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Editorial

Dear Readers,

with our new issue, the Goettingen Journal of International Law aims to contribute to current debates in international law.

A highly debated issue is the applicability of legal frameworks outside their jurisdictions. States justify the expansion of frameworks by arguing to fulfil extraterritorial human rights obligations in another State's territory, which are unwilling or unable to suppress the present threat. For instance, the applicability of the European Convention on Human Rights (ECHR) as a legal framework is linked to jurisdiction of its signatory parties.[1] Though, in the light of the case-law of the European Court of Human Rights, jurisdiction should in general derive from the territorial principle,[2] the extraterritorial applicability is conceivable only in very few exceptional cases.[3] Precisely because of the new era of State warfare – one might think of Artificial Intelligence, so-called killer robots and drones – the question of the compatibility of this State practice with the ECHR is highly topical.

Another current concern of the international community is the development, threat and use of nuclear weapons. Though the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) has been signed in 1968,[4] very little progress was made in globally advancing the nuclear disarmament, especially since four

1 Article 1 of the European Convention of Human Rights.

2 *Bankovic and Others v. Belgium and 16 other States*, ECtHR Application No. 52207/99, Judgment of 12 December 2001, para. 67.

3 *Al Skeini and Others v United Kingdom*, ECtHR Application No. 55721/07, Judgement of 7 July 2011, para. 133.

4 *Treaty on the Non-Proliferation of Nuclear Weapons*, UN Doc 729 UNTS 161, opened for signature 1 July 1968, entered into force 5 March 1970.

out of five non-party States are most likely to be equipped with nuclear arms.[5] Therefore, the Treaty on the Prohibition of Nuclear Weapons (TPNW) has been adopted in 2017 which proscribes the party members from developing, producing, testing, stockpiling, stationing and transferring nuclear weapons whilst reaffirming the full implementation of the NPT.[6] Its overall aim is to establish a nuclear weapon free world, yet does not legally dispense of nuclear weapons after all.

Under Chapter VII of the United Nations Charter the Security Council is authorized to take collective measures in order to maintain international peace and security. These peacekeeping operations seek to secure peace and to provide assistance in implementing agreements achieved by the peacemakers.[7] This issue sheds light on the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) which aims to stabilize the Central African Republic.[8] Ever since the first mission in 1948 during the Arab-Israeli war, the following mandate's characteristics have evolved immensely from maintaining ceasefires and providing fundamental political support to the preservation of territorial integrity and the promotion of human rights.[9] This development simultaneously portrays the United Nation's view on the implementation of the rule of law not only in the Central African Republic but around the globe.

In his article 'Avoiding the Legal *Black Hole*: Re-evaluating the Applicability of the European Convention on Human Rights to the United Kingdom's Targeted Killing Policy', *Liam Halewood* analyses the question if and to what extend targeted killings as a measure to combat terrorism is compatible with the ECHR. In doing so, the author scrutinizes the targeted killing of Reyaad Khan authorized by the United Kingdom in 2015. Similarities as well as significant differences to the Bankovic case are being portrayed. As a solution to the *black hole*, *Liam Halewood* sees the European Court of Human Rights in charge of detecting a juridical link between the country authorizing and the victims of the targeted killing.

5 https://www.nato.int/docu/review/2018/Also-in-2018/the-nuclear-non-proliferation-treaty-at-fifty-a-midlife-crisis/EN/index.htm (last visited 19 July 2019).

6 *Treaty on the Prohibition of Nuclear Weapons*, UN Doc A/CONF.229/2017/8, opened for signature 20 September 2017, not yet in force, Art. 1.

7 United Nations Peacekeeping Operations – Principles and Guidelines, 2008, 18.

8 SC Res. 2149, UN Doc S/RES/2149 (2014), 10 April 2014.

9 https://peacekeeping.un.org/en/our-history (last visited 19 July 2019).

In 'Advancing the Rule of Law Through Executive Measures: The Case of MINUSCA', *Édith Vansprange* sheds light on the United Nation´s perception of rule of law by examining the most recent operation MINUSCA in the Central African Republic. By analysing the wording of the mission, the author locates a qualitative shift from the promotion of peacekeeping to the permission to use executive measures, as no other mandate based on the rule of law has done before. Particular attention will also lay on the reconcilability of the operation with UN peacekeeping norms and prior peacekeeping practices.

The last contribution to this issue is the winning article of our essay competition on the topic 'Deterrence or Escalation? – Nuclear Weapons under International Law'. After reviewing all submissions, we are delighted to publish *Monika Subritzky´s* article 'An Analysis of the Treaty on the Prohibition of Nuclear Weapons in Light of its Form as a Framework Agreement' in which she examines the prospects of the TPNW to function as a disarmament device. In doing so, the author consults the Working Paper submitted by Ireland within the scope of obligations the Nuclear Disarmament Treaty implies. *Monika Subritzky* analyses if the TPNW fits more in the pathway of a Ban Treaty or Framework agreement that lead her to take a close look at the treaty's structure and value.

We hope that all these articles provide – in their diversity – a worthwhile read to our readership.

The Editors

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Avoiding the Legal *Black Hole*: Re-evaluating the Applicability of the European Convention on Human Rights to the United Kingdom's Targeted Killing Policy*

Liam Halewood**

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Abstract

In 2015, the United Kingdom (UK) became the first European State to incorporate extraterritorial targeted killing with drones into its counterterrorism framework. This article examines whether the UK's obligations under the European Convention on Human Rights (ECHR) extend to such operations. Scholars have suggested not, based on a comparison of a drone strike to the circumstances of the landmark *Bankovic* case, which was inadmissible on jurisdictional grounds. Consequently, the UK policy is perceived as occurring in a legal *black hole* outside the purview of the Convention. However, this article argues that the comparisons to *Bankovic* overlook the uniqueness of targeted killing operations and the context in which the UK policy is utilized. Considering the distinctiveness of the UK policy, this article re-evaluates the applicability of the ECHR and proposes that the European Court of Human Rights (ECtHR) could find a jurisdictional link between the UK and the victims of targeted killing, thereby avoiding the perceived legal *black hole*.

A. Introduction

Targeted killing is the intentional, premeditated and deliberate use of lethal force by States against selected individuals not in their custody.[1] Since 2001, the United States (US) has conducted targeted killing operations within the recognized armed conflicts in Afghanistan and Iraq to weaken the terror threat posed by members of Al Qaeda and associated forces.[2] Additionally, the US has deployed armed drones to lethally target alleged terrorists that are located away from any zone of conventional hostilities, in countries such as Pakistan, Yemen and Somalia.[3]

The use of intentional lethal force away from areas of active hostilities is a particularly controversial aspect of the US *war on terror*, justified on the basis that those targeted pose an ongoing terrorist threat to the US whilst located in so-called safe havens, which refers to territory that is ineffectively or substantially ungoverned.[4] Within safe havens, terrorists are able to organize, plan, and operate in relative security due to the territorial State's inadequate governance, lack of political will to combat terrorists, or both.[5] A consequence of ineffective governance is that the suppression of terrorist threats through conventional law enforcement, such as arrest or detention, is either unavailable or deemed unlikely to be effective. In this context, the US regards targeted killing as necessary for frustrating the activities of terrorists.[6]

European States have facilitated US targeted killing operations in numerous ways, such as the gathering and sharing of intelligence on the whereabouts of

1 N. Melzer, *Targeted Killing in International Law*, (2008), 5; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development* UN Doc A/HRC/14/24/Add.6, 28 May 2010, 3, para. 1.

2 J. C. Dehn, 'Targeted Killing, Human Rights and Ungoverned Spaces: Considering Territorial State Human Rights Obligations', 54 *Harvard International Law Journal* (2013), 84, 85.

3 A. Dworkin, Drones and Targeted Killing: Defining a European Position [Dworkin, European Position on drones and targeted killing], (2013), available at http://www.ecfr.eu/publications/summary/drones_and_targeted_killing_defining_a_european_position211 (last visited 03 March 2019).

4 Dehn, *supra* note 2, 85.

5 U.S. Department of State, Bureau of Counterterrorism and Countering Violent Extremism, *Country Reports on Terrorism 2015, Chapter 5: Terrorist Safe Havens (Update to 7120 Report)*, available at https://www.state.gov/j/ct/rls/crt/2015/257522.htm (last visited 03 March 2019).

6 G. Blum & P. B. Heymann, *Laws, Outlaws and Terrorists: Lessons from the War on Terrorism* (2010), 71.

targets and by permitting the US to use their air bases or air spaces.[7] Yet, the lethal targeting of terrorists away from zones of conventional hostilities remained outside the scope of the wide-ranging extraterritorial counter-terrorism actions of European States.[8] This was true until August 2015, when the UK launched a premeditated, intentional and deliberate drone strike against Reyaad Khan, a British jihadist located in Raqqa, Syria.

The targeted killing of Reyaad Khan was the first time in modern times that the UK conducted a strike away from an area it was involved in war.[9] Prime Minister David Cameron described the killing as an act of self-defence, protecting the British public from the direct threat of terrorist attacks being plotted and directed by Khan, who showed no signs of leaving Syria or desisting from plotting terrorist attacks against the UK. Due to the Syrian Government's lack of political authority in the Raqqa province[10] and the absence of British troops on the ground, lethal force was deemed the only way of preventing Khan's planned attacks.[11]

Following the killing of Reyaad Khan, a parliamentary inquiry confirmed that the UK would be prepared to use armed drones to intentionally target pre-identified terrorists. By adopting a form of direct military counterterrorism pioneered by the US[12], the UK has embraced conduct that was previously

7 C. Paulussen, J. Dorsey & B. Boutin, Towards a European Position on the Use of Armed Drones? A Human Rights Approach, (2016), available at https://icct.nl/wp-content/uploads/2016/10/ICCT-Paulussen-Dorsey-Boutin-Towards-a-European-Position-on-the-Use-of-Armed-Drones-October2016-2.pdf (last visited 04 March 2019).

8 For an overview of the counter-terror activities of main European actors see, A. Dworkin, Europe's new Counter-Terror Wars [Dworkin, Counter-Terror wars], (2016), available at http://www.ecfr.eu/publications/summary/europes_new_counter_terror_wars7155# (last visited 04 March 2019).

9 House of Commons Debates 7th September 2015, Vol. 599, Col. 30. At the time of the strike, the UK parliament had not authorized the use of force in Syria. In fact, parliament specifically refused to endorse the use of force against ISIS/Da'esh there in 2014. Therefore, the use of force occurred in an area that was away from the zone of hostilities that the UK was engaged in Iraq. This finding does not preclude the strike as occurring within an armed conflict situation where the Law of War would apply, however such an analysis is outside the scope of the present article.

10 In August 2014, the Syrian Government had lost *de facto* control of the Raqqa province. For a timeline of ISIS activities, including the control of territory see, C. Glenn, 'The Rise, Spread and Fall of the Islamic State' (2018), available at https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state (last visited 04 March 2019).

11 House of Common Debates 7th September 2015, *supra* note 9, Cols. 25-26.

12 Dworkin, Counter-Terror wars, *supra* note 8.

unprecedented for European nations.[13] Consequently, this new form of European State conduct raises the question as to whether the UK policy comes under the ambit of the ECHR and may be subject to legal challenges before the ECtHR.[14]

The extraterritorial applicability of the ECHR *vis a vis* targeted killing by drones relies on those targeted being within the jurisdiction of the acting State. There is no direct case law to definitively answer the Convention's applicability in such circumstances because the Reyaad Khan strike remains an isolated example of the UK policy,[15] which was not challenged legally at the State or individual level.[16] Nonetheless, it is the purpose of this article to examine the jurisprudence of the ECtHR and contribute to the discussion on whether targeted killing operations would engage the UK's obligations under the Convention.

The article will be structured as follows: first, the framework of the UK targeted killing policy will be outlined. Subsequently, it will be shown in which circumstances the obligations of the Convention extend beyond a signatory State's territory. Thereafter, it will be illustrated why scholars interpret victims of drone operated targeted killings as being outside the jurisdiction of the acting State. Thus, the UK policy can be described as occurring in a legal *black hole*[17] in so far as the ECHR is concerned. The perceived inapplicability of the Convention is influenced by the continued relevance of the *Bankovic*[18] case, when the Court held that missiles fired from an aircraft, absent territorial presence, did not create a jurisdictional link between the State and those killed. Despite

13 N. Bhuta, 'On Preventive Killing' (2015), available at https://www.ejiltalk.org/on-preventive-killing/ (last visited 04 March 2019).

14 S. Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', 20 *European Journal of International Law* (2009) 4, 1223, 1224.

15 Although, the UK has also facilitated US targeted killing operations against British jihadists. For example, the UK worked "hand in glove" to launch an airstrike against prominent IS extremist Mohammed Emwazi, also known as Jihadi John. See: C.Phipps, P.Wintour and J.McCurry, '"High Degree of Certainty" that US Strike Killed Mohammed Emwazi' (2015), available at https://www.theguardian.com/uk-news/2015/nov/13/us-air-strike-targets-mohammed-emwazi-uk-terrorist-known-as-jihadi-john (last visited 04 March 2018).

16 A. Lang, 'UK Drone Attack in Syria: Legal Questions' (2015), available at http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7332#fullreport (last visited 24 October 2018).

17 R. Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights', 26 *Michigan Journal of International Law* (2005) 3, 739, 740.

18 *Bankovic and Others v. Belgium and 16 other States*, ECtHR Application No. 52207/99, Judgment of 12 December 2001 [Bankovic].

the similarities between *Bankovic* and the circumstances of the UK policy, it will be posited that targeted killing, as an exceptional form of counterterrorism, is distinctive and *Bankovic* should not be seen as conclusive for the jurisdictional analysis. Considering the distinctiveness of the force envisaged by the UK policy, a re-evaluation of the applicability of the Convention will occur, leading to an observation that the ECtHR could find a jurisdictional link between the UK and the victims of targeted killing, thereby avoiding the perceived legal black hole.

B. The UK Parliamentary Inquiry on the Use of Armed Drones for Targeted Killing

Following the targeted killing of Reyaad Khan, the Joint Committee on Human Rights (JCHR) commenced a parliamentary inquiry to scrutinize the UK Government's policy on the use of drones for targeted killing. The inquiry sought to clarify whether the targeted killing of Khan heralded in the adoption of a new policy by the Government on the use of lethal force abroad and, if so, what exactly that new policy is.[19]

The Government set out its position in a memorandum to the inquiry, confirming that it will act to counter an identified threat to the UK or British interests abroad. However, the Government acknowledged that lethal action would always be a last resort, when there is no other option to defend against an attack and no other means to detain, disrupt or otherwise prevent those plotting acts of terror.[20] During the oral evidence sessions of the inquiry, Michael Fallon, who was the Secretary of State for Defence at the time, confirmed that the Government's approach would apply anywhere where there is no recognized Government or where there is a vacuum of political authority.[21] Therefore, the Government's approach clearly applies to safe havens, which are characterized by the absence of effective governance. Later in his evidence, the Secretary of State articulated a hypothetical example of when the UK Government would consider lethally targeting terrorists:

19 Joint Committee on Human Rights, *The Government's Policy on the Use of Armed Drones for Targeted Killing*, Second report of the session 2015-16, HL Paper 141 (2016) 29, para 2.1. [JCHR, *Second report*].

20 *Ibid*. 35, 2.32; Government of the UK, 'Government memorandum to the JCHR' (2015), available at http://www.parliament.uk/documents/joint-committees/human-rights/Government_Memorandum_on_Drones.pdf (last visited 04 March 2019).

21 JCHR, *Second report*, *supra* note 19, 36, para. 2.35.

> "If we had known that our 30 citizens were going to be murdered on the beach in Sousse [Tunisia], and we knew that the attack was being directly planned from, say, a training camp in Libya, would we have needed to seek authority if we were trying to forestall that attack by striking in Libya? I suspect that the answer would be fairly similar, that there was no political authority in Libya, there may have been no other way of preventing it and therefore we would have been justified in doing it [...]".[22]

At the time of the inquiry, Libya was outside the geographical area of the UK's armed conflict with ISIS/Da'esh. Accordingly, the hypothetical example provided by the former Secretary of State establishes that the Government is prepared to use lethal force outside areas of recognized armed conflict.

The JCHR achieved one of its core objectives by establishing that the UK has adopted a policy that contemplates the employment of armed drones to target terrorists operating in safe havens. The inquiry also recognized that the targeting of terrorists might also include pre-identified individuals.[23] The UK Government affirmed that the policy would only be employed as a last resort, in order to protect the UK or British interests abroad, when there is no other option, such as arrest or detention, to prevent those plotting acts of terror. The UK also contend that its policy can be employed unilaterally as a form of self-defence, when the State where the terrorist threat derives, is 'unable or unwilling' to prevent the attack.[24]

At the time of the inquiry, the Secretary of State for Defence denied that the UK policy equated to the adoption of a targeted killing policy.[25] However, the killing of Reyaad Khan *was* a targeted killing and the UK Government demonstrated the intention to repeat similar counterterrorism operations.[26] This

22 *Ibid*., 36, para. 2.36.

23 *Ibid*., 37, para. 2.39.

24 *Ibid*., 43, para. 3.23; See also, D. Cameron´s Speech Prior to the Authorization of Force in Syria, House of Commons Debates (26 November 2015), Vol. 602, Col. 1491.

25 JCHR, *Second Report*, *supra* note 19, 36, para. 2.33. "There is no policy of targeted killing."

26 Interestingly, the Ministry of Defence's Joint Doctrine on Unmanned Aerial Systems, published in September 2017, referred to the UK's practice of targeting terrorists outside of armed conflict situations. However, the UK Government recently updated its drone doctrine and omitted any reference to targeting outside conflict zones. See: J. Doward, MoD 'in chaos' over drone use outside of war zones, The Guardian (3 February 2018), available at https://www.theguardian.com/world/2018/feb/03/drones-gavin-williamson-mod-isis (last visited 24 October 2018).

intention was subsequently reiterated by former Secretary of State for Defence, Gavin Williamson, who suggested that Government will continue to hunt down British members of ISIS "[…] as they disperse across Syria, Iraq and other areas [...]".[27]

Despite a reluctance to label its policy as such, Governmental statements throughout the JCHR inquiry and comments made since, imply that the UK has adopted a targeted killing policy.[28] From a European perspective, the UK's incorporation of targeted killing within its counterterrorism framework is groundbreaking and provides a new context for discussions on the extraterritorial applicability of the ECHR.

C. The Concept of Extraterritorial Jurisdiction Under the ECHR

Article 1 of the ECHR states that the contracting parties shall secure to everyone within their jurisdiction the rights and freedoms of the Convention.[29] Therefore, the key concept that determines the applicability of the ECHR is jurisdiction. Yet, the text of the treaty does not provide any significant guidance on how jurisdiction is to be understood. Instead, the interpretation of this term has been a task reserved for the ECtHR.

The Court has consistently acknowledged that the jurisdictional competence of a State is primarily territorial[30] but has also recognized that "[…] a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities that produce effects outside its own territory [...]".[31] The desire to keep extraterritorial jurisdiction exceptional has influenced the Court's

27 BBC news, 'Terrorists Have Nowhere to Hide, says Defence Secretary' (2017), available at http://www.bbc.co.uk/news/uk-42260814 (last visited 24 October 2018).

28 However, as of yet, the UK Government has failed to publish any policy framework on the use of lethal force in extraterritorial counterterrorism operations. Concluding its inquiry into the UK's use of armed drones, the All Party Parliamentary Group (APPG) recommended that the UK publish its policy on targeted killings of individuals in line with the precedent set by the US and Israel. See: APPG on Drones Inquiry Report, 'The UK's Use of Armed Drones: Working with Partners' (2018), available at http://appgdrones.org.uk/wp-content/uploads/2014/08/INH_PG_Drones_AllInOne_v25.pdf (last visited 04 March 2019).

29 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 1, 213 UNTS 224.

30 *Bankovic*, *supra* note 18, para. 67; *Al Skeini and Others v United Kingdom*, ECtHR Application No. 55721/07, Judgement of 7 July 2011, para 131. [Al Skeini].

31 *Al Skeini*, *supra* note 30, para. 133.

consistent rejection of a *cause and effect* concept of jurisdiction, which would result in any State act capable of violating a person's human rights as being sufficient to bring that individual within the jurisdiction of the State.[32] Instead, the Court has opted for the extraterritorial applicability of the Convention to occur in exceptional circumstances.[33]

The pertinent issue for the present analysis is whether the type of force envisioned by the UK policy coincides with the exceptional circumstances when a State exercises its jurisdiction extraterritorially under the ECHR. Before making this assessment, it is necessary to recognize the circumstances when a person affected by the extraterritorial act of a State is brought within that State's jurisdiction under the Convention. The Court's jurisprudence on this issue is vast but for the purposes of this article, it is sufficient to focus on the case of *Al Skeini v. UK*, which is the leading authority in this area.

Al Skeini v. UK

The case of *Al Skeini v. UK* concerned the deaths of six Iraqi civilians during incidents involving British soldiers in South-east Iraq. The deaths occurred between May and November 2003, the period that the UK was an *occupying power* in Iraq.[34] The relatives of those killed brought a claim against the UK, alleging that the UK did not conduct effective investigations into the deaths, violating the procedural element of Article 2.[35] Before considering whether the applicants were within the jurisdiction of the UK, the Court referred to its previous jurisprudence to outline the circumstances when a State exercises extraterritorial jurisdiction. In respect to military operations abroad, the Court identified three situations, when an individual is brought within the State's jurisdiction.[36] One such situation is "[…] when, as a consequence of lawful or

32 F. Haijer & C. Ryngaert, 'Reflections on Jaloud v the Netherlands: Jurisdictional Consequences and Resonance in Dutch Society', 19 *Journal of International Peacekeeping* (2015) 1-2, 174, 180.

33 *Bankovic*, *supra* note 18, para. 71.; *Al Skeini*, *supra* note 30, para. 132; *Jaloud v. the Netherlands*, ECtHR Application No. 47708/08, Judgement of the 20 November 2014, para. 132. [Jaloud v. The Netherlands].

34 The UK and the US became 'occupying powers' on the 1st May 2003 and the period of occupation ended on the 28th June 2004. See *Al Skeini*, *supra* note 30, paras. 143-148.

35 *Al Skeini*, *supra* note 30, para. 3.

36 Additionally, the Court acknowledges other recognized instances of extraterritorial exercise of jurisdiction by a State include the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. See *Bankovic*, *supra* note 18, para. 73; *Al Skeini*, *supra* note 30, para. 134. However, these instances of extraterritorial jurisdiction are not relevant for the current analysis.

unlawful military action, a Contracting State exercises effective control of an area outside [its] national territory".[37] This exception to the primarily territorial concept of jurisdiction is referred to as *spatial jurisdiction* because individuals are brought within the State's jurisdiction, as a result of their location within an area under the State's *effective control*.

