proceduralization of conflict solution as well as, in the most favorable cases, cooperation. States thus comply with international law only insofar as this compliance coincides with their immediate and egoistic interests, so that the legal framework of relations among political communities is left with a very modest normative consistency.

The first element that differentiates Goldsmith and Posner's justification of particularistic egoism from the *naturalistic* conception of the inescapable struggle for survival among peoples concerns the method that is applied here. Usually, the capacity for self-interested rational choice is thought to be shared by all humans, building a basis for an understanding beyond any predetermined individual or collective identity. In Hobbes' and Locke's contractualistic state theory self-interested rationality builds the strongest motivation to create the *societas civilis*. On the contrary, in Goldsmith and Posner's approach – and here is the first great novelty of their proposal – the preference for self-interested (or instrumental) rationality is the strongest argument for denying any chance to build a *societas civilis* among states. Second, the rejection of solidarity has usually been justified by pointing out the centrality of the pre-reflexive identity of the community. Once again in the face of the prevailing philosophical, political and legal tradition, Goldsmith and Posner base their argument on the principle of democratic participation, therefore on the most reflexive decision-making procedure. And while for many legal philosophers people's participation was the best guarantee of freedom and of a universalistic understanding of inter-state interaction,⁸⁶ they see in it the most powerful obstacle against such a hopeful perspective. For that reason, they claim that precisely the democratic states will be particularly reluctant – not least because of their democratic tradition and praxis – to comply with international law when this compliance runs counter to their own interests.⁸⁷

⁸⁶ Just to remind one of the most prominent example in the history of political thought see: Kant, 'Zum Ewigen Frieden', *supra* note 60, 204-208. For a recent upholding of the *democratic peace thesis* see R. J. Delahunty & J. Yoo, 'Kant, Habermas and Democratic Peace', 10 *Chicago Journal of International Law* (2009-2010) 2, 437.

⁸⁷ Goldsmith & Posner, *supra* note 85, 212.

The egoistical attitude against the *others* based on rational choice theory raises some methodological concerns as regards the theory understanding here displayed.

First, it is problematic to extend the rational choice approach, conceived in order to interpret the behaviour of individuals, to collective entities like states, which are themselves composed of a plurality of individuals and social groups with articulated and sometimes diverging interests.⁸⁸ The justification that the *billiard ball* approach, considering every single state as a unity, albeit “far from perfect”, would be simply “[...] parsimonious [...]”,⁸⁹ – in the sense that it would allow one usefully to reduce the number and complexity of the analysed phenomena in order to concentrate on the most significant among them – cannot really remove the sense of an epistemological shortcoming. Nor can the consideration that “[both] ordinary language and history suggest that States have agency and thus can be said to make decisions and act on the basis of identifiable goals” be convincing.⁹⁰ Such an understanding seems to be somehow old-fashioned in a world in which state agency is challenged both at the *infra*-state and at the *supra*-state level.

Second, Goldsmith and Posner’s definition of the elements the evaluation of which essentially contributes to making a choice rational may be considered short-sighted insofar as it excludes factors like “[...] reputation [...]” and “[...] reciprocity [...]”.⁹¹ Furthermore – and third – Goldsmith and Posner do not distinguish clearly between immediate payoffs and mid- as well as long-term interests.⁹²

⁸⁸ As regards the disaggregation of the *billiard ball* state into a differentiated structure comprehending different social components in the neo-liberal State and law theory see: A. Moravcsik, ‘Taking Preferences Seriously: A Liberal Theory of International Politics’, 51 *International Organization* (1997) 4, 513; A.-M. Slaughter, ‘International Law in a World of Liberal States’, 6 *European Journal of International Law* (1995) 4, 503; A.-M. Slaughter, ‘A Liberal Theory of International Law’, in P. B. Stephan & S. J. Bailly (eds), *Proceedings of the 94th Annual Meeting of the American Society of International Law* (2000), 240; A.-M. Slaughter, *International Law and International Relations*, in *Collected Courses of The Hague Academy of International Law*, Vol. 285 (2000), 9.

⁸⁹ Goldsmith & Posner, *supra* note 85, 6.

⁹⁰ *Ibid.*, 5.

⁹¹ A. T. Guzman, *How International Law Works: A Rational Choice Theory* (2008), 33.

⁹² The distinction between *utilitas praesens* and *utilitas maxima* is well-known in the history of political thought. To mention just two examples, see Hobbes, *supra* note 84, Chapt. XIII ff., and also the “Prolegomena” of Hugo Grotius, *De Jure Belli ac Pacis* (1995), No. 18.

Fourth, they presuppose that states interact exclusively *vis-à-vis* each other, i.e. that they are not embedded in a broader and multipolar context. Moreover, state interaction is always seen as an individual and unique event, excluding from the consideration any form of iteration. Yet, the application of instrumental rationality may lead to the conclusion that cooperation and solidarity are irrational and that egoism is the most rational choice only if we collocate the actors within an abstract horizon, quite different from that in which they usually act. Indeed, interactions – even those among international actors – happen normally within multilateral contexts and include iteration. From this perspective, the attitude of international actors will be significantly more prone to complying with international law and, generally, less hostile to cooperation since they would take into account possible remuneration or retaliation in the next rounds of interaction.⁹³ Besides, the actions of international actors are not *bipolar* but *multipolar*, constructing the framework of *collective actions* that help us to understand cooperation.⁹⁴ The contexts of multipolar iterative interactions have been described as *international regimes*.⁹⁵ Within these regimes, international law takes the role of the normative element that decisively contributes to shaping actors' interactions, making them predictable.

Fifth – and last – according to the understanding of rationality proposed by Goldsmith and Posner, actors have predefined preferences which do not change during interaction. Nonetheless, evidence shows that preferences shift in the course of interactions.⁹⁶ This fact may be explained still within the horizon of instrumental rationality, namely by admitting that the information exchange, albeit maintaining the priority of individual interests, nevertheless modifies the concrete contents of the original preferences. But it can also be seen as a clue to the effectiveness of a non-instrumental rationality.⁹⁷ We have three possible interpretations in this case: according to the first one, it has been claimed that resorting to communicative action in the context of international negotiations

⁹³ R. O. Keohane, *After Hegemony* (1984) 75-78.

⁹⁴ *Ibid.*, 76-78.

⁹⁵ *Ibid.*, 78-80, 85-109.

⁹⁶ N. Deitelhoff, 'Was vom Tage übrig blieb. Inseln der Überzeugung im vermachteten Alltagsgeschäft internationalen Regierens', in P. Niesen & B. Herborn (eds), *Anarchie der kommunikativen Freiheit* (2007), 26; T. Risse, 'Global Governance und kommunikatives Handeln', in Niesen & Herborn (eds), *supra* note 96, 57; H. Müller, 'Internationale Verhandlungen, Argumente und Verständigungshandeln' in Niesen & Herborn (eds), *supra* note 96, 199.

⁹⁷ On the deployment, in general, of non-instrumental rationality in international relations see the contributions in Niesen & Herborn (eds), *supra* note 96.

really shapes a shared setting of value-oriented preferences and motivations to action among the actors involved, eventually leading even the most egoistic interaction participants to non-egoistic preferences.⁹⁸ Following the second one, the shared background of values is not created, at first, by introducing communicative arguments and by performing communicative actions, but is always already present as a contextual precondition to any interaction.⁹⁹ The third interpretation – like the first – maintains the transcendental (and non-contextual) character of communicative reason, but does not follow its ambitious claim that communicative (i.e. non-strategic and, therefore, universalistic and non-egoistic) arguments really transform the preferences of egoistic actors into solidarity;¹⁰⁰ the supporters of this approach rather limit themselves to asserting that communicative reason creates a normative background that even the most egoistic participants in the interaction cannot dare to ignore.¹⁰¹

These considerations are sufficient to raise some doubts about the *rationality* of egoistic choice. However, if the exclusive focus on one's own interests is not as *rational* as its supporters claim, the question arises, now, which alternatives we have, i.e. the rationality standards of the extra-legal arguments for solidarity.

E. Four Reasons for Solidarity

Of the four main arguments that have been elaborated to justify solidarity as well as the opening up of the forum to the *others*, the first is based – like the second justification of egoism in international relations – on the instrumental conception of reason, yet collocated here in the context of a much broader understanding (E. I.). On the other hand, the further justifications of solidarity top the horizon of strategic thinking, albeit in quite different ways: in the first case through the quasi-metaphysical postulation of a community of human beings, made one by shared values and interests (E. II.); in the second case

⁹⁸ H. Müller, 'Internationale Beziehungen als kommunikatives Handeln', 1 *Zeitschrift für Internationale Beziehungen* (1994) 1, 15; T. Risse, "'Let's Argue!': Communicative Action in World Politics', 54 *International Organization* (2000) 1, 1. Recently, H. Müller has partially reoriented his position; see *infra* note 99.

⁹⁹ This second interpretation, which may be seen as a modification and a attenuation of the first one, can be traced back to some recent works of H. Müller; see, in particular Müller, *supra* note 98.

¹⁰⁰ While preference shifts during negotiations can be scientifically proved, the motivations of those shifts remain largely inscrutable to empirical inquiries.

¹⁰¹ J. Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik', in Niesen & Herborth (eds), *supra* note 96, 406, 439 [Habermas, Kommunikative Rationalität].

by resorting to a pre-reflexive attitude to empathy (E. III.); in the third case by relying on the normative dimension of the multilevel interaction between humans (E. IV.).

I. Enlightened Self-Interest

In an earlier section (D. II.) resort to instrumental rationality was analysed as a justification of egoism. However, it has also been said that, from a broader perspective, self-interest can also be considered as an argument in favour of solidarity. In this sense, the *utilitas praesens* does not coincide with the *utilitas maxima*.¹⁰² Indeed, even if egoism is thought to bring immediate payoffs, a more open attitude towards the *others* may turn out to be of greater advantage in the long run. Among the reasons for this kind of *enlightened self-interest* the most significant is probably the consideration that taking into account the interests of the counterparts reduces the risks of conflict, therefore also improving the chances of self-preservation and self-realization. Furthermore, the transfer of resources to *others* as well as the acceptance of some of their requests may, in some situations, induce secondary benefits for the solidaristic party – as, for instance, in the cases of greater economic growth due to the increased economic and financial solidity of the counterpart, or of a reduction in environmental impact as a consequence of the introduction of environmental technologies or of easier access to financial resources.

This approach – which has also been labelled, with a concept that verges on an oxymoron, as “self-centred solidarity”¹⁰³ – maintains, however, that a rational action must always aim at maximizing the gains of the individual actor, as well as that these gains, generally, must be clearly measurable in terms of concrete payoffs. Against this background, two situations can be singled out in which solidarity, even in the long run, would not be a rational, benefit-maximizing choice. The first occurs when an individual actor enjoys a significant economic, social, ideological and military predominance. In this context, the actor does not need to fear any harm, even in the long run, from the actions of its counterparts. The hegemonic state would control global interactions in such a way that there would no longer be any difference between *utilitas praesens* and *utilitas maxima*. As a consequence, short-term egoistic preferences, from the point of view of the maximization of individual gains, would be the most rational choice.

¹⁰² See *supra* note 92.

¹⁰³ Hestermeyer, *supra* note 42, 50.

If such an unrestrained hegemonic situation may be considered to be an exception – history teaches us that even the most powerful states have never been invulnerable as well as that their hegemony was always destined to come to an end – the second scenario, on the other hand, depicts the rather usual condition of interactions based on fundamentally egoistic rational choices. If rational choices always aim at maximizing individual payoffs, and if solidarity is justified only because of greater advantages in the mid- and long-term, the question remains unanswered how we could – from a factual as well as from an argumentative point of view – meet the attitude of the so-called *free-riders*. Free-riders are those interaction participants who comply with the rules of interaction – in our case: with the rules which guarantee an essential level of recognition for the arguments of the *others* – just as long as they see in this behaviour a gain for themselves. In other words, they are always prone to breaking the rules as soon as they see a greater advantage to them from such a breach: under the premises of the definition of rationality as the maximization of individual gains, there can be no doubts that the behaviour of the free-rider appears to be the most rational choice here. Yet, it is difficult to imagine under these conditions how social interaction can be stabilized. As regards the rational preconditions for a functioning democracy, it has been argued that instrumental rationality cannot build the dispositional foundation that is indispensable for a society of citizens committed to achieving freedom and justice.¹⁰⁴ The same can be said with reference to the dispositional framework of international relations aiming to concretize peace, mutual recognition, the guarantee of fundamental rights and justice.

Overcoming short-sighted egotism in international relations cannot be considered, therefore, to be just a question of opportunity or of an enlightened expediency in the sense of a self-reflexive maximization of individual gains. Indeed, altruism and solidarity will always remain shaky if they are based on the instrumental use of reason. To be fully developed, they have necessarily to be derived from a universalistic-transcendental approach: only a non-egoistic use of reason can give us the conceptual elements to claim that opening minds – and hearts – to the arguments of the weak and powerless is an obligation. In order

¹⁰⁴ K.-O. Apel, *Diskurs und Verantwortung: Das Problem des Übergangs zur postkonventionellen Moral* (1990) 26-28, 55-63 [Apel, *Diskurs und Verantwortung*]; K.-O. Apel, 'Das Anliegen des anglo-amerikanischen "Kommunitarismus" in der Sicht der Diskursethik: Worin liegen die 'kommunitären' Bedingungen der Möglichkeit einer post-konventionellen Identität der Vernunftperson?', in M. Brumlik & H. Brunkhorst (eds), *Gemeinschaft und Gerechtigkeit* (1993), 149, 152-162.

to make the forum accessible to the *others*, the quest for a non-instrumental concept of rationality seems therefore to be unavoidable: only a post-instrumental rationality, if anything, can lead us to the realization of solidarity.

II. The Moral Duty to Exercise Solidarity Within the International Community, Understood as a Community Sharing Universal Values and Interests

While the claim to an enlightened self-interest is grounded on the presumption of actors primarily pursuing their own interests, the second extra-legal justification supporting the principle of solidarity is based on precisely the opposite approach, namely on the assumption of a natural sociability of humans, a condition that would lead, in the end, to a universal community of humankind. This community would share fundamental values and interests, so that universal solidarity would be the evident and quasi-natural result of the basic anthropological condition of human beings.

The idea of a universal community of humankind is a frequent *topos* of political thought. Albeit traceable back as far as to the concept of *οικέωσις* of the Stoic philosophy, it is in early modernity that the concept became one of the core elements of the emerging theory of international law. Indeed, we find the reference to the *corpus universale* of humanity in such numerous and different authors as – to mention just some among the most important – Francisco Suarez,¹⁰⁵ Johannes Althusius,¹⁰⁶ Alberico Gentili,¹⁰⁷ Hugo Grotius,¹⁰⁸ Samuel Pufendorf,¹⁰⁹ and Christian Wolff.¹¹⁰ In the 20th century, it was introduced anew – after a time in which the idea of a universal humanity had fallen into eclipse – first by Viktor Cathrein¹¹¹ and then, with a significantly greater impact, by Alfred Verdross. In particular, it was the international lawyer and legal philosopher Verdross who

¹⁰⁵ F. Suárez, ‘De legibus, ac Deo legislatore’, in Suárez, *supra* note 3, Vol. II, Chapt. XIX, No. 9, 348.

¹⁰⁶ On Althusius’ concept of *corpus consociationis universalis* see J. Althusius, *Politica methodice digesta* (1932), Chapt. IX, No. 22, 92.

¹⁰⁷ A. Gentili, *De jure belli libri tres* (1933), Vol. I, Chapt. XV, 107.

¹⁰⁸ Grotius’ ‘Prolegomena’, *supra* note 92, No. 6, No. 16 & No. 17.

¹⁰⁹ S. Pufendorf, *De jure naturae et gentium libri octo* (1995), Book II, Chapter II, No. VII; Book II, Chapter III, No. XV; Book VIII, Chapter VI ff.; S. Pufendorf, *De officio hominis et civis libri duo* (1927) Book I, Chapt. VIII.

¹¹⁰ C. Wolff, *Institutiones juris naturae et gentium* (1750) Book IX, Chapter I, No. V.

¹¹¹ V. Cathrein, *Die Grundlage des Völkerrechts* (1918), 45; V. Cathrein, *Moralphilosophie*, 6th ed., Vol. I (1924), 111.

collocated the assumption of a *corpus universale* of humankind at the basis of a theory of international law as the *constitution of the international community*¹¹² – a theory which has remained influential until today.¹¹³

The starting point of Verdross' considerations lies in his criticism of some aspects of Kelsen's conception of the legal system. Although Verdross largely endorses Kelsen's monistic approach¹¹⁴ as well as the priority assigned to international law within the hierarchical legal system,¹¹⁵ he is sceptical about the content that Kelsen gives to the concept of *Grundnorm*. Verdross substantially accepts the idea of the *Grundnorm* as the basis of a unitary and hierarchically organized legal system,¹¹⁶ but rejects its formalistic interpretation as it has been elaborated by the doctrine of legal positivism: a merely formalistic principle can justify the formal validity of the legal norms as an *ought*, a *Sein-Sollendes*, but cannot give us any arguments about its *objective validity*. Indeed – as we have seen before¹¹⁷ – the positivistic *Grundnorm*, which is originally empty, is eventually filled with nothing more than the effectiveness of power. In order to avoid swinging between empty formalism and crude power, which can account for our factual respect for the law but not for the reasons why this respect should be seen as *just*, Verdross claims that the *Grundnorm* needs to be traced back to objective values.¹¹⁸ The *Grundnorm* should be identified, therefore, with an objective principle that pre-exists individuals as well as their political and legal institutions, i.e. with an idea of a cosmic order as it had been conceived by the legal philosophy of natural law.¹¹⁹

In Verdross' interpretation the reference to the *corpus universale* of humankind is rather an implicit corollary of a broader pantheistic conception of cosmic order as the basis of moral and legal norms – a conception originally inspired by Plato's¹²⁰ and Hegel's¹²¹ metaphysics. In the decades following the publication of Verdross' seminal work, the authors who have resorted to the

¹¹² A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926).

¹¹³ On the theory of the *international community* see: A. L. Paulus, *Die internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (2001).

¹¹⁴ Verdross, *supra* note 112, 34-42.

¹¹⁵ *Ibid.*, 33-34.

¹¹⁶ *Ibid.*, 12.

¹¹⁷ See *supra*, at C., a).

¹¹⁸ Verdross, *supra* note 112, 23.

¹¹⁹ *Ibid.*, 22 & 32.

¹²⁰ *Ibid.*, 32.

¹²¹ *Ibid.*, 2-3.

natural law as the fundamental criterion for the objective validity of the law and as the justification of an international law aiming at cooperation and solidarity, have progressively refined their proposal from the pantheistic elements of Verdross' conception.¹²² As a consequence, the assumption of a universal community of humankind was left as the main – if not the only – pillar intended to support the entire legal system, with international law at its top, aiming at achieving a basic solidarity among all human beings. The international community is defined as “an ensemble of rules, procedures and mechanisms designed to protect collective interests of humankind, based on a perception of commonly shared values.”¹²³ Against this background, international law – or, at least, the most general part of it – is the legal expression of the activity of the international community and the most striking evidence of its existence. In other words, international law – as “[the] Common Law of Mankind”¹²⁴ – arises as the formalization of shared values as well as of the rules that guarantee the protection of common interests. Indeed,

“like a people which through the process of establishing its political constitution reaches agreement on a set of basic values which should determine the general course of the common journey into the future, the nations of the world, too, need a set of shared values in order for them to be classified as an international community”.¹²⁵

However, unlike the constitutional rules of individual states, the common values enshrined in international law are not essentially the result of deliberative and inclusive processes, but are, rather, already present *in re* as an objective fact of reason. The rational observer simply has to recognize them, international law has to assume and formalize them, and international adjudication has to make them effective. The international community, therefore, is not something to be built – as in the perspective of the communicative paradigm¹²⁶ – but is

¹²² See H. Mosler, *The International Society as a Legal Community* (1980); B. Simma, *From Bilateralism to Community Interest in International Law*, in *Collected Courses of The Hague Academy of International Law*, Vol. 250 (1994), 217; R. S. J. Macdonald, ‘The International Community as a Legal Community’, in Macdonald & Johnston, *supra* note 47, 853.

¹²³ C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, *Collected Courses of The Hague Academy of International Law*, Vol. 281 (1999), 88.

¹²⁴ C. W. Jenks, *The Common Law of Mankind* (1958).

¹²⁵ Tomuschat, *supra* note 123, 78.

¹²⁶ See *infra*, D. IV.

a previously existing ontological reality, characterized by common values and interests.¹²⁷ From this point of view, having assumed access to a kind of ontological truth, it is not surprising that the exponents of the theory of the international community dedicate little interest to deliberative processes due to determinate common rules as well as to the conditions of legitimacy of such rules, and prefer to concentrate on the role of international tribunals as the interpreters and executors of an objective principle of justice.

The idea of the “perfect community”, living in universal harmony, as the ultimate natural goal of all human persons and of all communities has also been explicitly claimed by contemporary natural law philosophy.¹²⁸ The close relationship between the justification for solidarity, within the conceptual horizon of international law theory, by resorting to the community of all humans and the noble and long intellectual tradition of natural law, from antiquity until the present time, does not, however, guarantee the epistemological quality of the claim. Indeed, the case for solidarity depends here on the epistemological status of the proposition that “a universal human community exists which shares fundamental interests and values.” In assessing the epistemological quality of this proposition it has to be pointed out that the expression cannot correspond to any kind of *analytic judgement* because the assertions that such a community exists, as well as that any such community shares values and interests, are not originally contained in the subject of the proposition. Thus, the proposition must be a *synthetic judgement*, aimed at reaching some knowledge of the world. On this knowledge of the world – and not just on a formalistic derivation system, as is claimed by the theory of the self-sufficient legal system – is based the whole *corpus iuris*. Furthermore, the judgement is *a priori* because it aims at building assertions that are necessary and universally valid. Yet, from a post-metaphysical approach, a synthetic *a priori* judgement – i.e. a proposition that makes an assertion of necessary and universal validity and claims to improve our knowledge of the world – can be acceptable only if it is based on empirical evidence about phenomena. Furthermore the proposition, relying upon empirical evidence, must be falsifiable, i.e. it must be open to correction as a consequence of new empirical data about phenomena which may be incompatible with the previous assertion. Yet, the assertion that “a universal human community exists which shares fundamental interests and values” does not satisfy either of the above-mentioned consistency conditions. Indeed, empirical evidence of such a

¹²⁷ M. Payandeh, *Internationales Gemeinschaftsrecht* (2010).

¹²⁸ G. Grisez, J. Boyle & J. Finnis, ‘Practical Principles, Moral Truth, and Ultimate Ends’, in J. Finnis (ed), *Natural Law*, Vol. I (1991), 237, 269.

universal human community is rather controversial – the realistic assumption of a permanent struggle for survival between human communities reveals significant evidence to the contrary – and the assertion, not being based on empirical evidence, cannot be falsified either.

On these terms, the argument for the existence of a universal human community turns out to be the result of the quasi-metaphysical ontologization of a transcendental capacity with which all humans are endowed, namely the faculty to interact communicatively with each other. In other words, the theory of the international community seems to draw from the transcendental capacity to interact and to search for consensus in a communicative way a presumed ontological fact that nevertheless lacks proper evidence. From a post-metaphysical perspective, the universal human community is something to be built and a task to be accomplished, not a reality to be simply discovered. The existence of the transcendental capacity of universal communication gives us the hope necessary to succeed in the ambitious purpose of construing a universal community of all human beings; an ontological certainty is, nonetheless, out of our reach.

III. Solidarity as Empathy

While the theory of the universal human community grounds its claim for solidarity on an alleged ontological truth, the next strand of international lawyers defending the case for solidarity follows the opposite strategy to reach the same goal: where the former resorts to ontology, the latter denies any basis *in re* or even in a universal conception of reason. Within this strand, solidarity is not a deducible universal duty simply because no ontological foundation for universal rationality is presumed to exist. The rejection of universalism is philosophically justified by resorting to the postmodern critique of modern rationalism and subjectivity.

According to the main strand of modern philosophy – from Descartes¹²⁹ to Kant¹³⁰ – the claim for universal rationality was founded on the universal features of subjectivity. Universal subjectivity – understood as the abstraction and generalization of the higher intellectual faculties with which every individual is endowed – would guarantee the truth of theoretical knowledge as well as the general validity of moral and political principles. Lastly, if we share the same subjectivity – or, from an ontological point of view, if we are all part of a macroanthropic subjectivity – solidarity is due as a commandment of

¹²⁹ R. Descartes, *Meditationes de Prima Philosophia*, Vol. II (1642), 78, 82.

¹³⁰ I. Kant, 'Kritik der reinen Vernunft', in Kant, *supra* note 60, Vol. III-IV, 136 (B, 132).

reason. In recent decades, however, this construction has been heavily attacked by postmodern criticism. The direction of the attack has been twofold. First, it has been argued that subjectivity is not the bulwark of freedom, justice as well as of scientific, moral and social progress, but a construct conceived by the power holders in order to justify the unequal distribution of resources and, eventually, to oppress the powerless.¹³¹ Second, the concept of subjectivity itself has been deconstructed by showing that it is not as unitary as modern philosophy assumed, being a composite notion made of a plurality of discursive strategies: precisely in this plurality – and not in resorting to an allegedly superior universal and unitary subjectivity – lies the possibility to self-affirmation and self-realization for the concrete individuals.¹³²

Translated into the language of legal theory – and, in particular, of the theory of international law – postmodern criticism against unitary and universal subjectivism has assumed the form of the rejection of the unity of the legal system as a desirable aim (i.e. as the best guarantee of the normative quality of the law) and as a possible reality, regardless of whether already present or future. From this point of view, the project of the “constitutionalization of international law”¹³³ is neither feasible nor attractive, and the fragmentation of the law should not be seen as a threatening perspective.¹³⁴ Furthermore, according to the postmodern approach, international law is not the legal expression of an ontological, moral or epistemological universal truth: swinging necessarily between apology and utopia, its norms and practices miss objectivity and, thus, universal validity.¹³⁵ The criticism of the universalistic claim of the international law discourse nevertheless does not lead to sheer nihilism. Indeed, the international law theorists influenced by postmodern thinking accept – as does in particular Martti Koskenniemi, as one of the most significant among them – the idea that some experiences may occur which are not characterized

¹³¹ M. Foucault, *L'ordre du discours* (1971); M. Foucault, *Histoire de la folie à l'âge classique* (1961); M. Foucault, *Les mots et les choses* (1966); M. Foucault, *Surveiller et punir* (1975); M. Foucault, *Histoire de la sexualité, I: La volonté de savoir* (1976); M. Foucault, 'The Subject and Power', in H. L. Dreyfus & P. Rabinow (eds), *Michel Foucault: Beyond Structuralism and Hermeneutics* (1982), 208.

¹³² M. Foucault, *L'archéologie du savoir* (1969).

¹³³ On the “constitutionalization of international law” see: B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998); S. Kadelbach & T. Kleinlein, 'Überstaatliches Verfassungsrecht', 44 *Archiv des Völkerrechts* (2006) 3, 235.

¹³⁴ M. Koskenniemi, 'International Legislation Today: Limits and Possibilities', 23 *Wisconsin International Law Journal* (2005) 1, 61, 78.

¹³⁵ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) [Koskenniemi, Utopia].

by mere contingency but, on the contrary, assume a kind of universal scope.¹³⁶ From the postmodern standpoint, however, this unassuming universality is not based on abstract ontological, moral or epistemological principles, but is derived from the continuity of the concrete experience of vulnerability among all individuals involved.

According to Koskenniemi, artistic expression is probably the most suitable way to give voice to the universal reach of a humanity made of concrete human beings.¹³⁷ But legal discourse can also play a role in accomplishing this task. In fact, due to its *formalism*,¹³⁸ the law makes it possible that, “[engaging] in legal discourse, persons recognize each other as carriers of rights and duties [...]”¹³⁹ which “belong to every member of the community *in that position*”.¹⁴⁰ Through the law – Koskenniemi adds – “[what] otherwise would be a mere private violation, a wrong done to *me*, a violation of *my interest*, is transformed [...] into a violation against *everyone in my position*, a matter of concern for the political community itself.”¹⁴¹ Following Koskenniemi’s interpretation, there is a non-ontological, non-moral and non-epistemological universalism that originates specifically from legal formalism. Yet, doubts arise whether this postmodern version of law’s universalism can really justify the claim for solidarity as an *obligation*. Indeed, if no epistemological argument aiming for the universality of international law is convincing, then the universal dimension of legal formalism is not an assertion either that every human being has to share. Koskenniemi recognizes the problem and switches from a universal obligation to protect the rights of the weak and the powerless to an individual commitment. Thus, taking the reasons of the *others* into account is not a duty the accomplishment of which can be demanded from every human being, but it is a task that committed people assume because of their specific sensibility – or *empathy* – towards the suffering of their fellow humans. As regards the profession of the lawyer, Koskenniemi’s approach leads explicitly to a pleading in favour of the role of legal advisers, who skilfully use the instruments put at their disposal by the formalism of the law

¹³⁶ M. Koskenniemi, ‘International Law in Europe between Tradition and Renewal’, 16 *European Journal of International Law* (2005) 1, 113, 119-21.

¹³⁷ *Ibid.*, 120.

¹³⁸ M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and fall of International Law 1870–1960* (2001), 500-505.

¹³⁹ M. Koskenniemi, ‘International Law and Hegemony: A Reconfiguration’, 17 *Cambridge Review of International Affairs* (2004) 2, 197, 214.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

in order to suggest solutions for the achievement of what they consider to be “a better society”.¹⁴²

As a political plan to improve the ethical stand of the legal profession, Koskenniemi’s idea is highly valuable. Nevertheless, it says little about the presumed *obligation* to take into account the interests of the *others*. And this substantial aphasia on the question is actually due to a substantial limitation. In fact, personal commitment based on empathy – regardless of how important empathy may be as a motivation of personal action¹⁴³ – cannot offer a solid basis for a legal system necessarily related to the essential quality of the law as an *ought*: empathy is fundamental but personal; the law, on the other hand, specifies the compelling rules that guarantee order in the interactions of an entire society – in the case of international law even of the world society. Moreover, it is almost impossible to justify the establishment of institutions with the task of fostering better consideration of the interests of the *others* by barely resorting to personal empathic attitudes. Therefore, solidarity may feed upon empathy as regards the mind-set of individuals, but it must rest on a psychologically neutral command of reason if it has to be seen as a general moral and legal duty and if it is to be adequately substantiated by rules and practices.

IV. The Protection of the Universal Interaction of Human Beings in a Multilevel Setting, According to the Communicative Paradigm

From the critique of the previous arguments in favour of solidarity the conclusion can be drawn that a consistent case for taking into account the interests of the *others* a) should be grounded on a non-instrumental use of practical reason, b) should refrain from resorting to metaphysical assumptions, and finally c) should rest on the commandments of a post-metaphysical universal reason and not just on individual mind-sets and attitudes. A convincing answer to these challenges can be articulated on the basis of the communicative paradigm of action.¹⁴⁴

From the point of view of the communicative paradigm, society is made not only by functional systems but also by a *lifeworld of intersubjective relations*,

¹⁴² Koskenniemi, *Utopia*, *supra* note 135, 495.

¹⁴³ On an understanding of solidarity based on empathy see: R. Rorty, *Contingency, Irony, and Solidarity* (1989).

¹⁴⁴ K.-O. Apel, *Transformation der Philosophie* (1973) [Apel, Transformation]; Apel, *Diskurs und Verantwortung*, *supra* note 104; Habermas, *Kommunikatives Handeln*, *supra* note, 69.

which is characterized by *different forms of interaction*. In order to be well-ordered, which means peaceful, cooperative and effective, *social interaction needs rules*. When rules are positive and compelling, they are defined – following the communicative interpretation of society – as *laws*. Thus, the task of the legal system consisting in stabilizing normative expectations – a view that has been outlined by systems theory – is not related here only or even just primarily to the performances of the functional subsystems, but refers rather to intersubjective interactions or to the tension- and conflict-filled relationship between lifeworld and functional subsystems. Lastly, the *corpus iuris* that regulates a frame of common concern is referred to as *public law*.

In his political writings and, in particular, in his philosophical essay on the conditions for a *Perpetual Peace* Kant introduces a visionary three-part division of public law, as the normative regulation of social interactions characterized by public relevance.¹⁴⁵ Jürgen Habermas, as the most influential exponent of the theory of communicative action, retrieves Kant's idea, adding however a further distinction at the third level of public law.

α) The first level consists of what Kant called the *ius civitatis*, namely the law “formed in accordance with the right of citizenship of the individuals who constitute a people.”¹⁴⁶ This level corresponds, according to Habermas, to the rules, based on representative and participative legitimation, that govern social and political relations within democratic states.¹⁴⁷

β) The second level is identified by Kant with the *ius gentium*, i.e. with the law, “the principle of which is international law which determines the relations of states.”¹⁴⁸ Following his predecessor, Habermas describes the *classic* international law as the *corpus iuris* in which national states regulate their converging or overlapping interests, yet without any attempt to establish these rules as characterized by universal validity.¹⁴⁹

γ) At the third level Kant collocates – for the first time in the history of political and legal thought – the *ius cosmopoliticum* as the law “insofar as individuals and states, standing in an external and mutual relation, may be regarded as citizens of a universal state of humankind.”¹⁵⁰ Habermas distinguishes here, within the general context of the “constitutionalization of

¹⁴⁵ Kant, ‘Zum ewigen Frieden’, *supra* note 60, 203.

¹⁴⁶ *Ibid.* (translation by the author).

¹⁴⁷ Habermas, *Faktizität und Geltung*, *supra* note 52.

¹⁴⁸ Kant, ‘Zum ewigen Frieden’, *supra* note 60, 203 (translation by the author).

¹⁴⁹ J. Habermas, *Der gespaltene Westen* (2001), 117-122.

¹⁵⁰ Kant, ‘Zum ewigen Frieden’, *supra* note 60, 203 (translation by the author).

international law,” two different legal and institutional frameworks.¹⁵¹ γ^1) The first is what he calls the *transnational law*, which could also be described as a post-classic international law dealing with matters of global concern. It is created (either as treaty law or as interpretation of customary law) by national states in order to formulate and implement rules regarding fields of general interest, like energy, environment, trade, financial transfers and economy. This *global* international law differs from the mere inter-state treaty praxis of the *classic*, i.e. non-constitutional, international law as its rules and practices do not just affect the interests of the political communities involved but shape common concerns on a worldwide scale. γ^2) The second framework is constituted by supra-state – or *supranational* – law, characterized by institutions, essentially a reformed UN, endowed with normative authority as regards the protection of peace and essential human rights. This is the *cosmopolitan law* in the proper sense of the word which, unlike the still state-oriented *global* dimension of post-classic international law, is directly addressed to individuals as the *citizens of the world*.

Outside the borders of single states, individuals meet and interact with each other regardless of their belonging to a specific political community. The level γ) of public law consists precisely in those rules and principles that guarantee a peaceful and cooperative interaction between humans within this most general context, beyond the status of being citizens of an individual state. Such norms contain the fundamental recognition that we owe to every human being as the consequence of the universal capacity to communicate. In this sense, solidarity *is* a moral obligation and its essential principles and rules have to be laid down necessarily as a fundamental part of the most universal *corpus* of public law, in the sense either of an interpretation of the *lex lata*, or of a contribution to the *lex ferenda*. Basing the case for solidarity on the communicative paradigm, i.e. interpreting it as part of the normative protection towards that kind of communication that occurs when individuals interact within the most general horizon, helps to avoid the shortcomings of the above-mentioned approaches: a) solidarity is not regarded as a result of a farsighted expediency because communication is an expression of a post-instrumental use of practical reason;¹⁵²

¹⁵¹ Habermas, *Faktizität und Geltung*, *supra* note 52, 133-135; J. Habermas, ‘Eine politische Verfassung für die pluralistische Weltgesellschaft?’, 38 *Kritische Justiz* (2005) 3, 222, 228-232; Habermas, ‘Kommunikative Rationalität’, *supra* note 101; J. Habermas, ‘Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgemeinschaft’, in Brugger, Neumann & Kirste (eds), *supra* note 71, 360, 368-373 [Habermas, Konstitutionalisierung]

¹⁵² According to the essential assets of the communicative paradigms, linguistic interaction can work only if the participants in the interaction assume that all those who are engaging

b) the claim for a non-egoistic approach avoids metaphysical assumptions insofar as the communicative capacity with which all humans are endowed has a merely transcendental – or better: linguistic-pragmatic – quality;¹⁵³ c) solidarity does not depend on individual preferences or personal commitment, but is a normative duty, necessary in order to guarantee the basic conditions for human interaction at the most general level, which has to be translated into an adequate ethical and legal framework.

F. Some Considerations on the Principles of an Institutional Implementation of Inter-Peoples Solidarity

Summing up, the results of the inquiry can be synthesized into four main assertions: a) the establishment of solidarity as a legal principle – or even as a *right* determined by rules – is necessarily related to, and must be substantiated by, extra-legal arguments; b) the use of extra-legal arguments in order to interpret existing norms or, in general, further to develop the law is an admissible, and even unavoidable, procedure; c) the conceptions that deny the obligation to solidarity prove to be, on the whole, less theoretically well-founded than those that endorse it; and d) despite some conceptual problems and a general tendency to abstraction, we have enough convincing arguments – drawn in particular from the communicative paradigm – to claim that solidarity is a moral obligation that has to be properly transposed into legal form, and that one of the most important consequences of the obligation to solidarity consists in opening the forum to the *others*, specifically to those who have good reasons to claim solidarity.

This transposition has to involve both international and national public law, in forms that implicate equally the interpretation of the *lex lata* as well as the introduction of new norms. Starting with the ways to implement the obligation to solidarity within the framework of international law, future treaties should insert clearer references to solidarity between peoples, integrated with precise definitions of normative duties, as well as hitherto unusual obligations to open

in the exchange of arguments a) are expressing true propositions (i.e. assertions that they consider to be provable), b) are being truthful (i.e. they are not cheating), and c) are eventually pursuing a just goal (i.e. they are not considering just their concerns). See: J. Habermas, *Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns* (1984) 598.

¹⁵³ Apel, *Transformation*, *supra* note 144, Vol. II, 358; Apel, *Diskurs und Verantwortung*, *supra* note 104.

the internal fora to the presentation of arguments by non-national citizens.¹⁵⁴ Following such a possible and desirable evolution, *solidarity* would consolidate its present status as a principle by becoming at least a *right* defined by precisely formulated *rules* and capable of being claimed by individuals or groups.¹⁵⁵ While the first kind of measures, namely the introduction into international treaties of clearer references to solidarity, may be seen as the improvement of a nonetheless already existing normative situation at the inter-state and supra-state level, the second – the opening of the internal fora – would probably be confronted, due to its complete lack of precedent and to its intervention in the political and legal mechanisms of the single states, with even greater resistance. Indeed, the international law norms providing for an obligation to open national fora up to non-national claims should be skilfully and cautiously conceived, imposing well-balanced procedures and avoiding any risk of jeopardizing the principle of autonomy. Nevertheless, if we take the obligation to solidarity seriously, then opening the internal fora must be seen as necessary insofar as the national decision-making-process must also internalize the multilevel setting of social interaction. Moreover, even if we maintain the centrality of sovereignty, there are good reasons for re-conceiving sovereign states, in a globalised world, as “[...] trustees of humanity [...]”.¹⁵⁶ Therefore, arguments of non-nationals have to be taken into account – even within the framework of national legal systems – when these arguments refer to their role against the background of universal human interaction.¹⁵⁷ Furthermore, international courts should be committed to the application of the solidarity principle wherever the existing law gives them this chance; the commitment of the courts is justified by the above-mentioned legitimacy of resorting to extra-legal arguments so as to interpret the law, in particular when the norms leave a wide discretion open to judicial exegesis.

¹⁵⁴ Such an enhancement of the international law instruments, however, is not only a project for the future; rather, it is a development which is already under way. For a detailed analysis of the international law instruments that provide for an involvement on non-citizens in decision-making-processes of sovereign States, see E. Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, 107 *The American Journal of International Law* (2013) 2, 295, 312 ff.

¹⁵⁵ Such an extension of the legal status of *solidarity* would nevertheless not do away with the need to interpret and further develop the rules concerning it by resorting – as is always the case within the legal discourse – to extra-legal arguments.

¹⁵⁶ Benvenisti, *supra* note 154.

¹⁵⁷ The principle of the protection of the fundamental rules of universal human interaction by national courts has already been applied, at least to some extent, by the doctrine of universal jurisdiction in international criminal law.

Nevertheless, the improvement of the solidarity principle as a legal obligation at the level of international law cannot be seen as exhaustive for at least two reasons. First, the inadequate democratic legitimation of international organizations and adjudication¹⁵⁸ justifies relevant concerns by democratic states as regards the establishment of international law norms explicitly providing for a supra-state implementation of the duty of solidarity, or for the opening up of internal democratic fora, insofar as these norms and proceedings could be used by autocracies for political manipulation. This problem can be properly addressed only by improving the democratic legitimacy of international political institutions and tribunals through both the spreading of democratic government at national level and the introduction of elements of what has been called “cosmopolitan democracy” into the institutional framework of international organization.¹⁵⁹ Although highly desirable, these progressive developments are out of reach, in their full range, for citizens of the single democratic nations. Moreover – and this is the second reason why the consolidation of the solidarity principle as a legal obligation within the international law horizon cannot be seen as sufficient – the principle of solidarity must find an adequate expression within national law and adjudication, too, since the fundamental norms of the most general human interaction, as a general obligation, have to be protected at all levels and should be anchored, therefore, in the national *corpora iuris*. The first national institutions called upon to act are the democratic parliaments, which have the task of passing clearly formulated norms – as open as possible, and as restrictive as necessary – containing precise regulations on the conditions under which the right to present claims before national institutions is granted to non-national citizens. The institutions involved by such norms are, first, the representative chambers themselves insofar as they admit that foreigners are included, under strict circumstances and excluding the right to participate in the voting process, in the law-making-procedures when it can be proved – on the basis of a public and well-motivated scrutiny regulated by law – that the bill being discussed is likely to affect their interests. A similar *right to be heard* can be applied – also in these cases after careful scrutiny – also, second, to administrative proceedings and, third, to the judiciary.

¹⁵⁸ On the democratic legitimacy of international courts see: A. von Bogdandy & I. Venzke (eds), *International Judicial Lawmaking* (2012); A. von Bogdandy & I. Venzke, *In Whose Name?* (2014).

¹⁵⁹ D. Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy* (2008); Habermas, *Kommunikative Rationalität*, *supra* note 101; Habermas, ‘Konstitutionalisierung’, *supra* note 151.

Admittedly, the perspectives drawn here may be situated far beyond the horizon of the immediate future. Nonetheless, they are not a chimera: if we do not want to leave our children a world that looks like a state of nature, we have to emphasize our institutional and intellectual fantasy – and finally acknowledge that only the universal recognition of rights and interests to all human beings can guarantee that our rights and interests are safe.

The 'Bonn Powers' of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment

Tim Banning*

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Abstract

The article traces the legal basis of the so-called 'Bonn Powers' that are claimed by the Office of the High Representative (OHR) in Bosnia and Herzegovina (BiH) as the basis for its extensive legislative, judicative, and executive decisions. The OHR's presence in BiH offers a very controversial example of how international institutions may exercise international public authority. The OHR has attracted far-reaching criticism and it has in fact been argued that its practice of adopting binding decisions runs contra to the main purpose of the civilian international presence in BiH. The contribution offers an analysis that substantiates such criticism on legal grounds. It discusses exemplary OHR decisions that reach far into the legislative, the executive, and the judicial domain of BiH and analyses possible legal sources for the broad powers claimed by the OHR. It explores the limits of the OHR's original mandate in light of the *Vienna Convention on the Law of Treaties* and it looks at the implied powers doctrine as a basis for the OHR's claims. It also considers a conferral of the 'Bonn Powers' on behalf of the United Nations Security Council. The article concludes that the 'Bonn Powers' do not qualify as a legal power and that their existence is merely a powerful, but delusive legal fiction.

A. Introduction

Sixteen years after the signing of the 1995 *Dayton Peace Agreement* (DPA), Bosnia and Herzegovina (BiH) is still under the extensive control of the Office of the High Representative (OHR),¹ an international institution set up to support the country's peace implementation process. As a relic of the immediate post-war era, the OHR's involvement in Bosnian domestic politics is still far-reaching and includes, *inter alia*, the imposition of substantial legislation, the amendment of Bosnian legislation, the dismissal of elected government officials, and the annulment of decisions of the Bosnian Constitutional Court.

The OHR's presence in BiH is thus a good example of how international institutions may exercise international public authority. The exercise of international public authority by the OHR has over the past years increasingly faced criticism from academia, NGOs, international institutions, and from the Government of the Republika Srpska. It has been argued that the binding

¹ The terms 'Office of the High Representative' (OHR) and 'High Representative' (HR) are used synonymously. Due to the institutional character of the problems addressed, the primarily used term will be 'Office of the High Representative'.

decisions adopted by the OHR run contrary to the main purpose of the civilian international presence in BiH which is the civilian implementation of the DPA. Moreover, it has even been argued that the form of international transitional administration as exercised by the OHR today obstructs the transformation of BiH into a sovereign State based on the rule of law, democracy, and well-governed democratic institutions. It is said that the unrestrained exercise of issuing binding decrees might have been justified as an emergency power during the immediate post-Dayton period. Yet this state of emergency has long vanished. Critics have thus labelled the OHR an “international protectorate”,² or the “European Raj”.³

While academic debate has largely focussed on the appropriateness and the legitimacy of OHR’s exercise of public authority, the legality of OHR’s conduct under international law has received little attention. This article examines the legal basis of OHR’s far-reaching practice to adopt legally binding decisions. The so-called ‘Bonn Powers’, which are regularly invoked to justify OHR decisions, are of central importance in this regard.