Whether a State exercises effective control over an area outside its territory is a question of fact and "[i]n determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area [...]".[38] In *Loizidou*[39], when the Court first articulated the spatial model of jurisdiction, the Court concluded that 30,000 ground troops equated to Turkey exercising *effective control* of Northern Cyprus.[40] When a State exercises *effective control* of an area, it is required to secure the entire range of rights contained in the Convention.[41] Practically speaking, a State is only able to fulfil this requirement with significant territorial presence, such as when it is occupying or administering a territory.[42] *Effective control* is considered comparable to territorial jurisdiction, in regards to the power of the State to regulate conduct.[43] As Lubell identifies, when a State has effective control of an area, it "[…]takes on responsibilities on a governmental scale and the circumstances are in many ways analogous to the State's own territory".[44]

Despite recognizing that the occupation of territory may be indicative of a State exercising *effective control* of an area, the Court in *Al Skeini* did not consider whether the UK exercised *effective control* in South-east Iraq.[45] Rather,

37 *Al Skeini, supra* note 30, para. 138.

38 *Al Skeini*, *supra* note 30, para. 139.

39 *Loizidou v. Turkey (preliminary objections)*, ECtHR Application No. 15318/89, Judgment of 23 March 1995, para. 62.

40 *Loizidou v Turkey*, ECtHR Application No. 15318/89, Judgment of 18 December 1996, para. 16.

41 *Al Skeini*, *supra* note 30, para. 138.

42 N. Quénivet & A. Sari, 'Submission to the Joint Committee on human rights on UK governments policy on use of drones for targeted killings (2015), available at: http://eprints.uwe.ac.uk/28332 (last visited 10 March 2019); N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010), 211.

43 B. Oxman, 'Jurisdiction of States', in R. Bernhardt & P. Macalister-Smith (eds), *Encyclopedia of Public International Law*, (1997), 55, 57.

44 Lubell, *supra* note 42, 211.

45 However, the judgment did recognize the chaotic circumstances of the period in question, when crime and violence were endemic. Within a 13 month period, there were over a thousand violent attacks against coalition forces, which included British soldiers and military police. *Al Skeini*, *supra* note 30, para 161. It can be inferred from the Court's

the Court articulated two additional situations of extraterritorial jurisdiction, which came under the heading of *State agent authority and control*. These exceptions to territorial jurisdiction are also known as *personal jurisdiction* because jurisdiction arises due to the acts of State agents and their impact upon individuals. Moreover, the Court clarified that when a State has jurisdiction over an individual on a personal basis, the State has an obligation to secure the rights and freedoms that are relevant to the individual's particular situation.[46] Therefore, the rights and obligations contained within the Convention can be *divided and tailored* to individual circumstances.[47]

In respect to personal jurisdiction, the Court acknowledged that "[…] whenever the State through its agents exercises control and authority over an individual, [...]", the State is exercising jurisdiction.[48] The Court referred to the cases of *Öcalan*[49], *Issa*[50], *Medvedyev*[51] and *Al-Saadoon and Mufdha*[52] to demonstrate when State agents exercise *authority and control* over individuals. All of the aforementioned cases involved the detention of individuals, confirming that individuals detained by State agents are brought within the jurisdiction of the State.

Furthermore, the Court accepted the exercise of extraterritorial jurisdiction by a Contracting State when, "[…] through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government".[53] It was on this basis that the Court found a jurisdictional link between the UK and the deceased in *Al Skeini*. The Court held that the UK, as an *occupying power*, assumed in Iraq the exercise of some of the *public powers* normally to be exercised by a Sovereign Government. In particular, the UK assumed the authority and responsibility for the maintenance of security in South-east Iraq.

assessment of the situation in South-east Iraq, that the UK did not exercise effective control of the area.

46 A. Cowan, 'A New Watershed? Re-evaluating Bankovic in Light of Al-Skeini', 1 *Cambridge Journal of International and Comparative Law* (2012), 1, 213, 219.

47 *Al Skeini*, *supra* note 30, para 137.

48 *Ibid*.

49 *Öcalan v. Turkey*, ECtHR Application No. 46221/99, Judgment of 12 May 2005.

50 *Issa and Others v. Turkey*, ECtHR Application No. 31821/96, Judgment of 16 November 2004.

51 *Medvedyev and Others v. France*, ECtHR Application No. 3394/03, Judgment of 29 March 2010.

52 *Al-Saadoon and Mufdhi v. The United Kingdom*, ECtHR Application No. 61498/08, Judgment of 2 March 2010.

53 *Al Skeini*, *supra* note 30, para 135.

In these exceptional circumstances, the Court considered that the UK, through soldiers engaged in security operations in Basrah, exercised *authority and control* over those killed in the course of such security operations, sufficient to establish a jurisdictional link between those killed and the UK.[54]

Although the Court categorized the *public powers* model of extraterritorial jurisdiction as a personal basis for jurisdiction, this is not how the Court actually applied the concept in *Al Skeini*. The Court held that UK soldiers had exerted *authority and control* by killing the deceased but only exceptionally because the killings occurring during the exercise of *public powers*. Consequently, as Milanovic alludes to, had the killings not occurred during the course of security operations, the personal model of jurisdiction would not have applied. [55]

It would be more accurate to consider the formulation of the *public powers* exception in *Al Skeini* as a "halfway house"[56] between the spatial and personal models of jurisdiction. For this model of jurisdiction to arise, elements of both the spatial and personal models of jurisdiction need to be present.

In *Al Skeini*, neither the assumption of governmental authority nor the killing by State agents were sufficient to bring those killed within the UK's jurisdiction on either a spatial or personal basis. However, the combination of the assumption of some governmental authority *and* the control exerted by British soldiers over the deceased *did* create a jurisdictional link.[57]

In summary, the Court acknowledged that a State exercises jurisdiction through spatial or personal control. Additionally, a jurisdictional link arises when a State assumes elements of governmental authority by exercising *public powers* and simultaneously exerts control over individuals. Due to the limited case law pertaining to the *public powers* exception, there remain questions surrounding its interaction with the spatial and personal jurisdictional concepts. For instance, as will be shown, the act of killing does not amount to the exercise of *authority and control* over individuals. Yet, *Al Skeini* demonstrated that during the exercise of *public powers*, killing *does* amount to *authority and control* over individuals. This indicates that *authority and control* either has an alternative meaning or a different threshold when connected to the utilization of *public*

54 *Al Skeini*, *supra* note 30, para 149.

55 M. Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg', 23 *The European Journal of International Law* (2012) 1, 121, 130.

56 Cowan, *supra* note 46, 224.

57 A. Sari, 'Untangling Extra-Territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands: Old Problem, New Solutions?', 53 *Military Law and the Law of War Review* (2014), 287, 293.

powers.[58] Generally, the meaning of *authority and control* in the *public powers* context will determine how narrow or wide this jurisdictional exception applies. Nonetheless, the ECtHR has established that the use of lethal force during the exercise of *public powers* brings those killed within the jurisdiction of the acting State, which is adequate for the scope of this analysis.

By maintaining a jurisdictional concept that is based on exceptional circumstances, rather than a *cause and effect* approach to jurisdiction, there will naturally be acts that impact upon individuals without bringing them within the jurisdiction of the acting State. Wilde has described such State acts as occurring in a legal *black hole*, in so far as the ECHR is concerned.[59] Some extraterritorial killings may occur in the aforementioned legal *black hole* because, controversially, the act of killing does not equate to the exercise of jurisdiction. In the UK, the High Court in *Al-Saadoon* deduced from *Al Skeini* that killing is a jurisdictional threshold because "[u]sing force to kill is indeed the ultimate exercise of physical power and control over another human being"[60]. This interpretation was reaffirmed in academic literature[61]and other UK cases[62] but was subsequently overruled by the Court of Appeal in *Al-Saadoon*. Summarizing whether killing amounted to *authority and control* over an individual, the Court of Appeal submitted that the Grand Chamber in *Al Skeini* required a "[…] greater degree of power and control than that represented by the use of lethal or potentially lethal force alone".[63]

58 There are also questions about the relationship between the 'public powers' model and the spatial concept of jurisdiction. For example, by having effective control of an area, the controlling State exercises governmental authority similar to the territorial State and is obligated to secure the entire range of rights contained in the Convention. Yet, when exercising 'public powers', the acting State also assumes governmental responsibilities but not to the extent when possessing territorial control. Consequently, the acting State is obliged to secure the rights of the Convention relevant to the individual situation. Perhaps, 'public powers' can be regarded as a diluted version of the spatial jurisdictional concept, were the scope of the acting States' obligations are commensurate with the level of governmental authority exercised.

59 Wilde, *supra* note 17, 804-805.

60 *Al-Saadoon & Others v Secretary of State for Defence* [2015] EWHC 715, para. 95.

61 M. Lippold, 'Between Humanization and Humanitarization? Detention in Armed Conflicts and European Convention on Human Rights', 76 *Heidelberg Journal of International Law* (2016), 53, 93-94.

62 *Sedar Mohammed v. Secretary of State for Defence / Yunus Rahmatullah & Iraqi Civilian Claimants v. Ministary of Defence and Foreign and Commonwealth Office* [2015] EWCA Civ 843, para. 95.

63 *Al-Saadoon and Ors v. Secretary of State for Defence / Rahmatullah & Anr v. Secretary of State of Defence & Anr*, [2016] EWCA Civ 811, para. 69.

Although it may be normatively appealing to equate the use lethal force with the exercise of jurisdiction, the Court of Appeal was correct in its interpretation of *Al Skeini*. If it was the intention of Strasbourg to equate killing with the exercise of jurisdiction, then the Court in *Al Skeini* could have simply found a jurisdictional link on this basis rather than resorting to the *public powers* model.[64] Therefore, for an extraterritorial killing to engage the Convention, the deceased must either be located in an area under the effective control of the State, killed during the exercise of *public powers* or the State has exerted an element of control, such as detention, over the individuals prior to the lethal force.[65] It will now be shown why there is a perception that targeted killing by drones would not amount to the exercise of jurisdiction and occur in a legal *black hole*.

D. The Perceived Inapplicability of the ECHR to Extraterritorial Drone Strikes

Contemporary armed drones enable a State to engage in targeted killing without territorial presence or detaining those targeted. This leads to questions about potential victims falling within the jurisdiction of the attacking State under Article 1 of the ECHR.[66] These questions are pertinent to the UK policy, as those targeted will not be in an area under the *effective control* of the UK. Rather, it is the location of terrorists in safe havens, areas that lack effective governmental authority, that necessitates the UK targeted killing policy. Moreover, it goes without saying that the UK would not conduct a drone strike against a detained individual. Thus, the circumstances of the UK targeted killing policy do not offer an obvious basis for extraterritorial jurisdiction and some prominent scholars have posited that killing with armed drones, absent territorial presence where the strike occurs, does not engage the Convention.

64 For an endorsement of the Court of Appeal's decision in *Al-Saadoon* see: H. Evans, 'Keeping it in Bounds: Why the UK Court of Appeal was correct in its cabining of the exceptional nature of extraterritorial jurisdiction in Al-Saadoon, available at: http://www.harvardilj.org/2018/01/keeping-it-in-bounds-why-the-u-k-court-of-appeal-was-correct-in-its-cabining-of-the-exceptional-nature-of-extraterritorial-jurisdiction-in-al-saadoon/ (last visited 12 March 2019).

65 Al-Saadoon & Rahmatullah, *supra* note 63, para. 69.

66 C. Heyns *et al*, 'The International Law Framework Regulating the Use of Armed Drones', 65 *International and Comparative Law Quarterly* (2016) 4, 791, 824.

Within legal literature, scholars have invoked the case of *Bankovic* to dismiss the relevance of the ECHR to targeted killing by drones.[67]

Bankovic

The case of *Bankovic* concerned a NATO airstrike on the 23rd April 1999, which hit one of the buildings of the *Radio Televizije Srbije* (RTS) in Belgrade. The NATO bombing of RTS caused the death of 16 persons and serious injuries to another 16.[68] Subsequently, claims were brought against the 17 members of NATO that were also parties to the Convention, alleging violations of Articles 2 (the right to life), 10 (freedom of expression) and 13 (right to an effective remedy).[69]

In considering the jurisdictional issue, the Court permitted one exception to the territorial principle of jurisdiction, a State having effective control of an area outside of its territory.[70] The Court found that the respondent States' control over airspace and the power to kill were insufficient to create a jurisdictional link.[71] Through aerial bombardment, the respondent States did not have *effective control* of the area where the airstrikes occurred and consequently, the case was inadmissible on jurisdictional grounds.

It is ironic that NATO's military action in Yugoslavia was predicated on the protection of human rights abroad, but the participant States maintained that they had no legal obligation to observe those rights themselves.[72] Yet, much of the *Bankovic* criticism focused on the Court's restriction of the Convention's extraterritorial applicability to narrow circumstances.[73] However, it was precisely the Court's intention to make the extraterritorial applicability of the Convention exceptional. The Court was concerned that finding the case admissible, on the basis that killing is a jurisdictional trigger, would "[...] open the floodgates and

67 F. Rosén, 'Extremely Stealthy and Incredible Close: Drones, Control and Legal Responsibility' 19 *Journal of Conflict and Security Law* (2014) 1, 113, 118.

68 *Bankovic*, *supra* note 18, para. 11.

69 Cowan, *supra* note 46, 214.

70 *Bankovic*, *supra* note 18, para. 80.

71 Milanovic, *supra* note 55, 123.

72 E. Roxstrom, M. Gibney & T. Einarsen, 'The NATO Bombing Case (Bankovic et al. v. Belgium et al) and the Limits of Western Human Rights Protection', 23 *Boston University International Law Journal* (2005) 55, 62-63.

73 For general criticism of the decision in *Bankovic* see R. Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', in F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004) 83; Milanovic, *supra* note 55.

involve it in assessing all uses of force by European States [...]".[74] The Court did not want to assume the competence to review all European overseas military action,[75] as doing so would increase the Court's heavy case-load and would require it to get involved in politically sensitive conflicts.[76] Influenced by policy considerations, the Court simply excluded *Bankovic* from its remit.

At the time, *Bankovic* was the leading authority on the extraterritorial applicability of the ECHR. This authority now resides with the judgment in *Al Skeini*, which overruled many of the principles articulated in *Bankovic*.[77] In mitigating the judgment of *Bankovic*, the Convention now applies to a broader range of extraterritorial situations. However, the Court still regards the extraterritorial applicability of the Convention as exceptional and that killing does not equate to the exercise of jurisdiction. Thus, the Court has *not* explicitly overruled the decision in *Bankovic*[78] and it appears unlikely that the Court would make a different jurisdictional assessment, if *Bankovic* were decided today.[79]

Scholars have reasoned that *Bankovic* remains good law[80]and according to the Court "[...] still perfectly correct in its result".[81] Therefore, it remains true that the act of firing missiles from an aircraft does not amount to the exercise of jurisdiction over those killed. Consequently, a *Bankovic*-like situation exists outside the scope of the Convention. On this basis, it is argued that drone strikes would equally be excluded from the purview of the ECHR.[82] With specific

74 Milanovic, *supra* note 55, 123.

75 *Ibid*.; Lawson, *supra* note 73, 109.

76 Lawson, *supra* note 73, 116.

77 Notably, the Court has backtracked on the suggestion in *Bankovic* that the rights of the Convention are indivisible and that either all of the rights contained within the Convention are applicable to a situation or none. The Court also confirmed that there is no geographical restriction to the potential reach of the Convention. The *Bankovic* judgment implied that the Convention can only apply within the '*espace juridique*' of the Contracting States. Furthermore, extraterritorial jurisdiction was conceived of in *Al Skeini* in spatial and personal terms, rather than solely spatially, as per '*Bankovic*'. For a more detailed comparison between the decisions in *Bankovic* and *Al Skeini* see: Cowan, *supra* note 46.

78 S. Miko, 'Al Skeini v United Kingdom and Extraterritorial Jurisdiction under the European Convention on Human Rights' 35 *Boston College International and Comparative Law Review* (2013) 3, 63, 76.

79 Milanovic, *supra* note 55, 132 "[A]l Skeini leaves unchanged the outcome of Bankovic".

80 Miko, 'Al Skeini v United Kingdom and Extraterritorial Jurisdiction under the European Convention on Human Rights', *supra* note 78, 77.

81 Milanovic, *supra* note 55, 130.

82 *Ibid*.; C. Ryngaert, 'Clarifying the Extraterritorial Application of the European Convention on Human Rights' 28 *Utrecht Journal of International and European Law*

reference to the targeted killing of Reyaad Khan, McCorquodale speculated that the UK's employment of an armed drone, absent territorial presence in Syria, makes finding the applicability of the Convention to the killing "unlikely".[83]

The continued relevance of *Bankovic* undeniably impedes the applicability of the Convention to killings arising from aerial bombardment. By comparing the circumstances of the UK policy to the situation in *Bankovic*, it is understandable that scholars have evaluated that drone utilized targeted killings would not engage the ECHR. Nonetheless, although there are similarities between the circumstances of *Bankovic* and the UK policy, treating both situations as a carbon copy of one another fails to appreciate the distinctive characteristics of drone operated targeted killing. By distinguishing the circumstances of the UK policy from those in *Bankovic*, it will be argued that the inadmissibility decision of *Bankovic* is not decisive in assessing whether victims of targeted killing would be within jurisdiction of the UK.

E. Distinguishing Drone Operated Targeted Killings From the Aerial Bombardment in *Bankovic*

It is posited that targeted killing operations are a distinctive form of State conduct with notable contrasts to the aerial bombardment in *Bankovic*. As previously defined, targeted killing is the intentional, premeditated and deliberate use of lethal force by States against selected individuals not in their custody. Therefore, when the UK conducts a targeted killing, the intention is to kill pre-identified targets. However, in *Bankovic*, the 16 deaths that occurred when NATO bombed the *Radio Televizije Serbije* buildings in Belgrade were incidental; those killed were not personally selected nor were their deaths the objective of the aerial bombardment.

An operation that seeks to kill specific individuals is undeniably more challenging than merely firing missiles from a plane. This is demonstrated by the process utilized by the US when conducting targeted killings. The US has followed a multi-staged process beginning with the gathering of intelligence,

(2012) 74, 57 - 60: "[A] *Bankovic*-like situation may still lead to a finding of inadmissibility on jurisdiction grounds. This may imply that victims of extraterritorial targeted killing. E.g., by unmanned drones, perpetrated by western powers in the wastelands of Yemen or Pakistan, do not fall within the acting States' ECHR jurisdiction".

83 R. McCorquodale, 'Human Rights and the Targeting by Drone' (2015), available at https://www.ejiltalk.org/human-rights-and-the-targeting-by-drone/ (last visited 12 March 2019).

followed by its analysis, the selection of a target, and the communication of those targets to operators who proceed to launch lethal strikes.[84] For targeted killing by drones, the firing of a missile is the final part of a protracted and multifaceted military mission against a specific individual. With respect to the killing of Reyaad Khan, the UK security agencies had acquired at least 25 intelligence reports on the terrorist threat posed by Khan. The first of the intelligence reports was produced in November 2014, nine months prior to the killing of Khan.[85] The important factor to acknowledge is that for targeted killing operations, there is a nexus between the State and the victim that exists prior to the killing. In contrast, the only link between the respondent States and the deceased in *Bankovic* was the killing itself, there was no connection prior to the killing.

An additional variance between *Bankovic* and the UK policy is the political context, in which force is utilized. In *Bankovic*, NATO conducted airstrikes *against* the Federal Republic of Yugoslavia, following the failed negotiations for a political solution to the ongoing crisis in Kosovo.[86] In contrast, the UK targeted killing policy does not seek to use force against another State but rather anticipates targeting specific terrorists associated with non-State groups.

Rosen postulates that the acts that produced *Bankovic* are simply hard to compare to situations where drones have been utilized for "[…]enduring the close-up monitoring of persons [...]".[87] Consequently, it seems rather doubtful that the judgment in *Bankovic* provides the "yardstick"[88] for a jurisdictional assessment of drone operated targeted killing. It is submitted that the viewpoint postulated by Rosen is convincing because the force envisaged by the UK policy is distinguishable from *Bankovic* in two significant ways. Firstly, targeted killing operations require comprehensive intelligence and substantial surveillance to identify and track a target prior to killing. The drawn-out nature of such

84 J. Gibson, 'The US's Covert Drone War and the Search for Answers: Turning to European Courts for Accountability' in European Centre for Constitutional and Human Rights (ed), *Litigating Drone Strikes: Challenging the Global Network of Remote Killing* (2017), 102, 104 - 105: For further information on the US process of drone utilized targeted killing see, J. Levs, 'CNN Explains: U.S. drones (2013), available at https://edition.cnn.com/2013/02/07/politics/drones-cnn-explains/ (last visited 13 March 2019); J. Scahill, 'The Drone Papers: Find, Fix, Finish' (2015) available at https://theintercept.com/drone-papers/find-fix-finish/ (last visited 13 March 2019); A. Callam, 'Drones Wars: Armed Unmanned Aerial Vehicles' 18 *International Affairs Review* (2010) 3.

85 Intelligence and Security Committee of Parliament, *UK Lethal Drone Strikes in Syria*, (2016-2017, HC 1152), 8 para. 20.

86 *Bankovic*, *supra* note 18, paras 6 - 8.

87 F. Rosén, *supra* note 67, 118.

88 *Ibid*.

operations is distinguishable from *Bankovic*, when the only connection between the States and the applicants was the *instantaneous* act of killing.[89] Secondly, the UK targeted killing policy is an exceptional form of counterterrorism that will be used to kill members of non-State groups. Therefore, the political context of the UK policy differs to that of *Bankovic*, when force was used against another State.

Evaluating the applicability of the Convention to an extraterritorial act requires the consideration of *all* of the relevant aspects of the act in question. The invocation of *Bankovic* to dismiss the applicability of the Convention to the UK targeted killing policy disregards the distinctiveness of targeted killing as a form of counterterrorism. Distinguishing targeted killing operations from *Bankovic* is not itself decisive for determining whether targeted killing falls within one of the exceptions for extraterritorial jurisdiction. Yet, significantly, neither is the judgment in *Bankovic.* For a comprehensive analysis of the Convention's applicability to the UK targeted killing policy, it is necessary to incorporate the policy's distinguishable characteristics into the jurisdictional evaluation. Notably, it will be evaluated whether the UK, by intervening in a State that is either *unable or unwilling* to prevent a threat to the UK, is assuming responsibility for counterterrorism and exercising *public powers* that would normally be reserved for the territorial State. Additionally, it will be assessed whether the Court could construe targeted killing operations, in particular the loitering over a target prior to a missile strike, as amounting to the exertion of personal *control* over the victim.

F. Re-evaluating the Applicability of the ECHR to the UK Targeted Killing Policy

I. Targeted Killing as a Form of Counterterrorism: The Exercise of *Public Powers*?

Evaluating whether the UK targeted killing policy equates to the exercise of *public powers* is complicated by the ECtHR's vague framing of what this model of jurisdiction requires.[90] Nonetheless, the Court's analysis in *Al Skeini* and *Jaloud*, when jurisdiction under the *public powers* model arose, provides some direction.

89 *Medvedyev*, *supra* note 51, para. 64.
90 Milanovic, *supra* note 55, 131.

In *Al Skeini*, the Court held that the UK, as an *occupying power* in Iraq, exercised elements of governmental authority, established in very formal terms, by reference to Security Council resolutions and regulations of the Coalition Provisional Authority in Iraq.[91] The assumption of authority and responsibility for the maintenance of security in South-east Iraq resulted in the UK conducting a variety of security operations, such as village patrols,[92] parameter patrols of an air base[93] and house raids.[94] The deaths that occurred during the course of or contiguous to the security operations carried out by British forces, came within the UK's jurisdiction because the operations equated to some or all of the *public powers* normally to be exercised by a Sovereign Government.[95]

Similarly, in *Jaloud* the Court held that the death of Azhar Sabah Jaloud was within the jurisdiction of the Netherlands.[96] Jaloud was killed when a vehicle he was travelling in was fired upon at a checkpoint under the command and direct supervision of a Netherlands Royal Army officer. The checkpoint had been set up in the execution of SFIR's[97] mission, under United Nations Security Council Resolution 1483, to restore conditions of stability and security conducive to the creation of an effective administration in Iraq.[98] Consequently, the Court considered that the manning of a checkpoint equated to Netherlands assuming the exercise of some elements of governmental authority in Iraq.[99] As a result, the Court was satisfied that the Netherlands exercised its jurisdiction within the limits of its SFIR mission and for the purpose of asserting *authority and control* over persons passing through the checkpoint. [100]

91 *Al Skeini*, *supra* note 30, paras 143-148.
92 *Ibid*., para. 36.
93 *Ibid*., para. 49.
94 *Ibid*., para. 40.
95 *Ibid*., para. 150.
96 *Jaloud v. Netherlands*, *supra* note 33, para. 152.
97 Stabilization Force in Iraq (SFIR).
98 *Jaloud v. Netherlands*, *supra* note 33, para. 152.
99 Sari, 'Untangling Extra-Territorial Jurisdiction from International Responsibility' in Jaloud v. Netherlands: Old Problem, New Solutions? *supra* note 57, 293.
100 In *Jaloud*, the Court did not explicitly State that the Netherlands exercised 'public powers'. However, the Court responded extensively (paras 140-153) to the Netherland's argument that they had not assumed 'public powers' as these 'powers' were in the hands of the US and the UK, whose status of 'occupying powers' distinguished them from other States working under the Coalition Provisional Authority (paras 113-114). By addressing this specific argument in detail, the judgment strongly implies that jurisdiction was considered and deemed to exist on the basis of the Netherlands exercising 'public powers'. Moreover, the Court did not address the Netherland's argument that the lack of detention precluded a jurisdictional link on a purely personal basis (para 118). It can be

The aforementioned cases demonstrate that the *public powers* model of jurisdiction requires the assumption of tasks that would normally be the prerogative of the territorial State. During the utilization of *public powers*, a jurisdictional link arises when the State exerts *authority and control* over individuals. In this context, the Court regards killing as the exertion of *authority and control*. It is submitted that the force envisaged by the UK policy could amount to the exercise of *public powers* because the prevention of terrorism is normally a task reserved for the territorial State and the UK, through its policy and legal justifications for targeted killing, implies the assumption of Governmental authority.

To support the suggestion that targeted killing, could amount to the exercise of *public powers*, it is necessary to acknowledge that, in addition to a States' negative obligation to "[…]refrain from […] acquiescing in organized activities within its territory directed toward the commission of [terrorist] acts [...]",[101] States also have a positive obligation to act to prevent non-State actors from carrying out terrorism from within their territories.[102] Therefore, when terrorists are operating within a State's territory, the employment of counterterrorism activities are not only *tasks* normally conducted by the territorial State but tasks that the State are legally obliged to undertake. As a result, the UK policy could be interpreted, as equating to conduct that would normally be the prerogative

inferred from this that the Court did not consider the jurisdictional issue on this basis, otherwise it would have been incumbent upon the Court to explain when a State exercises 'authority and control' over individuals outside detention scenarios. Additionally, the UK Courts have also read the judgment in *Jaloud* as applying the 'public powers' model of extraterritorial jurisdiction. See for example *Al-Saadoon*, *supra* note 60, para. 79; *Al-Saadoon & Rahmatullah*, *supra* note 63, para. 65.

101 Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), A/RES/25/2625, 24 October 1970, Annex; The International Court of Justice has described the provisions of the Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations as principles of customary international law, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgement, ICJ Reports 2005, 168, 226-227, para 162.

102 Following the terrorist attacks of 9/11, the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1373 (2001) (binding upon all UN members) which decided that all States shall 'prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens'; For the obligations of States to prevent international terrorism see K. Trapp, 'State Responsibility for International Terrorism: Problems and Prospects' (2011).

of the territorial State. This assessment does not imply that States have an obligation to conduct targeted killings but rather highlights that the UK policy is an exceptional form of counterterrorism, and the prevention of terrorism is a task normally reserved for the State where the threat originates.

Moreover, by highlighting the legal and policy justifications that the UK put forward for targeted killing, it can be inferred that the UK assumes governmental authority when conducting targeted killing operations. Firstly, the UK considers that that killing of specific terrorists is a necessary and justified action to thwart an imminent terrorist attack. However, the UK only seeks to utilize targeted killing as a last resort, when a threat emanates from a State that is either *unwilling or unable* to deter it. Therefore, the UK respects that the prevention of international terrorism is primarily the responsibility of the State where the threat derives. Nonetheless, when a threat to the UK exists and a State shirks their responsibility or lacks the political authority to effectively neutralize the terrorist threat, the UK is prepared to act to prevent the danger. In such circumstances, it is posited that the UK is stepping in and voluntarily assuming the responsibility of the territorial State to combat terrorism.

Further evidence to support this argument is found in the UK's justification for unilateral targeted killing operations. The reference within the UK policy to a State being *unwilling or unable* to deter terrorism against the UK is not only an attempt to emphasize the necessity of their policy but also a legal justification for extraterritorial forcible action.[103] The *unwilling or unable* doctrine is an expansive interpretation of self-defence under Article 51 of the UN Charter.[104] Proponents of the doctrine argue that when a terrorist organization operates within a State that cannot or will not act to prevent the group from attacking another State, the injured State may act in self-defence against the terrorist organization, with or without the consent of the host State.[105] It is argued that force used in the

[103] JCHR Report, *supra* note 19, 43 3.23.

[104] Although the legality of forced used in such circumstances remains unsettled within international law, it is not the aim of the current analysis to contribute to this discussion. For a detailed analysis of the 'Unable or Unwilling' doctrine, See P. Starski, 'Right to Self-Defense, Attribution and the Non State Actor-Birth of the "Unable or Unwilling" Standard?' 75 *Heidelberg Journal of International Law* (2015) 3, 455; O. Corten, 'The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?' 29 *Leiden Journal of International Law* (2016) 3, 777; A. Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense', 52 *Virginia Journal of International Law* (2012) 3, 483.

[105] M. D. Banks, 'Addressing State (Ir-)Responsibility: The Use of Military Force as Self-Defence in International Counter-Terrorism Operations', 200 *Military Law Review* (2009), 54, 57.

aforementioned circumstances equates to extraterritorial law enforcement[106] because the State using force in self-defence is fulfilling the legal obligation of the territorial State to fight terrorism.[107]

The UK Government justified the strike against Reyaad Khan on the basis that the Assad regime was unwilling and/or unable to take necessary action to prevent attacks orchestrated by ISIL from within Syria.[108] Therefore, the targeted killing amounted to the UK assuming responsibility for the prevention of terrorism, which is, according to international law, the prerogative of the territorial State, in this case Syria. Therefore, for targeted killings that replicate the circumstances of the Reyaad Khan strike, it is possible that the use of force would amount to the exercise of *public powers* and would bring those lethally targeted within the jurisdiction of the UK.

Yet, in *Al Skeini*, the Court stated that jurisdiction arises where "[…] through the consent, invitation or acquiescence of the Government of that territory, [a State] exercises all or some of the *public powers* normally to be exercised by that Government".[109] Therefore, it remains uncertain whether the absence of consent from the territorial State for action inside its borders, such as when the UK killed Reyaad Khan in Syria, could preclude jurisdiction under the *public powers* model. It is submitted that the absence of consent should not prohibit the *public powers* model of jurisdiction from arising. Consent, or the lack thereof, is a relevant consideration in assessing whether a State acting extraterritorially has a legal basis for its incursion onto the territory of another State. The existence or absence of consent is pertinent to the inter-State rules on the violation of sovereignty, but human rights law is concerned with the regulation of State conduct *vis a vis* individuals. It would be illogical if the applicability of human rights law were reliant on the State's legal basis for the extraterritorial act in question. It would be even more perverse if a Contracting State were obliged to respects its obligations under the Convention when acting lawfully on a foreign territory, but the Convention would be inapplicable if the State was acting unlawfully.

The Court has appeared to follow this line of reasoning in its jurisprudence relating to the *effective control of an area* model of jurisdiction. In assessing

106 Y. Dinstein, 'War, Aggression and Self-Defence' 5th ed. (2011) 268.

107 Starski, 'Right to Self-Defense, Attribution and the Non-State Actor-Birth of the "Unable or Unwilling" Standard?', *supra* note 104, 495.

108 Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015-2016, Fourth Report of Session 2016-17*, HL Paper 49, HC 747, 14 (Appendix: Government).

109 *Al Skeini*, *supra* note 30, para 135.

whether a State has exercised spatial control, the legal basis for the State's extraterritorial act has not been determinative. Rather, the Court has evaluated the existence of extraterritorial jurisdiction based on the factual circumstances of the case.[110] It would therefore be inconsistent for the *public powers* model of jurisdiction to be precluded on the basis of the illegality of the extraterritorial action. In fact, such a finding would even be a divergence from the Court's own case law relating specifically the *public powers* model. In *Al Skeini*, the UK did not assume *public powers* in Iraq with the *consent, invitation or acquiescence* of the Iraqi Government because there was no government at the material time.[111] Therefore, it is more likely that jurisdiction *vis a vis public powers* is determined by a factual assessment of whether a State is exercising "all or some of the public powers normally exercised by that Government".[112]

There is another issue that may preclude the applicability of the *public powers* exception to the UK targeted killing policy. So far, the ECtHR has recognized a jurisdictional link when *public powers* have been bestowed upon the acting State, either by the law of belligerent occupation[113] or a UN Security Council Resolution.[114] This raises the possibility that *public powers* are actual legal powers. If this is correct, the type of unilateral force envisaged by the UK policy could not equate to the exercise of *public powers* as there is no legal basis for the powers that the UK is purporting to exercise. Nonetheless, the UK Courts have read *public powers* as not requiring a legal basis. In *Al-Saadoon*, the High Court considered the test of whether *public powers* have been exercised as factual and not determined by their legal basis or legitimacy.[115] The factual test was actually applied in the case to conclude that British soldiers were exercising *public powers* by controlling the supply of rationed fuel to civilians, which would normally be the prerogative of the Iraqi police force,[116] even though the UK was

110 *Ibid.*, para. 139 "It is a question of fact whether a Contracting State exercises effective control of an area outside its own territory".
111 I. Park, 'The Right to Life in Armed Conflict' (2018), 79.
112 *Ibid.*
113 *Al Skeini*, *supra* note 30, para. 142.
114 *Jaloud*, *supra* note 33, para. 152.
115 *Al-Saadoon*, *supra* note 60, para. 74.
116 *Ibid.*, para. 83.

not an *occupying power* at the time[117] and acted without the consent of the Iraqi Government or authorization from the UN.[118]

This interpretation of *public powers*, according to the Court, stems from the judgment in *Jaloud*, when the Grand Chamber held that the status of 'occupying power' was not determinative in assessing whether the Netherlands exercised *public powers*.[119] Rather, of importance to the Court "[…]was the practical situation on the ground in terms of the powers which the Netherlands was actually purporting to exercise and not the legality or legal basis of its operations".[120] Therefore, the legal basis for a State's assumption of governmental tasks does not appear decisive but could influence the factual assessment of whether *public powers* were utilized.

The precise scope of the *public powers* exception is unknown due to the limited direct case law on the issue[121] However, it appears that when, following the assumption of governmental authority, a State kills during the performance of tasks normally reserved for the territorial State, the *public powers* model of jurisdiction arises. Moreover, the case law of the ECtHR and UK Courts indicates that the absence of a legal basis for the performance of governmental tasks does not preclude this model of jurisdiction. Thus, it is posited that the Court could interpret the UK targeted killing policy as amounting to the exercise of *public powers* because the UK would be assuming the responsibility for counterterrorism, which is normally the prerogative of the State, where the threat is located. Consequently, the victims of targeted killing would be within the jurisdiction of the UK.

117 Within the litigation, there was one case, the death of Atheer Kareem Khalaf, which occurred during the 'invasion period' of the Iraq war (29 April, 2003), prior to the formal declaration of the completion of major combat operations (May 1, 2003). The UK argued that their soldiers did not exercise 'public powers' during the 'invasion period' as they were fighting against Iraqi forces. Yet, the Court accepted that whether 'public powers' were exercised is not conclusively answered by identifying the date combat operations were formally declared complete. The Court acknowledged that actual war fighting had ceased some time prior to the UK's formal declaration and that the UK was effectively acting as a police force in Basra. See, *Al-Saadoon*, *supra* note 60, paras 77-83.

118 The High Court's interpretation of the 'public powers' model was endorsed by the Court of Appeal, which held that whether 'public powers' were exercised can only be answered by assessing the function actually performed in any given case. See, *Al-Saadoon & Rahmatullah*, *supra* note 63, para. 54.

119 *Jaloud*, *supra* note 33, para. 142

120 *Al-Saadoon*, *supra* note 60, para. 75.

121 Park, Right to Life in Armed Conflict, *supra* note 111, 84.

II. Personal Control and Targeted Killing

The jurisprudence of the ECtHR demonstrates clearly that a State brings an individual within their jurisdiction through detention.[122] However, detention is not a prerequisite for this subcategory of extraterritorial jurisdiction. For example, in *Isaak and others v. Turkey*,[123] the Court deemed the complaint admissible by the family of an individual beaten to death in a UN buffer zone in Northern Cyprus. Despite the absence of detention, the Court held that the killing at the hands of Turkish Cypriot police amounted to the deceased being under the authority and/or effective control of the respondent State through its agents.[124]

Furthermore, the UK Government itself acknowledged in *Al Saadoon* that an individual did not need to be formally detained in order to be within the State's jurisdiction, and "[…]accepts that there may be more difficult cases which do not strictly involve detention but where, nevertheless, the situation is so closely linked to the exercise of authority and control of the State as to bring it within its jurisdiction for this purpose".[125]

Drone operated targeted killings can certainly be characterized as a so-called more difficult case because those targeted are not detained by or in close proximity to agents of the State. Yet, it can be argued that such situations are closely linked to the exercise of authority and control of the State because targeted killing operations utilize extensive surveillance on individuals, for months if necessary[126] and drones can loiter for up to 14 hours,[127] stalking their target prior to the launch of a missile.

It is submitted, that when a drone pilot verifies the identity of a target and loiters over them prior to firing a missile, control is being exerted over the target.

122 With reference to personal jurisdiction, the Court stated that "this principle has applied where an individual is taken into the custody of State agents abroad", *Al Skeini*, *supra* note 30, para. 136.

123 *Isaak and others v. Turkey*, ECtHR App. No. 44587/98, Judgement 24 September 2008, para. 5.

124 *Isaak and others v. Turkey*, ECtHR App. No. 44587/98, Admissibility Decision 28 September 2006, 21, 2 (b)(ii).

125 *Al-Saadoon & Rahmatullah*, *supra* note 63, para. 71.

126 R. Wenzl, 'The Kill Chain: Inside the Unit that Tracks Targets for US Drone Wars', The Guardian (23 January 2018), available at https://www.theguardian.com/world/2018/jan/23/the-kill-chain-inside-the-unit-that-tracks-targets-for-us-drone-wars (last visited 13 March 2019).

127 M. Horowitz, S. Kreps & M Fuhrmann, 'Separating Fact From Fiction in the Debate Over Drone Proliferation' 41 *International Security* (2016) 2, 7, 21.

This is due to the drone pilot, figuratively speaking, having the individual's life within their hands when fixating the aim of a missile upon them. Lubell and Murray propose that within human rights treaties, extraterritorial jurisdiction should be established in relation to the right to life on the basis of targeting. It follows that, whenever a State agent places an individual *within their crosshairs*, they exercise direct control over an individual's right to life.[128]

This submission finds support in the Inter-American Commission case of *Alejandre*,[129] when a Cuban military aircraft shot down two private US registered aircrafts in international airspace. Although the act took place outside Cuban territory, the Commission held that the act amounted to exerting *authority and control* over those killed.[130] Additionally, in the case of *Pad*[131], the ECtHR held that victims of fire discharged from Turkish helicopters in Northern Iraq would have fallen within Turkey's jurisdiction, if the case would not have otherwise been inadmissible due to the applicants' failure to exhaust domestic remedies.[132]

It is proposed that when a drone operator places a target *within their crosshairs* with the intent to kill, they are exerting *authority and control* and the subsequent killing will be within the jurisdiction of the acting State. Finding a jurisdictional link on this basis would also ensure that intentional State killings that do not involve detention, such as sniper fire, are not excluded from the reach of the Convention. However, such an approach would not cover the entire range of extraterritorial State killing, with collateral deaths such as in *Bankovic* remaining outside the purview of the Court. Therefore, the Court would be able to continue the expansion of the Convention to a broader range of extraterritorial acts without needing to overrule *Bankovic*.

128 N. Lubell & D. Murray, 'Response to Call for Submissions Regarding Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights – Right to Life' (2017) para. 7, available at http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx (last visited 13 March 2019).

129 *Alejandre Jr and others v Republica de Cuba*, IACHR, Case 11.589, Report No. 86/99, 29 September 1999.

130 *Ibid.*, paras 23-25.

131 *Pad and others v. Turkey*, ECtHR, Admissibility Decision, App. No.60167/00, Judgement of 28 June 2007.

132 *Ibid.*, paras 54-55.

G. Concluding Remarks

Since 9/11, greater critical attention has centered on the wide range of extraterritorial actions taken by States to combat terrorism.[133] The UK's adoption of a targeted killing policy represents a groundbreaking form of European State conduct that introduces a new context for discussions on the extraterritorial applicability of the ECHR. Scholars have posited, based on the admissibility decision in *Bankovic* that the scope of the Convention does not extend to killings by armed drones due to the absence of a jurisdictional link. Similarities exist between the situation in *Bankovic* and the circumstances of the UK targeted killing policy. However, there are also significant differences that make the invocation of *Bankovic*, as precluding the applicability of the ECHR, unconvincing. Moreover, recognizing the previously overlooked distinctiveness of targeted killing operations and the context of the UK policy necessitates a jurisdictional re-evaluation.

It is posited that as a form of extraterritorial counterterrorism, the UK policy could be perceived as the assumption of *public powers* of the State where the drone strike occurs. Moreover, the capability of armed drones to loiter over a target prior to a strike could be interpreted as State agents having direct control over the targets' right to life, bringing the individual within the jurisdiction of the attacking State. The aforementioned arguments would enable the Court to continue the trend of expanding the reach of the Convention to an ever-growing range of extraterritorial circumstances, without opening the *floodgates* by equating killing as the exercise of jurisdiction.

The Court's willingness to expand the extraterritorial reach of the Convention is a positive development. Furthermore, the potential applicability of the Convention to targeted killing by drones would be favorable, ensuring that European States are held legally accountable for such operations. However, despite some progressive post-*Bankovic* developments in the Court's jurisprudence, the concept of extraterritorial jurisdiction is flawed, which is clearly evident in the context of extraterritorial State killing. For example, it is unjustifiable that an individual is within the jurisdiction of the State, if they are detained prior to being killed but there may not be a jurisdictional link if State agents simply shoot dead an individual from 20 meters away. The author acknowledges that the arguments articulated within this article would add further arbitrariness to the Convention's extraterritorial applicability. It seems unsustainable in the long term, and rightly so, for the Court to preserve an approach that would find a

133 Wilde, *supra* note 17, 740.

jurisdictional link for targeted killing operations whilst excluding generic aerial bombardments, as per *Bankovic*. Yet, in the meantime, the Court remains loyal to the principle that extraterritorial jurisdiction is exceptional and is reluctant to overrule the decision in *Bankovic*. Therefore, for the applicability of the Convention to State killings, it is necessary to show that a killing is distinctive and, with respect to killings conducted aerially, distinguishable from *Bankovic*.

This article has attempted to convey that the force envisaged by the UK policy is distinguishable from *Bankovic*, the circumstances of targeted killings are distinctive, and that such killings could be interpreted as the exercise of extraterritorial jurisdiction. It is ultimately for the Court to decide whether the Conventional is applicable to drone operated targeted killing. However, the arguments contained within this article provide the Court with a means of avoiding the perceived legal *black hole*.

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Advancing the Rule of Law Through Executive Measures: The Case of MINUSCA*

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Abstract

The United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) has been mandated to implement "urgent temporary measures" in the form of arrests and detentions of individuals. This rather innovative mandate brings about several legal and conceptual consequences that the article addresses, focusing on the compatibility of these measures with UN peacekeeping norms and principles and with past UN practice. In addition, the measures are said to contribute to law and order, public safety, the fight against impunity, and to the rule of law. This sheds light on the UN's interesting conception of the rule of law in the Central African Republic and in conflict and post-conflict settings in general.