B. The *Dayton Peace Agreement*

The DPA, initialled in November 1995, forms the legal basis of the OHR. Consisting of the *General Framework Agreement* (GFA),⁴ its eleven Annexes, “each of them constituting an international treaty”,⁵ and of the *Agreement on Initialling*, the DPA is an “intricate legal web” which mirrors the “multi-faceted nature of the conflict” and its entanglement of ethnic, religious, political, and military elements.⁶

The Parties to the GFA are the Republic of BiH, the Republic of Croatia, and the Federal Republic of Yugoslavia. In contrast, most of the Annexes are only concluded by the Republic of BiH and its constituent entities, the

² M. T. Parish, ‘The Demise of the Dayton Protectorate’, 1 *Journal of Intervention and State Building* (2007) (Special Supplement), 11, 11.

³ G. Knaus & F. Martin, ‘Lessons from Bosnia and Herzegovina – Travails of the European Raj’, 14 *Journal of Democracy* (2003) 3, 60.

⁴ *General Framework Agreement for Peace in Bosnia and Herzegovina*, 14 December 1995, 35 ILM 89 [GFA].

⁵ P. Gaeta, ‘The Dayton Agreements and International Law’, 7 *European Journal of International Law* (1996) 2, 147, 147.

⁶ *Ibid.*, 149.

Republika Srpska, and the Federation of Bosnia and Herzegovina,⁷ which are not themselves Parties to the GFA.

The GFA itself merely serves as a guarantee for the implementation of its Annexes. In most of the eleven articles of the GFA, the Parties 'welcome and endorse' the arrangements of a respective annex.

It has thus been observed that the relation between the GFA and its Annexes resembles a reverse legal logic, because the Annexes in fact provide the detailed provisions of the peace agreement while the GFA itself simply works as a safeguard mechanism.⁸

The United Nations Security Council (UN SC or Security Council) expressed its political support for the *Dayton Peace Agreement* in several resolutions. One day after the Agreement was initialled, on 22 November 1995, the Security Council, acting under Chapter VII, adopted *Resolution 1022*, thus adding considerable weight to the *Agreement on Initialling* and to the GFA. *Resolution 1022* conditionally suspended the economic sanctions which had been imposed on the Federal Republic of Yugoslavia and on the Bosnian Serbs until then. Yet they were to be automatically reimposed if the Federal Republic of Yugoslavia would fail to sign the Peace Agreement.⁹ Thus, the Security Council offered strong incentives for compliance with the agreement.

Similarly, in *Resolution 1031*, the UNSC endorsed the High Representative's (HR) responsibility for civilian implementation, as requested by the Parties to *Annex 10* of the GFA, and designated Carl Bildt as first High Representative.¹⁰ This was not a "prerequisite for validity" of the DPA, but simply added political authority to it.¹¹

Mirroring the two principle goals of Dayton – ending the fighting and creating a viable Bosnian State – the Annexes may be divided into two groups: one covering essentially the military agenda of reaching a robust cease-fire (*Annex 1A*), fostering regional stabilization (*Annex 1B*), and delimitating the Inter-Entity Boundary Lines under IFOR protection (*Annex 2*).

⁷ Annexes 1A, 2, 3, 4, 6, 7, 8 & 11 to the GFA. These Annexes can be found in 35 ILM 91-107, 111-128, 130-143 & 149-152. Annexes 5 & 9 to the GFA (35 ILM 129 & 144-146) are concluded only between those constituent entities. Annexes 1B & 10 to the GFA (35 ILM 108-111 & 149-152) are in turn concluded by all the Parties to the GFA and the constituent entities of the Republic of BiH.

⁸ Gaeta, *supra* note 5, 156.

⁹ SC Res. 1022, UN Doc S/RES/1022, 22 November 1995, 2, para. 1.

¹⁰ SC Res. 1031, UN Doc S/RES/1031, 15 December 1995, 4-5, para. 26.

¹¹ G. Nystuen, *Achieving Peace or Protecting Human Rights?: Conflicts Between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (2005), 48.

The other covering those Annexes which reflect the broader agenda of state-building in BiH, pertaining to issues like the new constitution (*Annex 4*), protection of human rights (*Annex 6*), and more generally to the legitimacy to Bosnia's new power-sharing institutions (*Annex 3, Annex 5*).

The most important annex for present purposes, *Annex 10* (the *Agreement on Civilian Implementation*), defines the mandate of the High Representative. In Article I (2), the Republic of Bosnia and Herzegovina, the Republic of Croatia, the FR Yugoslavia, the Federation of Bosnia and Herzegovina, and the Republika Srpska request as the Parties to *Annex 10*

“the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties’ own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a U.N. Security Council resolution, the tasks set out below”.¹²

The mandate of the High Representative includes for example the tasks to “[m]onitor the implementation of the peace settlement”,¹³ to “[m]aintain close contact with the Parties”,¹⁴ and to “[c]oordinate the activities of the civilian organizations and agencies”.¹⁵ Yet the controversial dynamics of the HR’s mandate stem from Article V in connection with Article II (1) (d). While Article II (1) (d) vests the HR with the power to “facilitate [...] the resolution of any difficulties arising in connection with civilian implementation”,¹⁶ Article V grants the power to issue binding interpretations of *Annex 10*.¹⁷

Annex 10 also highlights the limited Security Council involvement in the creation of the OHR, as it only states that the appointment of the High Representative should be “consistent with relevant United Nations Security Council resolutions”.¹⁸ The limited role played by the UN and by third States in

¹² *Annex 10* to the GFA, Art. I (2), 35 ILM 146, 147 [Annex 10 to the GFA].

¹³ *Ibid.*, Art. II (1) (a), 147.

¹⁴ *Ibid.*, Art. II (1) (b), 147.

¹⁵ *Ibid.*, Art. II (1) (c), 147.

¹⁶ *Ibid.*, Art. II (1) (d), 147.

¹⁷ *Ibid.*, Art. V, 148: “The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement.”

¹⁸ *Ibid.*, Art. I (2), 147.

the contractual arrangements of the DPA can be seen as a clear affirmation of Bosnian independence and sovereignty.

This constitutes a fundamental difference to other, externally imposed international administrative arrangements which granted direct oversight to the UN such as United Nations Interim Administration Mission in Kosovo (UNMIK) and United Nations Interim Administration in East Timor (UNTAET) in East Timor.¹⁹ The Bosnian case of international territorial administration is thus sometimes portrayed as being based on local consent, instead of external imposition. The idea of local consent has also sparked the argument that the Bosnian people have subjected themselves to the authority of the High Representative, who is responsible for interpreting the Social Contract which lies at the heart of their State.²⁰

C. Interpreting the *Annex 10* Mandate Under the *Vienna Convention on the Law of Treaties*

I. OHR Measures Justified on Grounds of *Annex 10* Express Powers

In an interview, Carlos Westendorp, HR in BiH from 1997 to 1999, bluntly explained this flexibility: “[...] if you read Dayton very carefully, *Annex 10* even gives me the possibility to interpret my own authorities and powers”.²¹ This is indeed a correct reading of the HR’s mandate. Yet it is far from obvious how the OHR could have bloated its mandate from being a co-ordinator and manager of the implementation process to imposing substantial legislation, dismissing senior government officials, and overriding decisions of the Constitutional Court simply based on his *Annex 10* mandate. The authority to interpret cannot be understood as a *carte blanche* for the OHR to create its mandate. Under this reading of *Annex 10* the OHR would acquire a status *legibus solutus*. However, international organizations are, as “[a] rule of thumb”,²²

¹⁹ See SC Res. 1244, UN Doc S/RES/1244 (1999), 10 June 1999 and SC Res. 1272, UN Doc S/RES/1272 (1999), 25 October 1999, respectively.

²⁰ W. Bain, *Between Anarchy and Society - Trusteeship and the Obligations of Power* (2003), 150.

²¹ S. Bosna, ‘Carlos Westendorp Reveals his Opinion About the Bosnian Politicians’ (30 November 1997), available at http://www.ohr.int/ohr-dept/presso/pressi/default.asp?content_id=3407 (last visited 15 August 2014).

²² H. G. Schermers & N. M. Blokker, *International Institutional Law*, 5th ed. (2011), 157, para. 209.

not allowed to generate their own powers or to determine their competences.²³ Moreover, general international law sets out rules of interpretation by which the HR has to abide when interpreting his mandate. Hence, exemplary decisions of the HR will be analyzed with regards to their compliance with these rules. They will be presented categorized in subsections according to the respective field of OHR activity.

1. Imposition of Substantial Legislation

The first imposition of substantial legislation occurred on 16 December 1997 when the OHR unilaterally signed a *Law on Citizenship of BiH*.²⁴ This decision was deemed “of utmost importance for the Peace Process”²⁵ and was imposed without the consent of the BiH Parliament:

“It is with regret that I have been informed about the failure of both Houses to take a similar decision with regard to the Law on Citizenship on Bosnia and Herzegovina within the said deadline. *In accordance with my authority under Annex 10 of the Peace Agreement* and Article XI of the Bonn Document, I do hereby decide that the Law on Citizenship of Bosnia and Herzegovina shall enter into force by 1 January 1998 on interim basis, until the Parliamentary Assembly adopts this law in due form, without amendments and no conditions attached.”²⁶

The total circumvention, or rather abrogation, of the national legislative process and the order to adopt the decision as national law ‘without amendments and no conditions attached’ meant the complete subjugation of national legislative bodies to the will of the OHR. This was partly justified with the OHR’s ‘authority under *Annex 10* of the Peace Agreement’.

Numerous examples of the HR’s imposition of national legislation based on his Annex 10 powers can be found: On 1 March 1998, the OHR established

²³ See *ibid.* and M. N. Shaw, *International Law*, 6th ed. (2008), 1306-1309.

²⁴ OHR, ‘Decision Imposing the Law on Citizenship of BiH’ (16 December 1997), available at http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=343 (last visited 15 August 2014).

²⁵ *Ibid.*

²⁶ *Ibid.* (emphasis added). As to the Bonn Document, see section E. below.

the *Interim Mostar Airport Authority*²⁷ and made the nomination of its personnel dependent on his consent.²⁸ Shortly after, the OHR imposed a new design of banknotes.²⁹ On 12 November 2000, the OHR enacted its broadest package of legislation, when it imposed several laws introducing EU standardisations in various fields,³⁰ annulled already existing Bosnian laws,³¹ and established the BiH State Court.³²

2. Removal of Public Officials

The OHR further developed the practice of dismissing public officials from their offices and banning them from holding any public employment again. This was done so often without even admitting the dismissed persons to confront the charges brought against them, let alone granting them a fair hearing or a right to appeal.

On 5 March 1999, the OHR removed Nikola Poplasen from the Office of President of Republika Srpska on grounds of allegedly abusing his power,

²⁷ OHR, 'Decision Establishing an Interim Arrangement to Run the Mostar Airport' (1 March 1998), available at http://www.ohr.int/decisions/mo-hncantdec/default.asp?content_id=110 (last visited 15 August 2014).

²⁸ *Ibid.*, Art. 2.

²⁹ OHR, 'Decision Imposing the Design of Bank Notes' (27 March 1998), available at http://www.ohr.int/decisions/econdec/default.asp?content_id=19 (last visited 15 August 2014).

³⁰ See, e.g., OHR, 'Decision Imposing the BiH Law on Standardisation, Introducing EU Standards' (12 November 2000), available at http://www.ohr.int/decisions/econdec/default.asp?content_id=44 (last visited 15 August 2014) [OHR, Decision Imposing the BiH Law on Standardisation]; OHR, 'Decision Imposing the BiH Law on Metrology, Introducing EU Standards' (12 November 2000), available at http://www.ohr.int/decisions/econdec/default.asp?content_id=43 (last visited 15 August 2014); OHR, 'Decision Imposing the BiH Law on Measuring Units, Introducing EU Standards' (12 November 2000), available at http://www.ohr.int/decisions/econdec/default.asp?content_id=42 (last visited 15 August 2014); OHR, 'Decision Establishing the BiH Law on Accreditation, Introducing EU Standards' (12 November 2014), available at http://www.ohr.int/decisions/econdec/default.asp?content_id=40 (last visited 15 August 2014).

³¹ OHR, 'Decision Annuling the Amendments on the RS Law on Pension and Disability Insurance From October 2000' (12 November 2000), available at http://www.ohr.int/dpa/default.asp?content_id=36 (last visited 15 August 2014).

³² OHR, 'Decision Establishing the BiH State Court' (12 November 2000), available at http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=362 (last visited 15 August 2014); OHR, 'Decision Imposing the Law on the State Court of BiH' (12 November 2000), available at http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=5228 (last visited 15 August 2014).

blocking the will of the people of Republika Srpska, refusing to abide by the decisions of the National Assembly, and obstructing the implementation of the GFA.³³ The action taken was partly justified by an invocation of the OHR's *Annex 10* powers supposedly contained in Articles V and II (1) (d).³⁴ Other examples include the removals of Mile Marceta,³⁵ elected mayor of the town Drvar, and of Pero Raguz from his position as elected Mayor of Stolac.³⁶ Under HR Petritsch (1999 to 2002) and HR Ashdown (2002 to 2006), the dismissals were extended to *en masse* removals where, for example, on 30 June 2004, Ashdown dismissed fifty-eight persons from public office on an *ad hoc* basis.³⁷

3. Judicial Reform and Annulment of the Constitutional Court's Decision

Two more striking examples of the OHR's mandate interpretation concern the judiciary of BiH. In 2000, the OHR initiated a judicial reform project by setting up an individual complaints procedure and by establishing the Independent Judicial Commission (IJC) to oversee the new procedure. Yet the individual complaints procedure was highly ineffective. In 2002, the OHR issued a decision, based on Article V and Article II (1) (d) *Annex 10*, which ended the procedure and demanded that all judges and prosecutors would have to resign and reapply for their positions.³⁸ The Council of Europe (CoE) expressed serious doubts about the lawfulness of such a measure. It was particularly concerned about breaches of basic principles of an independent judiciary, such

³³ OHR, 'Decision Removing Mr. Nikola Poplasen From the Office of President of Republika Srpska' (5 March 1999), available at http://www.ohr.int/decisions/removalssdec/default.asp?content_id=267 (last visited 15 August 2014) [OHR, Decision Removing Mr. Nikola Poplasen From the Office of President of Republika Srpska].

³⁴ *Ibid.*

³⁵ OHR & Organization for Security and Co-operation in Europe, 'Drvar Arbitration Award' (16 September 1999), available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=4789 (last visited 15 August 2014).

³⁶ OHR, 'Decision Removing Pero Raguz From his Position as Mayor of Stolac' (4 March 1998), available at http://www.ohr.int/decisions/removalssdec/default.asp?content_id=256 (last visited 15 August 2014).

³⁷ These decisions are available at <http://www.ohr.int/decisions/archive.asp> (last visited 15 August 2014).

³⁸ OHR, 'Decision Suspending all Judicial and Prosecutorial Appointments in BiH [...], Pending the Restructuring of the Judicial System' (4 April 2002), available at http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=7349 (last visited 15 August 2014) [OHR, Decision Suspending all Judicial and Prosecutorial Appointments in BiH].

as the irremovability and life tenure of appointed judges.³⁹ The CoE further noted that the measure might constitute a violation of Article 6 of the *European Convention on Human Rights* (ECHR).⁴⁰

Secondly, on 23 March 2007, HR Schwarz-Schilling annulled a decision of the Bosnian Constitutional Court in which the judges had found the practice of dismissing public officials in contravention of the ECHR. Here the OHR expressly prohibited any attempt to establish a domestic mechanism to review its decisions.⁴¹ The decision made it very clear that the OHR would not allow any Bosnian institution to challenge its claimed authority.

II. The Legality of the OHR's Measures Under General Rules of Interpretation

The OHR claims an extensive authority that does not seem to correspond to its power to interpret. It is questionable how the invoked combination of Article V and Article II (1) (d) *Annex 10* could have justified the measures listed above.

Article V vests the HR with "the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement".⁴² In the cases mentioned, this authority has been applied on Article II (1) (d) which states that the High Representative shall "[f]acilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation".⁴³

Clearly, when interpreting these provisions, the interpreter would be bound by the limitations set out in international law. Article 31 of the 1969 *Vienna Convention on the Law of Treaties* (VCLT) provides a "[g]eneral rule of interpretation".⁴⁴ This rule is applicable in the given case, as *Annex 10* is 'a treaty

³⁹ OHR, 'Discussion Paper on the Selection Process for the Interim High Judicial Council' (22 March 2002), available at http://esiweb.org/pdf/esi_europeanraj_judicialreform_id_2.pdf (last visited 15 August 2014), 3-4, Sec. 4 (a).

⁴⁰ *Ibid.*, 5-7, Sec. 4 (d).

⁴¹ OHR, 'Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al., No. AP-953/05' (23 March 2007), available at http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=39397 (last visited 15 August 2014), Art. 3 [OHR, Order on the Implementation of the Decision of the Constitutional Court in the Appeal of Milorad Bilbija et al.].

⁴² *Annex 10* to the GFA, *supra* note 12, Art. V, 148.

⁴³ *Ibid.*, Art. II (1) (d), 147 (emphasis added).

⁴⁴ *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 31, 1155 UNTS 331, 340 [VCLT].

between States' in the sense of Article 1 VCLT, and secondly because Article 31 VCLT reflects customary international law.⁴⁵ As the OHR is bound by the same rules as the parties to *Annex 10*, it also has to conform to the general rule of interpretation. Article 31 (1) VCLT stipulates that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".⁴⁶

Paragraph 2 defines the mentioned "context for the purpose of the interpretation"⁴⁷ and paragraph 3 provides additional means of interpretation "to be taken into account, together with the context".⁴⁸

These provisions combine the different historic methods of interpretation.⁴⁹ Such interpretation will be given in the following.

The final authority to interpret is indeed a power to interpret. The ordinary meaning of 'authority' is "[p]ower delegated to a person or body to act in a particular way. The person in whom authority is vested is usually called an [...] agent and the person conferring the authority is the principal."⁵⁰

A legal power to interpret means that the interpretation is binding upon others and, possibly, the interpreter himself. The decisive criterion here is the legally binding character. Hence, the OHR is allowed to make interpretations on *Annex 10* which are binding and final, meaning they cannot be appealed against in any higher instance. The meaning of 'interpretation' must simply be understood as a "judicial process" of "determining the true meaning of a written document" which is "effected in accordance with a number of rules and

⁴⁵ Shaw, *supra* note 23, 933.

⁴⁶ VCLT, Art. 31 (1), *supra* note 44, 340.

⁴⁷ *Ibid.*, Art. 31 (2), 340.

⁴⁸ *Ibid.*, Art. 31 (3), 340.

⁴⁹ Villiger points out that there have been five traditional approaches towards interpretation: 1. the subjective method, which inquires the intentions of the drafting parties and thus may heavily rely on the travaux préparatoires; 2. a textual or grammatical method, which regards the actual treaty text as the most authoritative expression of the drafters' common will; 3. the contextual or systematic method, which seeks the meaning of the treaty terms in their wider context; 4. the teleological or functional method based on the object and purpose of a treaty; and 5. the logical method, which uses abstract principles and supposedly pure rationality in order to interpret a legal text. See M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), 421-422 (para. 1). The methods mentioned seem to be closely interlinked and not to be easily separated. Other authors only identify three major approaches. See, e.g., I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (1984), 115; Shaw, *supra* note 23, 932-933.

⁵⁰ J. Law & E. A. Martin (eds), *A Dictionary of Law*, 7th ed. (2009), 50.

presumptions”.⁵¹ Again, the applicable rules and presumptions for the process of interpretation are contained in Article 31 VCLT.

At first, interpreting Article II (1) (d) *Annex 10* ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ does in fact yield results which are irreconcilable with the measures adopted by the OHR. Already a determination of the ordinary meaning – the starting point in this “single combined operation”⁵² – reveals an excessive misinterpretation of Article II (1) (d). Black’s Law Dictionary defines the meaning of ‘to facilitate’ in the context of criminal law as “[t]o make the commission of a crime easier”.⁵³ The notion of helping someone in doing something is reproduced by general English language dictionaries. Pocket Fowler’s Modern English Usage ascribes the following meaning to ‘facilitate’: “to make easy or feasible.”⁵⁴ In the New Oxford American Dictionary ‘facilitate’ is said to mean “to make (an action or process) easy or easier”.⁵⁵ From this, one can deduce the semantic consensus that ‘to facilitate’ does mean to improve the basic requirements or pre-conditions of a certain action. Yet it excludes the actual performing or implementing of the respective action. This meaning of ‘to facilitate’ must be read into Article II (1) (d) as forming its ordinary meaning.

However, these findings stand in stark contrast to the idea of Article II (1) (d) being the legal basis for a legal power to perform numerous executive tasks which actually do resolve “any difficulties arising in connection with civilian implementation”.⁵⁶ The actual resolution of such difficulties is precisely reserved for other bodies than the OHR, namely for the Parties to *Annex 10*. Otherwise, it would not have been necessary to expressly include the word ‘facilitate’ in the treaty text. The far-reaching interpretation of Article II (1) (d) as adopted by the OHR would have been correct if the treaty text simply said: “The High Representative shall resolve, as the High Representative judges necessary, any difficulties arising in connection with civilian implementation.”

By taking into account the context of Article II (1) (d) in accordance with Article 31 (1) and (2) VCLT, the misinterpretation becomes even more obvious. The proper contextual reading of Article II (1) (d) should start with a view to

⁵¹ *Ibid.*, 294.

⁵² ILC, *Draft Articles on the Law of Treaties with Commentaries*, Art. 27 & 28, Yearbook of the International Law Commission (1966), Vol. II, 187, 217, 219-220 (para. 8) [Draft Articles on the Law of Treaties with Commentaries].

⁵³ B. Garner (ed.), *Black’s Law Dictionary*, 9th ed. (2009), 668.

⁵⁴ R. Allen (ed.), *Pocket Fowler’s Modern English Usage*, 2nd ed. (2008), 249.

⁵⁵ A. Stevenson (ed.), *New Oxford American Dictionary*, 3rd. ed. (2010), 619.

⁵⁶ *Annex 10* to the GFA, Art. 2 (1) (d), *supra* note 12. 147.

the OHR's powers expressed in the remaining letters of Article II (1). Clearly powers, such as the *monitoring* of the peace settlement's implementation, the maintaining of close contact with the Parties, the *coordination* of the activities of civilian organizations and agencies or the powers to *participate* in meetings and to *report* periodically on the implementation process, are very general and emphasize the OHR's *auxiliary* character. They do not support the view that the OHR possesses substantial executive or even legislative powers. Article I (1) *Annex 10* places the OHR in line with a "considerable number of international organizations and agencies [that] will be called upon to *assist*".⁵⁷ Whatever broad interpretation of 'assisting' might have been maintained up to this point, Article I (2) crushes any illusion about the OHR as a powerful institution:

"In view of the complexities facing them, the Parties request the designation of a High Representative [...] to facilitate *the Parties' own efforts* [...]."⁵⁸

Hence, the Parties are meant to be in charge of the actual implementation – the OHR is simply vested with a supportive or a catalyst function in this process. The OHR's practice to impose substantial legislation is particularly opposed to this function and the forced adoption of legislation can by no means be portrayed as a 'facilitation of the Parties' own efforts'.