A. Introduction

The United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (hereafter MINUSCA, or "the mission") is the most recent peacekeeping mission[1] created by the Security Council of the United Nations (UN),[2] on the basis of resolution 2149, which was adopted on 10 April 2014.[3] It was established amid fears that ongoing "widespread and systematic targeting of civilians based on their religion or ethnicity" in the Central African Republic (CAR) could amount to pre-genocide acts[4], hence calling for a strong response from the international community, following months (and, before that, years) of political crisis escalating into an armed conflict. In December 2012, the armed rebel group Séléka resumed its attacks against the government, rapidly taking control of several towns and of the capital Bangui in March 2013, when one of the heads of Séléka, Michel Djotodia, ousted the then President François

1 *The United Nations Peacekeeping Operations – Principles and Guidelines* ("Capstone doctrine") states that "Peacekeeping is a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers. Over the years, peacekeeping has evolved from a primarily military model of observing cease-fires and the separation of forces after inter-state wars, to incorporate a complex model of many elements – military, police and civilian – working together to help lay the foundations for sustainable peace", United Nations, Department of Peacekeeping Operations and Department of Field Support, *United Nations Peacekeeping Operations – Principles and Guidelines*, 2008, 18 [UN Peacekeeping Guidelines]. Following UN terminology, the term "peacekeeping" will be used in the present article in the same large sense, i.e. including "traditional" peacekeeping missions as well as "robust", and/or multidimensional missions. It does not however cover peace enforcement which "involves the application, with the authorization of the Security Council, of a range of coercive measures, including the use of military force" without consent of the State, *ibid*. The terms "mission" and "operation" will be used as synonyms.

2 The United Nations Mission for Justice Support in Haiti (MINUJUSTH) has been created in 2017 by resolution 2350, however, it can be regarded as an extension of the United Nations Stabilization Mission in Haiti (MINUSTAH) which it replaces. See SC Res. 2350, UN Doc S/RES/2350 (2017), 13 April 2017.

3 SC Res. 2149, UN Doc S/RES/2149 (2014), 10 April 2014.

4 *Statement of the Under Secretary-General on the Prevention of Genocide during the meeting of the Security Council in Arria format on Inter-communities Dialogue and prevention of crimes in Central African Republic*, 14 March 2014, available at http://www.un.org/en/genocideprevention/documents/our-work/Doc.6_2014-03-12%20Statement%20of%20USG%20Adama%20Dieng%20to%20the%20Security%20%20Council.%20FINAL.pdf (last visited 10 January 2019); BBC News, 'UN warning over Central African Republic genocide risk', 4 November 2013, available at http://www.bbc.co.uk/news/world-africa-24800682 (last visited 10 January 2019).

Bozizé and declared himself President.[5] Groups of militias called "anti-balaka" opposed the Séléka, resulting in a civil war.[6] Prior to deploying MINUSCA in April 2014, the Security Council had authorized the deployment of the African-led International Support Mission to the Central African Republic (MISCA), an African Union peacekeeping mission with French military support (Operation Sangaris), a few months earlier.[7] The United Nations had also maintained a presence in the country through the United Nations Integrated Peacebuilding Office in the Central African Republic (BINUCA),[8] a field office of the Department of Political Affairs of the Secretariat with a peacebuilding[9] mandate.

5 *UN News Centre*, Le Secrétaire général préoccupé par la flambée de violences interconfessionnelles en RCA, available at https://www.un.org/apps/newsFr/storyF.asp?NewsID=31634&Kw1=amos&Kw2=&Kw3 (last visited 10 January 2019).

6 For more in-depth accounts of the conflict in the Central African Republic, see A. Arieff, 'Crisis in the Central African Republic', 7 Current Politics and Economics of Africa (2014), 27; M. Welz, 'Briefing: Crisis in the Central African Republic and the International Response', 113 African Affairs (2014) 453, 601; T. Lesueur, 'République centrafricaine : autopsie d'une crise méconnue', Politique étrangère (2014), 163; R. Marchal, 'Premières leçons d'une « drôle » de transition en République centrafricaine', Politique africaine (2015), 123.

7 SC Res. 2127, UN Doc S/RES/2127 (2013), 5 December 2013. MISCA actually took over the Mission for the consolidation of peace in Central African Republic (MICOPAX) led by the Economic Community of Central African States (ECCAS) and supported by the European Union and France, created on 12 July 2008. MICOPAX was itself preceded by the Multinational Force in Central African Republic also set up by ECCAS in 2002 with support from the European Union and Germany. Before that, the UN had deployed another peacekeeping mission, the United Nations Mission in Central African Republic (MINURCA) from 1998 to 2000 (see SC Res. 1159, UN Doc S/RES/1159 (1998), 27 March 1998).

8 Declaration of the President of the Security Council, UN Doc S/PRST/2009/5 (2009), 7 April 2009, stating that the BINUCA should replace the United Nations Peace-Building Support Office in the Central African Republic (BONUCA) created in 2000 by the declaration of the President of the Security Council, UN Doc S/PRST/2000/5 (2000), 10 February 2000.

9 The UN Secretariat defines peacebuilding as "a range of measures targeted to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundation for sustainable peace and development. Peacebuilding is a complex, long-term process of creating the necessary conditions for sustainable peace. It works by addressing the deep-rooted, structural causes of violent conflict in a comprehensive manner. Peacebuilding measures address core issues that affect the functioning of society and the State, and seek to enhance the capacity of the State to effectively and legitimately carry out its core functions", *UN Peacekeeping Guidelines* , *supra* note 1, 18. Key peacebuilding activities include: "a) Restoring the State's ability to provide security and maintain public order; b) Strengthening the rule

MINUSCA is a complex multidimensional[10] and "robust" mission, characterized by ambitious peacekeeping and peacebuilding tasks and supported by the authorization to "use all necessary means" to implement them.[11] The first mandate of MINUSCA included the protection of civilians, support to the transition process and the extension of State authority, the facilitation of the delivery of humanitarian assistance, the promotion and protection of human rights, support to justice and the rule of law, and disarmament, demobilization, reintegration, and repatriation activities.[12] The difficulties faced by MINUSCA in carrying out all of its duties, particularly the protection of civilians[13] in a highly volatile environment, led the Security Council to "prioritize" MINUSCA's mandate in favour of security and protection tasks, so that, according to the mandate's most recent version, MINUSCA shall in the first place ensure the protection of civilians and of the United Nations, provide good offices and support to the peace process, and facilitate the creation of a secure environment for the delivery of humanitarian assistance.[14] If its capacities allow it to, MINUSCA is also "authoriz[ed] to pursue the following tasks: Support for the extension of State

of law and respect for human rights; c) Supporting the emergence of legitimate political institutions and participatory processes; d) Promoting social and economic recovery and development", *ibid*., 25.

10 Multidimensional missions are peacekeeping missions which also "seek to undertake peacebuilding tasks and address root causes of conflict", SC Res. 2086, UN Doc S/RES/2086 (2013), 21 January 2013, preamble. "These operations are typically deployed in the dangerous aftermath of a violent internal conflict and may employ a mix of military, police and civilian capabilities to support the implementation of a comprehensive peace agreement". Their "core functions (…) are to a) Create a secure and stable environment while strengthening the State's ability to provide security (…) b) Facilitate the political process by promoting dialogue and reconciliation and supporting the establishment of legitimate and effective institutions of governance" as well as coordination, *UN Peacekeeping Guidelines*, *supra* note 1, 22.

11 Peacekeeping missions authorized to "use all necessary means" to implement their mandate are said to be "robust", *UN Peacekeeping Guidelines*, *supra* note 1, 19. SC Res. 2149 *supra*, note 3 is also based on the Chapter VII of the United Nations Charter, however, it is generally agreed that reference to the Chapter VII in the resolutions creating the missions does not carry as much legal consequences as giving peacekeeping missions the possibility to "use all necessary means". See A. Novosseloff , 'Chapitre VII et maintien de la paix : une ambiguïté à déconstruire', *Bulletin du maintien de la paix* (2010) n°100.

12 SC Res. 2149, *supra* note 3, para. 30.

13 *Human Rights Watch*, 'Central African Republic – Civilians in Danger', available at https://www.hrw.org/news/2014/09/15/central-african-republic-civilians-danger (last visited 10 December 2018).

14 SC Res. 2387, UN Doc S/RES/2387 (2017), 15 November 2017, para. 42.

authority, the deployment of security forces, and the preservation of territorial integrity", "Security Sector Reform (SSR)", "Disarmament, Demobilization, Reintegration (DDR) and Repatriation (DDRR)", "Promotion and protection of human rights", "Support for national and international justice, the fight against impunity, and the rule of law", "Illicit exploitation and trafficking of natural resources".[15] However, through this prioritization process, MINUSCA's mandate actually grew even broader. This broader mandate may be interpreted as a way to offer MINUSCA more flexibility in carrying out its activities, in the sense that MINUSCA can coordinate with other international actors in order to delegate or jointly implement the tasks that are of less priority, yet still having the possibility to intervene in these sectors that remain crucial in a peacekeeping enterprise[16].

MINUSCA thus has a large and robust mandate, but at first sight no different from other robust and multidimensional peacekeeping missions recently,[17] or less recently,[18] set up by the Council. However, MINUSCA's mandates do contain a distinctive element that makes them worth the present argument; that is, they constitute a qualitative shift in peacekeeping practice.

Already in the first mandate, the Security Council allowed MINUSCA to implement unspecified "urgent temporary measures",[19] presenting them as a possibility rather than a request by using the word "may".[20] These measures came to be specified in later mandates as the possibility to "arrest and detain" and were to be "urgently and actively adopt[ed]".[21] In all but the first mandate, two different paragraphs authorize MINUSCA to apprehend, arrest or detain individuals, under slightly different circumstances, so that a brief description of these provisions is necessary before moving on to their analysis.

15 *Ibid*., para. 43.

16 Interview conducted by the author with UN DPKO staff, 11 November 2017.

17 E.g. the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) (SC Res. 2100, UN Doc S/RES/2100 (2013), 25 April 2013) or the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) (SC Res. 1925, UN Doc S/RES/1925 (2010), 28 May 2010 and SC Res. 2098, UN Doc S/RES/2098 (2013), 28 March 2013).

18 The United Nations Mission in South Sudan, the African Union-United Nations Mission in Darfur, the United Nations Operation in Burundi or the United Nations Operation in Côte d'Ivoire, all have a robust mandate with broad peacekeeping and peacebuilding tasks.

19 SC Res. 2149, *supra* note 3, para. 40.

20 The French version uses the conditional tense: "*la MINUSCA pourrait*", *ibid*.

21 For the latest version of the measures, see SC Res. 2387, *supra* note 14, para. 43.

In the paragraph dedicated to the "urgent temporary measures", the Council mandated MINUSCA to

> "urgently and actively adopt, within the limits of its capacities and areas of deployment, at the formal request of the CAR Authorities and in areas where national security forces are not present or operational, urgent temporary measures on an exceptional basis and without creating a precedent and without prejudice to the agreed principles of peacekeeping operations, which are limited in scope, time-bound and consistent with the objectives set out in paragraphs 42 and 43 (e), to arrest and detain in order to maintain basic law and order and fight impunity".[22]

From 2015 onwards, resolutions contained another provision under the "rule of law" component of the mandate, authorizing MINUSCA

> "[w]ithout prejudice to the primary responsibility of the CAR Authorities, to support the restoration and maintenance of public safety and the rule of law, including through apprehending and handing over to the CAR Authorities, consistent with international law, those in the country responsible for crimes involving serious human rights violations and abuses and serious violations of international humanitarian law, including sexual violence in conflict, so that they can be brought to justice, and through cooperation with States of the region as well as the [International Criminal Court] in cases of crimes falling within its jurisdiction".[23]

This second provision, authorizing MINUSCA to apprehend alleged criminals, is related to the opening of investigations by the International Criminal Court (ICC) on alleged crimes committed in the Central African Republic since 1 August 2012,[24] and the creation of the Special Criminal Court, a hybrid jurisdiction set up by the Central African authorities with support from

22 *Ibid*. See also for similar wording SC Res. 2217, UN Doc S/RES/2217 (2015), 28 April 2015, para. 32; SC Res. 2301, UN Doc S/RES/2301 (2016), 26 July 2016, para. 34.

23 SC Res. 2387, *supra* note 14, para. 43.

24 Situation in the Central African Republic II, Decision Assigning the *Situation in the Central African Republic II* (Pre-Trial Chamber II), ICC-01/14-1, 18 June 2014.

the UN.[25] MINUSCA is thus tasked with arresting those who are likely to face charges before these two courts.

For the sake of the present analysis, the terms "urgent temporary measures" and "the measures" will designate both paragraphs, since they both allow MINUSCA to arrest and detain or apprehend[26] individuals. Differences of execution and rationale between the two paragraphs will be examined in part B of the article. It is worth noting that MINUSCA did implement such measures, with the Secretary-General regularly reporting on individuals who have been arrested and detained as part of the implementation of the measures.[27]

The Security Council has been extremely cautious in drafting the paragraphs setting out these measures: not only are they "temporary", "limited in scope [and] time-bound", but they are also adopted "on an exceptional basis and without creating a precedent and without prejudice to the agreed principles of peacekeeping operations", and "at the formal request of the CAR Authorities"[28]. This cautiousness alone reveals the unusual character of the measures. A similar wording has been used with respect to the creation of the Intervention Brigade of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO),[29] which is regarded as a truly innovative element in peacekeeping practice, arguably amounting to actual war fighting.[30] Another questioning element is that these measures are part of the mission's

25 *Loi organique portant création, organisation et fonctionnement de la Cour pénale spéciale* (Law allowing for the creation, organization and functioning of the Special Criminal Court), Loi organique n°15-003, Central African Republic, 3 June 2015.

26 Apprehend is regarded here as a synonym of arrest.

27 For the most recent cases, see Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2017/865, 18 October 2017, para. 49; Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2017/473, 2 June 2017, para. 50; Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2017/94, para. 45. See also previous Reports of the Secretary-General on the Central African Republic from 2016 and 2015.

28 See all resolutions, *supra* note 3, note 14 and note 22.

29 The Security Council decided "that MONUSCO shall, for an initial period of one year and within the authorized troop ceiling of 19,815, on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping, include an "Intervention Brigade" (…) with the responsibility of neutralizing armed groups as set out in paragraph 12 (b) below and the objective of contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC and to make space for stabilization activities", SC Res 2098, UN Doc S/RES/2098 (2013), 28 March 2013, para. 9.

30 M. Peter, 'Between Doctrine and Practice: The UN Peacekeeping Dilemma', 21 *Global Governance: A Review of Multilateralism and International Organizations* (2015) 351.

support to the rule of law and justice. Yet, except for cases of international territorial administration by the United Nations,[31] other peacekeeping missions with rule of law and justice support components have never been authorized, at least in explicit terms,[32] to take *executive* measures such as arrests and detentions. Rather, rule of law promotion by multidimensional missions has so far consisted of institutional support to key public institutions such as the judiciary.[33]

This unusual element in MINUSCA's mandate raises a number of legal and conceptual issues that this article seeks to address, in order to reveal that the "urgent temporary measures" constitute a qualitative shift in UN peacekeeping practice. In that perspective, the first and second parts of the analysis will look at the authorization to implement the "urgent temporary measures" in light of the general legal framework of peacekeeping activities (A) and previous peacekeeping practice (B), in order to determine the extent to which these measures are compatible with said framework and practice. This reveals that the implementation of the measures amounts to the exercise of executive powers rather than usual peacekeeping activity. Resorting to a teleological perspective, the third part of the article will focus on the conceptual implications of the urgent temporary measures in light of their own objective of support to the rule of law (C). In that respect, the shift from promotion to the execution of the rule of law by a peacekeeping mission shows the very specific, and at times contradictory, conception of the rule of law that the United Nations upholds in the Central African Republic.

31 International territorial administration by the United Nations in Kosovo and in Timor Leste, and to some extent in Cambodia, is regarded here as distinct from peacekeeping operations.

32 *See under*, B. Practical Framework and Implications of the Urgent Temporary Measures.

33 See, among others, mandates of the United Nations Mission in Liberia (SC Res. 1509, UN Doc S/RES/1509 (2003), 19 September 2003), the United Nations Operation in Côte d'Ivoire (SC Res. 1528, UN Doc S/RES/1528 (2004), 27 February 2004), the United Nations Mission for the Stabilization in Haiti (SC Res. 1542, UN Doc S/RES/1542 (2004), 30 April 2004), the United Nations Mission in the Central African Republic and Chad (SC Res 1778, UN Doc S/RES/1778 (2007), 25 September 2007) or the the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) (SC Res. 1925 supra note 17..

B. Normative Framework and Implications of the Urgent Temporary Measures

The authorization granted to MINUSCA to arrest and detain shall first be analyzed in light of the UN peacekeeping doctrine, i.e. norms and guiding principles that have been elaborated by the UN with respect to peacekeeping. The present section will explore the normative framework of UN peacekeeping in order to determine on which legal grounds the urgent temporary measures rest. Since the Security Council made sure to assert that the measures did not prejudice "agreed principles of peacekeeping operations", implicitly inferring that they could indeed contradict these principles, special attention will be given to the compatibility between the measures and the principles governing peacekeeping.

I. Beyond the UN Charter

The normative framework which will be considered here in order to assess MINUSCA's mandate lies first and foremost in the United Nations Charter,[34] and in internal UN principles and norms. Even though "[i]nternational human rights law is an integral part of the normative framework for United Nations peacekeeping operations" and international humanitarian law "is relevant to United Nations peacekeeping operations because these missions are often deployed into post-conflict environments where violence may be ongoing or conflict could reignite",[35] the purpose of the present article is not to enter the abundant debate on the respective relevance of human rights, humanitarian law and, at times, occupation law[36] to regulate peacekeeping activities.[37]

Peacekeeping was initially presented by former Secretary-General Dag Hammarskjöld as a "Chapter VI and a half" activity.[38] More recently, the Security Council started referring to Chapter VII when creating peacekeeping

34 See, for a general analysis, A. Orakhelashvili, ‚The Legal Basis of the United Nations Peace-Keeping Operations', 43 *Virginia Journal of International Law* (2003) 2, 485.

35 *UN Peacekeeping Guidelines*, *supra* note 1, 15.

36 Michael J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (1999).

37 *Ibid*., as well as F. Mégret & F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', 25 *Human Rights Quarterly* (2003), 314; S. Sheeran, 'The Use of Force in United Nations Peacekeeping Operations', in M. Weller (ed.), *The Oxford Handbook of The Use of Force in International Law* (2015), 349, 357.

38 A.J. Bellamy *et al*, *Understanding Peacekeeping* (2004), 129.

missions, including MINUSCA.[39] What matters eventually is that, under the UN Charter, the Security Council has "primary responsibility for the maintenance of international peace and security",[40] and that it has a large leeway in that respect.[41] Peacekeeping being an *ad hoc* activity initially not envisaged in the Charter, its normative framework developed along with practice. Following the first UN peacekeeping mission, the United Nations Emergency Force (UNEF I),[42] Secretary-General Hammarskjöld elaborated a set of principles governing peacekeeping, in order to ensure its compatibility with the Charter and with other principles of general international law and international humanitarian law. These principles are consent, impartiality, and the non-use of force.[43] They have been recalled and expanded in several UN documents since their inception and are mentioned in the resolutions concerning MINUSCA.[44] In addressing the question of the compatibility between MINUSCA's mandate, and more specifically the urgent temporary measures, and these principles, a special focus will be placed on practical implementation of measures on the ground. Principles and guidelines are indeed often developed at the theoretical or, as the UN puts it, at the "strategic" level, but sometimes fail to properly address implementation problems arising on the ground.

II. Consent

The principle of consent is at the heart of the definition of peacekeeping.[45] The necessarily consensual nature of peacekeeping operations directly ensues from

39 See *supra*, notes 3, 14 and 22.

40 *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI, art. 24.

41 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151, 177; L. Pineschi, 'L'emploi de la force dans les opérations de maintien de la paix des Nations Unies 'robustes' : conditions et limites juridiques', in *La sécurité collective entre légalité et défis à la légalité* (2008), 139, 148 ; P.M. Dupuy & Y. Kerbrat, *Droit International Public* (2014), 693.

42 Created by GA Res. 998, UN Doc A/RES/998 (1956), 4 November 1956.

43 The principles were first conceptualized by the then Secretary-General Hammarskjöld, see UN Secretary-General, Summary Study of the Experience Derived from the Establishment and Operation of the Force", UN Doc A/3943 (1958), 9 October 1958. They were then developed in several UN reports, particularly the Capstone doctrine, *supra*, note 1, 31, and by scholars, see among others N. Tsagourias, 'Consent, Neutrality/ Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension', 11 *Journal of Conflict and Security Law* (2006) 3, 465; Bellamy, *supra* note 38, 95.

44 SC Res. 2149, *supra* note 3, preamble, and following resolutions at notes 14 and 22.

45 See for instance the definition provided by the Secretary-General Boutros Boutros-Ghali in its *Agenda for peace*: "Peace-keeping is the deployment of a United Nations presence in

their non-coerciveness, which is what distinguishes peacekeeping activity from peace enforcement, the latter consisting in the decision to impose peace on parties which have not given their consent to such an operation.[46] Consent has to be given by "the main parties to the conflict. This requires a commitment by the parties to a political process and their acceptance of a peacekeeping operation mandated to support that process".[47]

On this basis, the urgent temporary measures appear to respect the principle of consent. First, execution of the measures is subjected to "the formal request of the CAR Authorities",[48] or in the first mandate, "the formal request of the Transitional Authorities".[49] This alone implies that the measures will only be implemented if the Central African authorities consent to their execution. Given the practical reality of arrests of suspected criminals and other individuals, the "formal request" should be interpreted here as a general request to implement the measures beforehand and not as an *ad hoc* request each time MINUSCA forces are in the position to arrest individuals. Central African authorities did express their consent on several occasions. An insider's perspective suggests that the UN actually elaborated the measures at the request of CAR authorities.[50] In its resolutions, the Security Council referred to several letters from the CAR authorities concerning the deployment of MINUSCA in general[51] and execution of the measures in particular.[52] Central African authorities also made several declarations expressing their consent before the Security Council, sometimes clearly calling for enforcement of the urgent temporary measures.[53]

the field, hitherto with the consent of all the parties concerned", *Report of the Secretary General*, UN Doc A/47/277 (1992), 17 June 1992, para. 20.

46 See Mosler/Oellers-Frahm, 'Art. 94' in B. Simma et al (ed.), *The Charter of the United Nations: A Commentary* (2002), 1175.

47 UN Peacekeeping Guidelines, *supra* note 1, 31.

48 SC Res. 2387, *supra* note 14, para. 43. See also for similar wording SC Res. 2217, para. 32 and SC Res. 2301, para. 34, *supra* note 22.

49 SC Res. 2149, *supra* note 3, para. 40.

50 S. Mathias, 'The Application of the Rule of Law to United Nations Peacekeeping Operations', in C. Feinäugle (ed.), *The rule of law and its application to the United Nations* (2016), 107, 127.