Considering the Bosnian Constitution in *Annex 4* as an "agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty",⁵⁹ it becomes clear that the imposition of substantial legislation was simply a usurpation of powers actually belonging to the Parliamentary Assembly:

"The Parliamentary Assembly shall have responsibility for [e]nacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution."⁶⁰

At this point it even seems doubtful that Article II (1) (d) actually constitutes a legal power. Considering the ordinary meaning in its context

⁵⁷ *Ibid.*, Art. 1 (1), 147 (emphasis added).

⁵⁸ *Ibid.*, Art. 1 (2), 147 (emphasis added).

⁵⁹ VCLT, Art. 31 (2) (a), *supra* note 44, 340.

⁶⁰ *Annex 4* to the GFA, Art. IV (4) (a), 35 ILM 117, 122.

as stated above, it seems that the auxiliary function granted to the OHR by Article II (1) (d) is lacking the decisive criterion of a legally binding character. It is thus also possible to think of Article II (1) (d) as a mere competence, meaning precisely not a legal power with legally binding effects.

This reveals that the OHR has also blatantly disregarded the limits of its power under Article V *Annex 10*. The "final authority in theater regarding interpretation" only relates to "this Agreement on the civilian implementation of the peace settlement",⁶¹ namely *Annex 10*. However, the OHR was engaged in an interpretation of Annex 4. The contextual interpretation of Article II (1) (d) *Annex 10* shall be concluded with a remark on Article 1 GFA, which also forms part of its context as a related agreement in the sense of Article 31 (2) (b) VCLT:

"In particular, the Parties shall fully respect the sovereign equality of one another [...] and shall refrain from any action, by threat or use of force or otherwise, against the territorial integrity or *political independence* of Bosnia and Herzegovina or any other State."⁶²

This reference to Bosnian political independence figures prominently in the DPA and it is by no means intelligible as to why the OHR should be so radically exempted from the underlying obligation to respect it. Any measures adopted by the OHR which undermine the political independence of Bosnia must thus be seen as based on an interpretation contrary to the treaty's context in the sense of Article 31 (2) (b) VCLT.

The decisions of the OHR can also not be seen as "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".⁶³ This is precisely so because they never established agreement among the parties.

Finally, attention should be paid to the treaty's object and purpose while interpreting Article II (1) (d) *Annex 10*. In the case of *Annex 10*, Article 1 clearly identifies its object and purpose as "the implementation of the civilian aspects of the peace settlement".⁶⁴ Those are understood to entail

"a wide range of activities including continuation of the humanitarian aid effort for as long as necessary; rehabilitation of infrastructure and economic reconstruction; the establishment of political and

⁶¹ *Annex 10* to the GFA, Art. V, *supra* note 12, 148.

⁶² GFA, Art. 1, *supra* note 6, 89 (emphasis added).

⁶³ VCLT, Art. 31 (3) (b), *supra* note 44, 340.

⁶⁴ *Annex 10* to the GFA, Art. 1 (1), *supra* note 12, 147.

constitutional institutions in Bosnia and Herzegovina; promotion of respect for human rights and the return of displaced persons and refugees; and the holding of free and fair elections according to the timetable”.⁶⁵

The crux is that most of the OHR’s measures described above might roughly be placed in one of those categories. Supposing the measures were necessarily required to give full effect to the civilian implementation of the peace settlement, which is as a question of public policy far from being proven, the OHR would still have to comply in its teleological interpretation with the standards of an *effective interpretation*. These limitations have been set up to exclude “an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty”, meaning that “to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but *to revise* a treaty”.⁶⁶ It has been demonstrated by means of a textual and a contextual interpretation that the adopted measures can hardly be termed a necessary implication of the treaty terms. This is why the OHR has unlawfully exerted its power to interpret *Annex 10*. Thus, all measures arising directly from this misinterpretation must be seen as not being in accordance with the OHR’s *Annex 10* mandate. The role of the OHR as inscribed in the DPA can by no means be understood as exceeding the function of a ‘mediator’ or a ‘facilitator’. No executive or legislative prerogatives can be read into *Annex 10* without revising it.

This is also true for the practice of dismissals. For instance, with regards to Mr. Poplasen’s dismissal, it is obvious that the measure does not find a proper legal basis in Articles V and II (1) (d). The interpretation adopted stands again in stark contrast to the ordinary meaning of ‘to facilitate’ in context of the whole treaty. Moreover, in most cases of dismissal the OHR has also acted in violation of Article 31 (3) (c) VCLT which demands that as further authentic means of interpretation “[a]ny relevant rules of international law applicable in the relations between the parties” be taken into account.⁶⁷ As mentioned above, those relevant rules of international law have been understood to include, amongst others, all multilateral treaties applicable in the relations between the parties. Again, it must be assumed that the parties to a treaty did not intend to

⁶⁵ *Ibid.*

⁶⁶ *Draft Articles on the Law of Treaties with Commentaries*, Art. 27 & 28, *supra* note 48, 217, 219 (para. 6) (emphasis added).

⁶⁷ VCLT, Art. 31 (3) (c), *supra* note 43, 340.

breach their previous obligations by entering into a new treaty.⁶⁸ Furthermore, it cannot be assumed that the parties did intend to breach their obligations under an "instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties",⁶⁹ such as the other annexes to the GFA. Yet the interpretation adopted by the OHR in the given cases would amount to precisely this. It violates fundamental rights and freedoms as enshrined in *Annex 6* to the GFA, for example "[t]he right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings".⁷⁰ Besides, the adopted interpretation is also not in conformity with Article I (2) of the *Bosnian Constitution* which establishes the rule of law as an important democratic principle.⁷¹ Ironically, the OHR accused Poplasen of "acting against democratic principles" and of "disregarding the General Framework Peace Agreement and the Constitution of Bosnia and Herzegovina Agreement".⁷²

The late *en masse* dismissals must be seen as the crudest infringements of the principles of rule of law and the right to due process. Bearing in mind the above interpretation of Article II (1) (d) *Annex 10*, it is impossible to justify such actions based on the OHR's *Annex 10* mandate.

The analysis shows that the OHR has continuously misinterpreted its *Annex 10* powers. Decisions taken under the adopted interpretation can by no means be said to be in compliance with *Annex 10*, Articles II (1) and V. First and foremost, the OHR has totally failed in determining the ordinary meaning of Article II (1) (d) *Annex 10* which it constantly claimed to be the legal basis for the measures adopted. By doing so, it neglected the "first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty".⁷³ Any interpretation adopted in such outright disregard of the ordinary meaning can only be seen as a wilful circumvention of the intent of the parties. Neither can an interpretation based on outright disrespect for the will of the parties be said to conform with the principle of good faith. The OHR's massive excess of power violates any 'legitimate expectations raised in other parties' and must be seen as evading its obligations under *Annex 4* and *Annex 6*. The amendment and

⁶⁸ Villiger, *supra* note 45, 133.

⁶⁹ VCLT, Art. 31 (2) (b), *supra* note 43, 340.

⁷⁰ *Annex 6* to the GFA, Art. I (5), 35 ILM 130, 130.

⁷¹ *Annex 4* to the GFA, Art. I (2), *supra* note 54, 118.

⁷² OHR, 'Decision Removing Mr. Nikola Poplasen From the Office of President of Republika Srpska', *supra* note 33.

⁷³ *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 3 March 1950, ICJ Reports 1950, 4, 8.

violation of constitutional provisions, the imposition of substantial legislation, the removal of democratically elected officials, and the annulment of decisions of the Bosnian Constitutional Court are measures which dramatically exceed the outer limits of an effective interpretation. In fact, the interpretation adopted by the OHR must be termed a revision of *Annex 10* of the GFA.

D. Interpreting the Annex 10 Mandate Under the Implied Powers Doctrine

I. The Legitimacy of International Transitional Administration

Yet, one might intuitively ask, should the powers granted to the OHR not be extended further than that, considering the intricate and demanding task of running an international transitional administration effectively? This issue of legitimacy reaches into the heart of the OHR mandate debate because it addresses the decisive question of who should have the final authority over the process of transition; local actors or the international community? It stems from a continuous tension between the idea of local ownership and the exercise of broad powers by the international administrative body which has frequently been pointed out to underlie the concept of state-building.⁷⁴ The idea of local ownership is closely related to the broader process of democratization of the administered entity and derives particular value from ensuring the sustainability of the transitional project. Only if the local population is allowed to participate in the creation of governmental structures and in the transfer of powers to them, it is likely that the project will be successful in the long run.⁷⁵ On the other side, a premature return to local ownership can have massively destabilizing effects. Chesterman explains the origin of the legitimate exercise of powers by international bodies; if the local community would have possessed the necessary military and economic capacities to ensure peace and economic development, a transitional administration would not have been required in the first place. Thus, he further argues, a transitional administration should also be empowered to undertake military, economic, and political measures which the local

⁷⁴ B. Knoll, *The Legal Status of Territories Subject to Administration by International Organizations* (2008), 289 et seq. & 318.

⁷⁵ S. Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (2004), 143.

community cannot yet exercise itself. This is why the 'final authority' should be placed with the international administrative mission.⁷⁶

Yet Chesterman's argument tacitly recognizes the necessary temporal limitation of such missions. If international transitional administration is supposed to substitute for the lack of governance capacities on part of the local actors, it must naturally be assumed that the transitional administration is terminated as soon as those capacities are regained. This is not the case for the OHR. The OHR's mandate does not contain specific provisions on its termination.⁷⁷ That alleviated the practice of prolonging the OHR's presence in BiH several times. The mandate was first extended for two more years in 1996 after the first free and fair general elections in BiH which were expected by some to trigger the termination of the OHR mission.⁷⁸ This was followed by an indefinite extension in December 1997. In July 2006, HR Schwarz-Schilling, who seemed at that point of time to advocate a strategy of 'domestic political ownership', announced the closure of his office for June 2007.⁷⁹ Schwarz-Schilling was subsequently dismissed in February 2007 and replaced by Miroslav Lajčák who pursued a re-assertion of the 'Bonn Powers' and was backed by another extension of the OHR mandate.⁸⁰ An earlier attempt to counter this immense legitimacy deficit was made by HR Ashdown in January 2003 by issuing the *Mission Implementation Plan* (MIP).⁸¹ The MIP tried to "identify the core tasks on which the OHR now needs to concentrate in order to accomplish its mission".⁸² However, the proposed MIP was handicapped insofar as it granted the OHR unrestrained leeway in setting the exact goals for the termination of its mandate and in interpreting when such goals have been reached. This phenomenon of moving 'goal posts' has been described by Knaus:

⁷⁶ *Ibid.*

⁷⁷ R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008), 234.

⁷⁸ Parish, *supra* note 1, 17.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, 17-18.

⁸¹ OHR, 'Mission Implementation Plan' (30 January 2003), available at http://www.ohr.int/ohr-info/ohr-mip/default.asp?content_id=29145 (last visited 15 August 2014).

⁸² *Ibid.* Such tasks were defined as 1. entrenching the rule of law; 2. ensuring that extreme nationalists, war criminals, and organized criminal networks cannot reverse peace implementation; 3. reforming the economy; 4. strengthening the capacity of BiH's governing institutions, especially at the State-level; 5. establishing State-level civilian command and control over armed forces, reform the security sector, and pave the way for integration into the Euro-Atlantic framework; 6. promoting the sustainable return of refugees and displaced persons. *Ibid.*

“First, there are the moving goalposts. In the early days of the protectorate, its stewards described their challenge as the establishment of law and order and basic public institutions. As those aims were met, the nationalist parties emerged as culprits in the failure of Bosnian democracy. Once they lost power, general crime and corruption [...] became the difficulties in Bosnia. Like Proteus in the Greek myth, every time it appears to have been defeated, the problem with Bosnia changes shape. The second dynamic has been the way in which the OHR’s powers have expanded to meet each newly defined challenge.”⁸³

Knaus further argues that, if the exercise of broad powers could initially have been legitimate on grounds of a ‘state of emergency’, this justification has today vanished. BiH’s membership in the CoE has been referred to as an indicator for the country’s state of development which supposedly stands in a dramatic contradiction to the notion of a ‘state of emergency’.⁸⁴ Hence, any further exercise of such powers would necessarily erode the OHR’s legitimacy.

The developments in BiH can be described as a struggle for final authority between local actors and the OHR.⁸⁵ It is doubtful to what extent the OHR actually represents the supposedly unified interests of the international community and to what extent this dynamic represents the OHR’s strive for self-preservation. From a political science perspective, the autonomous development of international institutions, in the sense of being divorced from the will of their founders, has been analyzed as an inherent characteristic of bureaucracies. It is understood as a problem of agency which surfaces if the principal grants powers to its agent:

⁸³ Knaus & Martin, *supra* note 3, 69. See also R. Caplan, ‘Who Guards the Guardians? International Accountability in Bosnia’, 12 *International Peacekeeping* (2005) 3, 463, 472.

⁸⁴ Knaus & Martin, *supra* note 3, 72.

⁸⁵ This particular understanding of the events is also shared by the European Stability Initiative: “In fact, what is really at stake in Bosnia today is neither its peace nor its territorial integrity: it is the authority of the international mission, the OHR and its political master, the Peace Implementation Council (PIC), which comprises 55 countries and international organisations involved in the peace effort.” European Stability Initiative, ‘The Worst in Class: How the International Protectorate Hurts the European Future of Bosnia and Herzegovina’ (8 November 2007), available at http://esiweb.org/pdf/esi_document_id_98.pdf (last visited 15 August 2014), 4.

"The fact that delegation is a *conditional* grant of authority does not imply that the international bureaucracy necessarily does what principals want or had expected. The term 'agency slack' captures actions by the agent that are undesired by the principal. Agents do 'implement policy decisions and pursue their own interests strategically'."⁸⁶

Already, Machiavelli seems to have noticed the difficulties of instituting extraordinary powers in such a way that they do not expand indefinitely. Drawing on the example of dictators in ancient Roman republics, he observes that no such mission should be expected to place limitations upon itself; instead, the exercise of emergency powers should rather depend on clear limitations to avoid open-endedness and expansion.⁸⁷

Naturally, this antagonism of interests has produced two clashing narratives about who should legitimately hold the final authority in BiH. While local actors frame the struggle as a "conflict over the degree of local participation (devolution)", international actors perceive it as a conflict "over the quality of local participation (standards)".⁸⁸ The OHR can certainly be described as a policy institution set up for the purpose of enhancing the quality of governance in post-war BiH. As Wilde puts it, the OHR has been established for "filling a perceived 'vacuum' in local territorial governance".⁸⁹ This 'governance policy' necessarily demanded the OHR's activity in broad domains such as securing the post-Dayton territorial status and in the field of a "broad agenda concerning effectiveness, democracy, the rule of law, and liberal economic policy".⁹⁰

It cannot be neglected that some of the OHR's early coercive decisions were indeed legitimate under the mentioned governance policy, even if they were not in accordance with the OHR's *Annex 10* mandate.⁹¹ Chesterman

⁸⁶ I. Venzke, 'International Bureaucracies From a Political Science Perspective – Agency, Authority and International Institutional Law', 9 *German Law Journal* (2008) 11, 1401, 1409 (footnotes omitted).

⁸⁷ Knaus & Martin, *supra* note 3, 70 *et seq.*

⁸⁸ Knoll, *supra* note 65, 319 (emphasis omitted).

⁸⁹ Wilde, *supra* note 68, 207.

⁹⁰ *Ibid.*, 207-234.

⁹¹ Wilde mentions in this respect the decision of 7 March 2001 in which the OHR "purported to dismiss Ante Jelavić as the elected Croat representative of the State Presidency, banning him from holding public and party offices in the future, because of Jelavić's declaration of independence on the part of 'Herzeg-Bosna' covering the Bosnian Croat areas of the Federation. So OHR exercised governance in an effort to prevent the Federation from unraveling." (Wilde, *supra* note 68, 215 (footnote omitted)). The legitimacy of the OHR's

makes an argument for the legitimacy of early OHR decisions when he observes that nationalist parties had regained their political support around 1996 while the implementation of the DPA faltered.⁹² This had inspired the international administration to pursue what he calls “a reversal of moves towards self-governance”.⁹³ During the ongoing conflict both parties produce arguments which are intended to challenge the legitimacy of the other. Local actors aim their arguments basically at the OHR’s accountability deficit which results from the OHR’s practice of setting benchmarks for evaluating the governance performance of local actors while remaining itself totally unaccountable for any of its own acts of governance.⁹⁴ The CoE did in fact admonish the OHR for not providing any legal remedy against its decisions in a 2004 Parliamentary Assembly resolution.⁹⁵ The ‘international agent’ in return adopts arguments for the purpose of delegitimizing the ‘local agent’ in the eyes of the public:

“[P]ortraying it as overly corrupt, as failing to transcend nationalist attitudes and values, of being incapable of conforming to the benchmarks set for local self-government, or as incompetent to introduce a review mechanism, as in the case of the OHR, the international authority communicates that the institutional resources for democratic authorization are lacking.”⁹⁶

It seems virtually impossible to strike the right balance in this struggle – the situation is termed for good reason a ‘paradox of state-building’ – and it is not the intent of this study to further immerse into the issue of legitimacy.

decision must then be seen in the attempt to prevent a separation of BiH. The ‘state-of-emergency-argument’ would arguably be applicable here.

⁹² Chesterman, *supra* note 66, 131.

⁹³ *Ibid.*

⁹⁴ Knoll, *supra* note 65, 319.

⁹⁵ “The scope of the OHR is such that, to all intents and purposes, it constitutes the supreme institution vested with power in Bosnia and Herzegovina. In this connection, the Assembly considers it irreconcilable with democratic principles that the High Representative should be able to take enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal recourse.” Parliamentary Assembly of the Council of Europe, ‘Resolution 1384’ (23 June 2004), available at <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=17232&Language=EN> (last visited 15 August 2014), para. 13. See also European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, Doc. CDL-AD (2005) 004, 11 March 2005, 2, para. 1.

⁹⁶ *Ibid.*

Yet it is important to notice that both claims for legitimacy have validity to a certain extent and that the OHR's excess of its *Annex 10* powers might have been justified in certain instances because of the goals and purpose of international transitional administration. It thus seems required to reassess the *legality* of the OHR's conduct on the basis of a broader standard which takes such teleological considerations into account more seriously.

Indeed, considerations on legitimacy may find sufficient legal grounds in certain developments in the law of international institutions. The founding documents of international organizations have long been considered to warrant an interpretation which is strongly driven by teleological considerations and thus does not primarily rely on a textual approach. Many scholars understand the founding documents of international organizations to bear an 'organic-constitutive element' that distinguishes them from other multilateral international treaties. This is so because the constituent treaties of international organizations are often concluded for an indefinite period of time and are intended to serve a "common goal".⁹⁷

The deviation from general rules of interpretation is strongest and most established when it comes to the powers of an international organization. The doctrine of implied powers assumes in this respect that an "organization [...] [has] certain powers which are additional to those expressly stipulated in the constituent instrument".⁹⁸ Again, the doctrine is closely linked to the constitutional character of constituent treaties and originally stems from constitutional law, especially from U.S. constitutional law.⁹⁹ The basis of implied powers is the idea that an international organization needs to be able to cope with the necessities of international life, therefore they are sometimes portrayed as "dynamic and living creatures".¹⁰⁰ As such necessities are constantly changing

⁹⁷ J. Klabbers, *An Introduction to International Institutional Law*, 2nd ed. (2009), 74-75.

⁹⁸ K. Skubiszewski, 'Implied Powers of International Organizations', in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989), 855, 856.

⁹⁹ *Ibid.*, 855-856.

¹⁰⁰ Klabbers, *supra* note 87, 58. This idea of an inherent flexibility in the constituent treaties of international organizations is opposed to the notion of 'attributed powers' or 'the principle of speciality'. The doctrine of attribute powers and the 'principle of speciality' both originate from *Jurisdiction of the European Commission of the Danube Between Galatz and Braila*, Advisory Opinion, PCIJ Series B, No. 14 (1927). Here the Court avoided to address any doctrinal issues, but stated that "[a]s the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definite Statute with a view to the fulfilment of that purpose". *Ibid.*, 64. Emanating from positivist thought, the doctrine of attributed powers allows powers only

and developing to an extent which cannot be completely envisaged at the time an international organization is founded, reliance on the static concept of express powers would be inadequate to respond to them. In order to avoid such power-necessities gaps and to act dynamically, an international organization should possess more than its express powers, it should possess subsidiary powers by means of implication.¹⁰¹

II. The OHR as an International Organization

In order to be subject to the implied powers doctrine, the OHR would also have to qualify as an international organization. This legal status forms a necessary precondition for the application of the doctrine and could serve as a justification for a broad interpretation of the *Annex 10* powers by means of implication.

At first, there is no specific law of international organizations. In order to answer legal questions about international organizations, one has to reason by analogy and view each international organization on its own merits. However, there are certain common characteristics or indicators which allow an assessment of whether a certain institution is also an international organization. Those indicators may be found in the *1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (VCLT-IO) which, although not yet entered into force, may give guidance in this matter.¹⁰² Similarly, the *Draft Articles on Responsibility of International Organizations* of the International Law Commission may serve as a guiding instrument.¹⁰³

According to Article 2 (1) (a) (i) VCLT-IO, international organizations are established between States and thus intergovernmental in character. Article 2 (1) (a) VCLT-IO provides that international organizations are established by treaty governed by international law. Thus, contracts and acts governed by national law

to exist if they had been expressly conferred upon an international organization by its Member States. See for this Klabbers, *supra* note 87, 56.

¹⁰¹ Skubiszewski, *supra* note 88, 855 *et seq.*; Schermers & Blokker, *supra* note 22, 180-189, paras 232-236; Klabbers, *supra* note 87, 59-64; N. D. White, *The Law of International Organisations*, 2nd ed. (2005), 83-87.

¹⁰² *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, 21 March 1986, UN Doc A/CONF.129/15, 25 ILM 543 [VCLT-IO].

¹⁰³ ILC, *Draft Articles on Responsibility of International Organizations*, 3 June 2011, UN Doc A/66/10, 54, para. 87.

are excluded. The treaty is either concluded by States or by other international organizations. Furthermore, international organizations must possess at least one organ with a "distinct will".¹⁰⁴ The characteristic of 'distinct will' reaches into the heart of the concept of international organizations, namely the problematic relationship between the organization and its Member States. As formulated by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, international organizations are "new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals".¹⁰⁵ Hence, 'distinct will' may mean the ability to adopt norms which are broadly conceived by and addressed to the members.

It is unproblematic to apply the first two criteria on the OHR. *Annex 10* is a treaty, amongst others, concluded between States and hence governed by international law. Also, the 'distinct will' criterion is fulfilled in the case of BiH because the OHR adopts norms addressed to it and conceived by it. Yet an abnormality can be observed when it comes to the Republic of Croatia and the Republic of Serbia which are not at all addressed by any act of the OHR and hardly fall into the scheme of Member States in the sense of the VCLT-IO.

Equally, the fact that the OHR enjoys the privileges and immunities of a diplomatic mission under Article III (4) *Annex 10* does not point to the legal status of an international organization. This is so because diplomatic immunity and the immunity of international organizations are two separate concepts resting on different legal bases.

The concept of diplomatic immunity only explains the personal immunity of the diplomatic agent, but not the immunity of an international organization as a legal person. More fundamentally, the doctrine of diplomatic immunity rests on the idea of reciprocity. That means that the consent of the receiving State is required. That is not the case for the appointment of international organizations personnel. Also no *persona non grata* declaration is possible for the headquarter State of an international organization.

The proper basis for immunities of international organizations can be explained by the theory of functional necessity. For example, Article 105 of the *Charter of the United Nations* (UN Charter) states that the UN as a legal person and its officials shall enjoy immunity in the territory of its Member States "as it is

¹⁰⁴ Klabbers, *supra* note 87, 49.

¹⁰⁵ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, 66, 74-75, para. 19.

necessary for the fulfilment of its purposes”.¹⁰⁶ However, the notion of necessity also implies a distinction between official and private acts. As only official acts are necessary for the fulfilment of the organization’s purpose, consequently only these acts are also covered by immunity according to Article V section 18 (a) of the *Convention on the Privileges and Immunities of the United Nations*.¹⁰⁷

In sum, the immunities of international organizations and their officials are limited to a greater extent than is the case under diplomatic law. This means in return that the OHR’s express grant of diplomatic immunities under Article III (4) *Annex 10* must be understood as a negative indicator for the legal status of an international organization. It must be pointed out here that the concept of diplomatic immunity, as stipulated by *Annex 10*, is not exactly fitting for the OHR. As mentioned, the core idea of diplomatic immunity is its reliance on reciprocity when States mutually consent to enter into diplomatic relations. This kind of reciprocity cannot be applied to the OHR.

An inquiry into the legal status of the OHR is hampered by the ambiguous position the OHR takes itself in this respect. As the government of the Republika Srpska notes in its *Fourth Report to the United Nations Security Council* of December 2010: “The High Representative, however, has been inconsistent and entirely opportunistic in describing his legal status before courts and tribunals.”¹⁰⁸

Here reference is made to the case of *Anthony Sarkis v. Miroslav Lajčák* where HR Miroslav Lajčák is understood to be “[when] acting in his [...] official capacity [...] as an employee of a foreign state”.¹⁰⁹ Contrary to this notion of a mere ‘instrumentality of foreign States’,¹¹⁰ the OHR argued in the case of *Dušan Berić and Others Against Bosnia and Herzegovina* before the European Court

¹⁰⁶ *Charter of the United Nations*, 26 June 1945, Art. 105, 1 UNTS XVI.

¹⁰⁷ *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, Art. V (section 18 (a)), 1 UNTS 15, 24.

¹⁰⁸ Government of the Republika Srpska, ‘Government of Republika Srpska Post-Election Priorities: Economic Growth; Restoration of Constitutional and Democratic Government; European Integration: Fourth Report of Republika Srpska to the UN Security Council’ (December 2010), available at http://rep-srpska.eu/documents/fourth_report_to_security_council.pdf (last visited 15 August 2014), 32, para. 103.

¹⁰⁹ *Anthony Sarkis v. Miroslav Lajčák*, *Office of the High Representative*, Specially Appearing Defendants Notice of Motion and Motion to Dismiss, U.S. District Court for the Northern District of California, Case No. C 08 01911 RMW, 31 October 2008, available at http://findforms.com/download_pdf.php?file=http://www.findforms.com/pdf_files/cand/202278/21.pdf (last visited 15 August 2014), 14.

¹¹⁰ *Ibid.*

of Human Rights (ECtHR)¹¹¹ that it was independent from any State and in essence an international body:

“The High Representative argued that his office had been created by, and he derived his powers from, various international instruments, including legally binding UNSC resolutions, and that his actions could not engage the responsibility of any State.”¹¹²

The ECtHR followed this reasoning and declared the case inadmissible because the applicants' complaint was “incompatible *ratione personae* within the meaning of Article 35 § 3 of the Convention”, as no State which is a party to the Convention was found to be in effective control over the OHR.¹¹³

In these two cases, the OHR has indeed taken inconsistent positions with regards to its legal status. While the latter case would suggest the legal status of an international organization and would thus allow for an application of the implied powers doctrine, the former case does not.

A more nuanced version of the OHR's legal status, which takes into account the complexity of the legal setting, is promulgated by the BiH Constitutional Court. When the Court was asked to review the constitutionality of the *Law on State Border Service* as enacted by the OHR, it based its reasoning on the standard of ‘functional duality’.¹¹⁴ In its respective decision of 3 November 2000, the Court pointed out similarities to the situation in post-World War II Germany and explained the OHR's position within two different legal systems. Those are, on the one side, international law as the source of the OHR's mandate, and, on the other side, domestic Bosnian law when the OHR functions as a substitute for domestic authorities:

“[...] [T]he High Representative [...] intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the

¹¹¹ *Dušan Berić and Others v. Bosnia and Herzegovina*, ECtHR Application Nos 36357/04 et al., Decision as to the Admissibility of 16 October 2007.

¹¹² *Ibid.*, 14, para. 25.

¹¹³ *Ibid.*, 17, para. 30.

¹¹⁴ *Request for Evaluation of Constitutionality of the Law on State Border Service*, Constitutional Court of Bosnia Herzegovina, Case No. U-9/00, Decision of 3 November 2000, available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=22419 (last visited 15 August 2014), 2, para. 5.

nature of a national law and must be regarded as a law of Bosnia and Herzegovina.”¹¹⁵

Undoubtedly, this was a ground-breaking decision as it manifested the option of incidental norm control as long as the respective HR decision affects the BiH Constitution. The Court clearly distinguished between the OHR’s interpretative authority deriving from its *Annex 10* powers on the one side and normative powers in the sphere of national legislation on the other side.¹¹⁶ More interestingly, HR Schwarz Schilling confirmed the theory of functional duality in his decision on the annulment of a Constitutional Court decision:

“Recalling that the High Representative has, based on his powers deriving from Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina, agreed to waive the immunity he enjoys under the said Annex and consented to the review of certain of his acts within the framework of the above mentioned domestic theory of functional duality.”¹¹⁷

However, if the OHR acts partly as a substitute for local authorities, this is hard to reconcile with the concept of an international organization. The clear-cut rules of the VCLT-IO for example demonstrate that international organizations in general do not occupy such an in-between position within two legal orders.¹¹⁸ Bodies of international territorial administration, such as the OHR, must consequently be regarded as a hybrid concept rooted in the international legal sphere as well as in the domestic legal sphere which does not fit easily into the general concept of international organizations. Knoll observes with reference to the UN that once the international administrative body has established its authority over a given territory, the domestic legal order of this territory becomes part of the international administration’s own legal order.¹¹⁹

¹¹⁵ *Ibid.*

¹¹⁶ C. Stahn, ‘International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead’, 60 *Heidelberg Journal of International Law* (2001) 1, 107, 169.

¹¹⁷ OHR, ‘Order on the Implementation of the Decision of the Constitutional Court in the Appeal of Milorad Bilbija et al.’, *supra* note 41, Preamble (part 16).

¹¹⁸ VCLT-IO, Preamble, *supra* note 92, 543-545.

¹¹⁹ Knoll, *supra* note 65, 180.

Therefore the OHR could be called a “*sui generis* international organization”¹²⁰ to which some of the above mentioned indicators apply, while others do not. A more precise solution would be to label the OHR a treaty organ. As Klabbers points out, some international institutions fall short of being an international organization and have simply been established to implement a treaty.¹²¹ He further argues that the distinction between international organizations and treaty organs is “diminishing at any rate” and is already being abrogated by the use of the broader term of international institutions.¹²² Yet it still seems to be the most suited analytical category to place the OHR into, as it best corresponds to the OHR’s lack of some of the above outlined characteristics of an international organization. Besides, to qualify the OHR as a treaty organ takes into account its strong link to the DPA, whose civil implementation is the sole purpose of the OHR.

III. Applicability of the Implied Powers Doctrine in Case of the OHR

After all, this calls, for a very careful application of the implied powers doctrine based on the restrictive standard of implication, which relies on the actual express powers as a legal basis. This narrow standard of implication was famously adopted by Judge Hackworth in his Dissenting Opinion on the ICJ Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*:

“Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are ‘necessary’ to the exercise of powers expressly granted.”¹²³

Hence, the respective decisions adopted by the OHR would have to ‘flow from a grant of expressed powers’ and would have to be ‘necessary to the exercise’ of such express powers.

Assessing the existence of an implied power by this standard, necessarily reverts attention to the express powers of Articles V and II (1) (d) *Annex 10*.

¹²⁰ Wilde, *supra* note 68, 67 (emphasis added).

¹²¹ Klabbers, *supra* note 87, 8.

¹²² *Ibid.*, 9.

¹²³ Dissenting Opinion by Judge Hackworth, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports 1949, 174, 196, 198.

It cannot be argued that Articles V and II (1) (d) *Annex 10* could serve as the basis for any implied power which would exceed the purely 'auxiliary' function of the OHR as it has been inscribed into those articles. In fact, it must be noted at this point that the existence of express powers can be seen under certain circumstances as a bar to the exercise of an implied power if the power to be implied would "substantially encroach on, detract from, or nullify other powers".¹²⁴ As Campbell argues, this limitation can be inferred primarily from the ICJ Advisory Opinion on *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*. Here the Court only reached its decision that the UN General Assembly (GA) had the power to establish an Administrative Tribunal as its subsidiary organ according to Article 22 *UN Charter* after it had emphasized that this power would not interfere or detract from other express powers contained in the *UN Charter*.¹²⁵ Campbell concludes from this that the ICJ did not allow the implication of a power "which was inconsistent with, and which would not merely complement, an express power the exercise of which was mandatory".¹²⁶

Applying this argument to the OHR's power to 'facilitate the resolution of any difficulties arising in connection with civilian implementation', it becomes clear that to imply a power to make binding decisions in context with the resolution of such difficulties would mean to 'substantially encroach' upon the given express power. This is so because it would nullify the auxiliary character enshrined in this provision and it would encroach upon the 'parties own effort' to resolve potential disputes. Hence, it would harshly distort the division of powers between the parties to the agreement and the OHR as envisaged in *Annex 10*.

For the exercise of the OHR's power 'to facilitate the resolution of difficulties', it is also by no means necessary to adopt binding decisions on the dismissal of public officials or on the annulment of decisions of the Constitutional Court. Any attempt to place the mentioned OHR decisions within the limits of necessity would again be based on a fundamental misconception of the meaning and context of the Articles V and II (1) (d) *Annex 10*.

¹²⁴ A. I. L. Campbell, 'The Limits of the Powers of International Organisations', 32 *International and Comparative Law Quarterly* (1983) 2, 523, 528.

¹²⁵ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1954, 47, 59-60 [Effect of Awards Case]. Campbell, *supra* note 124, 528.

¹²⁶ Campbell, *supra* note 528 (emphasis omitted).

In fact, the OHR's role as a facilitator only necessitates much weaker powers. What could be thought of as an implied power necessary for the exercise of Article II (1) (d) *Annex 10* is, for instance, a prerogative to suggest certain solutions to the parties which they would then be required to consider in their own effort to actually resolve potential difficulties. Obviously it is hard to think of measures which would be necessary in this respect and which would at the same time exceed the status of a mere competence by having any legally binding effect. Next to (1) (d), Article II speaks of monitoring, coordinating, and reporting. This wording is after all difficult to reconcile with the notion of legal powers, as a legally binding effect may only in very limited circumstances be deduced from it. Article II (1) suggests a much more subtle influence on Parties' own efforts. It seems impossible to conclude that for its exercise an implied power to make binding decisions would be necessary.

E. The 'Bonn Powers' as a Lawful Post-Dayton Grant of Powers?

As noted above, the role of the OHR, as inscribed into the DPA, can by no means be understood as exceeding the function of a 'mediator' or 'facilitator'. No executive or legislative prerogatives can be read into Annex 10 without revising it. Yet no formal revision of the *Annex 10* mandate in form of an amendment procedure according to Article 40 VCLT has ever been initiated. Instead, the OHR suggests an alternative legal basis for its alleged power to make binding decisions.

Besides Article V *Annex 10* in connection with Article II (1) (d) *Annex 10*, the OHR has frequently justified its decisions on grounds of section XI (2) of the *Conclusions of the Peace Implementation Conference* held in Bonn (Bonn Conclusions).¹²⁷ Thus, numerous decisions of the OHR use the following formulation which has been interpreted to vest the OHR with the so-called 'Bonn Powers':

"Recalling paragraph XI.2 of the Conclusions of the Peace Implementation Conference held in Bonn on 9 and 10 December 1997, in which the Peace Implementation Council welcomed the High Representative's intention to use his final authority in

¹²⁷ PIC, 'Bosnia and Herzegovina 1998: Self-sustaining Structures' (10 December 1997), available at http://www.ohr.int/pic/default.asp?content_id=5182#11 (last visited 15 August 2014), Sec. XI (para. 2) [PIC Bonn Conclusions].

theatre, regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement, in order to facilitate the resolution of any difficulties as aforesaid ‘by making *binding decisions*, as he judges necessary.’”¹²⁸

Reference to section XI of the *Bonn Conclusions* suggests that the Peace Implementation Council (PIC) has endowed the OHR with a power to make binding decisions. Whether this is the case will be examined in the following sections.

I. The Peace Implementation Council

The PIC was called into existence at the Peace Implementation Conference, held at Lancaster House in London from 8 to 9 December 1995, which was organized to “mobilise international support” for the DPA.¹²⁹ The PIC consists of 55 member countries, and agencies that supposedly “support the peace process in many different ways [...]”.¹³⁰

The 1995 *London Conclusions* identify the PIC as the successor of the International Conference on the Former Yugoslavia (ICFY) and as “a new structure [...] to manage peace implementation”.¹³¹ A Steering Board was established “to work under the chairmanship of the High Representative as the executive arm of the PIC”.¹³² More importantly, the Steering Board was intended to give “political guidance on peace implementation” to the OHR.¹³³

This first document issued by the PIC also provides an early orientation about how the PIC understands the OHR’s mandate. The PIC *London Conclusions* include a special section on the High Representative which pronounces a markedly *Annex 10*-oriented understanding of the OHR:

“In view of the complexity of the tasks, the parties have requested the designation of a High Representative who, in accordance

¹²⁸ OHR, ‘Decision Imposing the BiH Law on Standardisation’, *supra* note 30, Preamble (part 2) (emphasis added).

¹²⁹ OHR, ‘The Peace Implementation Council and its Steering Board’ (16 February 2012), available http://ohr.int/pic/default.asp?content_id=38563 (last visited 15 August 2014).

¹³⁰ *Ibid.*

¹³¹ PIC, *Conclusions of the London Meeting*, 12 December 1995, 35 ILM 223, 228, para. 20 [PIC London Conclusions].

¹³² OHR, ‘The Peace Implementation Council and its Steering Board’, *supra* note 118.

¹³³ PIC *London Conclusions*, *supra* note 132, 229, para. 21 (c).

with the civilian implementation annex of the Peace Agreement, will monitor the implementation of the Peace Agreement and mobilize and, as appropriate, coordinate the activities of the civilian organisations and agencies involved.”¹³⁴

This understanding was upheld in the following conference reports, such as in the 1996 PIC *Florence Conclusions*. Here the PIC noted that a “spirit of willing cooperation on the part of the parties” especially in the field of civilian implementation was still lacking.¹³⁵ It therefore appreciated “the energetic way in which the High Representative and his team have executed the task of *overall monitoring and coordination*”.¹³⁶ Next to this, the importance and coherence of the DPA was affirmed and it was stressed that the monopoly over enforcement measures would clearly lie with the UN SC through the option of re-imposing the sanctions of SC *Resolution 1022*.¹³⁷ The role of the OHR was again clearly confined to its monitoring and reporting powers.

In reviewing the first year of peace implementation, the PIC *Paris Conclusions* of 14 November 1996 contained guiding principles on the future consolidation of the civilian implementation. At that point in time it was already envisaged responsibility would be transferred to local authorities.¹³⁸ It was confirmed that “the prime responsibility for implementing the Peace Agreement lies with the different authorities of Bosnia and Herzegovina”.¹³⁹ Most striking is however the role attributed to the Presidency of Bosnia and Herzegovina:

“It accordingly undertakes as a high priority to establish all the joint institutions provided for in the Constitution and make them fully operational as soon as possible, *as well as to resolve such disputes* as may arise within this framework.”¹⁴⁰

¹³⁴ *Ibid.*, 228, para. 17.

¹³⁵ Peace Implementation Council, ‘*Chairman’s Conclusions of the Peace Implementation Council*’ (13 June 1996), available at http://ohr.int/pic/default.asp?content_id=5169 (last visited 15 August), para. 5 [PIC Florence Conclusions].

¹³⁶ *Ibid.*, para. 2 (emphasis added).

¹³⁷ *Ibid.*, para. 6.

¹³⁸ Ministerial Meeting of the Steering Board and of the Presidency of Bosnia-Herzegovina, *Conclusions: Guiding Principles of the Civilian Consolidation Plan (14 November 1996)*, available at http://www.ohr.int/pic/default.asp?content_id=5173 (last visited 15 August 2014), para. 2 [PIC Paris Conclusions].

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*, para. 3 (emphasis added).

This view is completely in line with the above suggested interpretation of Article II (1) (d) which excludes the actual resolution of such disputes and places it under the authority of the parties to *Annex 10*.

Correspondingly, the powers of the OHR are again limited to making recommendations to the Bosnian authorities. In contrast to the OHR's own assertions, here, even its power to interpret is only perceived as a power to recommend a particular version of interpretation.¹⁴¹

Very similarly to the preceding conclusions, the conclusions of the 1996 PIC Main Meeting in London emphasize the reporting and recommendation powers of the OHR.¹⁴² Furthermore, this document is of interest as it reaffirms the role of the Steering Board in giving 'political guidance' to the OHR and because it expresses the PIC's self-understanding of being "the overall structure supervising peace implementation in Bosnia and Herzegovina".¹⁴³

While all of the mentioned Conclusions so far reflect a very modest understanding of the OHR's powers, the following *Political Declaration* of the Steering Boards Ministerial Meeting in Sintra marks a turning-point in this respect. In several instances it still highlights the auxiliary role of the OHR.¹⁴⁴ Yet in paragraph 70, the Steering Board simply declares that the OHR possesses powers which are not at all in line with its *Annex 10* mandate:

"The Steering Board is concerned that the media has not done enough to promote freedom of expression and reconciliation. It declared that the High Representative has the right to curtail or suspend any media network or programme whose output is in persistent and blatant contravention of either the spirit or letter of the Peace Agreement."¹⁴⁵

It is already at first sight questionable how a body like the Steering Board with the repeatedly stated purpose of giving *political* guidance could simply

¹⁴¹ *Ibid.*, para. 6.

¹⁴² Peace Implementation Conference, 'Bosnia & Herzegovina 1997: Making Peace Work' (5 December 1996), available at http://www.ohr.int/pic/default.asp?content_id=5175 (last visited 15 August 2014), Sec. Co-Ordination Structures (para. 6).

¹⁴³ *Ibid.* (para. 4).

¹⁴⁴ OHR, *Political Declaration From Ministerial Meeting of the Steering Board of the Peace Implementation Council*, UN Doc S/1997/434 annex, 5 June 1997, 2, 7, 9-10, paras 46, 57, 61 & 68 [PIC Sintra Declaration].

¹⁴⁵ *Ibid.*, 11, para. 70.

vest the OHR with powers that it did not possess on grounds of its *Annex 10* mandate by means of an expressly *political* declaration.

Nevertheless, this new authority was readily embraced by the OHR. In August 1997, the OHR ordered that the complete board of a Serb radio and television station, known for spreading ethnic propaganda, had to resign. This action was not backed by any other formal legal instrument and must be seen as a direct result of the preceding *Political Declaration*. It finally paved the way for what was to become known as the 'Bonn Powers'. In a final step of this expansive dynamic, the PIC issued its so-called *Bonn Conclusions* after a PIC Main Meeting in Bonn in December 1997. Paragraph 2 of this document has, as demonstrated above, become a cornerstone in the OHR's argumentation, as it

“welcomes the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to *facilitate the resolution of difficulties by making binding decisions*, as he judges necessary”.¹⁴⁶

Particularly, paragraph 2 (c) of the *Bonn Conclusions* provided a *carte blanche* in this respect. Its broad wording allows any binding decision to be subsumed under 'other measures to ensure implementation' and does not place any restriction on the conduct of the OHR. The far-reaching

'Bonn Powers' seem to neglect totally the will of the parties to the DPA and their frequent invocation has been the reason why the OHR gained the reputation of being an “international protectorate”.¹⁴⁷ The following section will thus examine the legal plausibility of this power-granting model.

II. The 'Bonn Powers' as Delegated Powers?

Indeed, it is questionable whether the 'Bonn Powers' could have been lawfully conferred upon the OHR as delegated powers additional to the ones enshrined in the OHR's *Annex 10* mandate.

The practice of delegating powers from one organ to another organ of an international institution is generally accepted subject to the precondition that the two organs stand in a principal-subordinate relationship to each other.¹⁴⁸ Within the UN system, this is for example the case if a principal organ establishes a

¹⁴⁶ *PIC Bonn Conclusions*, *supra* note 129, Sec. XI (para. 2) (emphasis added).

¹⁴⁷ Knaus & Martin, *supra* note 3, 69; Parish, *supra* note 1, 11.

¹⁴⁸ Schermers & Bokker, *supra* note 22, 172-173, para. 224.

subsidiary organ according to Article 7 (2) *UN Charter*. In order to qualify as a subsidiary organ, the respective body has to be established by a principal organ¹⁴⁹ which needs to maintain authority and control over it.¹⁵⁰

More generally, the principal organ may delegate powers to its subsidiary organ even if the constituent document does not entail a specific provision on delegation.¹⁵¹

Secondly, two basic restrictions apply to all acts of delegation accumulatively: The powers delegated may not exceed the extent of powers which the delegating organ itself possesses¹⁵² and responsibility may not be conferred to the subsidiary organ.¹⁵³

The OHR suggests that it received a grant of power from the PIC, but does not employ a specific legal language when it refers to the PIC as a source of its assumed power to make binding decisions. It does not expressly state whether such a power was conferred upon it by means of delegation, but simply *recalls*¹⁵⁴ or *endorses*¹⁵⁵ Section XI (2) of the *Bonn Conclusions* as the legal basis for a particular exercise of its alleged 'Bonn Powers'. In order to qualify as a lawful act of delegation, this conferral must have been in compliance with the two basic restrictions and the OHR must be a subsidiary organ of the PIC.