51 SC Res. 2149, *supra* note 3, preamble.

52 "Taking note of the letter of the President of the Central African Republic to the Security Council dated 8 April 2014 of the letter to the Security Council dated 8 April 2014, by which the President of the CAR conveyed views regarding MINUSCA's mandate in terms of protection of civilians and urgent temporary Measures", SC Res. 2217, *supra* note 22, preamble.

53 Ms Kpongo, the CAR representative before the Council, declared: "with regard to temporary emergency measures, this will be something new for MINUSCA. We welcome

However, even though consent is traditionally expected to come from the host State,[54] the Capstone doctrine affirms, as highlighted above, that consent should be given by the "main parties to the conflict", in the context of a "political agreement".[55] In the Central African context, the two main parties were, initially, the State and the Séléka, whose leader Michel Djotodia seized power in March 2013. Michel Djotodia agreed to the creation of a *Conseil national de transition* (National Transition Council) functioning as a transitional Parliament and benefitting from support of the Economic Community of Central African States (ECCAS). He promulgated the *Charte constitutionnelle de transition*,[56] a constitutional text previously adopted by the *Conseil national de transition* organizing the political transition in the country. The *Charte* can be regarded as a political agreement and was supported by the Security Council.[57] Under heavy international pressure, Michel Djotodia and his Prime Minister resigned in January 2014, allowing the *Conseil national de transition* to appoint new transitional authorities and Catherine Samba-Panza as transitional President.[58] It can thus be argued that the main parties to the conflict were involved in the conclusion of a political agreement in the sense prescribed by the UN, and that the principle of consent is respected.

To date though, several armed groups, some of which are offshoots of the Séléka, continue to wage attacks on civilians, UN forces, the government, and against each other.[59] The difficulty in assessing whether consent has been given or not thus lies in the identification of the "main parties" to the Central

that this is included in the mandate with stronger language, as it is essential that such measures be further implemented. President Touadera asked for this, and it has been done. We now hope that the temporary emergency measures will be implemented with determination", UN Doc S/PV.7747, 26 July 2016.

54 For an example illustrating this understanding, see S. Sebastian & A. Gorur, 'U.N. Peacekeeping and Host State Consent', Stimson Center (2018).

55 *UN Peacekeeping Guidelines*, *supra* note 1, 31. Peter argues that the principle of consent can hardly be regarded as respected if peacekeeping missions intervene when no comprehensive peace agreement has been reached, Peter, *supra* note 30, 358.

56 *Charte constitutionnelle de transition* (Transition Constitutional Charter), Central African Republic, 18 July 2013, available at http://mjp.univ-perp.fr/constit/cf2013.htm (last visited on 10 January 2019); Welz, *supra* note 6, 603.

57 SC Res. 2149, *supra* note 3, para. 3.

58 Marchal, *supra* note 6, 137.

59 Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2017/865, *supra* note 27 ,para.12-24; Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2017/473, *supra* note 27, para. 3 and para. 12-14; and previous Secretary-General's reports on the Central African Republic.

African conflict, in opposition to "spoilers" of the peace process, described as those "who may actively seek to undermine the peace process or pose a threat to the civilian population".[60] The UN recognizes that there is no black or white answer to this question:

> "[t]he fact that the main parties have given their consent to the deployment of a United Nations peacekeeping operation does not necessarily imply or guarantee that there will also be consent at the local level (…). Universality of consent becomes even less probable in volatile settings, characterized by the presence of armed groups not under the control of any of the parties, or by the presence of other spoilers".[61]

From the UN's perspective, lack of consent at the local level thus does not necessarily contravene the principle of consent to peacekeeping activity, insofar as local armed groups are regarded as "spoilers". However, in civil conflicts such as the one in the Central African Republic, such a distinction between "main parties" to the conflict and "spoilers" can be contested. From a factual point of view, local armed groups do take part in the conflict. Indeed, the political agreements and transitional process initiated by the "main parties" to the Central African conflict have not resulted in a cessation of armed attacks, including against MINUSCA.[62] In addition, the argument that consent is not to be sought from local armed groups regarded as "posing a threat to the civilian population" and as "spoilers" of a peace process to which they are not parties is difficult to uphold if the armed groups that are regarded as the "main parties" to the conflict, including the host State supported by the UN, have also threatened and endangered civilians and/or have carried out actions that threatened the peace process. In the Central African case, the Secretary-General carefully attributed attacks on civilians and other acts disrupting the peace process to "former" Séléka members or "militias", and not to official parties to the peace process.[63] On that basis, the principle of consent is respected, though it can be argued that the way the "main parties" have been identified in the Central

60 *UN Peacekeeping Guidelines*, *supra* note 1, 34 and 43.

61 *UN Peacekeeping Guidelines*, *supra* note 1, 32.

62 Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2017/473, *supra* note 27,para. 12-14.

63 See Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2013/677, 15 November 2013, para. 2-7, and *Report of the Secretary-General on the Central African Republic*, UN Doc S/2014/142, 3 March 2014, para. 3-9.

African case remains problematic and, if these same groups were to be regarded as parties to the conflict, then MINUSCA's mandate would violate the principle of consent.

III. Impartiality

Impartiality in the context of peacekeeping is defined by the UN as the implementation of the mandate "without favor or prejudice to any party (…) but [it] should not be confused with neutrality or inactivity".[64] The UN further adds that "[t]he need for even-handedness towards the parties should not become an excuse for inaction in the face of behavior that clearly works against the peace process".[65] Impartiality is frequently regarded as a political and strategic condition for effective peacekeeping.[66] The legal rationale and legal implications of a lack of impartiality are the same as the rationale and implications of the absence of consent as articulated by the Capstone doctrine[67] in that under both circumstances, i.e. whether the UN intervenes without consent of the parties or acts in a partial way, the UN mission would become party to the conflict and peacekeeping would transform into peace enforcement. Recently, this issue has been raised in relation to MONUSCO's Intervention Brigade,[68] and several authors argued that the Brigade turned MONUSCO into a partial party to the conflict, targeting only the armed group March 23 Movement (M23) while backing the *Forces Armées de la République Démocratique du Congo* (FARDC), the government armed forces.[69]

Since the urgent temporary measures pursue general goals, such as the maintenance of law and order, justice and the rule of law, and fighting impunity, they do not target one party as such and can thus be regarded as impartial,

64 *UN Peacekeeping Guidelines*, *supra* note 1, 33.

65 *Ibid*.

66 Several authors base their argument on this perspective, e.g. C.T. Hunt, 'All necessary means to what ends? the unintended consequences of the 'robust' turn in UN peace operations', 24 *International Peacekeeping* (2017) 1, 108, H. Willmot & S. Sheeran, 'The protection of civilians mandate in UN peacekeeping operations: reconciling protection concepts and practices', 95 *International Review of the Red Cross* (2013) 517, or Peter, *supra* note 30, 359.

67 *UN Peacekeeping Guidelines* , *supra* note 1, 32.

68 Peter, *supra* note 30.

69 J. Karlsrud, 'The UN at War: Examining the Consequences of Peace-Enforcement Mandates for the UN Peacekeeping Operations in the CAR, the DRC and Mali', 36 *Third World Quarterly* (2015) 1, 7 and C.T. Hunt, *supra* note 66, 113; see also Peter, *supra* note 30, 360.

in theory at least.[70] Rather, because they aim at combating the commission of acts that work against peace, like serious violations of human rights and international humanitarian law, they actively contribute to the principle of impartiality. However, since MINUSCA, like other peacekeeping missions, is mandated to provide support to the government in place, its actual impartiality is questionable.[71] Again, respect of the impartiality principle depends upon who the individuals actually targeted by the urgent temporary measures are. In practice, there is a risk that execution of the measures will only result in the arrest of leaders of local rebel groups (the same ones whose consent is not sought by the United Nations) while avoiding those close to, or part of, the government in place. In order to respect the principle of impartiality, it is therefore necessary that MINUSCA equally enforces the measures, regardless of the political affiliation of the alleged criminals. In fact, it is important that MINUSCA efficiently implements the measures *tout court* so as not to leave itself open to criticisms of biased enforcement. Indeed, failure to arrest well-known criminals of one or the other armed group will likely be interpreted by the population as MINUSCA taking sides when implementing the measures,[72] and could consequently constitute a violation of the principle of impartiality.

IV. Non-use of force

The principle of the non-use of force by peacekeeping operations is at the heart of the definition of peacekeeping itself and has become the key criterion to categorize peace operations in academic works.[73] It is also the principle that has evolved most since its first inception as the prohibition for UN peacekeepers to use force except in cases of strict self-defence.[74] A rapid chronology of the use of

70 Similarly, one can argue that insofar as the urgent temporary measures fall under "law enforcement" rather than "peace enforcement", they respect the impartiality principle, H. Yamashita, ‚Impartial' Use of Force in United Nations Peacekeeping', 15 *International Peacekeeping* (2008) 5, 627.

71 Peter, *supra* note 30, 359.

72 One such case has been reported concerning Abdoulaye Hissene and Haroun Gaye from the *Front Populaire pour la Renaissance de la Centrafrique*, see *Civilians in Conflict*, 'The Primacy of Protection', available at https://civiliansinconflict.org/publications/research/primacy-of-protection/ (last visited on 18 February 2019)

73 See amongst others, Mathias, *supra* note 50, Bellamy, *supra* note 38, 108, and K. Kenkel, 'Five generations of peace operations: from the "thin blue line" to "painting a country blue"', 56 *Revista Brasileira de Política Internacional* (2013) 125.

74 "This right [to self-defence] should be exercised only under strictly defined conditions", Secretary-General, *Summary Study of the Experience Derived from the Establishment and*

force by UN peacekeeping missions illustrates this evolution. The authorization to use force quickly exceeded strict self-defence, with the first mission allowed to use force in order to implement its mandate being the United Nations Operation in Congo (ONUC).[75] The notion of "defence of the mandate" thus appeared in order to accommodate the non-coercive nature of peacekeeping with the perceived need to ensure efficiency in implementation of the mandate. The notion of "defence of the mandate" was clearly recognized by the report of the Panel on United Nations Peace Operations (Brahimi report)[76] and later official documents.[77] The use of force by peacekeeping missions further evolved when the Security Council allowed peacekeeping missions, designated as "robust" missions, to "use all necessary means", including force.[78] Practice of the Security Council to allow peacekeeping missions to use "all necessary means" grew in the 2000s (e.g. the United Nations Mission in Sierra Leone,[79] the United Nations Mission in the Democratic Republic of Congo,[80] the United Nations Operation in Côte d'Ivoire,[81] the United Nations Mission in Sudan,[82] the African Union-United Nations Hybrid Operation in Darfur[83] or the United Nations Mission in the Central African Republic and Chad).[84] To date, the principle of non-use of force by peacekeepers should thus be understood in a rather extensive sense as allowing the use of "all necessary means", including force, in self-defence and in defence of the mandate. This understanding of the (non-)use of force reveals that, again, the UN bases its conception of the use of

Operation of the Force", UN Doc A/3943, 9 October 1958, para. 179.

75 SC Res. 143, UN Doc S/RES/143 (1960), 14 July 1960. In a further resolution, the Security Council "[authorized] the Secretary-General to take vigorous action, including the use of the requisite measure of force, if necessary", Sc Res. 169, UN Doc S/RES/169 (1961), 24 November 1961, para. 4.

76 "Once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission's mandate", *Report of the Panel on United Nations Peace Operations*, UN Doc S/2000/809, 21 August 2000, para. 49.

77 *UN Peacekeeping Guidelines* , *supra* note 1, 31.

78 See also above, notes 11, 16 and 17.

79 SC Res. 1289, UN Doc S/RES/1289 (2000), 7 February 2000.

80 SC Res. 1291, UN Doc S/RES/1291 (2000), 24 February 2000.

81 SC Res. 1528, UN Doc S/RES/1528 (2004), supra note 33.

82 SC Res. 1590, UN Doc S/RES/1590 (2005), 24 March 2005, para. 16.

83 SC Res. 1769, UN Doc S/RES/1769 (2007), 31 July 2007.

84 SC Res. 1778, UN Doc S/RES/1778 (2007), 25 September 2007.

force on a distinction between the international and the local or "tactical" level.[85] The use of force at the international level qualitatively differs from peacekeeping: it amounts to peace enforcement in the form of an armed intervention under international law. The use of force at the local level, on the contrary, still fits within the principle of non-use of force by peacekeeping missions.

Thereby, the urgent temporary measures are compatible with the principle of the non-use of force as understood in UN doctrine. When authorizing for the first time a peacekeeping mission, the ONUC, to use force, the Security Council had actually done so precisely to proceed to arrests and detentions.[86] The measures do constitute a way to use force, but only at the national level and not in the international understanding of the use of force. They can be regarded as one of "the necessary means" that MINUSCA is allowed to use to implement its mandate, being a robust mission.[87] In that sense, rather than considering that the Security Council took yet another step in the ever broadening authorization granted to peacekeeping missions to use force,[88] it can be argued that, by explicitly authorizing MINUSCA to arrest and detain individuals, the Security Council clarified what these "necessary means" may entail, offering a clarification as to what the principle of non-use of force by peacekeepers does cover.

The normative basis for peacekeeping activity, including the UN Charter, thus allows the Security Council to authorize MINUSCA to arrest and detain individuals, and execution of the urgent temporary measures appears compatible with the "agreed principles of peacekeeping operations", at least theoretically and on the basis of a broad and extensive understanding of these principles. At the "field" level, compatibility of the measures with traditional principles of peacekeeping is more dubious. The urgent temporary measures thus offer an example of the tendency of recent UN peacekeeping practice to drift away from usual UN peacekeeping doctrine,[89] and illustrate the lack of adequacy between, on the one hand, the doctrine and discourses on peacekeeping

85 According to the Capstone doctrine, "robust peacekeeping should not be confused with peace enforcement, as envisaged under Chapter VII of the Charter. Robust peacekeeping involves the use of force at the tactical level with the authorization of the Security Council and consent of the host nation and/or the main parties to the conflict. By contrast, peace enforcement does not require the consent of the main parties and may involve the use of military force at the strategic or international level", *UN Peacekeeping Guidelines* , *supra* note 1, 34.

86 SC Res. 169, UN Doc S/RES/169 (1961), 24 November 1961, para. 4.

87 SC Res. 2149, *supra* note 3, para. 29.

88 Mégret & Hoffmann, *supra* note 37, 314, 327; Peter, *supra* note 30, 351, 352.

89 On this topic, see generally Peter, *supra* note 30.

principles, and, on the other hand, its actual implementation in the field. The fact that MINUSCA's mandate seems to stretch peacekeeping doctrine leads one to wonder about the relevance of analyzing the urgent temporary measures in light of peacekeeping norms and principles. Rather, it may be useful to look for another, more relevant paradigm to understand the qualitative shift that MINUSCA's mandate induces. Indeed, comparison between these measures and previous peacekeeping practice reveals that, even if they appear theoretically compatible with peacekeeping norms and principles, the urgent temporary measures do constitute a unique case that is best addressed from the perspective of international territorial administration practice.

C. Practical Framework and Implications of the Urgent Temporary Measures

Just as the Council affirmed that the urgent temporary measures did not prejudice agreed principles of peacekeeping, it also warned that they did not set a precedent in peacekeeping practice. An *a contrario* reading of this assertion suggests that these measures could indeed constitute a precedent. Explicitly authorizing a peacekeeping mission to apprehend, arrest, and detain individuals is not as such a complete novelty in UN peacekeeping practice. The Security Council had already allowed three previous peacekeeping missions to implement similar measures, though with slight differences which the present section will undertake to reveal. Comparing the measures with previous practice, this part of the argument will demonstrate that the measures do constitute a qualitative shift in peacekeeping practice, to the point that they draw closer to cases of international administration of territories by the UN, rather than other peacekeeping missions.

I. Previous Practice of Arrests and Detentions by Peacekeeping Missions

As previously mentioned, the first mission to be formally allowed to arrest and detain individuals was the United Nations Operation in Congo (ONUC). In resolution 169, the Security Council "authorized the Secretary-General to take vigorous action, including the use of the requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation".[90] Several decades later, the Security Council authorized the second

[90] SC Res. 169, UN Doc S/RES/169 (1961), 24 November 1961, para. 4.

United Nations Operation in Somalia (UNOSOM II), which was already allowed to use "all necessary means", to proceed to arrests and detentions of individuals suspected of having carried out the attack against UN forces on 5 June 1993.[91] Finally, the Security Council asked the United Nations Mission in Liberia (UNMIL) "to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone".[92] In parallel to these three cases where the Security Council explicitly authorized peacekeeping missions to arrest and detain individuals, some reports of the Secretary-General reveal that other peacekeeping missions had, on an *ad hoc* basis, also arrested and/or detained individuals. This is the case of "robust" missions allowed to use all necessary means, such as the United Nations Mission in the Democratic Republic of Congo (MONUC), but also of peacekeeping missions that were not allowed to use force, like the United Nations Assistance Mission for Rwanda (UNAMIR) and the United Nations Mission for the Stabilization in Haiti (MINUSTAH).[93] In addition, it is likely that some arrests and detentions are not reported by the United Nations, so that they remain unnoticed.[94] These cases show that the execution by MINUSCA of the urgent temporary measures does not constitute a precedent in the sense that it already occurred in previous peacekeeping practice, both in a legal and factual sense. However, some notable differences remain between the three missions authorized by the Security Council to arrest and/or detain individuals, and MINUSCA's mandate. One difference relates to the fact that the measures are presented as a means to support the rule of law in the Central African Republic, and this will be addressed in part C. Other differences relate to the execution of the measures and reveal that they constitute a qualitative shift from peacekeeping to the exercise of executive powers, so that the peacekeeping paradigm becomes irrelevant to properly understand and address the nature of the urgent temporary measures.

91 SC Res. 837, UN Doc S/RES/837 (1993), 6 June 1993, para. 5.

92 SC Res. 1638, UN Doc S/RES/1638 (2005), 11 November 2005, para. 1.

93 B. 'Ossie' Oswald, ‚Detention by United Nations Peacekeepers: Searching for Definition and Categorisation', 15 *Journal of International Peacekeeping* (2011) 1-2, 118, 127-128.

94 *Ibid*., 129.

II. Differences Between Previous Practice and the Urgent Temporary Measures

A key difference between the above-mentioned cases of peacekeeping missions allowed to arrest and detain individuals and MINUSCA's urgent temporary measures lies in the absence of limits surrounding the implementation of the latter. Indeed, there is no restriction *ratione personae* to the execution of the urgent temporary measures and the "time-bound" character of the measures is doubtful, particularly since there is no link connecting implementation of the measures with a specific event.

The above-mentioned authorizations granted to peacekeeping missions to arrest and detain were each limited *ratione personae*, sometimes in relation to a specific event, and consequently, *ratione temporis*. ONUC had the wider mandate in that respect, yet still targeting a specific group of individuals explicitly designated by the Security Council as "all foreign military and paramilitary personnel and political advisers not under United Nations Command, and mercenaries, as laid down in paragraph 2 of Security Council resolution 161 A".[95] With respect to UNOSOM II, the authorization to proceed to arrests and detentions targeted "all those responsible for the armed attacks referred to in paragraph 1 above, including against those responsible for publicly inciting such attacks", paragraph 1 condemning "the unprovoked armed attacks against the personnel of UNOSOM II on 5 June 1993"[96]. In addition, the fact that the authorization was directly linked to a specific event suggests that UNOSOM II would not have been allowed to arrest and detain individuals otherwise. UNMIL's mandate is the most specific since it targeted only one person, former Sierra Leonean president Charles Taylor,[97] against whom the Special Tribunal for Sierra Leone had issued an international arrest warrant.[98] In all three cases, the possibility to carry out arrests and detentions was thus limited to certain individuals and/or certain circumstances, so that also resulted in a limitation in time. In the case of ONUC, due to the limitation *ratione personae*, the authorization to arrest and detain would logically end when no "foreign military

95 SC Res. 169, UN Doc S/RES/169 (1961), 24 November 1961, para. 4. Resolution 161 again designates "all Belgian and other foreign military and paramilitary personnel and political advisers not under United Nations Command, and mercenaries", SC Res. 161, UN Doc S/RES/161 (1961), 21 February 1961, para. 2.

96 SC Res. 837, UN Doc S/RES/837 (1993), 6 June 1993, para. 5 and para. 1.

97 SC Res. 1638, UN Doc S/RES/1638 (2005), 11 November 2005, para. 1.

98 *The Prosecutor against Charles Gankay Taylor*, Warrant of Arrest and Order for Transfer and Detention, SCSL-2003-01-1, 7 March 2003.

and paramilitary personnel" were present in the Congo anymore – though this indeed could turn out to be a never-ending period of time, while for UNMIL, the authorization would automatically end if Charles Taylor was arrested – which happened a few months after the Security Council adopted resolution 1638.[99]

On the contrary, MINUSCA can apprehend anyone suspected of having committed serious violations of human rights and humanitarian law, and it can also simply "arrest and detain" individuals with the view to "maintain basic law and order". In the former scenario, MINUSCA should specifically target individuals responsible for such serious violations, particularly those likely to face proceedings before the International Criminal Court and before the Special Criminal Court, though, in the context of ongoing violence, there is no restriction *ratione personae* to such an authorization. In the second case, the authorization is even broader since MINUSCA can arrest anyone suspected of breaching the law. As to restrictions *ratione temporis*, even if the measures are said to be "time-bound",[100] the Security Council did not specify what the limit may be, though it could have done so by either deciding on a specific duration, or by circumscribing the execution of the measures to certain circumstances such as the improvement of security conditions. Furthermore, the Security Council has systematically renewed the measures with each mandate. Under such circumstances, MINUSCA is thus acting as any police force fulfilling its law and order functions.

The Security Council did however limit the execution of the measures to a (still quite broad)[101] geographical circumstance: "areas where national security forces are not present or operational".[102] Paradoxically, this restriction precisely reveals the qualitative shift induced by the measures from support to direct executive functions. Indeed, peacekeeping missions, however robust they may be, still implement their mandate in *support* of the host State. This is obvious in the

99 C. Timberg, 'Liberia's Taylor Found and Arrested' (2006) available at http://www.washingtonpost.com/wp-dyn/content/article/2006/03/29/AR2006032900879.html (last visited on 20 November 2018).

100 See all MINUSCA resolutions previously cited, *supra* notes 3, 14 and 22. It is worth noting that the "temporary" measures have so far been renewed systematically in each new mandate.

101 See, for the latest account, Secretary-General, *Report on the Central African Republic October* 2017, *supra* note 59, para. 12-24.