At first, the powers granted by the PIC to the OHR must have been fully in the possession of the PIC. The power concerned is the power to make binding decisions as stated in section XI (2) of the *Bonn Conclusions*. Yet a look at the 1995 London Conclusions, the founding document of the PIC, reveals that no express powers have been bestowed upon the PIC. It is only suggested that the PIC would play a role in managing the process of peace implementation.¹⁵⁶ The only relevant express power contained in the document is the power of the Steering Board to give political guidance to the OHR.¹⁵⁷ Yet this power cannot possibly be the basis for a delegated power to make binding decisions. The political character of any recommendation issued by the Steering Board

¹⁴⁹ D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005), 119.

¹⁵⁰ *Ibid.*, 128.

¹⁵¹ Schermers & Bokker, *supra* note 22, 172-173, para. 224.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ OHR, 'Decision Imposing the BiH Law on Standardisation', *supra* note 30.

¹⁵⁵ OHR, 'Decision Suspending all Judicial and Prosecutorial Appointments in BiH', *supra* note 38.

¹⁵⁶ PIC London Conclusions, *supra* note 120, 228, para. 20.

¹⁵⁷ *Ibid.*, 228-229, para. 21 (c).

under this power would by definition be juxtaposed to the notion of a legally binding character. This fact already precludes the option of a lawful delegation of the 'Bonn Powers'.

Furthermore, in order to delegate powers to the OHR, a clear principal-subordinate relationship between the PIC and the OHR, as two organs of the same institution, must be given. If this institutional nexus cannot be established, the 'Bonn Powers' can also not originate from a delegation of powers.

The usual method of creating organs is to amend the constituent treaty accordingly. Yet alternatives exist. Subsidiary organs can also be "created subsequently by a decision of one of the organs mentioned in the constitution".¹⁵⁸ This was held by the ICJ in its 1954 Advisory Opinion on *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*. Here the Court justified the creation of the UN Administrative Tribunal based on the notion that in creating a subsidiary organ, the GA was only exercising a power which it already possessed under the *UN Charter*.¹⁵⁹ The actual legal basis for this was never mentioned by the Court. Yet it has been understood to lie in either Article 7 or Article 22 *UN Charter*.¹⁶⁰ It is thus not necessary that a subsidiary organ stems from the same constituent document as its principal or primary organ.

Still, to depict the OHR as a subsidiary organ of the PIC would mean to distort reality. At first and as a matter of logic, it cannot be assumed that the existence of a subsidiary organ was envisaged in detail prior to any effort made for the establishment of its principal organ. However, this would be precisely the case here. The OHR's establishment was already negotiated at the time the *Agreement of Initialling* was concluded (21 November 1995). The *London Conclusions* expressly refer to this fact¹⁶¹ and thus must be seen as mere reaction to it. Moreover, the OHR's independence and completeness is evidenced by the fact that no reference is made to the PIC in *Annex 10*. The PIC, on the contrary, relies heavily on reference to the OHR. Taken together with the stated purpose of the PIC, this only allows the conclusion that the PIC is a body created to support the OHR. If it was to determine the exact hierarchy between the two bodies, the fact that the PIC's Steering Board is chaired by the High Representative would indicate that the PIC is the subsidiary organ in this relation, not the other way around. However, the fact that the PIC has no single mentioning in the GFA,

¹⁵⁸ Schermers & Bokker, *supra* note 22, 155, para. 205.

¹⁵⁹ *Effect of Awards Case*, *supra* note 127, 61.

¹⁶⁰ Klabbers, *supra* note 87, 165.

¹⁶¹ *PIC London Conclusions*, *supra* note 120, 225, para. 1.

the central document of the peace agreement, is more important. If it would have been intended to vest the PIC with any meaningful legal role, it would have made its way into the agreement. Hence the required institutional link of a principal-subordinate relation between the PIC and the OHR does not exist. The PIC is simply a parallel structure to the OHR with no authority over it. It works as a joint diplomatic body which may give advice, but may not grant any powers to the OHR.

Moreover, considering the fact that the OHR itself chairs the Steering Board and normally drafts its reports,¹⁶² it would mean to ridicule any notion of institutional balance if one would assume that this body could declare new powers of the OHR as done in the *Sintra Conclusions*.¹⁶³ It would further come close to granting the OHR a '*Kompetenz-Kompetenz*', the power to create its own powers, which is a concept that stands in outright contradiction to the idea of international institutions.

With regards to the *Bonn Conclusion*, it is after all not even clear whether the PIC intended to grant the power to make binding decisions to the OHR as it only 'welcomes the *High Representative's intention* to use his final authority in theatre regarding interpretation' in such a way. The language does not at all indicate the PIC's intent to actively grant additional powers to the OHR. If it would have been intended to suggest the legally binding character of this provision, a wording such as 'the Council decides' could have easily been chosen instead of this passive formulation. It is thus much more likely that the PIC was aware of its lack of legal competence and only intended to issue political advice. Everything else must be seen as a tragic form of wishful thinking of the OHR.

In conclusion, a lawful delegation of the so-called 'Bonn Powers' did not occur. Firstly, the PIC cannot delegate such powers to the OHR because the OHR is not a subsidiary organ of the PIC. Secondly, the PIC can also not delegate powers which it does itself not possess. And finally, a delegation of powers was never intended.

III. The 'Bonn Powers' as a Power Granted Through the UN Security Council?

When assessing the option of a post-Dayton grant of additional powers to the OHR, particularly a power to impose legislation, the UN SC has to be considered as the last possible source for such powers. Indeed, it has been

¹⁶² Knaus & Martin, *supra* note 3, 61.

¹⁶³ PIC Sintra Declaration, *supra* note 132, 11, para. 70.

argued by the OHR in very rare cases that its so-called 'Bonn Powers' have been affirmed by the Council:

"Noting that, under Chapter VII of the United Nations Charter, the United Nations Security Council expressly affirmed the aforementioned Conclusions of the Peace Implementation Council in a series of resolutions [...]"¹⁶⁴

Similarly to the preceding section, it must be asked whether the UN SC could have attributed any additional power to make binding decisions to the OHR and whether it did so in its respective resolutions.

At first, it is already questionable whether the UN SC itself has the power to legislate. Yet, even if the UN SC does not itself possess a power to legislate, it would still be possible to transfer such a power to the OHR by means of an attribution of powers as this does not require the attributing organ to possess the attributed power itself. In this case the limits for an attribution of powers to subsidiary organs would apply, as stipulated by the ICTY's Appeals Chamber in the *Prosecutor v. Duško Tadić* case. Here the UN SC was judged capable of establishing subsidiary organs vested with powers, which the Council itself does not possess, as long as the subsidiary organ thus created would be "an instrument for the exercise of its own principal function of maintenance of peace and security".¹⁶⁵

The question whether the UN SC actually itself possesses a power to legislate has been intensely debated with regards to *SC Resolution 1373*. The resolution addresses any act of terrorism and has been perceived to qualify as an act of legislation because it can be applied as a general rule in an indeterminate number of future cases. Some authors have come to the conclusion that in *Resolution 1373*, the UN SC acted *ultra vires* while, at the same, time acknowledging the fact that no UN organ is allowed to review the legality of

¹⁶⁴ OHR, 'Order Temporarily Suspending Certain Decisions of the Central Election Commission of Bosnia and Herzegovina Adopted at its 21st Session Held on 24 March 2011 and any Proceedings Concerning Said Decisions', (23 March 2011), available at http://ohr.int/decisions/statemattersdec/default.asp?content_id=45890 (last visited 15 August 2014), Preamble (part 3).

¹⁶⁵ *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 38 [*Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction].

UN SC resolutions.¹⁶⁶ Precisely from this impossibility of reviewing the legality of UN SC resolutions, others draw the conclusion that the UN SC has the *de facto* power to legislate.¹⁶⁷

Similarly, a look at the *UN Charter* suggests that the UN system envisaged the attribution of legislative powers to subsidiary bodies, such as peacekeeping operations, which exercise powers over territories under transitional government. Article 81 *UN Charter* already foresees the UN administration of territories based on a trusteeship agreement.¹⁶⁸ Also, the effective exercise of Article 42 measures might lead to an UN occupation of territory which in return would have to be administered. More directly, since the measures listed in Article 41 *UN Charter* have been judged to be non-exhaustive in character,¹⁶⁹ it is also possible to think of the creation of civilian institutions with a power to legislate as such a measure under Article 41.¹⁷⁰ Hence, UN administration of territories and the respective exercise of public authority can result from *UN Charter* provisions.

No clear-cut answer to the question as to whether or not the UN SC possesses a power to legislate seems possible. However, for two reasons, the question can be disregarded in the following: Firstly, not all decisions adopted by the OHR do qualify as legislative acts. Some of them, such as dismissals of officials, are merely executive decisions. Secondly, for either kind of power conferral, be it a delegation or an attribution, the receiving organ would have to be established as a subsidiary organ of the UN SC according to Article 29 *UN Charter*.

This precondition would only not apply if the given situation was a case of delegation of UN SC Chapter VII powers to a regional arrangement under Article 53 (1) *UN Charter*. Those Chapter VIII delegations are made to international organizations which are clearly not a subsidiary organ of the

¹⁶⁶ See M. Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations', 16 *Leiden Journal of International Law* (2003) 3, 593, 608.

¹⁶⁷ S. Talmon, 'The Security Council as World Legislature', 99 *American Journal of International Law* (2005) 1, 175.

¹⁶⁸ C. Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis', 5 *Max Planck Yearbook of United Nations Law* (2001), 105, 107-108 [Stahn, The United Nations Transitional Administrations in Kosovo and East Timor].

¹⁶⁹ *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* note 153, para. 35.

¹⁷⁰ Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor', *supra* note 156, 139.

UN SC, such as NATO. However, Article 53 (1) only concerns the delegation of military enforcement powers¹⁷¹ and is thus not applicable to the OHR.

In order to clarify whether or not the OHR was established as a subsidiary organ to the UN SC and whether the Council actually vested the OHR with such additional powers, it is conducive to compare the situation to prior cases of transitional administration with UN SC involvement, namely the UNMIK and the UNTAET. UNMIK was established in 1999 by SC *Resolution 1244* under Chapter VII powers of the UN SC.¹⁷² It was clearly placed under UN auspices,¹⁷³ and it was vested with the responsibility of "[p]erforming basic civilian administrative functions where and as long as required",¹⁷⁴ and to support a "democratic and autonomous self-government".¹⁷⁵ Drawing on the UNMIK precedent, the UN SC deployed a transitional administration mission to East Timor in the same year. Through SC *Resolution 1272*, UNTAET was vested with the overall responsibility to exercise all administrative and legislative powers, as well as with executive powers, including the administration of justice, right from the beginning.¹⁷⁶ Although not expressly stated by the UN SC, the legal basis in both cases has been identified as a conjunction of Article 39 and Article 29 *UN Charter*.¹⁷⁷

This is different with regards to the OHR. In SC *Resolution 1031* of 15 December 1995, the UN SC "[e]ndorses the establishment of a High Representative" within the limits set by *Annex 10* to the GFA.¹⁷⁸ This provision can by no means be equated to the ones deciding on the establishment of UNMIK and UNTAET in SC *Resolution 1244* and SC *Resolution 1272*. In *Resolution 1031*, the UN SC only expresses its support for the establishment of the OHR. It did not itself create the OHR as a subsidiary organ and it does not claim authority or control over it. This self-effacement is indeed conclusive if seen in context with the pre-Dayton negotiation process in which the UN did not play a decisive role. As the OHR was neither established as a subsidiary organ of the UN SC nor established under the auspices of the UN as for example

¹⁷¹ D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (2000), 248.

¹⁷² SC Res. 1244, *supra* note 19.

¹⁷³ *Ibid.*, 2 (operative part 5).

¹⁷⁴ *Ibid.*, 3 (operative part 11 (b)).

¹⁷⁵ *Ibid.*, 3-4 (operative part 11 (c)).

¹⁷⁶ SC Res. 1272, *supra* note 19, 2 (operative part 1).

¹⁷⁷ Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor', *supra* note 156, 139.

¹⁷⁸ SC Res. 1031, *supra* note 10, 4 (operative part 26).

the United Nations Mission in Bosnia and Herzegovina,¹⁷⁹ the UN SC could consequently neither have delegated nor attributed powers to the OHR.

Considering the fact that the legality of UN SC resolutions is not subject to any judicial review, it still remains crucial to determine whether the UN SC did *de facto* transfer such powers to the OHR. In several UN SC resolutions relating to the OHR reference to the so-called 'Bonn Powers' can be found in identical wording:

*"Emphasizes its full support for the continued role of the High Representative in monitoring the implementation of the Peace Agreement and giving guidance to and coordinating the activities of the civilian organizations and agencies involved in assisting the parties to implement the Peace Agreement, and reaffirms that the High Representative is the final authority in theatre regarding the interpretation of Annex 10 on civilian implementation of the Peace Agreement and that in case of dispute he may give his interpretation and make recommendations, and make binding decisions as he judges necessary on issues as elaborated by the Peace Implementation Council in Bonn on 9 and 10 December 1997."*¹⁸⁰

First it must be noted that here the role of the OHR is reduced to 'monitoring the implementation of the Peace Agreement' and to 'giving guidance to and coordinating the activities of the civilian organizations and agencies'. In the same resolutions the UN SC further "[r]eiterates that the primary responsibility for the further successful implementation of the Peace

¹⁷⁹ SC Res. 1035, UN Doc S/RES/1035 (1995), 21 December 1995.

¹⁸⁰ SC Res. 1247, UN Doc S/RES/1247 (1999), 18 June 1999, 2-3 (operative part 4); SC. Res. 1423, UN Doc S/RES/1423 (2002), 12 July 2002, 3 (operative part 4); SC Res. 491, UN Doc S/RES/1491 (2003), 11 July 2003, 2 (operative part 4); SC Res. 1551, UN Doc S/RES/1551 (2004), 9 July 2004, 2-3 (operative part 4); SC Res. 1575, UN Doc S/RES/1575 (2004), 22 November 2004, 3 (operative part 4); SC Res. 1639, UN Doc S/RES/1639 (2005), 21 November 2005, 3 (operative part 4); SC Res. 1722, UN Doc S/RES/1722 (2006), 21 November 2006, 3 (operative part 4); SC Res. 1785, UN Doc S/RES/1785 (2007), 21 November 2007, 3 (operative part 4); SC Res. 1845, UN Doc S/RES/1845 (2008), 20 November 2008, 3 (operative part 4); SC Res. 1895, UN Doc S/RES/1895 (2009), 18 November 2009, 3 (operative part 4) (emphasis partly added); and SC Res. 1948, UN Doc S/RES/1948, (2010), 18 November 2010, 3 (operative part 4) (emphasis partly added).

Agreement lies with the authorities in Bosnia and Herzegovina themselves".¹⁸¹ This reveals an understanding of the OHR which is very much in line with its original *Annex 10* mandate.

However, the UN SC also makes reference to the PIC *Bonn Conclusions* when it reaffirms that the OHR may make binding decisions. Still, the UNSC does not *decide* that the OHR has the power to make binding decisions, it only *reaffirms* what the PIC concluded. This must be understood as a mere expression of political support. Therefore it does not amount to an actual act of *de facto* granting of powers to the OHR.

To infer a *de facto* grant of powers from a mere expression of UN SC support for an act which was in itself not a grant of power, but only the political advice of a diplomatic body, would truly be legal fiction. It would further imply that the UN SC intended to act outside of its powers because the OHR does not even form a subsidiary organ of the UN SC to which a power could be lawfully granted. In conclusion, it cannot be argued that the so-called 'Bonn Powers' were conferred upon the OHR by the UN SC. However, the fact that the UN SC actually reaffirms the 'Bonn Powers' leaves the situation somewhat ambiguous. While the UN SC clearly did not intend to confer the power to make binding decisions upon the OHR, it must be noted that the Council expressed political support for it.

F. Conclusion

In light of all the above, none of the justifications brought forward by the OHR provides sufficient legal grounds for the extensive use of a self-proclaimed power to make binding decisions today.

As the analysis of the OHR's *Annex 10* mandate demonstrates, the DPA can by no means be regarded as the legal basis for such a power. None of the discussed decisions can be based on *Annex 10* as interpreted in line with Article 31 VCLT. Any attempt of the OHR to root its alleged powers in this central source of authority would thus be based on a systematic misinterpretation of its express mandate in *Annex 10*.

¹⁸¹ SC Res. 1247, *supra* note 179, 2 (operative part 2); SC. Res. 1423, *supra* note 179, 2-3 (operative part 2); SC Res. 1491, *supra* note 179, 2 (operative part 2); SC Res. 1551, *supra* note 179, 2 (operative part 2); SC Res. 1575, *supra* note 179, 2-3 (operative part 2); SC Res. 1639, *supra* note 179, 3 (operative part 2); SC Res. 1722, *supra* note 179, 3 (operative part 2); SC Res. 1785, *supra* note 179, 3 (operative part 2); SC Res. 1845, *supra* note 179, 3 (operative part 2); SC Res. 1895, *supra* note 179, 3 (operative part 2); and SC Res. 1948, *supra* note 179, 3 (operative part 2).

Neither could an interpretation that circumvents the will of the parties be said to conform to the principle of good faith as it violates any 'legitimate expectations raised in the parties'. The OHR would furthermore be in evasion of its obligations under Annex 4 and Annex 6. The amendment and violation of constitutional provisions, the imposition of substantial legislation, the removal of democratically elected officials, as well as the annulment of decisions of the Bosnian Constitutional Court are measures which even dramatically exceed the outer limits of an effective interpretation. In fact, the interpretation adopted by the OHR must be termed a revision of *Annex 10* of the GFA.

Also, a reassessment of the OHR's *Annex 10* powers under the implied powers doctrine could not confirm the legality of such sweeping powers today. While it has to be acknowledged that the goals and purpose of any transitional territorial administration require the implementation of a broad agenda in areas related to effectiveness of public service, democracy, the rule of law, and liberal economic policy, it must not be forgotten that such a 'governance policy' is strictly bound to certain temporal limitations. Such limitations are crossed if the administering body simply neglects the fact that local authorities have regained their own governance capabilities. At this point of time, any legitimate and lawful substitution of governance capabilities turns into an illegitimate and unlawful imposition even under the broadest teleological considerations. The OHR has been judged to have crossed those limits. Today its actions seem to thwart its functions and purpose.

Furthermore, it was found that the suggested delegation of the 'Bonn Powers' through the PIC did actually not occur for a number of reasons: Firstly, the PIC could not delegate such powers to the OHR because the OHR is not a subsidiary organ of the PIC. Secondly, the PIC could not delegate powers which it does not possess itself. And finally, a delegation of powers was never intended.

Last but not least, it was not possible to deduce the creation of such additional powers from UN SC involvement. At first, the institutional preconditions of an attribution or delegation of powers through the UN SC do not exist. And secondly, even a *de facto* grant of the 'Bonn Powers' could not be inferred from the relevant SC Resolutions. The UN SC support for the OHR's practice to adopt binding decisions was found to be only of a political nature.

Therefore the OHR cannot rely on the so-called 'Bonn Powers' as a basis for the acts discussed. As a matter of fact, they actually do not qualify as a legal power. Their existence is a powerful, but delusive legal fiction.

Determining the Relationship Between International and Domestic Laws Within an Internationalized Court: An Example From the Cambodian Extraordinary Chambers' Jurisdiction Over International and Domestic Crimes

Mélanie Vianney-Liaud*

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Abstract

Internationalized criminal tribunals such as the Extraordinary Chambers in the Courts of Cambodia (ECCC) differ from traditional international criminal tribunals by a lesser degree of internationality.

The ECCC emerged through an international agreement but their mixed composition and operating rules are also defined in Cambodian Law. The relationship between the ECCC's Agreement and Law has not been clearly stated, which generates questions since both texts are not always consistent.

This paper proposes, through the study of the provisions of the ECCC Law relating to the ECCC's subject-matter jurisdiction, to determine the impact of such discrepancies on the activity of the Chambers. The decisions of their judicial bodies on the application of Articles 3, 4 and 5 which provide for the ECCC's jurisdiction over crimes against humanity, genocide and certain domestic crimes have allowed to cope with the uncertainty generated by those differences.

However, a bigger issue remains which is due to the ECCC's particular hybrid structure. Composed of national judges in the majority, ECCC's decisions may only be taken if the required qualified majority is reached, which implies the need for an agreement with their international counterparts.

A. Introduction

To remedy the lack of a domestic repressive system, the commission of crimes of exceptional magnitude calls for the alleged perpetrators, to have their trial take place in special courts. The early 2000s saw the emergence of a new generation of such courts¹: the *internationalized* criminal courts which include the ECCC.

These courts were created to meet specific situations where serious crimes were committed on a massive scale. Their particularity appears mainly in their different degrees of internationality and lies in the originality of their methods of creation and operation.² Particularly, these tribunals implement new relationships between national and international laws, but they remain complex. The ECCC is a good example in that matter.

¹ P. Pazartzis, 'Tribunaux pénaux internationalisés: une nouvelle approche de la justice pénale', 49 *Annuaire français de droit international* (2003), 641, 642.

² *Ibid.*, 643.

Between 1975 and 1979, atrocities were perpetrated by the Khmer Rouge in Cambodia, when they were in power. However, the establishment of a competent tribunal to hold trials took almost thirty years.

Lengthy negotiations between the United Nations (UN) and the Royal Government of Cambodia (RGC) led to an innovative solution: the creation by an international agreement in 2003³ (ECCC Agreement) of “Extraordinary Chambers” in the Courts of Cambodia with significant international participation. Erected formally under Cambodian law, these Chambers fall, in reality, under a *hybrid* legal system which explains their unique composition and specific operating rules.⁴ A Cambodian law passed in 2001⁵ defines the peculiar structure of the ECCC and its applicable law.

Although the 2001 ECCC Law was amended in 2004⁶ after the adoption of the *ECCC Agreement* in 2003, these changes appear insufficient.⁷ It turns out that some provisions of the 2004 Amended ECCC Law (ECCC Law) are not in full compliance with the *ECCC Agreement* and international standards, particularly, the provisions regarding the Chambers’ subject-matter jurisdiction over international and domestic crimes.⁸ This affects the nature of the crimes tried before the ECCC since their constitutive elements differ from one text to

³ *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, 6 June 2003, 2329 UNTS 117 [ECCC Agreement].

⁴ D. Boyle, ‘Une juridiction hybride chargée de juger les Khmers rouges’, 1 *Droits fondamentaux* (2001) 1, 213, 215; *Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC-E39/5 (Trial Chamber), Decision on Request for Release, 15 June 2009, para. 10: “Although its constitutional documents show that the ECCC was established within the Cambodian courts structure, the ECCC is, and operates as, *an independent entity* within this structure.” (emphasis added).

⁵ *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, NS/RKM/0801/12, adopted in its final version by the National Assembly on 11 July 2001, approved by the Senate on 23 July 2001, pronounced as being fully in accordance with the Constitution by the Constitutional Council in its Decision 043/005/2001 KBThCh (7 August 2001) and signed by the Cambodian king on 10 August 2001, available at <http://www.derechos.org/human-rights/seasia/doc/krlaw.html> (unofficial translation) (last visited on 17 November 2014) [2001 ECCC Law].

⁶ *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* (2001), as amended by NS/RKM/1004/006 (27 October 2004) [ECCC Law].

⁷ In the 2004 Amended Law, the mention “new” is added to the number of the articles which were changed.

⁸ ECCC Law, *supra* note 6, Arts 3-6.

another. This also may challenge the validity of prosecutions which find their ground in a text whose legality under international law is controversial.

The Law has not been changed since 2004 to conform with the *ECCC Agreement* and international standards. In reality, it is the jurisprudence of the ECCC which has allowed the Chambers to overcome this inconsistency.

Before considering the relevant discrepancies in the provisions of the ECCC founding texts, it is at first necessary to clarify the relationships between the Law and the *ECCC Agreement*. This involves analyzing the choice made by the Cambodian State under a monist or a dualist approach with respect to international law (Sec. B). Indeed, such a preliminary study is necessary in order to understand why a second modification of the ECCC Law should have occurred. However, as this did not happen, it will then be seen how the judicial organs were able to cope with the problems created by the Law's provisions on the ECCC's jurisdiction over international and national crimes (Sec. C).

B. Positioning the *ECCC Agreement* With Regard to Cambodian Law

The 2003 *ECCC Agreement* between the UN and the RGC concerning the prosecution of crimes committed under the Democratic Kampuchea regime⁹ is an international agreement. At the time of its adoption, however, the conditions of its applicability to Cambodia remained unclear. On the question of monism and dualism, the choice of the Cambodian State is ambiguous.

According to the monist approach, domestic and international legal systems form a unity.¹⁰ Consequently, the act of ratifying an international treaty immediately incorporates its provisions into national law. The dualists, on the contrary, emphasize the difference between national and international law, and require the translation of the latter into the former by some act of the relevant national authorities that expressly transforms those norms into domestic law.¹¹

No provision of the 1993 Cambodian Constitution¹² brings precision and even the *ECCC Agreement* contradicts itself in this regard. Art. 2 (2) provides

⁹ Democratic Kampuchea was the name of the Khmer Rouge regime in Cambodia from 17 April 1975 to 6 January 1979.

¹⁰ M. Shaw, *Textbook on International Law* (2002), 82-83.

¹¹ P. M. Dupuy & Y. Kerbrat, *Droit International Public* (2014), 452.

¹² English translation of *Constitution of the Kingdom of Cambodia*, original version adopted by the Constitutional Assembly in Phnom Penh on 21 September 1993 at its Second Plenary Session, and signed by the President on the same date, available at <http://www.refworld.org/docid/3ae6b5428.html> (last visited 16 November 2014).

that “[the] present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers [...]” while Art. 31 states that it “[...] shall apply as law [...]” within Cambodia. Thus, it has to be determined whether the *ECCC Agreement* directly applies in Cambodian law, or whether it had to be incorporated into it through an act of “transformation” which allows its application as a domestic norm.¹³

I. A Domestic Law Adopted Before the International Agreement

Surprisingly, the *ECCC Agreement* was adopted after the Law on the Establishment of the ECCC.¹⁴ The reason is to be found in the history of the negotiations between the UN and the RGC for their creation. The parties agreed on the principle of prosecutions. However, the court, and the modalities of its operation, remained to be defined.

The negotiations began in 1997 when the Co-Prime Ministers at the time, Hun Sen and Prince Norodom Ranariddh, sent a letter to the UN Secretary-General asking for help to conduct the trials of the Khmer Rouge.¹⁵ After three years, the parties agreed on a unique compromise: the Cambodian judges would remain the majority in the Court, but decisions would be taken by a supermajority implying the need for the voice of at least one international judge.¹⁶ In July 2000, the UN laid out the arrangements on the principle on international participation in a draft Memorandum of Understanding.¹⁷ However, contrary to the standard practice in which a government first agrees on the international agreement and then submits the agreement to parliament, the Cambodian Deputy Prime Minister, Sok An, declared that the Government could not formally agree to any arrangement with the UN until the relevant text had been passed by parliament and was adopted as law.¹⁸ This stipulation explains why the ECCC Law was passed in January 2001 by the Cambodian Parliament¹⁹ and

¹³ Dupuy & Kerbrat, *supra* note 11.

¹⁴ 2001 ECCC Law, *supra* note 5.

¹⁵ *Situation of Human Rights in Cambodia*, GA Res. 52/135, UN Doc A/RES/52/135, 12 December 1997.

¹⁶ Boyle, *supra* note 4, 214.

¹⁷ ‘Tribunal Memorandum of Understanding Between the United Nations and the Royal Government of Cambodia’, 9 *Phnom Penh Post* (27 October - 9 November 2000), 22, available at http://www.yale.edu/cgp/mou_v3.html (last visited 22 May 2015).

¹⁸ C. Etcheson, ‘A “Fair and Public Trial”: A Political History of the Extraordinary Chambers’, in Open Society, *Justice Initiatives* (2006), 7, 13.

¹⁹ Boyle, *supra* note 4, 213.

approved by the King in August 2001. However, the UN raised concerns with regard to this text and pulled out of negotiations.²⁰

II. A Peculiar Cambodian Approach Regarding the Law and the *ECCC Agreement*

Following this withdrawal, the RGC expressed its own approach on the relationship between the international agreement and the national law. The Deputy Prime Minister, Sok An, publicly stated that

“[...] ‘the Law, which was adopted by the Cambodian legislature under the Constitution of Cambodia, has determined the jurisdiction and competence of the Extraordinary Chambers as well as their composition, organizational structure and decision-making procedures, while the Articles of Cooperation are to determine the modalities of cooperation between the [RGC] and the [UN] in implementing those provisions of the Law concerning foreign technical and financial support’.”²¹

Thus, “[while] the Articles of Cooperation [...] may clarify certain nuances in the Law, and elaborate certain details, it is not possible for them to modify, let alone prevail over, a law that has just been promulgated.”²² Based on the content of the position held by the RGC, it may be assumed that dualism prevails within Cambodia.²³ Consequently, the *ECCC Agreement* should not directly apply to Cambodia.

²⁰ See *Statement by UN Legal Counsel Hans Corell at a Press Briefing at UN Headquarters in New York*, 8 February 2002: “[...] the United Nations has come to the conclusion that the Extraordinary Chambers, as currently envisaged, would not guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have [...]”, available at <http://www.un.org/news/dh/infocus/cambodia/corell-brief.htm> (last visited 22 May 2015) [UN Legal Counsel’s Statement].

²¹ *Statement of the RGC in Response to the Announcement of UN Pullout From the Negotiation on the Khmer Rouge Trial*, 12 February 2002, available at http://www.eccc.gov.kh/sites/default/files/legal-documents/SA_statement_on_UN_pullout.pdf (last visited 22 May 2015).

²² *UN Legal Counsel’s Statement*, *supra* note 20, quoting Minister Sok An’s letter to Mr. Corell of 23 November 2001.

²³ E. Meijer, ‘The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized Tribunal’, in C. P. R. Romano, A. Nollkaemper & J. K. Kleffner,

In 2003, the final *ECCC Agreement* was adopted by the parties. Reflecting the Cambodian position, Art. 1 provides that its purpose

“[...] is to regulate the cooperation between the [UN] and the [RGC] in bringing to trial senior leaders [...] and those who were most responsible for the crimes [...] that were committed during the [Democratic Kampuchea] period [...]”.

However, in accordance with the law of treaties to which the *ECCC Agreement* is subjected,²⁴ the 2001 Law was amended in 2004²⁵ in order to be brought into conformity with the *ECCC Agreement*.²⁶ A closer look at the 2004 Law indicates that some of its provisions, particularly, those concerning the subject-matter jurisdiction, are not in complete accordance with the *ECCC Agreement*: some are less detailed than the provisions in the *ECCC Agreement*, while others even appear to be contrary to international standards.

In this situation, the dualistic approach held by the RGC would normally require that the ECCC Law is amended and that the *ECCC Agreement*'s details are added to the Law (whereas in the monistic tradition, the details would apply directly through the *ECCC Agreement* and no amendment would be necessary).²⁷ Regardless of whether the provisions of the Law are more or less detailed, if the Law is not in conformity with the *ECCC Agreement*, the Law needs to be adapted.²⁸ Nevertheless, the provisions on the ECCC's subject-matter jurisdiction in the 2004 Amended Law have never been changed since.

Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia (2004), 207, 211. However, the author notes that “this is a mere assumption”.

²⁴ *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 26, 1155 UNTS 331, 339.

²⁵ *Law to Amend the 2001 Law on the Establishment of the Extraordinary Chambers*, 27 October 2004, available at <http://www.eccc.gov.kh/en/documents/legal/law-amend-2001-law-establishment-extraordinary-chambers> (last visited 22 May 2015).

²⁶ *Report of the Secretary General on Khmer Rouge Trials*, UN Doc A/57/769, 31 March 2003, 10, para. 5.

²⁷ Meijer, *supra* note 23, 210.

²⁸ *Ibid.*, 211.

C. Bringing the Law on the Extraordinary Chambers Into Conformity With the Agreement: The ECCC Law Provisions on the Subject-Matter Jurisdiction

The ECCC have competence to bring Khmer Rouge to trial for international²⁹ (Sec. I) as well as domestic crimes³⁰ (Sec. II). However, for both, the question of the compliance of the ECCC Law's provisions with international standards is raised.

I. An Incomplete Law Concerning the ECCC's Jurisdiction Over International Crimes

Art. 9 of the *ECCC Agreement* states that

“[the] subject-matter of the Extraordinary Chambers shall [...] be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, [and] crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court [...]”.

Articles 4 and 5 of the ECCC Law concern the jurisdiction of the Chambers over the crime of genocide (1) and crimes against humanity (2). Both articles were not amended in 2004, despite the fact that they were different from Art. 9 of the *ECCC Agreement*.

Further, the ECCC's temporal jurisdiction over acts committed from 1975 to 1979 raises the question of whether those crimes existed and were criminalized in Cambodia at the relevant time, in compliance with the principle of non-retroactivity of the law as defined in Art. 15 of the *International Covenant for Civil and Political Rights* (ICCPR)³¹ and protected by both the *ECCC Agreement* and Law.³²

²⁹ ECCC Law, *supra* note 6, Arts 4, 5 & 6.

³⁰ *Ibid.*, Art. 3 (new). Homicide, torture and religious persecution as defined in Arts 209, 210, 500, 501, 503-508 of the 1956 Penal Code of Cambodia.

³¹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Article 15 (1): “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”

³² *ECCC Agreement*, *supra* note 3, Art. 12; ECCC Law, *supra* note 6, Art. 33 (new).

1. The Crime of Genocide

Art. 4 of the ECCC Law provides for the prosecution of persons having committed genocide “[...] as defined in the [1948 Genocide] Convention [...]”.³³ However, the definition of the crime in Art. 4 diverges from its international equivalent.

The first part of Art. 4 is similar to Art. II of the *Genocide Convention* but holds an important difference. Art. II states that “[...] genocide means any of the *following acts* committed with the intent to destroy, [...] a national, ethnical, racial or religious group *as such* [...]”³⁴ while Art. 4 states that “[the] acts of genocide, [...] mean *any acts* committed with the intent to destroy [...] a national, ethnical, racial or religious group *such as* [...]”.³⁵ Thus, the words “as such” in the definition of the *mens rea* are replaced by “such as”.³⁶

First, since these words are followed by the enumeration of acts³⁷ consisting of the *actus reus* of genocide, the list found in the *Genocide Convention* appears to be exhaustive, while the list of acts found in the ECCC Law does not.³⁸ Secondly, the ECCC Law also seems to lower the *mens rea* required. According to its provisions, indeed, a perpetrator would still be held liable for genocide, even if the acts he committed with the intent to destroy the group was perpetrated without intending to destroy the group “as such”.³⁹

The second part of Art. 4 on the incriminated modes of participation in genocide departs from the terms of Art. III of the *Genocide Convention*. The acts of direct and public incitement to commit genocide⁴⁰ and complicity in

³³ *Convention on the Prevention and Punishment of the Crimes of Genocide*, 9 December 1948, I-1021 UNTS 78, 280-286 [Genocide Convention].

³⁴ *Ibid.*, Art. II (emphasis added).

³⁵ ECCC Law, *supra* note 6, Art. 4 (emphasis added).

³⁶ It should be noted that these discrepancies do not appear in the French version of the ECCC Law.

³⁷ ECCC Law, *supra* note 6, Art. 4 and *Genocide Convention*, *supra* note 33, Art. II: “[causing] serious bodily or mental harm to members of the group; [deliberately] inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; [imposing] measures intended to prevent births within the group, forcibly transferring children from one group to another group”.

³⁸ *Prosecutor v. Nuon Chea and Others*, D427 (CIJ), Closing Order, 15 September 2010, para. 1311 [OCIJ Closing Order in Case 002].

³⁹ *Prosecutor v. Nuon Chea and Others*, D240/2 (CIJ), Ieng Sary’s Supplemental Alternative Submission to His Motion Against the Applicability of Genocide at the ECCC, 21 December 2009, para. 12.

⁴⁰ *Genocide Convention*, *supra* note 33, Art. III (c).

genocide⁴¹ do not appear in Art. 4 which provides for attempts to commit acts of genocide,⁴² conspiracy to commit acts of genocide,⁴³ and adds the non-technical term of “[...] participation in acts of genocide”.

The accused in *Case 001*, Kaing Guek Eav *alias* Duch,⁴⁴ has only been convicted for crimes against humanity and grave breaches of the 1949 Geneva Conventions.⁴⁵ The two remaining⁴⁶ accused in *Case 002*, Nuon Chea⁴⁷ and Khieu Samphan,⁴⁸ are currently indicted for the crime of genocide.⁴⁹ The Co-Investigating Judges (CIJs),⁵⁰ to conform with the principle of non-retroactivity,⁵¹ decided to apply the international definition of genocide⁵² since it was the one that applied to Cambodia during the period of Democratic

⁴¹ *Ibid.*, Art. III (e).

⁴² *Ibid.*, Art. III (d). The word ‘attempt’ is singular in the Convention, while it is in plural in the ECCC Law: ‘attempts to commit genocide’.

⁴³ *Ibid.*, Art. III (b).

⁴⁴ Kaing Guek Eav *alias* “Duch” was the head of Tuol Sleng (S-21) prison and torture center in Phnom Penh under the regime of the Khmer Rouge.

⁴⁵ *Co-Prosecutors v. Kaing Guek Eav alias Duch*, Judgement, E188 (TC), 26 July 2010, paras 313 & 568 [ECCC Judgment in Case 001].

⁴⁶ Originally, there were four accused in *Case 002*. Ieng Tirth (the former Minister of Social Affairs) has been found unfit to stand trial and consequently the Trial Chamber has stayed the proceedings against her. Her husband Ieng Sary (former Deputy Prime Minister of Foreign Affairs) died on 14 March 2013. The proceedings against him are terminated.

⁴⁷ Nuon Chea was appointed as Deputy Secretary of the Communist Party of Kampuchea and retained this position throughout the period of Democratic Kampuchea.

⁴⁸ Khieu Samphan was the Democratic Kampuchea’s Head of State.

⁴⁹ *OCIJ Closing Order in Case 002*, *supra* note 38, para. 1335.

⁵⁰ Following the example of Cambodian law which included the French concept of the investigating judge, the investigations before the trial stage are carried out not by the parties (prosecutors and defence), but by two Co-Investigating Judges, a national judge and an international judge. The Co-Investigating Judges investigate facts set out in introductory and supplementary submissions from the Co-Prosecutors. After investigation has been concluded, the Co-Investigating Judges issue a Closing Order containing an indictment with an order to send the case for trial, or a dismissal order, terminating the proceedings.

⁵¹ See *supra* note 31 and *supra* note 32.

⁵² *OCIJ Closing Order in Case 002*, *supra* note 38, paras 1312-1313.

Kampuchea.⁵³ The CIJs' reasoning was upheld on appeal before the Pre-Trial Chamber (PTC).⁵⁴

To date, the CIJs and the PTC's decisions are the sole decisions on genocide by ECCC judicial organs. Prior to the evidentiary phase, in September 2011, the Trial Chamber (TC) decided to sever *Case 002* into smaller trials. The genocide charges were excluded from the scope of the first trial, referred to as *Case 002/01*.⁵⁵ Only in the second part of the *Case 002* trial, i.e. *Case 002/02*, will the two accused stand trial for the genocide charges.⁵⁶

2. Crimes Against Humanity

Art. 5 of the ECCC Law⁵⁷ does not follow Art. 9 of the *ECCC Agreement*, as it differs from Art. 7 of the *Rome Statute*. First, unlike the *Rome Statute*, the definition adopted by the ECCC Law includes a discriminatory requirement which defines crimes against humanity as "[...] any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious ground, such as [...]".⁵⁸

In *Case 001*, the TC noted that any discriminatory basis requirement under other international criminal instruments was limited to the underlying offence of persecution and recognized that Art. 5 of the ECCC Law has "[...] added [a] jurisdictional requirement [...]"⁵⁹ which "[...] narrows the scope of the ECCC's jurisdiction over crimes against humanity further than would

⁵³ Cambodia acceded to the *Genocide Convention* upon joining the "French Union" in 1949. The *Genocide Convention* entered into force in 1951 after the reception of the twenty required ratifications, it applied therefore to Cambodia during Democratic Kampuchea period, *ibid.*, para. 1310.

⁵⁴ *Co-Prosecutors v. Nuon Chea and Others*, D427/1/30 (Pre-Trial Chamber), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, para. 248.

⁵⁵ *Co-Prosecutors v. Nuon Chea and Others*, E124 (Trial Chamber), Severance Order Pursuant to Internal Rule 89ter, 22 September 2011. The scope of *Case 002/01* was limited to two forced movement phases, executions committed against the soldiers of the former regime in the aftermath of the evacuation of Phnom Penh in April 1975 and related crimes against humanity; see *Co-Prosecutors v. Nuon Chea and Others*, E284 (Trial Chamber), Decision on Severance of *Case 002* following the Supreme Court Chamber Decision of 8 February 2013, 4 April 2014, 70.

⁵⁶ The evidentiary hearings of *Case 002/02* began on 17 October 2014.

⁵⁷ In fact, Art. 5 of the ECCC Law reproduces Art. 3 of the *Statute of the International Criminal Tribunal for Rwanda*. See Art. 3, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), UN Doc S/Res/955, 8 November 1994.

⁵⁸ ECCC Law, *supra* note 6, Art. 5 (emphasis added).

⁵⁹ *ECCC Judgment in Case 001*, *supra* note 45, para. 313.

otherwise have been necessary under customary international law during the [Democratic Kampuchea] period.”⁶⁰ However, it also stated that the requirement qualifies “[...] the nature of the attack [...]” rather than the individual underlying offences.⁶¹ Consequently, it does “[...] not import a discriminatory intent as a legal ingredient for all underlying crimes against humanity [...]”.⁶² Such findings were upheld on appeal by the Supreme Court Chamber (SCC)⁶³ and by the TC in *Case 002/01*.⁶⁴ Thus, contrary to genocide, the judges decided to apply the provisions of the ECCC Law.

Secondly, the acts enumerated in Art. 5 of the ECCC Law are not as precise and detailed as those enumerated in Art. 7 of the *Rome Statute*.⁶⁵ Art. 5 provides that crimes against humanity are “[...] any acts [...] such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious ground; other inhumane acts.” Thus, the following acts of Art. 7 of the *Rome Statute* do not appear in Art. 5 of the ECCC Law: acts of forcible transfer of population;⁶⁶ severe deprivation of physical liberty in violation of fundamental rules of international law;⁶⁷ sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;⁶⁸ enforced disappearance of persons;⁶⁹ and the crime of apartheid.⁷⁰

However, in Art. 5 the use of the words “*such as*”⁷¹ suggests that the list is not exhaustive⁷² and that the characterization of “other inhumane acts” may include acts described in Art. 7 of the *Rome Statute* that do not appear in Art. 5 of the ECCC Law. This interpretation has been followed by the TC in both

⁶⁰ *Ibid.*, para. 314.

⁶¹ *Ibid.*, para. 313.

⁶² *Co-Prosecutors v. Nuon Chea and Others*, E 313, Case 002/01 Judgment, 7 August 2014, para. 188 [ECCC Case 002/01 Judgment].

⁶³ *Co-Prosecutors v. Kaing Guek Eav alias Duch*, F28 (SCC), Appeal Judgement, 3 February 2012, para. 238 [ECCC Appeal Judgment].

⁶⁴ *ECCC Case 002/01 Judgment*, *supra* note 62, para. 188. The TC noted that the ICTY adjudged such a discriminatory element to be a jurisdictional requirement which was not required by international customary law, see *ibid.*, para. 565.

⁶⁵ *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993 [Rome Statute].

⁶⁶ *Ibid.*, Art. 7 (d).

⁶⁷ *Ibid.*, Art. 7 (e).

⁶⁸ *Ibid.*, Art. 7 (g).

⁶⁹ *Ibid.*, Art. 7 (i).

⁷⁰ *Ibid.*, Art. 7 (j).

⁷¹ Emphasis added.

⁷² Meijer, *supra* note 23, 213.

Case 001 and *Case 002/01*. In its judgments, it stated that “[other] inhumane acts comprise a residual offence which is intended to criminalize conduct which meets the criteria of a crime against humanity but does not fit within one of the other specified underlying crimes.”⁷³ It added that “[other] inhumane acts [...]”⁷⁴ constituted *in itself* a crime against humanity under customary international law before 1975, specifying in *Case 002/01*, that it was “[...] unnecessary to establish that each of the sub-categories alleged to fall within the ambit of this offence were criminalised [...]”⁷⁵ under the Democratic Kampuchea period. Consequently, in *Case 002*, the criminal liability of the accused was acknowledged for their participation in the commission of acts which were not expressly included in Art. 5, such as forcible transfer of population and enforced disappearance of persons.⁷⁶

In respect of genocide and crimes against humanity, the ECCC Law lacks clarity since it partly differs from the legal instruments specified in Art. 9 of the *ECCC Agreement*. Particularly, the modes of liability for genocide and the underlying acts of crimes against humanity are less detailed in the ECCC Law.⁷⁷ According to the dualistic approach that Cambodia follows, the *ECCC Agreement*’s details should have been added to the ECCC Law in order ensure their application within the ECCC.⁷⁸ Finally, it is the interpretation of the ECCC Law made by the judges that allowed for these details to be applied, and this in conformity with the principle of non-retroactivity.

Another difficulty is raised by Art. 3 (new) of the ECCC Law on the Chambers’ jurisdiction over national crimes, since part of this provision violates such a principle.

⁷³ *ECCC Judgment in Case 001*, *supra* note 45, para. 367; *ECCC Case 002/01 Judgment*, *supra* note 62, para. 437.

⁷⁴ *ECCC Judgment in Case 001*, *supra* note 45, para. 367; *ECCC Case 002/01 Judgment*, *supra* note 62, para. 435.

⁷⁵ *ECCC Case 002/01 Judgment*, *supra* note 62, para. 436.

⁷⁶ *Ibid.*, paras 940-942 (Nuon Chea) and paras 1053-1054 (Khieu Samphan).

⁷⁷ Meijer, *supra* note 23, 213.

⁷⁸ *Ibid.*, 210.