102 See all MINUSCA resolutions previously cited, *supra*, notes 3, 14 and 22.

general philosophy of peacekeeping detailed above,[103] in the terminology used in UN documents, whether doctrinal[104] or operational,[105] and in concrete activities. UN peacekeeping missions usually contribute to law and order, rule of law, justice, and fighting impunity by supporting, training, assisting, or helping with reforms of national institutions.[106] For instance, they accompany local police forces when patrolling, or visit tribunals or prisons to provide advice to local personnel.[107] But, in the case of MINUSCA, when implementing the measures, the mission intervenes on its own, hence neither supporting national institutions, nor contributing to the strengthening of their capacities. It does provide such support otherwise as will be explained in part C, but not through the execution of the measures.

103 See A. Normative Framework and Implications of the Urgent Temporary Measures.

104 *United Nations Peacekeeping Operations – Principles and Guidelines*, *supra* note 1, 18.

105 Except for the protection of civilians and itself, MINUSCA is mandated to provide support to the Central African authorities in general, including with respect to "support for national and international justice, the fight against impunity, and the rule of law" which includes "To help reinforce the independence of the judiciary, build the capacities, and enhance the effectiveness of the national judicial system as well as the effectiveness and the accountability of the penitentiary system; (ii) To help build the capacities of the national human rights institution", "To provide technical assistance to the CAR Authorities to identify, investigate and prosecute those responsible for crimes involving violations of international humanitarian law and of violations and abuses of human rights", "To provide support and to coordinate international assistance to the justice and correctional institutions to reinstate the criminal justice system", "To provide technical assistance to the CAR Authorities in partnership with other international partners, to support the operationalization of the [Special Criminal Court]", "To provide technical assistance, in partnership with other international partners, and capacity building for the CAR Authorities, in order to facilitate the functioning of the SCC", "To assist in the coordination and mobilization of bilateral and multilateral support to the operationalization and functioning of the SCC", and "To provide support and to coordinate international assistance to build the capacities, and enhance the effectiveness of the criminal justice system as well as the effectiveness and the accountability of police and penitentiary system", SC Res. 2387, *supra* note 14, para. 43. See also for similar wording SC Res. 2217, *supra* note 22, para. 32 and SC Res. 2301, *supra* note 22, para. 34

106 Secretary-General, *Strengthening and coordinating United Nations rule of law activities*, UN Doc A/71/169, 20 July 2016, para. 29-37 [Secretary-General, United Nations rule of law activities July 2016]; Secretary-General, *Strengthening and coordinating United Nations rule of law activities*, UN Doc A/70/206, 27 July 2015, para. 37-44 [Secretary-General, United Nations rule of law activities July 2015]; Secretary-General, *Strengthening and coordinating United Nations rule of law activities*, UN Doc A/69/181, 24 July 2014, para. 23-27 [Secretary-General, United Nations rule of law activities July 2014]; and previous reports on the same subject.

107 *Ibid*.

MINUSCA then becomes, on some parts of the Central African territory, the sole "legitimate" bearer of public force.[108] As a consequence, its mandate is best addressed as an example of international territorial administration,[109] even if more limited than model cases of the United Nations administrations in Kosovo and Timor Leste where the United Nations held executive powers, including enforcement of law and order.[110] Mégret and Hoffmann consider cases of international territorial administration as "qualitative" changes in peacekeeping practice and define them according to the fact that these missions implement "policing and order-maintenance work that is usually taken care of by the state".[111] Cases of international territorial administration by the United Nations in contexts such as Kosovo and Timor Leste have been criticized for their lack of accountability and failure to uphold human rights, all the more important since these missions held executive powers.[112] Similar problems may arise in relation to the execution of the urgent temporary measures by MINUSCA, particularly because of the absence of a proper remedy to challenge the legality of the measures.[113] However, the executive nature of MINUSCA's mandate is not officially acknowledged by the United Nations (though it is acknowledged

108 In political theory, this function is the main attribute of public power and defines sovereignty (see, for instance, M. Weber, *The Theory of Social and Economic Organization* (1922), translated by A.M. Henderson and Talcott Parsons (1947), 156. MINUSCA's legitimacy derives from the Security Council resolutions and the fact that they are compatible with peacekeeping norms, see above, part A.

109 On unnoticed instances of international territorial administrations, see R. Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', 95 *The American Journal of International Law* (2001) 583.

110 In Timor Leste, the Security Council decided that the United Nations Transitional Administration in East Timor (UNTAET) would "exercise all legislative and executive authority, including the administration of justice", SC Res. 1272, UN Doc S/RES/1272 (1999), 25 October 1999, para. 1. UNMIK was similarly mandated to "[m]aintaining civil law and order", SC Res. 1244, UN Doc S/RES/1244 (1999), 10 June 1999, para. 11.

111 Mégret & Hoffmann, *supra* note 37, 328.

112 "Where the UN itself acts as the government, the normal rationale for immunity, shielding the organization from state interference, makes little sense" F. Rawski, 'To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations', 18 *Connecticut Journal of International Law* (2002) 103, 105. For criticisms regarding the lack of accountability of these missions, see Mégret & Hoffman, *supra* note 37, as well as P. Klein, 'L'administration internationale de territoire : quelle place pour l'Etat de droit ?', in Société française pour le droit international (S.F.D.I.) (ed.), *L'État de droit en droit international: colloque de Bruxelles* (2009), 385; E. De Brabandere, 'Immunity of International Organizations in Post-Conflict International Administrations', 7 *International Organizations Law Review* (2010), 79.

113 See C. I.

internally),[114] and thus legal implications stemming from it are more likely to go unnoticed and unaddressed.

Through comparison with previous practice of arrests and detentions by peacekeeping missions, this section showed that MINUSCA's urgent temporary measures constitute a qualitative shift that is however not addressed as such, since it is hidden in an otherwise robust but standard multidimensional peacekeeping mandate. However, the executive dimension within MINUSCA's mandate bears the risk of bringing about problems of accountability and respect for human rights that experiences of international territorial administrations by the United Nations have already revealed. These problems will be further addressed in the final part of the article, which will take a closer look at the compatibility between the execution of the measures and support to the rule of law, including respect for human rights and accountability.

D. Conceptual Framework and Implications of the Urgent Temporary Measures

Previous developments analyzed the urgent temporary measures within the framework of general peacekeeping doctrine and practice by the United Nations, which revealed that the execution of the urgent temporary measures reached the limits of peacekeeping practice, even in a broad, robust understanding of it, so that it is best addressed as a case of international territorial administration, even if limited. The present section will now look at the urgent temporary measures from the perspective of their own rationale, that is, the rule of law. Authorizing MINUSCA to arrest and detain individuals in order to promote the rule of law, justice, and fight against impunity, reveals the very specific conception of the rule of law that the United Nations upholds in the Central African Republic. Besides, since MINUSCA is acting like a State when implementing the measures, resorting to the rule of law paradigm to analyze the measures becomes all the more relevant.[115]

114 Interview conducted by the author with UN DPKO staff, 8 November 2017. This is also evident from general UN discourse on the mission.

115 "This kind of UN peacekeeping thus seems to be the UN activity closest to actions of organs of a nation state. Therefore, the view can be taken that in this specific context the contents of the rule of law which apply to UN staff should more or less be congruent with those the rule of law in the UN Declaration provides for States on the national level", C. Feinäugle, ‚The UN Declaration on the Rule of Law and the Application of the Rule of Law to the UN: A Reconstruction From an International Public Authority Perspective', 7 *Goettingen Journal of International Law* (2016), 157, 178.

In the resolution creating MINUSCA, the urgent temporary measures were not part of paragraph 30 of the resolution which covered the tasks included in the mission's mandate per se.[116] In later resolutions, both the paragraph on the urgent temporary measures and the paragraph authorizing MINUSCA to apprehend suspects of serious human rights and humanitarian law violations were related to the rule of law, though the exact formulation varied from "Support for national and international justice and the rule of law",[117] "Assistance to advance the rule of law and combat impunity",[118] to "Support for national and international justice, the fight against impunity, and the rule of law", and, specifically, "Rule of law" in the later version of the mandate.[119] The link between implementation of the measures and the rule of law is further confirmed by the objectives expressly associated with the urgent temporary measures: the authorization to arrest human rights violators serves the purposes of "the restoration and maintenance of public safety and the rule of law",[120] while the urgent temporary measures as such will "maintain basic law and order and fight against impunity".[121]

The link between MINUSCA arresting and detaining individuals, and the promotion of the rule of law, justice, and the fight against impunity, thus seems evident for the United Nations. Such a causal relationship is, however, questionable if one looks at most definitions of the rule of law, justice, and impunity, including those of the United Nations itself. For the sake of the present demonstration, justice and the fight against impunity will be regarded as sub-elements of the rule of law, so that the argument will mostly revolve around definitions of the rule of law. This is justified by the UN's own conception of these notions. The Secretary-General associated the concepts of the rule of law and justice in its report proposing definitions of these two notions, which regards the rule of law as

116 SC Res. 2149, *supra* note 3.

117 SC Res. 2217, *supra* note 22, para. 33 and SC Res. 2301, *supra* note 22, para. 35.Note that in the 2015 mandate, the urgent temporary measures appear as an autonomous task of the mandate, while the authorization to arrest those suspected of serious breaches of human rights and humanitarian law appears under the "Support for national and international justice and the rule of law" component of the mandate.

118 SC Res. 2301, *supra* note 22, para. 34.

119 SC Res. 2387, *supra* note 14, para. 43.

120 All but the 2014 resolution, *supra* notes 14 and 22.

121 All resolutions previously cited, *supra* notes 3, 14 and 22.

> "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[122]

In the same report, the Secretary-General adds that "justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large".[123] The conceptual closeness between these two definitions is rather self-explicit since they both refer to notions of accountability, procedural guarantees, and cover substantive human rights content. The fight against impunity appears as a practical consequence of these two notions. In practice, the promotion of justice, support to justice systems and mechanisms, and fighting against impunity are widely regarded by the United Nations as elements contributing to the promotion of the rule of law in general, for instance in the Secretary-General reports on the rule of law.[124]

In its Declaration on the rule of law of 2012, the General Assembly, though not adopting any official definition of the rule of law, still referred to some elements of the Secretary-General's definition, stating that "all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any

122 Secretary-General, *Report of the Secretary-General on the Rule of law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc S/2004/616 (2004), 23 August 2004, para. 6 [Secretary General, Rule of law and Transitional Justice in Conflict and Post-conflict Societies].

123 *Ibid*., para. 7.

124 See, among others, Secretary-General, *United Nations rule of law activities July 2016*, *supra* note 106, para. 30 and para. 40; Secretary-General, *United Nations rule of law activities July 2015*, *supra* note 106, para. 46; Secretary-General, *United Nations rule of law activities July 2014*, *supra* note 106, para. 24 and 28-32; and previous reports on the same subject.

discrimination to equal protection of the law".[125] The Declaration also associated the rule of law and justice, and recalled that the rule of law applied to the UN itself.[126]

The present section will rely on the description of the rule of law contained in the Declaration of the General Assembly and on the above-mentioned definition of the rule of law by the Secretary-General, in order to evidence the extent to which the rule of law promoted and enforced by MINUSCA greatly differs from these conceptions. The demonstration will proceed in two parts, first focusing on the contradictions between the urgent temporary measures and the rule of law as described in the Declaration and defined by the Secretary-General, including related conceptions of justice and the fight against impunity, and second showing that *enforcement* of the rule of law through the execution of the measures is incompatible with the concept of the rule of law itself.

I. Contradictions Between the United Nations' Conception of the Rule of Law and the Urgent Temporary Measures

The central element in both the General Assembly's Declaration and the Secretary-General's definition of the rule of law, as well as in conceptions of justice and the fight against impunity, appears to be accountability.[127] Accountability of the Secretariat is defined by the General Assembly as "the obligation of the Secretariat and its staff members to be answerable for all decisions made and actions taken by them, and to be responsible for honouring their commitments, without qualification or exception."[128] If military and police components of peacekeeping missions are not "staff members" of the Secretariat per se, the Secretary-General still affirmed on numerous occasions that peacekeepers had to abide by the

125 GA Res. 67/1, UN Doc A/RES/67/1, 30 November 2012, para. 2.

126 "We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities", *ibid*.

127 See again, "all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law", *ibid*., "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws", Secretary General, *Rule of law and Transitional Justice in Conflict and Post-conflict Societies*, *supra* note 122, para. 6.

128 GA Res. 64/259, UN Doc A/RES/64/259, 5 May 2010, para. 8.

rule of law,[129] and were to be held accountable.[130] Yet, implementation of the executive measures, though theoretically contributing to the rule of law, results in a violation of the principle of accountability. Indeed, notwithstanding the much debated issue of accountability of peacekeepers in general, the measures themselves lack a mechanism that would hold MINUSCA forces accountable for the arrests and detentions that they carry out. In the absence of such a mechanism, MINUSCA is at risk not only of failing to respect the accountability requirement in the definition of the rule of law, but also of actively violating a set of human rights explicitly or implicitly mentioned in the definition of the rule of law, particularly the right to judicial remedy and a fair trial,[131] as well as general "protection of the law".[132] Indeed, if the Secretary-General did (indirectly) address the question of protection of individuals detained by UN peacekeeping operations through, for instance, the UN Bluebook on Criminal Justice Standards for UN Police updated in 2009,[133] the Bulletin on Observance by UN Forces of International Humanitarian Law,[134] or the Interim Standard Operating Procedures on Detention in UN Peace Operations,[135] there is no general mechanism allowing individuals to contest their arrest and detention before the United Nations,[136] nor is there such a mechanism for MINUSCA specifically.

For that matter, the UN did set up mechanisms to address possible human rights violations where it exercised executive powers. In Kosovo, an

129 He did so notably in his report proposing a definition of the rule of law, where he stated that "if the rule of law means anything at all, it means that no one, including peacekeepers, is above the law", Secretary General, *Rule of law and Transitional Justice in Conflict and Post-conflict Societies*, *supra* note 122, para. 33.

130 Secretary-General, *In larger Freedom: towards Development, Security and Human Rights for all*, UN Doc A/59/2005, 21 March 2005, para. 113; *UN Peacekeeping Guidelines* , *supra* note 1, 15 and 79.

131 GA Res 217 (III), UN Doc A/RES/217, 10 December 1948, Art. 8-10.

132 GA Res. 67/1, *supra* note 125, para 2.

133 Department of Peacekeeping Operations & United Nations Office on Drugs and Crime, *United Nations Criminal Justice Standards for United Nations Police*, 2009.

134 Secretary-General, *Observance by United Nations Forces of International Humanitarian law*, UN Doc ST/SGB/1999/13, 6 August 1999.

135 Not publicly available, mentioned in Mathias, *supra* note 50, 109.

136 M. Heupel & M. Zürn, *Protecting the Individual from International Authority: Human Rights in International Organizations* (2017), 189-191.

Ombudsperson[137] and later a Human Rights Advisory Panel[138] were created (with much delays and limited competency and funding), as well as a commission which was mandated specifically to review detentions but lasted only three months.[139] Similarly, the International Force for East Timor, which supported the United Nations Transitional Administration in East Timor (UNTAET), created a Detainee Management Unit which operated for a few months,[140] while UNTAET eventually set up an Ombudsperson,[141] though all of these institutions have been criticized for their relative lack of efficiency.[142] More generally, and since such a mechanism does not exist for MINUSCA, it is worth recalling that the United Nations as an organization enjoys absolute immunity, including for violations of fundamental human rights.[143] The general framework of functional immunity enjoyed by UN peacekeeping personnel[144] (civilian police staff[145] as well as military contingents[146]) with respect to acts committed in the exercise

137 *On the Establishment of the Ombudsperson Institution in Kosovo*, U.N. Doc. UNMIK/REG/2000/38, 30 June 2000.

138 *On the Establishment of the Human Rights Advisory Panel*, U.N. Doc. UNMIK/REG/2006/12, 23 March 2006.

139 *On the Establishment of a Detention Review Commission for Extra-judicial Detentions based on Executive Orders*, UN Doc. UNMIK/REG/2001/18, 25 August 2001. See also De Brabandere, *supra* note 112, 115.

140 M. Kelly *et al*. (eds), 'Legal Aspects of Australia's Involvement in the International Force for East Timor', 83 *International Review of the Red Cross* (2001) 101.

141 UNTAET Daily Briefing, *Twenty Cases Examined by Ombudsperson*, 1 June 2001. See also De Brabandere, *supra* note 112, 117.

142 Klein, *supra* note 112, 393-396; De Brabandere, *supra* note 112, 112-116.

143 *Mothers of Srebrenica v. The State of the Netherlands and the United Nations*, Supreme Court of the Netherlands, case n°200.022.151/01, 30 March 2010, para. 5.1.

144 *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, 1 UNTS 15. For an extensive overview of applicable customary and conventional law, see D. Fleck, 'The Legal Status of Personnel Involved in United Nations Peace Operations', 95 *International Review of the Red Cross* (2013) 613.

145 Personnel of UN Civilian police is to be considered as "experts" according to the Model Status of Forces Agreement, thus enjoying functional immunity as provided for in the *Convention on the Privileges and Immunities of the United Nations*, *supra* note 144, para. 26.

146 Generally provided by Status of Forces Agreements, though in the case of MINUSCA, this document is not publicly available. According to the Model Status of Forces Agreement, only the contributing State has jurisdiction to prosecute military personnel for criminal offences, Secretary-General, *Report of the Secretary-General: Model Status-of-Forces Agreement for Peace-Keeping Operations*, UN Doc A/45/594, 9 October 1990, para. 47. Since arrests and detentions are unlikely to qualify as criminal offences, it appears that military contingents would also be protected by immunity provisions in this scenario.

of their duties will most likely protect them from facing charges with respect to unlawful arrests or detentions.[147]

Moreover, supposing that individuals arrested and detained by MINUSCA forces could seek remedy before national courts after they have been transferred to the Central African authorities, they will face a highly dysfunctional justice system,[148] the incapacity of which to dispense justice is precisely the justification for MINUSCA's support to the rule of law in general, and for the urgent temporary measures in particular. As the Secretary-General reports on the decision to enforce the measures:

> "A United Nations multidisciplinary team visited the Central African Republic to develop recommendations with regard to the adoption of urgent temporary measures to maintain basic law and order and fight impunity pursuant to paragraph 40 of resolution 2149 (2014). The team confirmed an almost total lack of capacity of national counterparts in the areas of police, justice and corrections. (…) The team recommended that, where national actors and institutions are unable to adequately assume their roles and perform their functions, international personnel should have the authority, exceptionally, to take over those roles and functions and perform them directly".[149]

Furthermore, the execution of the measures contradicts the principles of "legal certainty" and "procedural and legal transparency" since UN peacekeepers continue to operate in a legal vacuum that has been highlighted by previous

147 See, on this issue, R. Burke, 'Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity', 16 *Journal of Conflict and Security Law* (2011) 63; Fleck, *supra* note 144; Rawski, *supra* note 112, De Brabandere, *supra* note 112.

148 The incapacity of the Central African justice system to dispense justice – or its total absence – has been reported throughout most Secretary-General's reports on the Central African Republic. The Secretary-General notes that "[r]ampant impunity remains a major challenge throughout the country. Rule of law institutions are totally absent outside Bangui. (…) Since my last report, no major crime cases have been investigated, prosecuted or adjudicated by the authorities", *Report of the Secretary General on the Central African Republic*, UN Doc S/2014/562, 1 August 2014, para. 16 [Secretary-General, Report on the Central African Republic August 2014]. See also Human Rights Watch, *Meurtres Impunis: Crimes de Guerre, Crimes contre l'humanité et la Cour Pénale Spéciale en République Centrafricaine* (2017), 82-83.

149 Secretary-General, *Report on the Central African Republic August 2014*, *supra* note 148, para. 52.

research.[150] The paragraphs on arrests of alleged criminals in MINUSCA's mandate specify that arrests should be "consistent with international law",[151] which is too vague a provision to offset the problem of legal uncertainty. A staff member of the Department of Peacekeeping Operations (DPKO) interviewed on the topic[152] answered that MINUSCA forces were to apply national law, particularly since the Central African Criminal code and Code of Criminal Procedure had both been redrafted in the 2000s with the support of the United Nations and were thus regarded as compliant with international human rights standards.[153] However, the extent to which UN police and military forces are knowledgeable of the Central African Codes remains doubtful. It also poses the question of which law is applicable to the execution of the measures, in the hypothesis that some dispositions of the Central African Codes contradict international law provisions on that matter and since the UN has elaborated (non-binding) guidelines for peacekeeping forces carrying out police and similar functions.[154] Finally, such legal uncertainty further complicates the issue of accountability, since it becomes all the more difficult to hold MINUSCA forces accountable in the absence of a clear legal framework.[155]

Execution of the measures thus contradicts several elements of the UN's conception of the rule of law as set out in the Declaration of the General Assembly and in the definition of the Secretary-General, including the principle of accountability, recognized international human rights such as the right to judicial remedy, "equal protection of the law", and legal certainty.

150 "Falling back on the national laws and police practices of the respective police officer or contingent equally does not meet the requirements of the rule of law. More precise guidance is needed on what should replace any insufficient law, at least in the areas where UN police work directly affects the rights of citizens of the host state" T. Fitschen, ‚Taking the Rule of Law Seriously : More Legal Certainty for UN Police in Peacekeeping Missions', 9 *Geneva Papers* (2012), 6.

151 See SC Res. 2387, *supra* note 14; SC Res. 2301, *supra* note 22.

152 Interview conducted by the author with UN DPKO staff, 17 November 2017.

153 "The reforms reflected in the new code of criminal procedure focused, inter alia, on the harmonization of domestic penal laws with universally recognized principles governing the rights of the accused", Secretary-General, *Report of the Secretary-General on the situation in the Central African Republic and on the activities of the United Nations Peacebuilding Support Office in that country*, UN Doc S/2009/627, 8 December 2009, para. 49.

154 *Supra* notes 133-135.

155 Fitschen, *supra* note 150, 6 and 25.

II. The Paradox of Enforcing the Rule of Law

One of the elements of the Secretary-General's definition of the rule of law, "participation in decision-making", recalls what, according to a majority of scholars, the rule of law truly is: a constitutional principle organizing the relationship between a State and its citizens.[156] In that perspective, the very fact that the rule of law is "enforceable" by a peacekeeping mission through the execution of measures, like the urgent temporary measures, negates the constitutional essence of the principle. Indeed, this "rule of law" undercuts the possibility of the State-citizens relationship to even exist by directly intervening in lieu of the State and assuming its functions. Such a paradox raises the question of the conception of the rule of law as developed by the United Nations in post-conflict settings: what is its content and what are its functions?

The urgent temporary measures are the most obvious example of the conception of the rule of law that the UN has developed in conflict and post-conflict settings, i.e. a concept amounting to criminal justice, with a primary law and order and securitization objective.[157] This understanding of the rule of law is evident in other provisions of MINUSCA's mandate on the rule of law as well. In addition to apprehending alleged human rights and humanitarian law violators, the other task in MINUSCA's latest mandate to support the rule of law is to "provide support and to coordinate international assistance to build the capacities, and enhance the effectiveness of the criminal justice system as well as the effectiveness and the accountability of police and penitentiary system",[158] while previous mandates comprised similar tasks related to the "criminal justice system".[159] United Nations peacekeeping missions[160] and agencies[161] acting in

156 Amongst others, Kanetake affirms that the rule of law "regulates the relations between the national government and individuals under its jurisdiction", M. Kanetake, 'The Interfaces between the National and International Rule of Law: A Framework Paper', in M. Kanetake & A. Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (2016), 15. See also A. Lewis, *Judicial Reconstruction and the Rule of Law: Reassessing Military Intervention in Iraq and Beyond* (2012), 13; J. Chevallier, *L'État de droit*, 5th ed. (2010), 13.

157 See again R.Z. Sannerholm & F. Wall, *supra* note 33.

158 SC Res. 2387, *supra* note 14, para. 43.

159 See all resolutions previously cited, *supra* notes 3, 14 and 22.

160 See the missions enumerated, *supra* note 33.

161 Under its section "Just and Accessible Rule of Law", the United Nations Development Assistance Framework in Afghanistan 2015-2019 reports that "Most rule of law funding supported the MoI and Afghan National Police (…). In addition, courthouses have been re-built, judges have been trained (…). Prosecutors have been trained and joint police-prosecutor work has been initiated. Additional prisons and detention centres have been

other post-conflict settings demonstrate a similar approach to the rule of law embodied in the police, justice, and corrections systems. In a resolution on multidimensional peacekeeping operations, the Security Council noted that these missions could be mandated to "[s]upport the strengthening of rule of law institutions of the host country (…) in helping national authorities develop critical rule of law priorities and strategies to address the needs of police, judicial institutions and corrections system and critical interlinkages thereof".[162] This conception of the rule of law as amounting to the functioning of the "criminal justice chain" at the same time explains, and is further reinforced by, the adoption of the urgent temporary measures to support the rule of law in MINUSCA's mandate. This specific conception of the rule of law allows it to not only be supported, but also enforced, by measures such as arrests and detentions carried out by an external armed force in a relative legal vacuum. The fact that the UN sees the rule of law as a functioning criminal justice system thus explains the paradox highlighted above, according to which direct law enforcement measures can be implemented externally but still be regarded as a way to uphold the rule of law.

E. Conclusion

MINUSCA has been mandated to implement "urgent temporary measures" allowing for arrests and detentions of individuals by UN forces, together with the authorization to apprehend those suspected of having committed serious violations of human rights and humanitarian law in the Central African Republic. If such authorizations are not entirely new in a UN peacekeeping context, they nonetheless carry important legal and conceptual implications that this contribution sought to address. First, the present article demonstrated that, if execution of the measures appears to be compatible with the normative framework for peacekeeping, including the principles of consent, impartiality, and the non-use of force, this was made possible only at the theoretical level and on the basis of a very broad and flexible understanding of these principles.

built or refurbished" *United Nations Development Assistance Framework in Afghanistan 2015-2019*, 13; see also the programmes implemented under the Rule of Law section of the United Nations Development Programme (UNDP) in Afghanistan, available at http://www.af.undp.org/content/afghanistan/en/home/ourwork/crisispreventionandrecovery/overview.html (last visited 26 November 2018); the *Integrated Strategic Framework of the United Nations in Haiti 2010-2011*, 11; the *United Nations Development Assistance Framework in Sierra Leone 2008-2010*, 5.

162 SC Res. 2086, *supra* note 10, para. 8.

At the "field" level, the compatibility of the urgent temporary measures with peacekeeping doctrine is more dubious. Comparison between the conditions under which the measures are implemented, and previous practice of arrests and detentions by UN peacekeeping forces, further showed that the measures could hardly be considered as any other peacekeeping tool. Rather, the measures confer MINUSCA executive powers, and are best addressed as examples of international territorial administration. Indeed, they bring about the same problems of accountability and respect for human rights. It is thus all the more paradoxical that the urgent temporary measures and the authorization granted to MINUSCA to apprehend alleged criminals be presented as serving the rule of law, justice, and the fight against impunity, in addition to "basic law and order".[163] Indeed, the urgent temporary measures turned out to be incompatible with the UN's own general conception of the rule of law at the international level, particularly because of the lack of accountability and legal certainty that prevail in the implementation of the measures. More fundamentally, the very fact that MINUSCA directly enforces such measures is irreconcilable with the essence of the rule of law as a principle governing the relationship between a State and its citizens. Such a paradox reveals the extremely specific conception of the rule of law that the UN supports in post-conflict settings, which revolves around enforcing criminal justice. The extent to which the urgent temporary measures promote the rule of law in the Central African Republic thus depends on the understanding of the rule of law that one chooses to adopt: a functioning criminal justice system or a legal principle organizing the State-citizens relationship.

[163] See all resolutions previously cited, *supra* notes 3, 14 and 22.

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An Analysis of the Treaty on the Prohibition of Nuclear Weapons in Light of its Form as a Framework Agreement*

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A. Introduction

Nuclear weapons present a unique problem and risk to global safety and security. The destructive capability of nuclear weapons, which extends beyond intended targets, is what sets these weapons apart from all else; they are *sui generis*. These weapons are indiscriminate in both their scale of destruction, which cannot be said to involve proportionate force, and in their residual effects of radioactive fallout, which some scholars have equated to the effect of a poisoned weapon.[1]

The *Treaty on the Prohibition of Nuclear Weapons* (TPNW) was adopted at the United Nations Headquarters on 7 July 2017, with 122 States voting in favour of the final draft, one voting against, and one abstaining.[2] As of July 2019, the Treaty has twenty-three parties and seventy signatories.[3] It is currently not in force as it requires ratification by a minimum of fifty States in order to come into effect.[4] The core prohibitions of the Treaty are set out in its first Article, in which State parties agree to never develop, acquire, use or threaten to use, transfer, or stockpile nuclear weapons. What the Treaty does not do, however, is directly eliminate any nuclear weapons; a challenging task in itself considering that none of the current possessors of nuclear weapons even partook in the negotiation of the Treaty.

State parties to the *Treaty on the Non-Proliferation of Nuclear Weapons* (NPT) have obligations under Article VI to undertake negotiations on effective measures leading to disarmament.[5] Against a backdrop of little discernible progress on the implementation of Article VI over the last fifty years, Ireland, on behalf of the New Agenda Coalition, submitted a Working Paper outlining possible pathways to nuclear disarmament in an effort to fulfil the provisions

1 Elliott L. Meyrowitz, 'The Laws of War and Nuclear Weapons', 9 *Brooklyn Journal of International Law* (1983) 2, 227, 235-236.

2 United Nations vote to negotiate a legally binding instrument to prohibit nuclear weapons: *Draft treaty on the prohibition of nuclear weapons*, UN Doc A/CONF.229/2017/L.3/Rev.1 (7 July 2017).

3 United Nations Treaty Collection, 'Status of the Treaty on the Prohibition of Nuclear Weapons, Chapter XXVI Disarmament', available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26&clang=_en (last visited 08 July 2019).

4 *Treaty on the Prohibition of Nuclear Weapons*, UN Doc A/CONF.229/2017/8, opened for signature 20 September 2017, not yet in force, Art. 19 [TPNW].

5 *Treaty on the Non-Proliferation of Nuclear Weapons*, UN Doc 729 UNTS 161, opened for signature 1 July 1968, entered into force 5 March 1970, Art. VI [NPT].

of Article VI.[6] These pathways were debated in 2016 during the Open-Ended Working Group (OEWG), which was set up for the purpose of providing a forum for discussion regarding advancing nuclear disarmament.

The argument of this paper is that the TPNW has the potential to function radically as a disarmament mechanism. At first glance, the Treaty appears to fit within the second pathway outlined in the Irish Working Paper, effectively functioning as a simple Ban Treaty. However, a careful analysis reveals that it more neatly fits into the third pathway – a framework arrangement. It is this characteristic which makes the TPNW a novel and profound instrument as well as a potential foundational solution to the problem of nuclear weapons.

The core section of the paper is divided into two parts. The first delves into the three main pathways discussed in the Irish Working Paper and analyzes how well each of the proposals can address the problem of achieving nuclear disarmament. As suggested by Brazil in the OEWG debates in 2016, three categories are key in establishing the degree to which each pathway can achieve progress in achieving nuclear disarmament – universality, effectiveness, and political viability.[7] All nuclear disarmament treaties must intend to be universal in light of the humanitarian consequences of their usage. However, a disarmament treaty can be successful with universality as one of its objectives, rather than a precondition. Widespread support for a treaty also lends to its effectiveness, as do mechanisms for verification and enforcement.[8] The political viability of a treaty is key as, without the willing participation of governments, proposals can easily be discarded. The analysis is centred on these categories.

The second core part of the paper analyzes the structure of the TPNW with a focus on Articles 4 and 8. It demonstrates that the TPNW surreptitiously

6 New Agenda Coalition (Brazil, Egypt, Ireland, Mexico, New Zealand and South Africa), 'Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons', Working Paper NPT/CONF.2015/PC.III/WP.18, 2 April 2014 [New Agenda Coalition Working Paper].

7 Working paper submitted by Brazil 'Effective measures, legal norms and provisions on nuclear weapons: A hybrid approach towards nuclear disarmament' Working Paper A/AC.286/WP.37 (9 May 2016), para. 3.

8 Some scholars argue that in order to be effective, arms control regimes should have a two-tiered verification system, as states will not rely on good faith, but on evidence that the other party is towing the line, cf. R. Thakur & W. Maley 'The Ottawa Convention on Landmines: A Landmark Humanitarian Treaty in Arms Control', 5 *Global Governance* (1999) 3, 273, 290. Whilst there are some arms control agreements which have achieved success and compliance without exhaustive verification measures, such as the Ottawa Treaty, nuclear weapons are *sui generis* due to their potential humanitarian consequences if used, and would require either immediate verification provisions, or the potential for amending the instrument with such provisions.

functions as a framework agreement and that this attribute has enormous value, both in practice and in shaping norms. The flexibility and adaptability of framework agreements is what makes them the most suitable mechanisms for nuclear disarmament.

B. Pathways to the Treaty

I. First Pathway – A Comprehensive Nuclear Weapons Convention

The first option that was suggested in the Irish Working Paper is that of the comprehensive Nuclear Weapons Convention. As the name suggests, this is an exhaustive multilateral instrument which aims to both prohibit and eliminate all nuclear weapons simultaneously. Within the Convention itself would be an all-encompassing legal architecture which would include: general obligations, declarations obligation, phased process of arms elimination, detailed verification process, procedures for domestic implementation, the establishment of an agency to implement the Convention, guidelines regarding fissile material, processes for dispute resolution, clarification of how the Convention would relate to existing international agreements, details as to financing, and the inclusion of an optional protocol regarding energy usage.[9] One of the first comprehensive Conventions in the arms control sphere was jointly proposed by the Soviet Union and the United States in 1961, known as the McCloy-Zorin Agreement, which was followed by more detailed proposals presented separately by both countries.[10] Both of these propositions were extremely aggressive and had very short timelines, with the goals of comprehensive nuclear disarmament and the elimination of all stockpiles. Ultimately, they proved to be politically unattainable. They were too ambitious and were also thwarted by the onset of the Cuban missile crisis and the Cold War.[11] Despite the fact that the agreements were far too quixotic for their time, they have proven to have normative value and, in particular, the

9 New Agenda Coalition Working Paper, *supra* note 6, 11-12.

10 J. Dhanapala, 'The Hierarchy of Arms Control and Disarmament Treaties', 19 *Denver Journal of International Law and Policy* (1990) 1, 37, 46. For the US 1962 plan, cf. United States Arms Control and Disarmament Agency, *Blueprint for the Peace Race: Outline of Basic Provisions of a Treaty on General and Complete Disarmament in a Peaceful World*, 1962. For the Soviet 1962 proposal, cf. 'Treaty on General and Complete Disarmament under Strict International Control: Draft submitted by the Union of Soviet Socialist Republics', 56 *American Journal of International Law* (1962) 3, 899, 926.

11 D. Cortright, 'The Coming of Incrementalism', 52 *Bulletin of Atomic Scientists* (1996) 2, 32, 36.

McCloy-Zorin Agreement laid the foundation for the principles that were to be found in the NPT.[12]

More recently, a comprehensive Convention was proposed by Costa Rica and Malaysia to the United Nations in 1997.[13] The updated version was endorsed by the then Secretary-General of the UN, Ban Ki-moon.[14] More recently, at the Vienna Conference on the Humanitarian Impact of Nuclear Weapons in 2014, Cuba put forth a proposal for another comprehensive Convention to be negotiated pursuant to *General Assembly Resolution 68/32*. Cuba envisaged that such a convention would be adopted no later than 2018.[15] Several countries showed support for a comprehensive Convention during the NPT Review Conference of 2015, and Sweden suggested that it would be the most palatable as by definition it is global in reach.[16]

Initially, a comprehensive Convention appears to provide an exhaustive solution to the problem of nuclear disarmament. It would be an instrument that provides for the prohibition and elimination of nuclear arms. A well drafted convention is detailed, measured, unambiguous and clear. The draft convention tabled by Costa Rica and Malaysia would certainly meet the objectives and principles of the NPT and would also fulfill Article VI. The model convention has detailed verification and monitoring provisions, which provide a sense of transparency and accountability in the instrument. It has been said that an effective monitoring regime is paramount in arms control regimes, as States are

12 D. S. Jonas, 'General and Complete Disarmament: Not Just for Nuclear Weapons States Anymore', 43 *Georgetown Journal of International Law* (2012) 3, 587, 598.

13 *Letter dated 31 October 1997 from the Chargé d'Affaires a.i. of the Permanent Mission of Costa Rica to the United Nations addressed to the Secretary-General*, UN Doc A/C.1/52/7, 17 November 1997. Costa Rica and Malaysia submitted an updated version in 2007, *Letter dated 17 December 2007 from the Permanent Representative of Costa Rica and Malaysia to the United Nations addressed to the Secretary-General*, UN Doc A/62/650, 18 January 2008.

14 Ban K., *'Contagious' Doctrine of Deterrence Has Made Non-Proliferation More Difficult, Raised New Risks, Secretary-General Say in Address to East-West Institute*, UN Doc SG/SM/11881-DC/3135, 24 October 2008.

15 Cuba, *Statement by the Delegation of Cuba in the Third International Conference on Humanitarian Impact of Nuclear Weapons*, 9 December 2014, 2.

16 Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 'Substantive Recommendations for Incorporation into the Final Document of the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons', Working Paper NPT/CONF.2015/PC.III/WP.17, 1 April 2014, 5; A. Thunborg, *Statement to the Open-Ended Working Group taking forward multilateral disarmament negotiations*: Panel V, 11 May 2016, 4.

more likely to relinquish their weapons if they have assurance that other states will also "play by the rules" lest they be hindered by surprise inspections and sanctions.[17] In this sense, such a model nuclear weapons convention could account for issues of transparency and indeterminacy.[18] A comprehensive Convention could also result in the stigmatization and delegitimization of nuclear weapons, which revolves around the collective ethical unacceptability of the potential usage of nuclear weapons, in light of their devastating humanitarian consequences.[19] However, the negotiation of a comprehensive Convention is reliant on the nuclear-armed States to participate and lead the process, something which they have not wanted to engage in.[20] Therefore, any stigmatization effect of nuclear weapons would be muted without their participation at the outset.

A Nuclear Weapons Convention requires the cooperation of most if not all Nuclear Weapon States (NWS), and they should lead the process or else it will prove futile. This is one characteristic that differentiates a comprehensive Convention from a Nuclear Ban Treaty.[21] It also presents a major stumbling block, as NWS have refused thus far to participate in any such negotiations. Such an instrument may therefore not be politically feasible to achieve. Also, a comprehensive Convention requires all parties to agree concurrently to all of the provisions in the instrument.[22] This is challenging in a political environment where the NWS all rely on a national security policy of deterrence, and no state is willing to be the first one to pivot on this issue.[23] Furthermore, Non-Nuclear Weapon States (NNWS) who are dependent allies to NWS and rely on

17 J. M. Beard, 'The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention', 101 *American Journal of International Law* (2007) 2, 271, 272.

18 Note that the proposal tabled by Costa Rica and Malaysia is only a model of a comprehensive pathway; the actual instrument would not necessarily have to be identical.

19 For a discussion on stigmatization, cf. N. Ritchie, 'Nuclear Disarmament and a Nuclear Weapons Ban Treaty', in P. Meyer & N. Ritchie, *The NPT and the Prohibition Negotiation: Scope for Bridge-building* (2017), 11.

20 Article 36 and the Women's International League for Peace and Freedom, 'A Treaty Banning Nuclear Weapons', Working Paper A/AC.286/NGO/3, 24 February 2016, para. 2.

21 R. Acheson, T. Nash & R. Moyes, *A Treaty Banning Nuclear Weapons: Developing a Legal Framework for the Prohibition and Elimination of Nuclear Weapons* (2014), 15.

22 J. Borrie *et al.*, *A prohibition on nuclear weapons: A guide to the issues* (2016), 21 [Borrie *et al.*, A Prohibition on Nuclear Weapons].

23 This is perfectly exemplified in Donald Trump's State of the Union Address of 2018 where he said that, "we must modernize and rebuild our nuclear arsenal, [...] making it so strong and powerful that it will deter any acts of aggression", cf. D. Trump, 'President Donald J. Trump's State of the Union Address' (30 January 2018), available at https://

extended deterrence would be reluctant to accept a comprehensive Convention.[24] A comprehensive Convention would likely have a verification and enforcement mechanism, and would thus be effective as a disarmament mechanism. However, for the aforementioned reasons, this will not happen in the current political climate. Although such a Convention would theoretically provide an ideal solution to the problem of nuclear disarmament, in reality it is utopian and idealistic.

II. Second Pathway – A Nuclear Weapons Ban Treaty

The second suggestion posited in the Irish Working Paper is that of a Nuclear Weapons Ban Treaty, or a simple Ban Treaty. Such a treaty would briefly outline general obligations on State parties as well as setting out prohibitions relating to nuclear weapons. These could mimic those outlined in the Model Comprehensive Convention tabled by Costa Rica and Malaysia. Where a Ban Treaty diverges from a Convention is in its distinct lack of legal architecture prescribing, for example, verification and enforcement measures; it would also not include any provisions relating to existing nuclear stockpiles and their elimination.[25] At its simplest, a Ban Treaty would only seek to prohibit nuclear weapons. Having said that, it is useful to note that a Ban Treaty could potentially have a wider scope of prohibition, bringing it more closely to that of a comprehensive Convention.[26] The salient difference between a standalone Ban Treaty and that of a comprehensive Convention is that the former advocates prohibition of weapons before elimination, entailing a full separation between prohibition and elimination, and the latter envisages a simultaneous occurrence of both.[27] Furthermore, supporters of a Ban Treaty suggest it would not need the support of NWS or require universality to be effective, unlike a comprehensive Convention.[28] This is because its linchpin is the prohibition of

www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/ (last visited 14 June 2019).

24 J. Quinn, "First Committee – Nuclear Weapons" (UNGA 72, New York, USA, 12 October 2017), 4.

25 New Agenda Coalition Working Paper, *supra* note 6, 14.

26 T. Dunworth, 'Pursuing "effective measures" relating to nuclear disarmament: Ways of making a legal obligation a reality' 97 *International Review of the Red Cross* (2015) 899, 601, 610.

27 Borrie *et al.*, *A prohibition on nuclear weapons*, *supra* note 22, 19.

28 Chair of the Open-Ended Working Group Taking Forward Multilateral Nuclear Disarmament Negotiations, *Synthesis Paper,* UN Doc A/AC.286/2, 20 April 2016, 4, para. 22.

nuclear weapons and not the elimination of existing arsenals. A Ban Treaty is supported by civil society actors such as Article 36, an organization which works to prevent the unacceptable harm caused by certain weapons, including nuclear weapons. Article 36 argues that the prohibition of weapons often precedes their elimination, citing the precedent of the 1925 Geneva Protocol, a Ban Treaty which prohibited chemical weapons. The Protocol laid the foundation for the Chemical Weapons Convention in 1993.[29]

It has been suggested that a normative prohibition on the first use of nuclear weapons has developed since 1945 and is merely the "tip of the iceberg"; even the mere act of harbouring nuclear weapons as a deterrent factor may one day be considered taboo and illegitimate.[30] A Ban Treaty could act as a vital stepping stone in this process. Even if NWS do not join such a Treaty, it would nonetheless have an impact on their behaviour by acting as a direct challenge to the notion that it is justifiable to possess, threaten to use, or use nuclear weapons.[31] This would bolster the inception of a new norm against both the use and possession of nuclear weapons, and would provide much needed clarification of the International Court of Justice (ICJ) Advisory Opinion in 1996, which held that "the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[32] To highlight the importance normativity can have on changing State behaviour, one need only to point to the Ottawa Treaty, which has achieved widespread cooperative compliance against the use of landmines, despite lacking an exhaustive verification mechanism.[33] It has achieved this largely through its normative processes, such as stigmatization on the part of civil society and other

29 Article 36 (ed.), 'Banning nuclear weapons: Responses to ten criticisms' (December 2013), 4.

30 N. Tannenwald, 'The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use', 53 *International Organization* (1999) 3, 433, 464.

31 B. Fihn, 'The Logic of Banning Nuclear Weapons', 59 *Survival* (2017) 1, 43, 45.

32 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Report of the ICJ 1995/1996, 266; for further reading about norms and nuclear weapons, cf. W. Walker, 'The Absence of a Taboo on the Possession of Nuclear Weapons', 36 *Review of International Studies* (2010), 865.