II. An Invalid Law Concerning the ECCC's Jurisdiction Over National Crimes

Art. 3 (new) of the ECCC Law provides that the Chambers may try the Khmer Rouge for domestic crimes of homicide⁷⁹, torture⁸⁰, and religious persecution⁸¹ as set forth in the 1956 Penal Code. Charging these crimes in addition to the international crimes may prove to be useful when “[...] the [...] thresholds and *mens rea* required for the latter are too difficult to prove beyond a reasonable doubt.”⁸² “National crimes in contrast, do not require proof of [...] additional elements [...]”⁸³ and consequently appear easier to establish.

However, the legal legitimacy of the ECCC to convict an accused for domestic offences has been seriously weakened by challenges to the validity of the second paragraph of Art. 3 (new) on the statute of limitations of those national crimes.

1. A Controversial Provision

Art. 3 (new) states that “the statute of limitations set forth in the 1956 Penal Code shall be extended for an additional thirty years for the crimes enumerated above”. This provision was amended in 2004. Art. 3 of the 2001 ECCC Law provided for a twenty-year extension of the statute of limitations.⁸⁴ The initial limitation period provided by the 1956 Penal Code for felonies (designated as crimes) was of ten years from the date of commission.⁸⁵ Thus, the limitation period for the prosecution of the crimes committed by the

⁷⁹ 1956 Penal Code, Arts 501, 503, 504, 505, 506, 507 & 508 as provided by ECCC Law, *supra* note 6, Art. 3.

⁸⁰ 1956 Penal Code, Art. 500 as provided by ECCC Law, *ibid.*

⁸¹ 1956 Penal Code, Arts 209 & 210 as provided by ECCC Law, *ibid.*

⁸² D. Scheffer, ‘The Extraordinary Chambers in the Courts of Cambodia’, in M. C. Bassiouni (ed), *International Criminal Law: International Enforcement*, Vol. III, 3rd ed. (2008), 219, 243; see also, Boyle, ‘Une juridiction hybride chargée de juger les Khmers rouges’, 1 *Droits fondamentaux* (2001), *supra* note 4, 221.

⁸³ *Co-Prosecutors v. Kaing Guek Eav alias Duch*, ECCC D99/3/3, Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav Duch Dated 8 August 2008, 5 September 2008, para. 40.

⁸⁴ ECCC Law, *supra* note 6, Art. 3.

⁸⁵ 1956 Penal Code, Art. 109. See *Co-Prosecutors v. Kaing Guek Eav alias Duch*, E187, (Trial Chamber), Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, para. 4 [TC’s Decision on the Statute of Limitations of Domestic Crimes in Case 001].

Khmer Rouge between 1975 and 1979 would have normally expired between 1985 and 1989 *before* the 2001 ECCC Law was enacted.

These extensions of the limitation period may be seen as an impermissible *ex post facto* legislation that would violate the principle of non-retroactivity.⁸⁶ Art. 3 of the 2001 ECCC Law and Art. 3 (new) of the 2004 Amended Law appear therefore contrary to the *ECCC Agreement* and to international standards.

The Cambodian Constitutional Council stated in its decision on the constitutionality of the 2001 ECCC Law that “[this] paragraph unquestionably affects a fundamental principle, ‘the non-retroactivity of any new law over offences committed in the past’ [...]”⁸⁷. However, it “[...] made no further ruling on the impact of this principle [...]”⁸⁸ thus concluding that Art. 3 was in conformity with the 1993 Constitution.⁸⁹ In 2007, however, the Constitutional Council issued another decision.⁹⁰ It stated that a “[...] judge shall not only rely on [the law at issue], but also rely on [...] the international laws that [...] Cambodia has recognized [...]”⁹¹. This requirement, which departs from the Cambodian dualistic approach, appears consistent with the 1993 Constitution of Cambodia, since Art. 31 provides that “[...] the Kingdom of Cambodia shall recognize and respect human rights as stipulated in [...] the covenants and conventions related to human rights [...]”⁹². It follows that the international instruments relating to human rights and ratified by Cambodia⁹³ may directly be applied by national courts, including the ECCC.⁹⁴

⁸⁶ See *supra*, notes 31 and 32.

⁸⁷ Constitutional Council, Decision No. 040/002/2001, 12 February 2001, available at http://www.eccc.gov.kh/sites/default/files/legal-documents/Const_Council_Res_on_KR_Law_12_Feb_2001.pdf (unofficial translation) (last visited 8 July 2015).

⁸⁸ *TC’s Decision on the Statute of Limitations of Domestic Crimes in Case 001*, *supra* note 85, Opinion of Judges Silvia Cartwright and Jean-Marc Lavergne, para. 46.

⁸⁹ *Ibid.*, para. 6.

⁹⁰ Constitutional Council, Decision No. 092/003/2007, 10 July 2007, available at http://cambodia.ohchr.org/WebDOCs/DocProgrammes/CC_decision.pdf (last visited 8 July 2015).

⁹¹ *Ibid.*

⁹² *Case of Nuon Chea and Others.*, D427/1/6 (Defence), IENG Sary’s Appeal against the Closing Order, 25 October 2010, para. 153 [IENG Sary’s Appeal against the Closing Order].

⁹³ The ICCPR is loosely incorporated by reference into the 1993 Cambodian Constitution, Art 31.

⁹⁴ *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Role and Achievements of the Office of the United Nations High Commissioner for Human Rights in Assisting the*

The issue of Art. 3 (new) was raised by the defendants before the ECCC jurisdictional organs, giving them an opportunity to decide on the validity of this article with international standards in *Case 001* and *Case 002*.

2. The Validity of Articles 3 and 3 (new) Raised in *Case 001*

a. An Attempt to Avoid the Issue: The Question of Cumulative Charging

In *Case 001*, the CIJs chose not to indict Duch for domestic crimes on the basis of the civil-law practice⁹⁵ of only indicting for the “[...] *highest available legal classification* [...]”⁹⁶ (crimes against humanity⁹⁷ and grave breaches of the 1949 Geneva Conventions⁹⁸). They mentioned later in *Case 002*’s Closing Order⁹⁹ that they “[...] draw on French jurisprudence, as Cambodian law shares the same root as French law [...]”¹⁰⁰. This was appealed by the Co-Prosecutors¹⁰¹ who had proposed to indict the accused for domestic crimes¹⁰² in their Introductory Submission.¹⁰³ A commentator has underlined the significance of charging these crimes. This indeed may foster a sense of *ownership* of the ECCC judicial

Government and People of Cambodia in the Promotion and Protection of Human Rights, UN Doc A/HRC/7/56, 11 February 2008, para. 26.

⁹⁵ R. Merle & A. Vitu, *Traité de droit criminel: Problème généraux de la science criminel, Droit pénal général*, Vol. I, 7th ed. (1997), 517: “Les tribunaux français considèrent généralement qu’un acte matériel unique à qualifications légales multiples constitue une seule infraction punissable ‘sous sa plus haute acception pénale’” (“the French courts generally hold that a unique material act with several possible legal characterisations constitute a single offence punishable ‘under its highest available legal classification’”) (unofficial translation).

⁹⁶ *Co-Prosecutors v. Kaing Guek Eav alias Duch*, D99 (OCIJ), Closing Order, 8 August 2008, para. 152 [OCIJ Closing Order in Case 001] (emphasis added).

⁹⁷ *Ibid.*, paras. 131-143.

⁹⁸ *Ibid.*, paras. 144-151.

⁹⁹ *OCIJ Closing Order in Case 002*, *supra* note 39, para. 739.

¹⁰⁰ *Ibid.*, para. 1566.

¹⁰¹ *Co-Prosecutors v. Kaing Guek Eav alias Duch*, Appeal of the Closing Order Against Kaing Guek Eav “Duch”, D99/3/3 (OCP), 8 August 2008.

¹⁰² M. Lemonde & J. Reynaud, *Un juge face aux Khmers rouges* (2013), 146.

¹⁰³ The Introductory Submission refers to the written submission by the Co-Prosecutors requesting the Co-Investigating Judges to open an investigation into a crime and proposing charges, *Internal Rules of the Extraordinary Chambers in Cambodia* (Rev.8 of 3 August 2011), adopted at the Plenary Session of the ECCC on 12 June 2007, and signed into force by the President and Deputy President of the Plenary on 19 June 2007, glossary.

proceedings for the Cambodian judiciary.¹⁰⁴ The former international Co-Investigating Judge stated that it was before all, in the eyes of the Cambodian Co-Prosecutor that the Cambodian law had to be applied.¹⁰⁵

As Cambodian law does not “[...] contain provisions relating to the possibility to set out different legal offences for the same acts in an indictment [...]”,¹⁰⁶ the PTC¹⁰⁷ on appeal applied Art. 12 of the *ECCC Agreement*.

According to this Article, where

“[...] Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, *guidance may also be sought in procedural rules established at the international level.*”¹⁰⁸

Thus, the PTC followed the international jurisprudence and retained the domestic crimes of torture¹⁰⁹ and premeditated murder.¹¹⁰ The PTC relied on the ICTY Appeal Chamber which held that “[...] *cumulative charging* constitutes the usual practice [...]”,¹¹¹ providing that “[...] *multiple criminal convictions* entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other.”¹¹² Interestingly, the International Criminal Court also

¹⁰⁴ A. Heindel, ‘Overview of the Extraordinary Chambers’, in J. D. Ciorciari & A. Heindel (eds), *On Trial: The Khmer Rouge Accountability Process* (2009), 103.

¹⁰⁵ Lemonde & Reynaud, *supra* note 102, 145-146.

¹⁰⁶ *Co-Prosecutors v. Kaing Guek Eav alias Duch*, D99/3/42 (Pre-Trial Chamber), Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias Duch, 5 December 2008, para. 86 [PTC Decision on Appeal Against Closing Order in Case 001].

¹⁰⁷ *Ibid.*, paras 41 & 43: The Pre-Trial Chamber decided that it fulfils the role of the Cambodian Investigation Chamber in the ECCC and that it is therefore not bound by the legal characterization given by the Co-Investigating Judges but on the contrary, “[...] empowered to decide on the appropriate legal characterisation of the acts.”

¹⁰⁸ *ECCC Agreement*, *supra* note 3, Art. 12 (1); *ECCC Law*, *supra* note 6, Art. 33 (new) (emphasis added).

¹⁰⁹ *PTC Decision on Appeal Against Closing Order in Case 001*, *supra* note 106, para. 72.

¹¹⁰ *Ibid.*, para. 84.

¹¹¹ *Prosecutor v. Delalic and Others*, IT-96-21-A, Appeal Judgment, 20 February 2001, para. 400 (emphasis added).

¹¹² *Ibid.*, para. 412, cited in *PTC Decision on Appeal Against Closing Order in Case 001*, *supra* note 106, para. 59. It seems here that the ECCC Pre-Trial Chamber applied for the charging (pre-trial stage) the test used by the ICTY for the conviction (trial stage), which

held that “[...] as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges.”¹¹³ As the PTC concluded that the domestic offences of torture and premeditated murder were not subsumed by their international equivalent (because they required proof of a materially distinct element),¹¹⁴ it included them in the Amended Closing Order.¹¹⁵

It further stated that

“[the] addition of legal offences at this stage of the proceedings does not affect the right of the Charged Person to be informed of the charges [...] as he will have the opportunity to present his defence on these specific offences during trial.”¹¹⁶

On January 2009, Duch’s Defence filed a Preliminary Objection with the TC alleging that the domestic crimes for which the accused was indicted are time-barred because the applicable limitation period had expired.¹¹⁷

b. The Trial Chamber’s Disagreement on the Suspension of the Limitation Period for Domestic Crimes

In the TC, both national and international judges shared the assumption that any extension of the statute of limitations could only be valid if it was adopted before the expiration of the initial ten-year period.¹¹⁸ They agreed that

results in confusion. ICTY judges indeed, unlike ECCC judges, may not change the characterization of the crime as set out in the Indictment. Cumulative charging appears therefore essential at the ICTY, as “[...] it is not possible to determine to a certainty which of the charges brought against an accused will be proven [...]”, *Prosecutor v. Delalic and Others*, IT-96-21-A, Appeal Judgment, 20 February 2001, para. 400.

¹¹³ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC, Decision Pursuant to Art. 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424 (Pre-Trial Chamber II, 15 June 2009), para. 202. However, ICC judges, like ECCC judges, may recharacterise the crimes at trial. The ICC Pre-Trial Chamber thus held that “[...] before the ICC, there is no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one will be retained by the Chamber [...]”, *ibid.*, para. 203.

¹¹⁴ *PTC Decision on Appeal Against Closing Order in Case 001*, *supra* note 106, para. 85.

¹¹⁵ *Ibid.*, para. 99 (for the domestic crime of torture) & para. 103 (for premeditated murder).

¹¹⁶ *Ibid.*, para. 106.

¹¹⁷ *TC’s Decision on the Statute of Limitations of Domestic Crimes in Case 001*, *supra* note 85, para. 1.

¹¹⁸ *Ibid.*, para. 8 (conversely).

many national legislatures may have suspended or interrupted the limitation period in the aftermath of national instability.¹¹⁹ For instance, they cited the 12 May 1950 French Law which amended the 29 March 1942 Law Concerning the Lapse of Public Prosecution and Sentences¹²⁰ and suspended the limitations period for the duration of the Second World War.

In their decision, the judges had to determine whether the limitation period of the relevant domestic crimes may have been suspended or interrupted, so that it was not extinguished in 2001, when Art. 3 of the ECCC Law was enacted. But the judges disagreed on the practical application of the conditions of suspension or interruption in the case of Cambodia. Although the judges unanimously decided that there was no legal or judicial system in Cambodia, and no possible criminal investigations or prosecutions between 1975 and 1979,¹²¹ they “[...] failed to reach agreement on whether [...] the applicable limitation period was interrupted or suspended between 1975 and 1993 [...]”.¹²² Cambodian and international judges thus issued separate opinions.

National judges considered particularly that while some trials were conducted during this period, the national judicial capacity was severely impaired before 1993 due to its destruction during the Democratic Kampuchea regime.¹²³ According to them, the limitation period applicable to national crimes therefore started to run on 24 September 1993 with the promulgation of the Constitution of the Kingdom of Cambodia.¹²⁴ On their side, international judges recognized that the Cambodian judicial system was “[...] severely weakened and compromised [...]”¹²⁵ between 1979 and 1993 but they were not convinced that “[...] no prosecution or investigation would have been possible[...].”¹²⁶ They added that it was “[...] not apparent [...] that the promulgation of the Constitution restored to the Cambodian justice system the objective capacity to investigate or prosecute, or eradicate [its] various systemic weaknesses [...]”.¹²⁷ The international

¹¹⁹ *Ibid.*, Opinion of Judges Nil Nonn, Ya Sokhan, Thou Mony, para. 17 & Opinion of Judges Silvia Cartwright & Jean-Marc Lavergne, para. 27.

¹²⁰ *Loi du 29 mars 1942 relative à la prescription de l'action publique et des peines* (unofficial translation in the text).

¹²¹ *TC's Decision on the Statute of Limitations of Domestic Crimes in Case 001*, *supra* note 85, para. 14.

¹²² *Ibid.*, para. 14.

¹²³ *Ibid.*, Opinion of Judges Nil Nonn, Ya Sokhan & Thou Mony, para. 19.

¹²⁴ *Ibid.*, para. 25.

¹²⁵ *Ibid.*, Opinion of Judges Silvia Cartwright & Jean-Marc Lavergne, para. 32.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, para. 34.

judges did not consider themselves in the position “[...] to conclude that the Cambodian legal system was objectively incapable of launching investigations or prosecutions prior to 1993 [...]”.¹²⁸ They concluded that the limitation period had expired before the adoption of Art. 3 in 2001,¹²⁹ adding that there was “[...] no provision of national or international law to support the interpretation of Art. 3 (new) of the ECCC Law as a permissible reinstatement of the right to prosecute the Accused for these crimes.”¹³⁰

The judges were split three to two, and the absence of a supermajority barred the TC from convicting Duch for domestic crimes.¹³¹ According to Art. 14 (new) of the ECCC Law, indeed, “[...] a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges”. In the absence of supermajority, the TC held itself “[...] unable to consider the guilt or innocence of the Accused with respect to domestic crimes [...]”¹³² but its decision left open the possibility of charging the other accused with domestic crimes.¹³³

3. The Validity of Article 3 (new) Raised in *Case 002*

The CIJs decided to charge the accused in *Case 002* with domestic crimes¹³⁴ despite finding themselves in a “procedural stalemate”, as they were unable to agree on the limitation period.¹³⁵ They chose not to make use of the procedure provided by Art. 23 (new) of the ECCC Law. According to this provision, in case of disagreement between them, either judge may bring the disagreement before the PTC to settle.¹³⁶ Instead, they stated that

“[...] taking into account their obligation to make a ruling within a reasonable time [...] they have decided by mutual agreement to

¹²⁸ *Ibid.*, para. 35.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*, para. 54.

¹³¹ *Ibid.*, para. 56.

¹³² *Ibid.*

¹³³ T. Pettay & K. Lampron, ‘A Partial Victory for Fair Trial Rights at the ECCC with the Decision on the Statute of Limitations on Domestic Crimes’, available at <http://www.internationallawbureau.com/blog/wp-content/uploads/2011/11/A-Partial-Victory-for-Fair-Trial-Rights-at-the-ECCC-with-the-Decision-on-the-Statute-of-Limitations-on-Domestic-Crimes.pdf> (last visited 8 July 2015), 7.

¹³⁴ *OCIJ Closing Order in Case 002*, *supra* note 38, para. 1574-1576.

¹³⁵ *Ibid.*, para. 1574.

¹³⁶ ECCC Law, *supra* note 6, Art. 23 (new); *ECCC Agreement*, *supra* note 3, Art. 7.

grant the Co-Prosecutors' requests, leaving it to the Trial Chamber to decide what procedural action to take regarding crimes in the Penal Code 1956."¹³⁷

Two Defence teams appealed their decision, arguing that Art. 3 (new) violates the principle of non-retroactivity.¹³⁸

The PTC decided that the ECCC had subject-matter jurisdiction over domestic crimes,¹³⁹ holding first that the application of Art. 3 (new) does not violate the principle of non-retroactivity.¹⁴⁰ According to its judges, the ten-year statute of limitations had not expired when Art. 3 (new) was enacted as it had been suspended or interrupted due to a poorly functioning judiciary.¹⁴¹ The PTC added that although the CIJs did not explicitly state the facts and modes of liability for the charges of domestic crimes in the Closing Order, this lack of specification did not prevent the accused from being sent to trial for such crimes.¹⁴² It considered that "[whether] the facts stated in the indictment can actually be characterised as [domestic crimes] [...] under the 1956 Penal Code is ultimately a question of legal characterisation that is to be determined by the Trial Chamber [...]".¹⁴³

The Defence teams filed Preliminary Objections with the TC on the validity of Art. 3 (new).¹⁴⁴ The TC, unlike the PTC, decided that the Closing Order's insufficiency in setting out the facts and modes of liability to support

¹³⁷ *OCIJ Closing Order in Case 002*, *supra* note 38, para. 1574.

¹³⁸ *IENG Sary's Appeal against the Closing Order*, *supra* note 92, paras. 158-173; *Case of Nuon Chea and Others*, D427/2/1 (PTC), IENG Thirtieth Defence Appeal from the Closing Order, 18 October 2010, para. 77.

¹³⁹ *Case of Nuon Chea and Others*, D427/1/30 (PTC), Public Decision on IENG Sary's Appeal against the Closing Order, 11 April 2011, para. 76 [PTC Decision on Appeal Against Closing Order in Case 002].

¹⁴⁰ *Ibid.*, para. 285.

¹⁴¹ *Ibid.*, paras. 286-287.

¹⁴² *Ibid.*, para. 294.

¹⁴³ *Ibid.*, para. 296.

¹⁴⁴ *Case of Nuon Chea and Others*, IENG Thirtieth Defence's Preliminary Objections, E44 (TC), 14 February 2011; *Khieu Samphan's Preliminary Objections Concerning Termination of Prosecution* (Domestic Crimes), E47 (Trial Chamber), 14 February 2001; *Nuon Chea's Consolidated Preliminary Objections*, E51/3 (Trial Chamber), 25 February 2011; *Summary of IENG Sary's Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in Lieu of Reasoned Judicial Decisions Subject to Appellate Review*, E51/4 (TC), 25 February 2011.

domestic crimes resulted in its inability to try domestic crimes in *Case 002*.¹⁴⁵ It decided further that it was “[...] unnecessary [...] to otherwise determine the applicability of domestic crimes before the ECCC.”¹⁴⁶ The TC has thus ruled out the possibility of taking another decision on the validity of Art. 3 (new), leaving open again the possibility of charging the next accused with domestic crimes at the ECCC. The respective positions held by the national and international TC’s judges in *Case 001* may also have remained unchanged in *Case 002*. The decision of the TC, on that matter, would consequently have stayed the same. However, as long as the judges disagree regarding the suspension of the limitation period, the validity of Art. 3 (new) will remain uncertain.¹⁴⁷

D. Conclusion

Cambodia adopted a moderate dualist approach regarding the application of international law within its domestic legal framework. This means that the *ECCC Agreement* should apply to Cambodia through the ECCC Law. However, although the 2004 Amended ECCC Law is not as detailed as the *ECCC Agreement* and some of its provisions are controversial regarding international standards, the Law has not been changed yet. However, thanks to the decisions of the ECCC judges on the application of the Law, these discrepancies were smoothened out. In deciding how such provisions should apply, the judges have allowed the *ECCC Agreement*’s provisions and international standards to be accurately implemented. Even if they did not explicitly use it, the judges may have been influenced by Art. 12 of the *ECCC Agreement*.¹⁴⁸ Drawing inspiration from the international practice, they managed to solve the problems caused by the litigious provisions of the Law on the ECCC’s subject-matter jurisdiction. The scope of Art. 12 has thus gone beyond the sole procedural rules, applying also to substantive provisions.

¹⁴⁵ *Case of Nuon Chea and Others*, E122 (TC), Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 22 September 2011, para. 15, 22.

¹⁴⁶ *Ibid.*, para. 23.

¹⁴⁷ On 3 March 2015, the ECCC international CIJ charged two accused in *Case 003* and *Case 004* of homicide as a violation of the 1956 Cambodian Penal Code. To date, however, the arrest warrants issued by the international CIJ have remained without effect, see *Statements of the International Co-Investigating Judge regarding Case 003 and Case 004*, available at <http://www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-meas-muth-absentia-case-003> & <http://www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-im-chaem-absentia-case-004> (last visited 18 July 2015).

¹⁴⁸ See Sec. B.II.2.a.

However, the judges' power in the interpretation of the rules has significant limitations due to the particular hybrid structure of the Chambers. The application of the Law's provisions is dependent on reaching a consensus among the international and national judges. If the judges' decisions do not get the required supermajority, the fate of these provisions is negated.¹⁴⁹ This not only slows down the process of justice started by the ECCC but may also annihilate it, by preventing any substantial decisions from being taken, thereby creating a significant detriment to the victims of the Khmer Rouge regime.

¹⁴⁹ To date, no decision on the validity of Art. 3 has been taken yet.