33 A. Bower, 'Norms Without the Great Powers: International Law, Nested Social Structures, and the Ban on Antipersonnel Mines', 17 *International Studies Review* (2015) 3, 347, 357-358; K. Rutherford, 'The Hague and Ottawa Conventions: A Model for Future Weapon Ban Regimes?', 6 The Nonproliferation Review (1999) 3, 36.

states.[34] Canada's former Ambassador for Disarmament, Paul Meyer, has also commented that a Ban Treaty could act as a precursor to a future comprehensive agreement and that the two would be complementary.[35]

Universality of a Ban Treaty would be an objective of the instrument, and not a precondition. This in itself is not a deal breaker, as the NPT has demonstrated that it can achieve support despite not having universality as a precondition at its inception.[36] Furthermore, because of a lack of technical detail that would need to be negotiated in a Ban Treaty initially, NWS would not need to be involved in the negotiation or adoption of it. This is indeed a positive. Politically, a Ban Treaty would be much more feasible as it would propose prohibition before elimination. A simple prohibition on nuclear weapons would set forth a strong political goal towards disarmament without the inclusion of any elimination mechanisms. This means that NWS could be more inclined in the future, under a different political climate, to agree to an instrument which would stigmatize nuclear weapons without having to commit to any immediate relinquishment.[37] However, the crux of the issue lies in that a Ban Treaty would not be effective as a disarmament mechanism. Arguably, a simple Ban Treaty with no further provisions or commitment towards the elimination of nuclear weapons would be no better, and in fact would be less effective, than Article VI of the NPT. It would continue to uphold the tacit bargain at the core of the NPT, which maintains that NWS who ratify it have the privilege of continuing to possess nuclear weapons.[38]

Scholars have suggested that norm development is a three-stage process culminating in internalization whereby conformance with the norm is axiomatic.[39] However, it can be argued that norm development is not a simple teleological process which results in norm internalization, but is instead dynamic and complex. Norms that have been previously internalized may degenerate or even erode. Norm contestedness, therefore, is central to the

34 cf., for example, R. A. Matthew, 'Human Security and the Mine Ban Movement I: Introduction', in R. A. Matthew, B. McDonald & K. R. Rutherford (eds), *Landmines and Human Security: International Politics and War's Hidden Legacy* (2004), 8.

35 P. Meyer, 'From Vienna to New York: The Bumpy Road to Nuclear Disarmament' (29 January 2015) available at https://www.opencanada.org/features/from-vienna-to-new-york/ (last visited 14 June 2019).

36 Working paper submitted by Brazil, *supra* note 7, para. 5.

37 After the adoption of the TPNW, no nuclear armed States have signed the Treaty.

38 I. Bellany, *Curbing the Spread of Nuclear Weapons* (2006), 140-141.

39 M. Finnemore & K. Sikkink, 'International Norm Dynamics and Political Change', 52 *International Organization* (1998) 4, 887, 895.

evolution of norms.[40] A Ban Treaty could have a powerful stigmatizing and delegitimizing effect, and it could serve to strengthen the norm against nuclear weapons, as institutionalizing norms in treaty law legitimizes the deleterious humanitarian consequences of nuclear weapon use.[41] However, it does not necessarily follow that the other pathways would be without normative effect. If Paul Meyer is correct in his assertion that a Ban Treaty would successfully act as a precursor to a comprehensive Convention, then this would reduce a Ban Treaty to a mere building block in the progressive approach, which has not seen any forward movement in the last fifty years. Lastly, the Irish Working Paper notes that, whatever form a Ban Treaty might take, it would need to make some sort of contingency for the elaboration of disarmament obligations such as verification mechanisms, timelines, etc. These provisions could either be included immediately in the Ban Treaty or could be negotiated subsequently.[42] The issue here is that this would then start to overlap with the characteristics of a framework treaty, which will be discussed below.

III. Third Pathway – A Framework Arrangement

The third option suggested in the Irish Working Paper is that of a framework agreement. A framework arrangement is a treaty with a chapeau agreement which outlines key obligations and provisions that can facilitate further negotiations on issues that cannot be agreed upon at the outset. These issues could include verification and enforcement mechanisms. It can also be characterized as an umbrella treaty and has been a relatively new phenomenon in international law. It is mostly found in international environmental law, but it is not restricted to this area.[43] A key feature of a framework arrangement is that, although the head agreement contains only general obligations and prohibitions, the subsequent negotiation mechanisms allow for the inclusion of more contentious issues such as elimination processes. There is no set model for what a framework convention must look like, though usually these subsequent

40 C. Wunderlich, 'Theoretical Approaches in Norm Dynamics', in H. Müller & C. Wunderlich (eds), *Norm Dynamics in Multilateral Arms Control: Interests, Conflicts, and Justice* (2013), 28.

41 A. Chayes & D. Shelton, 'Multilateral Arms Control', in D. Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in The International Legal System* (2000), 527.

42 New Agenda Coalition Working Paper, *supra* note 6, 15.

43 Cf. for example *WHO Framework Convention on Tobacco Control*, 16 June 2003, 2302 UNTS 166.

agreements take the form of protocols.[44] In this way, a framework agreement maintains a legal architectural link between prohibition and elimination.[45] This is in contrast to a comprehensive Convention where the prohibition and elimination of nuclear weapons is agreed upon simultaneously and, unlike in a Ban Treaty, where prohibition precedes elimination.

Another key characteristic of framework agreements is their structural flexibility. Each framework agreement can be set up between parties and adapted to suit individual needs and goals. They can range from the aforementioned model of a procedural chapeau agreement with protocols detailing essential issues to more substantive head instruments outlining certain but not all substantive arrangements and leaving the door open for further negotiation or discussion on contentious matters.[46] Framework agreements will also establish a plenary body for meetings and negotiations of State parties, which are the fora for establishing subsequent agreements such as protocols.[47] These subsequent agreements have the same legal effect as the head treaty and both fall under the rules in the *Vienna Convention on the Law of Treaties*.[48]

44 N. Matz-Lück, 'Framework Agreements', *Max Planck Encyclopedia of Public International Law* (2011), available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e703?rskey=VXw5nz&result=1&prd=EPIL (last visited 14 June 2019).

45 Borrie *et al.*, *A Prohibition on Nuclear Weapons*, *supra* note 22, 21.

46 N. Matz-Lück, 'Framework Conventions as a Regulatory Tool', 1 *Goettingen Journal International Law* (2009) 3, 439, 441. An example of the first model is the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, 10 April 1981, 1342 UNTS 137. An example of the second model is the *United Nations Framework Convention on Climate Change*, 4 June 1992, 1771 UNTS 107 which contains more substantive issues in its chapeau agreement.

47 J. Brunnée, 'Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements', in R. Wolfrum & V. Röben (eds) *Developments of International Law in Treaty Making* (2005), 101, 105.

48 Matz-Lück, 'Framework Agreements', *supra* note 44; *Vienna Convention on the Law of Treaties* (VCLT) 23 May 1969, Art. 31 (3) (a), 1155 UNTS 331. Note that there is some debate as to whether memoranda of understanding (MOUs) that can follow umbrella treaties have the same legal force as other subsequent agreements. The ICJ seems to not distinguish between the two, however States will sometimes conclude agreements where they purport to hold no legal obligations. Cf. J. Klabbers, *International Law* (2017), 46-48; G. Nolte, 'Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-judicial Proceedings', in G. Nolte (ed), *Treaties and subsequent practice* (2013), 25-26.

An elusive element of framework agreements is that it may not always be clear as to whether an instrument can be characterized as being a framework agreement. Some drafters include the word "framework" in the title of a treaty, such as in the *United Nations Framework Convention on Climate Change* (UNFCCC). However, this is not a requirement to be constitutive of a framework treaty. The nomenclature of a legal instrument is largely irrelevant. What is fundamental, though, is how the instrument functions rather than what it is called.[49] The *Convention on Biological Diversity* is an example of a treaty that is considered to be a framework agreement despite not explicitly referring to this fact in the text.[50] Rather, what constitutes a framework treaty is an arrangement where parties agree to provisions allowing for the further negotiation of subsequent agreements, as a sort of gestalt. In essence, framework agreements are dynamic and evolving, effectively serving as living instruments.

Despite this fluidity, most framework conventions will have similar fundamental elements. First, usually included in an instrument's preamble are the objectives and principles which help guide consensus among States. Second, there are general obligations or fundamental principles included in the chapeau agreement. Third, there are provisions for the creation of institutions or plenary bodies to provide ongoing negotiation and governance, such as conferences or meetings of State parties. Fourth, implementation mechanisms are occasionally included in framework treaties, which may include provisions for dispute resolution and national reporting. These are usually not exhaustive but included in later protocols. Fifth, framework agreements must include provisions for the future amendment of the treaty through negotiation and the adoption of amendments or protocols. Lastly, final clauses provide for details regarding ratification and entry into force.[51] These elements are not exhaustive, and framework arrangements can include other components and provisions.

Framework protocol agreements have several advantages over the other models discussed. Consensus of all parties is not needed on every substantive or technical issue.[52] It is much simpler to negotiate an agreement on an overarching

49 D. Bodansky, J. Brunnée & L.Rajamani, *International Climate Change Law* (2017), 72-73.

50 Matz-Lück, 'Framework Agreements', *supra* note 44; *Convention on Biological Diversity,* 5 June 1992, Art 28 (1), 1760 UNTS 79 which allows for the formulation and adoption of protocols. Another example is the *Convention for the Prevention of Pollution from Ships* (MARPOL), 2 November 1973, 1340 UNTS 184.

51 D.Bodansky, *Framework Convention on Tobacco Control*, WHO/NCD/TFI/99.1 (1999), 19-31.

52 Bodansky, Brunnée & Rajamani, *supra* note 49, 57.

issue and decide on thornier issues at a later stage. Also, it has been posited that framework agreements create "positive feedback loops" whereby States may feel normative pressure to agree upon subsequent arrangements which they would not have had they been tabled simultaneously in one instrument.[53] Flexibility is therefore a key characteristic of framework agreements and lends to their overarching aim, which is to encourage State participation with the accession of a modest agreement, and then over time to incrementally broaden obligations and commitments.

Despite these constructive and pragmatic features, framework arrangements can have their drawbacks. For example, constitutional problems can arise. As per Article 40 of the Vienna Convention, amendments enter into force only for new parties to the treaty after the entry into force of the amending agreement. Although every State party is entitled to be a party to the amending agreement, this does not occur automatically.[54] The inevitable result is that a treaty can be amended for some States but not for others. As such, an uneven overlap of both new and old obligations between sets of parties can occur, bringing with it a lack of uniformity. This can be problematic particularly if amendments are passed regarding core prohibitions of a treaty. One solution to this issue comes from inserting a clause in the treaty which stipulates that the treaty will be amended for all State parties automatically if the amendment is adopted and ratified by a majority.[55] Although this solution does solve the issues of asymmetricity with regard to obligations, politically this can be an issue as parties to a treaty may find themselves bound to amendments to which they have not agreed. The TPNW does not contain this provision and amendments shall enter into force only for those State parties which accept the amendment by depositing an instrument of ratification.[56]

A framework agreement model for a new treaty prohibiting nuclear weapons was discussed at the OEWG debates of 2016 and was advanced by some States and civil society.[57]

53 D. Bodansky, *The Art and Craft of International Environmental Law* (2010), 186-187.

54 VCLT, *supra* note 48, Art 40.

55 A. E. Boyle & C. M. Chinkin, *The Making of International Law* (2007), 243-244.

56 TPNW, *supra* note 4, Art 10. Prior to the adoption of the Treaty, Liechtenstein noted that the formulation and wording of the article regarding amendments could lead to differing regimes, cf. N.N., 'News in brief', 2 *Nuclear Ban Daily* (2017) 5, 5, 9.

57 Middle Powers Initiative, 'Options for a Framework Agreement', Working Paper A/AC.286/NGO/20 (4 May 2016); Article 36 and the Women's International League for Peace and Freedom, 'A Treaty Banning Nuclear Weapons', Working Paper A/AC.286/NGO/3, *supra* note 20.

Politically speaking, framework arrangements make sense when there is a lack of overall political agreement on technical details and substantive measures on an issue, but where there is overarching broad agreement. They would provide the necessary flexibility for future negotiation on the gradual path to nuclear disarmament, while providing a forum for discussion in the form of meetings or conferences of State parties.

However, politically framework arrangements can potentially be problematic. As these treaties only begin with very broad obligations, they can often lack clear political end goals and have inadequate or indeterminate time frames. The nature of a framework treaty can be a boon or a bane. The very ambiguous nature of a framework treaty can be seen as a great strength, encouraging incipient negotiation of a politically challenging issue. This characteristic can also lead to either the stalling of the entire negotiating process or lead to treaties with structural deficiencies containing indeterminate language which contribute to their ineffectiveness.[58] It is evident that political will on the part of States will always be a necessary element in the success of a framework arrangement. It is also clear from the outset that it would be politically less risky for States to agree to a framework agreement over a comprehensive Convention. Therefore, universality is likely to be highest through the framework pathway.

A framework arrangement also has the potential to be effective, though the extent of this effectiveness depends upon the political will of parties to negotiate subsequent protocols or implementing agreements. Balancing the competing issues, a framework arrangement could serve as an effective model for a new treaty prohibiting nuclear weapons, attracting support and participation, initially obviating discussions around contentious issues; it could potentially prove to be a compelling disarmament mechanism in the long term.

C. Structure and Characteristics of the Treaty

At first glance, it is not immediately obvious what pathway the drafters have chosen. The only clear indication that the Treaty is likely not a comprehensive Convention is its relatively short length of only ten pages, which suggests it is unlikely to be exhaustive. Overall, the TPNW contains objectives and principles,

58 Brazil, 'Consolidated Answers to the Guiding Questions Submitted by Panel I on Substantively Addressing Concrete Effective Legal Measures, Legal Provisions and Norms That Will Need to be Concluded to Attain and Maintain a World Without Nuclear Weapons', Working paper A/AC.286/WP.10, 24 February 2016, 3; Cf. J. M. Beard's paper where he discusses the problems of indeterminacy in the Biological Weapons Convention, a framework arrangement – Beard, *supra* note 17, 272, 280-281.

general obligations, a provision for the creation of a meeting of State parties, and non-exhaustive implementation. It is lacking in detail, for example, with respect to fissile materials. On the other hand, its verification mechanisms, although not as exhaustive as in the *Chemical Weapons Convention*, are more substantial than what was envisaged in the earlier drafts. Compare, for example, Article 4(1) in the June draft as against the final Treaty text.[59]

Ultimately, there are two key elements which cement the Treaty as a framework agreement and not any other pathway. The first is Article 8, which provides for additional issues to be negotiated through meetings of State parties in the form of protocols, in order to fulfil the effective measures needed to achieve nuclear disarmament as per Article VI NPT.[60] The second is Article 4, which provides a time-bound plan for both the elimination and verification of a State party's nuclear weapons program.[61] Both of these provisions will be examined in turn.

I. Article 8 – Meeting of States Parties

Prior to the adoption of the final text, the provisions in Article 8 were initially included in Article 5 as "Additional Measures" in both the May and June drafts, which metamorphosed into Article 8 in the final text.[62] Article 5 in both the May and June drafts allows for the creation of a plenary body in the form of a Meeting of State Parties that allows for the negotiation of further measures for nuclear disarmament. These measures include not only the implementation of the Treaty but also measures for the elimination of nuclear

59 Article 4(1) in the final text provides for verification of the elimination of nuclear weapons of nuclear possessor States who adopt the treaty after eliminating their nuclear arms. In the draft text there was no substantive verification, cf. *Draft Treaty on the Prohibition of Nuclear Weapons*, 27 June 2017, Art. 4(1), A/CONF.229/2017/CRP.1/Rev.1; TPNW, *supra* note 4, Art. 4(1). Cf. R. Acheson, 'One Week to the Nuclear Ban', 2 *Nuclear Ban Daily* (2017) 11, 1, 3; R. Acheson, 'We've Got a Treaty Banning Nuclear Weapons', 2 *Nuclear Ban Daily* (2017) 12, 1, 2.

60 TPNW, *supra* note 4, Art 8. This one provision is akin to Article II(2) of the very short Polaris Sales Agreement which authorised the entry into "such technical arrangements, consistent with this Agreement, as may be necessary", *Polaris Sales Agreement*, 6 April 1963, Art II(2), 479 UNTS 49.

61 TPNW, *supra* note 4, Art 4.

62 TPNW, *supra* note 4, Art 8.

weapons and the creation of additional protocols to fulfil the objectives and principles of the Treaty.[63]

Some States, such as the Netherlands, were concerned that the creation of Meetings of State Parties in Article 5 would circumvent the established process of negotiation in the Conference on Disarmament and so proposed that these should be removed. New Zealand clarified that, although this was not the intent of the article, it would provide for an additional forum for the negotiation and adoption of protocols which could include "legally-binding negative nuclear security assurances for non-nuclear weapon States" and which would exist outside of the scope of the Conference of Disarmament.[64] As a result, a framework agreement took shape which provided an open door for future negotiations on substantive issues that would not be included in the main Treaty but could be discussed at these meetings. The Treaty was formulated so as to be adaptable in the future through the formation of protocols. Provisions for the creation of plenary bodies to provide ongoing negotiation of a treaty, as well as provisions for its future amendment, are fundamental characteristics of both framework agreements and of comprehensive Conventions such as the *Chemical Weapons Convention*.[65]

II. Article 4 – Towards the Elimination of Nuclear Weapons

The final text of the Treaty requires State parties, who after 7 July 2017 eliminated their nuclear weapons program, to cooperate with international authorities for the purposes of verifying this elimination. In the previous May draft, the Treaty did not permit either nuclear possessor States or States who participated in nuclear weapon alliances from joining the Treaty. Article 4 outlined a "destroy and join" option, whereby States would first need to eliminate their nuclear weapons before adopting the Treaty. During the 2017 Conference, some States advocated for the addition of a "join and destroy" option which would

63 *Draft Treaty on the Prohibition of Nuclear Weapons*, 22 May 2017, Art 5, A/CONF.229/2017/CRP.1; *Draft Treaty on the Prohibition of Nuclear Weapons*, 15 June 2017, *supra* note 59, Art 5.

64 A. Sanders-Zakre, 'Banning the Bomb – A Blog of the Nuclear Weapons Prohibition Talks' (2017), available at www.armscontrol.org/print/8518 (last visited 09 July 2019).

65 *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, 13 January 1993, 1974 UNTS 45. Note that Article 10 of the TPNW is the provision which directly provides for the amendment of the Treaty. However, this in itself does not necessarily point either way to a particular pathway, as most treaties have provisions for amendments.

allow States possessing nuclear weapons to join the Treaty. Ireland suggested that nuclear possessor States, who could not submit a declaration that they had not possessed, manufactured, or acquired nuclear weapons as per Article 2, could still join the Treaty. Conditions for their accession would be negotiated at future Meetings of State Parties.[66] Malaysia agreed with the general ethos that the Treaty should be dynamic and adaptable, capable of incorporating protocols in the future without the negotiation of every minutiae.[67] As such, in the final text, both "join and destroy" and "destroy and join" options were included in Article 4.

Ireland's proposal to allow the details of a nuclear possessor State's accession to be discussed at a later date was not incorporated in the final text, which outlines that such State parties must remove all nuclear weapons from operational status within 60 days of entry into force of the Treaty for that State party and must submit a time-bound plan for the destruction of its weapons. This plan is to be submitted to other State parties and negotiated with a competent international authority, which is then to submit the plan to a Meeting of State Parties for its acceptance.[68] This is significant as it illustrates that the Treaty is not a simple Ban Treaty, since it provides much more substantial detail regarding the elimination and verification of weapons than would normally be expected of a Ban Treaty. Recalling that a Ban Treaty advocates for the prohibition of weapons before elimination and a comprehensive Convention envisages both to occur simultaneously, it is evident that the TPNW does not fit neatly into either category. Article 4 provides for a time-bound plan for both the elimination and verification of a State party's nuclear weapons program, but the actual details are left for negotiation. The final version of Article 4 is much more detailed than in the draft versions, and points away from the Treaty being just a simple Ban Treaty.[69]

Articles 4 and 8 are foundational to the TPNW. In fact, Articles 4 and 8 were initially negotiated as part of a package that also included Articles 2

66 R. Acheson, 'Pathways to Elimination', 2 *Nuclear Ban Daily* (2017) 4, 1, 2.

67 N.N., `News in brief', 2 *Nuclear Ban Daily* (2017) 4, 3, 6.

68 TPNW, *supra* note 4, Art 4(2).

69 There are diverging opinions regarding the verification measures in Article 4. For example, regarding the final text of Article 4, the Philippines warned of creating something overly detailed and complicated, lest a "Frankenstein" is produced that will have to be dealt with in the future, cf. R. Acheson, 'We've Got a Treaty Banning Nuclear Weapons', *supra* note 59, 2. Note the criticism of the structure of Article 4 in N. Highsmith & M. Stewart, 'The Nuclear Ban Treaty: A Legal Analysis', 60 *Global Politics and Strategy* (2018) 1, 129, 132-135.

and 3, regarding declarations and safeguards respectively.[70] The provisions of Article 5 were removed in the final text as the drafters felt they could adequately incorporate these into Article 9 of the June draft (Article 8 of the final text).[71] Their inclusion shifts the Treaty away from being a Ban Treaty and towards a framework agreement.

This characteristic of the TPNW as a framework arrangement is valuable and has the potential to provide a solution to the problem of nuclear weapons specifically through its flexible intrinsic evolutionary mechanism.

D. Conclusion

The TPNW grew out of the frustrations of the ongoing failure on the part of States to pursue effective measures relating to disarmament as per Article VI NPT, as well as the political standstill and the inadequacies of the NPT conferences to meet their action plans and goals in the 21st century.

Upon close investigation, it is apparent that the TPNW is a framework arrangement, comprised of a chapeau agreement outlining general obligations, followed by provisions which allow for the further negotiation on matters through a Meeting of State Parties. The TPNW has a flexible and loose structure, which allows for any elimination and disarmament plan, likely to be complicated and tailored to the specific needs of each State, to be left to be worked out in future negotiations. Despite the assertion by some States that this renders the Treaty inefficient and imprecise, its structure is actually its greatest strength.[72] It enhances the potential for universality of the treaty, makes it politically viable, and therefore the most effective model to attain a world free of nuclear weapons. A simple Ban Treaty would be restricted and would not easily allow for practical measures of disarmament. A comprehensive Convention, although exhaustive, would be politically unfeasible. It is therefore not a toothless tiger as suggested by its critics but has the potential to have a strong normative effect, stigmatizing and delegitimizing nuclear weapons, with an eye to the future of nuclear disarmament. The flexibility and adaptability of framework agreements is what makes the model most suitable as a mechanism for nuclear disarmament. The TPNW has the potential to have a positive practical effect on the state of nuclear arms control and disarmament.

70 N.N., `News in brief`, *supra* note 66, 6.

71 N.N., 'News in brief', 2 *Nuclear Ban Daily* (2017) 11, 6.

72 Cf. for example R. A Wood, 'State Thematic Discussion on Nuclear Weapons', UNGA 72, 12 October 2017, 1.